



AUSTRALIAN LOCAL
GOVERNMENT ASSOCIATION

**SUBMISSION TO THE EXPERT PANEL ON CONSTITUTIONAL
RECOGNITION OF LOCAL GOVERNMENT**

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OVERVIEW

The Australian Local Government Association (ALGA) welcomes the opportunity to make a submission to the Expert Panel on the Constitutional Recognition of Local Government.

ALGA is the national voice of local government in Australia, representing 560 councils across the nation. In structure, ALGA is a federation of state and territory local government associations, and includes the Government of the Australian Capital Territory in recognition of its combined state and local government functions.

ALGA was established in 1947 and throughout its history has been closely involved in issues of national significance and worked closely with the Commonwealth Government on issues affecting the local government sector. This submission has been prepared in consultation with ALGA's members and draws heavily on work prepared by Professor George Williams in his role as adviser to ALGA.

Local government is one of the oldest forms of government in Australia. The Australian federal system of government established in 1901 has many strengths but Australia and the roles and responsibilities of governments have changed significantly since that time. If the federal system and the Constitution are to reflect contemporary Australian practice and societal values, there need to be amendments from time to time. Local government's expanding role since federation and legal standing are outlined in more detail at [Appendix 1](#).

ALGA strongly supports the constitutional recognition of local government and our preference is for the financial recognition of local government, with inclusion in a Preamble if one is to be developed as well.

The constitutional recognition of local government has been the subject of numerous resolutions passed unanimously by councils at successive National General Assemblies of Local Government and State Local Government Association Conferences in recent years. This submission details the work led by ALGA in response to those calls and covers activities undertaken, particularly over the past five years, to examine the issue and determine an agreed position for an appropriate amendment to the Australian Constitution to meet local government's and the Australian community's needs.

ALGA's preference for financial recognition reflects the increased use of direct funding of local government in recent years by the Commonwealth to achieve national objectives and the continuing doubts about the constitutional validity of such direct funding. It is ALGA's view that the High Court decision on *Pape v Commissioner of Taxation* (2009) highlights the need for an appropriate amendment to ensure that the Australian Parliament may, if it so determines, provide grants directly to local government on whatever terms and conditions it sees fit so that local communities have access to adequate funding for the services and infrastructure they require. ALGA's preferred option also reflects our view that a change to Section 96 of the

Constitution to provide for financial recognition is a simple and pragmatic proposal that will resonate with the broader community and so garner the necessary support to succeed at a referendum.

ALGA recognises constitutional reform is a significant challenge. The history of constitutional reform is discussed in more detail in **Appendix 2**. The record of successful referendums is poor with only 8 out of 44 being passed. In our submission to the House of Representatives Legal and Constitutional Committee Inquiry into the Machinery of Referendums in 2009 we noted that a significant barrier to constitutional reform was the lack of public awareness of the Constitution and the processes for constitutional reform. In that submission ALGA argued for a broadly-based education program as a precursor to a (any) referendum. Independent research, commissioned by ALGA, indicated a general lack of awareness and understanding of constitutional matters and noted that as it is now more than 30 years since the last successful referendum, a sizable proportion of the population has not had a positive experience of engagement in constitutional debate or reform.

ALGA is confident that there is a strong case and need for constitutional reform to provide for financial recognition of local government. ALGA's independent research indicates that on average 57% of the population supports constitutional recognition but when 'prompted' (provided with information that explains local government is not in the Constitution and that direct funding to local government is not provided for in the Constitution) this response rises to approximately 68%, and a majority in every state. ALGA's conclusion from this finding is that a referendum on the recognition of local government can be successful. In this regard the preconditions for success are:

- The merit (technical and otherwise) of the case for financial recognition of local government; and
- The conduct of a broadly based 'education' program on the constitution and constitutional reform.

ALGA believes that an 'education' program should be conducted in advance of the referendum by the Australian Electoral Commission. It should not be an academic exercise and should be relatively short in duration, and then followed shortly after by the referendum which would involve the conduct of a 'yes' and possibly 'no' case if required, which would be conducted by relevant bodies.

ALGA'S PROCESS – HOW WE GOT TO WHERE WE ARE

In 2007 the ALGA Board, supported by all state and territory local government associations, identified Constitutional reform as a major strategic priority within the sector. Local government has for some decades sought this objective. A timeline of developments in the constitutional recognition of local government is included at **Appendix 3**.

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

be pursued. These materials drew in part upon constitutional consultations that occurred during Australia's bicentennial year 1988.

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

In December 2008 ALGA convened a special Constitutional Summit of local government, where delegates more formally examined options for the form of constitutional recognition that could be sought by local government. ALGA worked with a panel of constitutional law experts to develop detailed materials and inform debate, including Professor George Williams, Associate Professor Anne Twomey, Mr Scott Bennett and Mr Kerry Corke. The outcome of the Summit was a 'Declaration' which was unanimously agreed by delegates. The Summit Declaration is at **Appendix 4**. The Summit endorsed three core principles as the basis of any referendum on local government:

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

Local government delegates further accepted that in seeking recognition, the form of any proposed referendum should not seek to remove the nexus between state/territory governments and local government.

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

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

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

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

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

The 2009 the High Court decision in *Pape v Commissioner of Taxation* (2009) served only to crystallise the strength of the financial recognition issue.

Implications of the Pape decision

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

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

The first instance was in 1945, involving the Pharmaceutical Benefits Scheme *Attorney-General (Vic): Ex rel Dale v Commonwealth (First Pharmaceutical Benefits Case)* (1945) 71 CLR 237. The High Court upheld the challenge by the Medical Society of Victoria that the Act was not authorised by the power of appropriation in Section 81 of the Constitution, but the meaning of "the purposes of the Commonwealth" was not clearly resolved. The second instance, in 1975, *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 was for the expenditure of \$5.97m for the Australian Assistance Plan to establish Regional Councils for Social Development throughout Australia. The High Court rejected the challenge 4:3, while again leaving the question of the power of the Commonwealth unresolved. Since the AAP Case the Commonwealth has proceeded on that a broad view of its power is correct, and it may fund whatever it wishes.¹

The case of *Pape v Commissioner of Taxation* [2009] HCA 23 unanimously rejected the Commonwealth's broad view of its power and resolved the legal uncertainty of the first two

¹ Source: Advice by Professor George Williams to ALGA. Professor George Williams, *Advice re Pape v Commissioner of Taxation and direct federal funding of local government*, 6 August 2009

cases. Professor Williams' advice was that the decision was a clear rejection of the Commonwealth's wide view of its own spending power and that there was no express or implied provision in the Constitution which grants the Commonwealth responsibility over local government. Consequently the Commonwealth has no general power to directly fund local government bodies or activities under section 81 of the Constitution. The Commonwealth is only able to directly fund local government bodies where this can be tied back to a federal power such as corporations power, nationhood and incidental powers or other powers (such as quarantine, marriage and territories).² The Commonwealth's tax bonus payment was upheld by a narrow majority based largely on the exceptional nature of the global financial crisis. It was determined that a combination of the executive power in Section 61, applied through its incidental power in Section 51(xxxix) provided the basis for making the payments.³

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

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

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

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

² Op.cit

³ Op. cit

CONSIDERATION OF THE OPTIONS

ALGA's process to reach its preferred option of financial recognition

ALGA's preferred position, to seek financial recognition in the Australian Constitution, has been determined after a comprehensive process, including extensive consultation, over several years.

Specialist legal advice

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

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

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

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

Following the *Pape* decision, Professor Williams' further advice was that the legal uncertainty was largely resolved by the High Court Decision, which clearly rejected the Commonwealth's wide view of its own spending power and held that it can only fund specific local government bodies where this is tied back to a federal power. The consequence is that past funding may be constitutionally invalid. Professor Williams concludes that the only long-term means of ensuring general direct funding is to bring about change to the Constitution by way of a referendum.

“This could be achieved either by amending section 96 of the Constitution by adding the words ‘and local government’, or by drafting a new section 96A to provide: ‘The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament sees fit’.”

Why not symbolic recognition?

Symbolic recognition in a new Preamble to the Constitution was one of the options considered by local government.

The Constitutional Convention in 1998 discussed a new Preamble if Australia became a Republic. It discussed the possible content of a new Preamble, recommending that it should make reference to the origins of the Constitution and Australia's evolution into an independent, democratic and sovereign nation; recognize Australia's federal system of representative democracy and responsible government; affirm the rule of law; and acknowledge the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders. It rejected two different proposals for the inclusion of a reference to local government in the Preamble.

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

According to leading experts including Professor George Williams and Professor A J Brown there are several problems with inclusion in the Preamble alone: the change would be symbolic at best, would not make any substantial change to the position of local government, and would be unattractive to voters.⁴

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

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

The Expert Panel's Discussion Paper notes that "symbolic recognition of local government would seek to enhance the status of local government in the Australian Federation in a way that has minimal or no effects". ALGA's consultation process and research supports the view that symbolic recognition in a Preamble would not gain the acceptance of voters, neither would it be likely to gain bipartisan support. In order to rectify the problems which have been identified in the High Court's *Pape* decision, there needs to be a substantive change to the Constitution to allow the direct funding relationship between the Commonwealth and local government, which has existed for the past decade, to continue. This can only be achieved through financial recognition.

However, in addition to financial recognition in the Constitution, if a new Preamble is proposed, ALGA would seek to be mentioned as a level of government in the Australian Federation.

⁴ Professor George Williams and Ms Nicola McGarrity, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164

Why not democratic or institutional recognition?

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

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

Currently, local government is a democratically elected sphere of government and is directly accountable to the local communities it serves. Local government is also required to meet numerous legal and financial reporting obligations stipulated under state legislation. The terminology in the majority of State Constitutions currently allow the ‘appointment’ (as opposed to the election) of local government representatives. The New South Wales Constitution, for example, provides that they be “duly elected or duly appointed”.

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

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

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

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

Why not collaborative federalism?

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

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

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

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

Local government, as a level of government, should be recognized in the Australian Constitution to more accurately reflect the role it plays in contemporary Australian society. However, ALGA believes it is appropriate for local government to be recognized under the Constitutions of the States and Territories, and remain under their jurisdiction.

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

LEVEL OF SUPPORT

ALGA has received notice from over 440 councils supporting financial recognition of local government. Notwithstanding this high level of sectoral support ALGA does not underestimate the size of the task involved in seeking any amendment to the Constitution - history shows that achieving constitutional change in Australia is an enormous challenge and does not happen easily.

ALGA however is confident that this referendum will be supported by the Australian people and will be successful. Independent research commissioned by ALGA in 2011 shows that when prompted ⁵ support for direct funding of local government increased was supported by 68% of respondents nationally.

Independent Research Commissioned by ALGA in 2009

⁵ Respondents were informed that the Australian constitution currently does not recognise and protect the existence of local government and funding for local government only occurs via the states according to convention.

In 2009 ALGA commenced a strategic campaign to pursue the constitutional recognition of local government in accordance with the principles outlined by local government at the December 2008 Constitutional Summit. As an early step in the campaign, ALGA commissioned national research to gain a deeper understanding of Australians' attitudes to the different levels of government; to explore the level of understanding Australians have about the Australian Constitution and the process by which it can be changed; to seek an understanding of Australians' perceptions of local government; and to identify any differences in these factors across the states.

The results of ALGA's research were first detailed in its 2009 submission to the House of Representatives Inquiry into the Machinery of Referendums.

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

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

Less than half of respondents were aware that state governments were recognized in the Constitution. In terms of local government, 19% thought that local government was already recognized in the Constitution and 21% did not know.

The lack of understanding about constitutional issues, the conservative nature of the voting public and the reasons for the low success rates for referenda have been the subject of several reviews.⁶ These findings and the findings of ALGA's own research indicated that it is crucial that more effort is directed towards better informing the Australian public around what is involved in constitutional change.

ALGA's research showed that regardless of age, people need to be convinced of the merits of any referendum question. Nationally 69% of those surveyed said would make up their mind depending on the particular issue and a further 15% were very cautious about changing the Constitution, with only 7% being enthusiastic about changing the Constitution. ALGA's submission to the House of Representatives' Inquiry into the Machinery of Referendums in 2009, highlighted the need for much greater effort to inform Australians about their Constitution and how it can be amended, if they are to be fully and meaningfully engaged in any referendum debate.

⁶ For example, Scott Bennett, John Warhurst, Prof Cheryl Saunders .

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

The House of Representatives Committee's report *A Time for Change: Yes/No?* recommended sweeping changes to the way in which Australians are provided with information leading up to a referendum. It concluded that material made available to electors should inform the voter of the purpose and ramifications of change because "if a proposal for change is not fully understood, it is more likely that a voter will vote 'no' and the defeat of a proposal may reflect voter misunderstanding or fear of change rather than a true assessment of the proposal".⁷ It considered that education of the public is vital to ensure that voters have the capacity to make an informed decision, saying that the Yes/No arguments alone are insufficient to adequately prepare voters to exercise their democratic right and responsibility in a referendum. A national civics education program was recommended by the Committee to improve the knowledge and understanding of Australians about the Australian Constitution prior to each referendum.⁸

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

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

ALGA's preferred process for constitutional reform is detailed at [**Appendix 5**](#).

Follow-up research in 2011

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

59% rated local government as very or somewhat important, compared with 62% for State Government and 64% for Federal Government. Importantly, there had been a change to the

⁷ *A Time for Change: Yes/No?* Report of the House of Representatives Legal and Constitutional Affairs Committee into the Machinery of Referendums, December 2009, page 54

⁸ Op. cit, page 60

perception of which tier of government was on the right track. 42% thought local government was on the right track (up from 37% in 2009), 39% thought the Federal Government was on the right track (down from 56% in 2009) and 33% considered the state governments to be on the right track (32% in 2009). Of all the levels of government, local government is currently perceived as being most on track.

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

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

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

Overwhelming council support

Local government is committed to supporting constitutional change to allow the Commonwealth to fund local government directly.

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

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.

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

The financial constraints facing local government have been illustrated in a 2006 Pricewaterhouse Coopers report which identified a \$14.5 billion backlog in repairing ageing infrastructure and which also found that between 10% and 30% of councils would face financial sustainability challenges without reform to their revenue or expenditure patterns. The report recommended that local government seek funding security through (a) a Local Community

Infrastructure Renewals Fund of around \$200m - \$250m per annum, (b) more secure and adequate Financial Assistance Grants funding from the Commonwealth, as well as recommending that councils undertake internal reforms to ensure that the sector is maximising its operational and financial effectiveness. Further discussion on the funding of local government is at **Appendix 6**.

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

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

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

The change local government is seeking, is to formalize and secure what has been occurring for the past ten years to give financial security to communities.

CONCLUSION

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. 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.

ALGA welcomes the commitment of the Australian Government to hold a referendum on the recognition of local government by 2013 and the appointment of the Expert Panel as the mechanism to assess support for the recognition of local government and make recommendations on possible specific changes to the Constitution.

ALGA strongly supports the consensus option of financial recognition reached by local government following the processes outlined in this submission as the only option likely to gain the necessary support for a successful referendum. This view is based on research which shows that the population will support change where it has merit and where it will achieve a concrete outcome. There is little support for symbolic change.

ALGA recognises that any proposal, for support ideally must have bipartisan support and feedback to ALGA during its consultations with the major political parties indicates that a simple change to Section 96 to enable the Commonwealth to provide direct funding to local government if it wishes, has the best chance of success.

Similarly, support must come from the States and feedback to ALGA indicates that a change to Section 96 has a far greater chance of gaining support than the more complex alternative of democratic (or institutional) recognition.

Finally, ALGA believes that any proposal to change the Constitution to recognize local government must be supported by an appropriate public education campaign to address the lack of knowledge about the Constitution and the process by which it is changed.

APPENDIX 1 – ABOUT LOCAL GOVERNMENT

The 'legal standing' of local government

The Australian Constitution does not contain any reference to local government. Local government is established in Australia under the constitutions of the states and territories (except the ACT) and its structures, powers and functions are determined by state/territory legislation.

In each of the states and territories in the last ten to fifteen years, the relevant legislation creating and regulating local government has been reviewed and significantly amended, or replaced with new legislation, to give local councils greater powers consistent with the principles of 'general competence'. For most jurisdictions, this was the first time in the past 50 years that the legislation creating and regulating local government had been substantially reviewed and modernized.

In general, these changes have enabled local governments to provide a wider range of services and to undertake functions that make them more responsive to the needs of local and regional communities.

Local government is an elected level of government

Local government is a democratically elected sphere of government and is directly accountable to the local communities it serves. Local government is also required to meet legal and financial reporting obligations stipulated under state legislation.

Findings of a 2009 survey found Australians felt a greater connection and sense of community with the local government. This illustrates why local government is often said to be the level of government 'closest to the people'.⁹

Amongst its many functions, local government:

⁹ As an example, in the most recent *Interacting with Government* survey report commissioned by the Australian Government, "focus group participants explained that they felt a greater connection with local government offices. Participants were more likely to feel a sense of community with the local government." See p.45 of the 2009 report on Australians' use and satisfaction with e-government services provided through the internet and telephone at <http://www.finance.gov.au/publications/interacting-with-government-2009/docs/interacting-with-government-2009.pdf>. In addition, Griffith University's Federalism Project, noted in a speech by Terry Moran to ANZSOG in 2008, noted that over half of those surveyed also agreed with the principle of subsidiarity, being that decision-making power should be devolved to the lowest competent level of government. Mr Moran explained that 'while some Australians did support wholesale abolition of one or more levels of government, almost one-third supported the addition of a new regional level. Almost 60 per cent, given the choice, said they would prefer to have three or more levels of government. When asked to consider all current levels of government, 50 per cent of Australians rate the Commonwealth Government as the most effective at 'doing its job'. In contrast, only 18.1 per cent rate the state level as the most effective, and 19.9 per cent rate the local level of government as the most effective'. See http://www.dpmc.gov.au/media/speech_2008_09_12.cfm. The study results are described in more detail at <http://www.austlii.edu.au/au/journals/UNSWLawJl/2008/27.pdf>

- maintains over 80 (640,000 km) per cent of the nation's road network;
- provides, operates and maintains a vast range of community infrastructure;
- plans communities, keeps them clean, safe and healthy;
- cares for the environment through waste management and natural resource management,
- administers community education and local environmental programs;
- provides an array of regulatory services often on behalf of other levels of government, for example, environmental health and food inspection services;
- promotes regional development, tourism and economic and social advancement;
- supports emergency services activities; and
- provides an increasing array of human services, from services for the young and the elderly (such as childcare and Home and Community Care) to the promotion of public health and public safety).

The fact that it is elected by the community and responsible for a broad range of services in a clearly defined geographic area means that local government is well-placed to understand and meet local needs and respond to those needs in ways that are most appropriate to local conditions. Within its jurisdiction of general competence, local government is multifunctional and, unlike other spheres of government, is able to combine and integrate services to best satisfy community expectations.

This also means that local government is a highly diverse sector. Its diversity has been acknowledged by the Productivity Commission¹⁰ and is apparent in councils' differing powers and functions, history and culture, level of financial resources, population, geographic area, location and human resources. Local governments have a measure of choice over the range of non-statutory functions they may exercise, as well as the manner in which they interpret their statutory functions, and this results in a considerable range of differences across local councils, both within and between jurisdictions. These differences reflect the geographic and socio-economic variability that exists in Australia but they raise considerable challenges and policy tensions for councils in the delivery of services and infrastructure to local communities.

Expanding role since Federation

Local government has existed in Australia since 1840¹¹: that is, some 60 years prior to Federation. It even pre-dates the establishment of some colonial governments in Australia¹², yet only two levels of government are mentioned in the Constitution – the Commonwealth Government and the governments of the states and territories. Even though it is not recognized, local government is intimately linked to and affected by the distribution of powers set out in the Constitution.

Since 1901, the roles of all three levels of government have expanded and changed markedly, without corresponding changes to the Constitution which governs them. In the absence of

¹⁰ 2008 PCstudy into local government revenue raising

¹¹ The first Australian local council to be established was the Adelaide City Council.

¹² Some academics have noted that many of the participants of the Constitutional conventions were councilors and that local government was left out of the constitution more by omission than by design.

constitutional reform, the High Court is left to determine matters in relation to the Constitution and although the cost of amendment via referendum are high, the alternative is high costs in court time, litigation costs and the inability to achieve desired policy outcomes.

As the roles and functions of the Australian Government and state/territory governments have evolved over the last century, the roles and responsibilities of local governments have also evolved. Whilst local government continues to fulfil its traditional role of ‘roads, rates and rubbish’,¹³ over recent decades the size, scope and role of local government have expanded dramatically.¹⁴ This has been acknowledged in a number of independent reports. In 2001, the Commonwealth Grants Commission observed that the composition of services being provided by local government over the period from 1961-62 to 1997-98 had ‘changed markedly,’ adding that there had been ‘a move away from property-based services to human services; a decline in the relative importance of road expenditure; an increase in the relative importance of recreation and culture, and housing and community amenities; and an expansion of education, health, welfare and public safety services.’¹⁵ In 2008, the Productivity Commission reinforced this observation when it found that the majority of local government spending was no longer exclusively in the areas of ‘property-related services and roads’ but also in the areas of ‘recreation, health and welfare services.’¹⁶ Indeed, the Henry Tax Review found that local governments have come to play an important role in the delivery of government services in Australia (p.689) and that ‘given the expertise that local governments have in the delivery of some goods and services, [payments to local government for specific purposes] can represent value for money for higher levels of government’ (p.696).

Notwithstanding its exclusion from the Australian Constitution, local government is seen as Australia’s ‘third arm of government’.¹⁷ It is increasingly called upon to assist in the delivery of Commonwealth Government initiatives at the local level, and through its membership of COAG, and a number of other Ministerial Councils and the Australian Council of Local Government, is closely consulted on national policies and programs that affect local and regional communities. This is consistent with the Commonwealth-Local Government Accord of 14 November 1995, under which the Commonwealth committed to local government representation on the Council of Australian Governments (‘COAG’) and other intergovernmental forums, as well as to the goal of constitutional recognition of local government.

At the national level, local government has been increasingly called upon as a partner in the delivery of initiatives that foster Australians’ wellbeing. In response to the Global Financial Crisis, the Australian Government’s National Stimulus Package 2009 provided more than \$1 billion directly to local government as a means of promoting economic activity across the nation. Local government is also working in partnership with the Commonwealth in areas as diverse as:

¹³ Whilst these are the traditional functions attributed to local government, ALGA’s submission to the Henry Tax Review 2008, at www.alga.asn.au, explains that the role of local government in Australia has never been amenable to strict definition.

¹⁴ Local government has increasingly become involved in the delivery of human services, such as community care, health care, welfare services, aged care and childcare services.

¹⁵ Commonwealth Grants Commission, 2001, *Review of the Operation of the Local Government (Financial Assistance) Act 1995*, Canberra, p.53.

¹⁶ Productivity Commission 2008 (op cit), p.7.

¹⁷ See then PM Rudd media release circa 18 September 2008 about the Australian Council of Local Government.

the new Healthy Communities Initiative, overseen by the Department of Health and Ageing; Natural Disaster Emergency Management; the promotion of the national broadband network and digital economy; and climate change adaptation and mitigation strategies.

One of the most successful partnerships between the Commonwealth and local councils has been the Roads to Recovery program. Since its inception in 2001, this program has delivered on national objectives directly through local government, benefiting local communities and enhancing economic capacity, particularly in rural and regional areas. The recent Australian Government initiatives to enhance local government's overall performance and assist in its considerable asset management task (respectively the establishment of the Australian Centre of Excellence for Local Government – ACELG - and the \$25 million Local Government Reform Fund) are welcome additions that will help improve the ability of local government, in partnership with the Commonwealth, to deliver effective services and infrastructure to the Australian community.

There are many reasons for the evolution of local government's roles and responsibilities, including the impact of changing community demands and expectations prompted by demographic change (such as ageing populations), changing settlement patterns ('sea' and 'tree' changers, as well as the growth of mining communities) and different economic conditions leading to the expansion of service types and levels.

The role of local government in serving its communities was acknowledged by the Australian Parliament in 2006 when the following motion was passed both Houses:

“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.”

APPENDIX 2 – THE HISTORY OF CONSTITUTIONAL REFORM

The track record of constitutional reform in Australia

The Australian Constitution is the fundamental document which sets the framework for the governance of the Australian federation. ALGA does not support the view that the Constitution is a document ‘written in stone’ which should not be amended. Carefully considered amendments to the Constitution are an important part of Australia’s evolution as a nation and a mechanism for addressing omissions from the original text, the changing circumstances facing Australia and the evolving aspirations and wishes of Australian citizens.

ALGA is therefore concerned that our historical tendency as a nation to be unable to agree to changes to the Constitution appears to reflect both a lamentable level of ignorance and disinterest in the Constitution and a mechanism for changing the Constitution that hinders, rather than facilitates, change. The poor record of change is evident from the history of previous referenda. Of the 44 referenda put to the people since 1906, only 8 have been successful. The last successful referendum was in 1977 which is now more than 30 years ago. This growing record of opposition to change is creating a degree of inertia which will be increasingly difficult to overcome. In previous eras the electorate has been more familiar with referenda. In the 31 years between 1946 and 1977 there were seven referenda votes covering 17 different questions of which five were successful. In the 34 years since 1977 there have been three referenda votes covering six questions of which none have been successful. The electorate’s lack of familiarity with referenda runs a real risk of increasing the public’s ignorance of the Constitution and decreasing its willingness to countenance future change.

ALGA supports the need for a review of the mechanisms guiding constitutional change to ensure that they facilitate, rather than hinder, sensible and necessary constitutional change.

ALGA believes that it makes sense that the Constitution should be amended from time to time in a mature democracy such as Australia’s, in order to keep pace with changing practice and to accurately describe and support contemporary governance arrangements. For example, it is ALGA’s view that the current Constitution would be improved by including local government and by describing the machinery that has evolved since federation to support intergovernmental relations between the three levels of government, such as the operation of the Council of Australian Governments (COAG).

In the absence of referenda to bring about sensible and necessary constitutional change, it appears that the High Court has increasingly become the mechanism by which change is promoted or stymied, depending on the views of the Court at a particular point in time. The recent decision in *Pape v Commissioner of Taxation* (2009) 257 ALR 1, and its implications for the Commonwealth’s ability to fund activities it believes are in the national interest, is a clear illustration of the growing divergence between the black letter of what the Constitution empowers and Australia’s need for a flexible and modern system of government.

The history of referenda on local government

Attempts to amend the Australian Constitution have twice been put to the Australian people. The first in 1974 and again in 1988.

The 1974 referendum was designed to allow the Australian Government to directly fund local government rather than require it to first pass the funds through state and territory governments; the 1988 referendum sought to require state governments to maintain a system of local government. Both referenda failed to produce either a majority of voters or a majority of voters in a majority of states.

The Expert Panel's Discussion Paper (Attachment B) discusses the proposals put in both referenda and the positions of the 'yes' and 'no' campaigns, referenced from papers and submissions of Professor George Williams and Nicola McGarrity. ALGA will not outline the details of each referendum proposal again, but makes some additional comments.

ALGA does not underestimate the challenge of a successful referendum. The fact that only 18% of referenda held in Australia have been successful demonstrates the conservative nature of voters. In 1979, Professor Denis Altman of Latrobe University wrote "the greatest single obstacle to constitutional change in Australia is the conservative nature of society itself."

ALGA's own research is consistent with the findings of other research (as reported in the Parliamentary Library's Current Issues Brief 11 of 1997-98 on the 1998 Constitutional Convention, at page 7) which state that a 1994 report on citizenship by the Civics Expert Group found that only 18% of Australians have some understanding of what their Constitution contains and a 1987 survey conducted for the Australian Constitutional Commission which found that 47% of Australians were unaware that Australia had a written Constitution.

Various commentators have discussed the difficulty of obtaining a double majority, and that a double majority creates a benchmark which is too high for a referendum to succeed. In addition to the requirement for a majority of states to vote yes, the more significant factor appears the difficulty of securing 50% of the national vote. Scott Bennett¹⁸ concludes that although almost 60% of the proposed changes stood a chance of succeeding at referendum, on at least nine occasions the vote has been in the range of 49.0%-49.8% and on a further 7 occasions has been in the range of 45%-48%. Bennett further concludes that bipartisan support would probably have resulted in securing a yes majority in more cases. The view that bipartisan support is essential for a referendum to succeed, is shared by most referendum analysts.

ALGA has devoted considerable energy into consulting with key political stakeholders across the political spectrum, to arrive at a solution which has bipartisan support. After four years of consultation, the simple and practical option of financial recognition for local government has the support of all sides of politics. Each of the key political parties has indicated support for progressing a referendum to recognize local government: the National Party and the Greens have each stated their support for the constitutional recognition of local government, and the leader of the Liberal Party has supported recognition in principle.¹⁹

¹⁸ Scott Bennett, *The Politics of Constitutional Amendment*, Parliamentary Research Paper, No. 11, 2002-03

¹⁹ See in particular the statements made by the respective parties at the 2010 NGA of Local Government

In previous local government referenda, local government was not intimately involved in the process and in considering the options as it is on this occasion, and there was also a lack of bipartisan support.

Over the past four years ALGA has convened a Constitutional Summit, conducted comprehensive social research, sought advice on the options for constitutional reform from leading constitutional experts and canvassed the views of all political parties, before reaching its preferred position.

APPENDIX 3 - TIMETABLE OF DEVELOPMENT IN THE CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

Source: Professor George Williams advice on constitutional recognition options with reference to Cheryl Saunders, 'Constitutional Recognition of local Government in Australia' in Nico Steytler (ed) 'The Place and Role of Local Government in Federal Systems' (2005), 47-64.

- 1973: First session of the Australian Constitutional Convention held in Sydney. In the face of the State opposition to its participation, local government is given limited representation at the Convention. Nonetheless, constitutional recognition of local government is among the issues identified as requiring further investigation by the Convention. The issue appears as an item on the agenda for most of the subsequent plenary sessions of the Convention in 1975, 1976, 1978 and 1985.
- 1974: First failed referendum on constitutional recognition of local government.
- 1976: Session of the Australian Constitutional Convention held in Hobart. A resolution if passed that:
- Calls on the States to recognize local government in their Constitutions;
 - Encourages further investigation by the Convention of the best means of Commonwealth recognition of local government; and
 - Invites Prime Minister Fraser to raise at the Premiers' conference 'the question of the relationship which should exist between Federal, State and Local Government'.
- 1976: Advisory Council on Inter-Government Relations is established. Local Government is given full recognition on the Council through the Australian Local Government Association.
- 1979: Victoria becomes the first State to recognise local government in its Constitution. Western Australia followed later that year.
- 1980: South Australia recognizes local government in its Constitution.
- 1984: Structure of Government Sub-Committee of the Australian Constitutional Convention reports on a 'maximum' and 'minimum' position for recognition of local government. The 'minimum' position was a *Declaration as to the Principles to be applied in the Constitutional Operation and Regulation of Local Government Authorities in Australia* to be adopted by legislation in all Australian Jurisdictions and added 'as an attachment to the publication which contains the Australian Constitution'. The Declaration identified six principles, including the existence of a system of local government, the right of local government to

be given adequate powers and funds to enable it to perform its activities, and freedom of local government from arbitrary dismissal and suspension.

The 'maximum' position involves constitutional recognition of local government by adding the following clause to the Constitution:

Subject to such terms and conditions as the Parliament of a State or the Northern Territory or in respect of any other Territory the Parliament of the Commonwealth may from time to time determine, every State and Territory of the Commonwealth shall provide for the establishment and continuance of Local Government bodies elected in accordance with such laws and charged with the peace, order and good government of the local areas for which they are elected. Each such Local Government body shall have power to make by-laws for the peace, order and good government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf.

- 1985: Plenary session of the Australian Constitutional Convention approves the report of the Structure of Government Sub-committee. The report is forwarded to the State Premiers' Conference in 1986 'with the strong recommendation that a clause for insertion in the Commonwealth Constitution be proposed by referendum in terms of the draft clause'.
- 1985: Advisory Council on Inter-Government Relations endorses a similar to the 'maximum' position set out by the Structure of Government Sub-Committee of the Australian Constitutional Convention in 1984, noting that it would achieve no more than 'purely formal recognition' of local government.
- 1985: Constitutional Commission and five advisory committees are established (effectively replacing the Australian Constitutional Convention). The Commission is to carry out a 'fundamental review of the Australian Constitution'. The terms of reference of the Commission include achieving 'an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government'. Two of the committees report on the issue of constitutional recognition of local government.
- Distribution of Powers Committee recommends against constitutional recognition on a range of grounds, including the unpredictable legal effects of recognition and the undesirability of entrenching in the Constitution 'another level of government which would be in competition with the States'.
 - Trade and National Economic Management Committee recommend some form of constitutional recognition.

- 1986: New South Wales recognises local government in its Constitution.
- 1988: Interim report of the Constitutional Commission delivered. This report recommends constitutional recognition of, amongst other things, the ‘establishment and continuance’ of ‘local government bodies’ (rather than a ‘system’ of local government as was contained in the 1988 referendum proposal).
- 1988: Second failed referendum on constitutional recognition of local government.
- 1988: Tasmania recognises local government in its Constitution.
- 1989: Queensland recognises local government in its Constitution.
- 1992: Council of Australian Governments established. The Council is the peak inter-governmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Local Government Association.
- 1995: Discussion Paper released by the Northern Territory Legislative Assembly entitled ‘Constitutional Recognition of Local Government’.
- 2001: Council of Australian Governments amalgamates the existing Local Government Ministers’ Conference and Planning Ministers’ Conference to create a combined Local Government and Planning Ministers’ Council.
- 2006: Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters passed by the Council of Australian Governments.
- 2006: Federal Parliament *Resolution on Local Government* passed by the House of Representatives and the Senate. This Resolution:
- 1) recognises that local government is part of the governance of Australia, serving communities through locally elected councils;
 - 2) values the rich diversity of councils around Australia, reflecting the varied communities they serve;
 - 3) acknowledges the role of local government in governance, advocacy, the provision of infrastructure, service delivery, planning, community development and regulation;
 - 4) acknowledges the importance of cooperating with and consulting with local government on the priorities of their local communities;
 - 5) 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

- 6) commends local government elected officials who give their time to serve their communities.

- 2007 Rudd Government election commitment to progress the process for achieving constitutional recognition of local government.
- 2008: Inaugural meeting of the Australian Council of Local Government.
- 2008: Constitutional Summit convened by the Australian Local Government Association.
- 2009: Rudd Labor Government releases its response to the recommendation of the *Australia 2020* Summit. This response includes a commitment to take steps towards the recognition of local government in the Commonwealth Constitution.
- 2009: Second meeting of the Australian Council of Local Government.
- 2010: Gillard Government announces a dual referendum on the constitutional recognition of Indigenous Australians as the first people, and the constitutional recognition of local government.
- 2011: Expert Panel on Constitutional Recognition of Local Government established, chaired by former justice James Spiegelman.

APPENDIX 4 - SUMMIT DECLARATION

Local Government Constitutional Summit – A Special National General Assembly Summit Declaration

Whereas:

- Local government existed in Australia prior to Federation;*
- Local government contributes more than 2 per cent of economic activity to GDP, through the employment of over 168,000 people, the custodianship of more than \$200 billion of assets and the annual expenditure of over \$23 billion on the services and infrastructure that allows Australian communities to develop and grow; and*
- The role of local government in the governance of the Australian Federation has been recognised by participation on the Council of Australian Governments (COAG)*

We the Mayors, Shire Presidents, Councillors and Aldermen, who are:

- Democratically elected by the Australian people to councils throughout the Commonwealth; and*
- In attendance at this Local Government Constitutional Summit – A Special National General Assembly*

Now declare our commitment to achieve the recognition of local government as the third sphere of government in the paramount political document of the Australian Federation – the Australian Constitution.

We:

- Applaud the commitment of the Rudd Labor Government to constitutional recognition, and the Australian Labor Party and Coalition commitment to participate in the development of a referendum proposal on the constitutional recognition of local government; and*
- Commend the spirit of bipartisanship demonstrated by the passing of the Federal Parliamentary Resolution in 2006 recognising the importance of local government to our nation and our system of Australian Government.*

Building on these developments and, whilst recognising the continuing importance of maintaining accountability and legislative frameworks for local government established by State and Territory Parliaments, we now declare our belief that constitutional recognition will assist the process of reforming the Australian Federation by:

- Correcting the historical oversight of not recognising in Australia's paramount political document the level of government that is closest to the people;*
- Acting as a driver for local government participants to act in a transparent, fair and accountable manner;*
- Reinforcing the belief that local decision-making will ensure the provision of services and infrastructure that best meet local needs;*
- Reaffirming the concept that individuals and communities have the right to engage in the democratic processes of their local government area;*

- *Advancing the relationship between all three spheres of government within the Australian Federation; and*
- *Establishing a clear capacity for the Commonwealth to provide direct funding to local government, so as to improve or provide the infrastructure and services to meet the legitimate expectations of all Australians, whilst ensuring the sustainability of the local government sector.*

We believe that to ensure the quality of planning and delivery of services and infrastructure provided to all Australians, and the ongoing sustainability of local government, any constitutional amendment put to the people in a referendum by the Australian Parliament (which could include the insertion of a preamble, an amendment to the current provisions or the insertion of a new Chapter) should reflect the following 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.*

We call on the Australian Local Government Association, the State and Territory Associations and the councils of Australia to work with the:

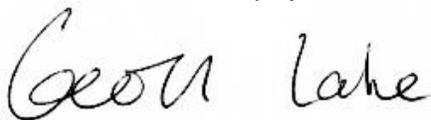
- *Parliaments of Australia;*
- *Governments of Australia;*
- *Political Parties of Australia;*
- *The Australian Council of Local Government;*

and, most importantly, the

- *People of Australia.*

So as to create and leave a stronger nation for future generations.

DATED this 11th Day of December 2008



Cr Geoff Lake

On behalf of the Delegates

Local Government Constitutional Summit

APPENDIX 5 - ALGA'S PREFERRED PROCESS FOR CONSTITUTIONAL REFORM

ALGA's preferred process to develop proposals for constitutional change was outlined in considerable detail in its submission to the House of Representatives Legal and Constitutional Committee inquiry into the Machinery of Referendums in 2009.

The Government's appointment of the Expert Panel on the Constitutional Recognition of Local Government (and a similar parallel process for the Indigenous recognition question) has superseded ALGA's proposal for the establishment of Constitutional Commission to look at possible options for reform. ALGA had proposed a six-member Commission based on the model adopted in 1985 when the Hawke Government appointed a six-person Commission to carry out a fundamental review of the Constitution to look at possible options for constitutional reform and make a series of recommendations to the Government or Parliament. ALGA welcomes the appointment of the Expert Panel to undertake this task and is ready to assist the Panel at any stage of the process. The Panel is due to report in December 2011.

ALGA then proposes that on receiving the report of the Expert Panel, the Government establish a Joint Select Committee of the full Parliament to look at the recommended options for reform and decide on those to be pursued. ALGA accepts that such joint select committees are quite rare with the most recent being the Select Committee on the Retailing Sector formed in December 1998. That Committee at that time consisted of 10 members (five from the House of Representatives and five from the Senate):

- 3 members of the House of Representatives nominated by the Government;
- 2 members of the House of Representatives nominated by the Opposition or Independents;
- 2 Government Senators;
- 2 opposition Senators; and
- 1 minor party Senator,

ALGA believes a Joint Select Committee would have sufficient authority and support of Parliament to enable proposals to be developed with the greatest chance of support from the full Parliament. Such support is essential if constitutional reform is to be achieved.

In order to facilitate a referendum in the current term of Parliament, ALGA believes that such a Select Committee could be formed in early to mid 2012 and given 6 months to report (December 2012).

ALGA envisages such a Select Committee refining and determining the proposals to be put to referenda and then approving the draft of the bills to be submitted to the House and the Senate, perhaps in the period March/June 2012 with a referendum vote to follow in the second half of 2013. ALGA believes that the Government should give precedence to those proposals of the Committee which have the unanimous support of the Committee.

National civic education campaign

ALGA believes on the basis of its recent research that before any proposals to amend the Constitution are put to the Australian people, there needs to be a nationally funded education campaign on the nature of the Constitution and the process for constitutional change.

ALGA's research is consistent with the findings of other research on the low level of awareness and understanding amongst Australians about the Constitution and the process for amendment. In 1987, the Australian Constitutional Commission found that 47% of Australians were unaware that Australia had a written Constitution. In 2009 ALGA's research found that only 76% of Australians knew that Australia had a Constitution, falling to 60% amongst women aged 18-34.

ALGA believes the education program should be aimed primarily at informing voters, in advance of a referendum, on the role of the Constitution, the mechanism by which it can be changed and the role of individual electors. This should be designed as a factual campaign, in advance of the referendum and in advance of the "yes" and "no" campaigns.

A precedent for such a campaign was set during the 1999 Republic Referendum, where \$4.5 million was set aside for a neutral education campaign, which ran for a period of five months prior to the referendum. It provided material on

- the current system of government;
- information on the referendum process; and
- information on the actual questions.

The campaign would be run following the passing of a Bill to amend the Constitution and before any question-specific materials (such as pamphlets) are circulated to voters

Such a civics campaign is in line with the recommendations of the findings of the Parliamentary Inquiry into the Machinery of Referendums, which recommended a national civics education program prior to each referendum as well as an independent, non-partisan Referendum Panel to be established prior to each referendum, to develop an overarching communications strategy for the referendum, including educational material.

Funding of the 'yes' and 'no' cases

ALGA believes that the current constraints on public funding of referendums should be removed.

The current legislation prohibits the Commonwealth from spending money in respect of the presentation of either the 'yes' or 'no' cases, except in very limited circumstances relating to the costs expended on the preparation of the 'yes' and 'no' case pamphlets, translations into other languages and into other forms suitable for visually impaired people and distribution and publication on the internet.

ALGA believes that the special arrangements which applied to the 1999 referendum should apply on a permanent basis (in 1999, \$15 million of public funding was provided, with \$7.5 million going to either side of the republic question). ALGA believes the Commonwealth should fund the advertising for both the 'yes' and 'no' cases but unlike the 1998 referendum on the

republic, ALGA has proposed that the proportion of public funding to be allocated to the ‘yes’ and ‘no’ cases should reflect the proportion of parliamentarians voting for and against the Bill. This would be an equitable distribution of Commonwealth funding, reflecting the will of the Parliament.

ALGA is of the view that the current arrangements in the Electoral Act, which provide for public funding of Federal Elections, provide a precedent for the amount of funding and for its allocation on the basis of support. The level of election funding in 2007 was in the order of \$49 million, based on the sum of around \$2.10 per first preference vote. The amount is indexed annually.

ALGA further believes that public funding for advertising of the ‘yes’ and ‘no’ cases for each referendum should be equal to that amount provided for elections. The allocation of funding should, however, be based on the level of support in Parliament, rather than a post event assessment of votes received. The funding pool should be notionally allocated between the 226 members of the Federal Parliament (approximately \$217,000 per member, if the pool is assumed to be about \$49 million). The funds should then be allocated between the ‘yes’ and ‘no’ cases based on the level of support they receive in the House of Representatives and the Senate.

Oversight of the expenditure on the ‘yes’ and ‘no’ advertising campaigns should lie with Parliament. Panels of members should be appointed with responsibility for preparing both the ‘yes’ and ‘no’ cases.

The parliamentary inquiry into the Machinery of Referendums has recommended removing current legislative limits on spending. ALGA supports this recommendation.

The committee’s report also proposed that there be equal promotion of the ‘yes’ and ‘no’ cases. ALGA suggests that if there is unanimous support to a referendum proposal in the parliament, there would be no requirement for the production of a publicly funded ‘no’ case, and, indeed, under the current *Referendum (Machinery Provisions) Act 1984* an official ‘no’ case cannot be authorized where a constitutional amendment bill is passed unanimously.

ALGA does not support the committee’s suggestion that when a bill is passed unanimously by both Houses of parliament, all members of the parliament should be responsible for both ‘yes’ and ‘no’ arguments on the basis that this is an inequitable and unwieldy solution. In a situation where a bill has almost unanimous support, it would also be inequitable to expend equal funding to the ‘no’ case. Funding proportional to the support in the Parliament would more accurately reflect the will of the Parliament.

Content of the ‘yes’ and no’ cases

ALGA is concerned about the quality of the ‘yes’ and ‘no’ pamphlets which are created by Parliamentarians under the Referendum (Machinery Provisions) Act. Previous referenda have been characterised by ‘no’ cases which exaggerated the implications of accepting the proposed constitutional change. ALGA understands that there is no requirement that arguments keep to the facts and it has often been the case that opponents of amendments have distorted and exaggerated the dangers with the aim of frightening voters.

In his work on referenda previously cited, Scott Bennett notes that the *Aviation* proposal (1937) was designed to give the Commonwealth power to make laws with regard to aviation. However, the ‘no’ case supporters pushed the argument much further than the government expected, claiming that the proposal would ‘ruin the state railway systems’ and ‘bankrupt country towns’. The two earlier *Local Government* cases featured similar distortion of the facts by opponents. Opponents of the Commonwealth making grants to local government (1974) asserted that the referendum was ‘an underhand attempt to put Canberra’s bureaucratic fingers into every one of Australia’s Council Chambers’. In the recognition of local government question (1988) the proposal was described as being ‘a legal minefield that will keep the High Court busy for years’. Such exaggerated claims can be difficult to rebut.

In addition, the wording on the ballot papers can influence a vote. For example, the use of language which raises concerns can, at the very point of voting, influence voters making their decision.

ALGA believes that such exaggeration is neither appropriate nor ethical, given that public funding is involved in the distribution of such material. ALGA believes that the ‘yes’ and ‘no’ texts should be approved by the Parliament itself. ALGA proposes that format guidelines should be adopted in the ‘yes’ and ‘no’ cases, to ensure the factual nature and comparability of the cases in the hands of the voters.

The Machinery of Referendums Committee report reinforced that it was Parliament’s responsibility to put the case to the voters and that members of Parliament should retain responsibility for authorizing the official ‘yes’ and ‘no’ arguments.

APPENDIX 6 - FUNDING OF LOCAL GOVERNMENT

Throughout Australia's modern history, local government has always been involved as a key partner in the Federal system of government, and has acquitted itself well in assisting the other levels of government to respond to new challenges and implement solutions that respond to the changing needs of local and regional communities. For example, local government is now more typically involved in the economic and social development of communities, local environmental management and adaptation to climate change (as well as human services) than occurred in previous decades. One of the hallmarks of local government in Australia has been its willingness to take on new functions or increase levels of service, provided they are underpinned by appropriate funding and agreements.

While it is clearly evident that the roles and responsibilities of local government have evolved over the past century, there have not been matching changes to the legal and financial institutions in the Federation. As a consequence, there has been a growing mismatch between responsibilities and funding and a growing reliance on funding mechanisms for local government which raise questions of constitutional validity.

In 2011, after more than thirty years of Commonwealth Government support for local government, there remains a question of the constitutional validity of direct funding and the need to continue the situation where money is passed through state governments before it reaches local government. The primary concern should be the people in the community – the recipients of the programmes and the services that government provides. The recipient of the service typically is not concerned which level of government delivers the service, as long as it is delivered efficiently and effectively. In 2011, local government is seeking a sensible, deliverable and practical change to the Australian Constitution which makes the Australian system of government work better.

Local government has annual revenue and expenditure of approximately \$28 billion (2009-10), with most of that revenue (in excess of 80% across all councils) raised through its own sources rather than provided through inter-governmental transfers. State and territory laws provide local government with the ability to raise its own revenue. Its 'own-source' revenue raising powers include powers to raise revenue from rates and charges on property; user fees and charges; fines and penalties; interest earned on accounts; and developer contributions and charges.

In 2008, the Productivity Commission reviewed the capacity of local government to raise its own revenue and found that on average, it is raising about 88 per cent of its theoretical own source revenue-raising capacity benchmarks.²⁰ This is a very high level of own-source revenue raising effort compared with Commonwealth or state and territory own-source revenue raising efforts.

Of local government's own sources of revenue, rates are the largest component, accounting for 40% of total local government revenue. Rate revenue also constitutes around 3 per cent of

²⁰ Productivity Commission, 2008, op cit, p.77.

Australia's total taxation revenue per annum,²¹ which compares with the share of total taxation raised by the states of 15% and 82% for the Commonwealth. ALGA notes that rates were found by the Productivity Commission to represent around 1.7% of disposable income for the majority of households and were assessed by the Henry Taxation review to be a fair, efficient, simple and well-designed tax²².

Rates however, are under significant pressure. As the only form of taxation that local government can raise under Australia's federal fiscal system, rates were originally expected to support services related to property, primarily roads and rubbish. Yet they are increasingly being called upon as a source of funds from which local government is expected to meet the costs of much more expensive and non property-based services, like human and welfare services.

Local government rates are also under further pressure where state or territory governments (such as in NSW and the NT) have imposed rates caps on councils, which restrict the ability of councils to support property-based services, and/or where state and Commonwealth governments have exempted particular land from rating even though councils are expected to provide municipal services to them (mining leases²³, land used for charitable purposes and indigenous lands are often exempt). Concessions mandated by state/territory governments for types of ratepayers, such as seniors, are not always fully reimbursed by them either.²⁴ These forms of rate 'carve outs' combine to affect the fiscal capacity of local government rates and in the case of rates capping in particular, are distortionary.

However, even without these constraints on rates and notwithstanding the importance of other own-sources of revenue such as user fees and charges, the Productivity Commission has found that some local governments will always be dependent on grants from the Commonwealth. External sources of funding are very important in allowing local government to deliver the services and infrastructure that is needed in local and regional communities and grants from the other two levels of government are an important component of total local government revenue.

Whilst it is difficult to gauge the precise level of grants, particularly from the state sphere, local government derives around 17 per cent of its total revenue from intergovernmental grants, divided in roughly equal shares between the Commonwealth and the states.²⁵ This revenue,

²¹ Productivity Commission, 2008, op cit, p.28, see Table 2.5. The Table shows that local government's taxation revenue has been a relatively stable proportion of total Australian taxation revenue since 1990-91, whilst Commonwealth total taxation revenue has been increasing.

²² See Australia's Future Tax System – Report to the Treasurer, Part 2, Volume 1, p258

²³ Note subsection 154(2)(e) of the LG Act (Vic) states that land exclusively used for mining is not rateable. For electricity generators, there is a section in the Electricity Act that requires them to pay councils an amount in lieu of rates, which is determined by KW hour.

²⁴ NSW reimburses local councils about 55% of the total, compared to 100% paid by the other states

²⁵ See Productivity Commission, 2008, op cit, p.xxii, Figure 2, for breakdown in percentage terms. ALGA would note it has significant concerns with data regarding grants, and from state governments in particular. This is due to a range of factors including that some states do not identify grant funding separately in state budget documentation, which ALGA drew to the attention of the Senate Select Committee on State Finances in 2008, the lack of uniformity in how or whether all local councils report grants received, and definitional differences in ABS data. Some of these issues were expanded upon in ALGA's 2008 submission to Senate Select Committee on State Government Financial Management, which recommended that 'the Australian Government impose more stringent requirements on state governments having regard to the identification of Commonwealth funds flowing through states to local

identified as grants, ranges from untied grants, available for council-determined priorities, to contractual payments from state governments to cover the cost of maintaining state government infrastructure.

Since 1974-75, the Australian Government has provided Financial Assistance Grants (FAGs) to local government. FAGs were also provided to the states until the introduction of the GST resulted in their abolition. Accordingly the states now have access to a growth tax which reflects the growth in the economy. Between 1976 and 1985, local government FAGs were set as a proportion of net personal income tax collections. From 1986 to 1995, they generally increased at a rate equal to the increase in general purpose payments to the states. Since 1995, the rate of increase has generally been equal to growth in population and the consumer price index (CPI), with the exception of 1997-98 when they were escalated only for the CPI. The total amount of funding is escalated each year to maintain the real per capita value of the FAGs. These grants represent around 7 per cent of local government's total income per annum (or just under \$2.2 billion in 2011-12). They are the largest single component to the sector of externally sourced revenue.

The Australian Government provides FAGs as a form of Specific Purpose Payment under the *Local Government (Financial Assistance) Act 1995* (the Act) and they comprise two components: general purpose grants (approximately \$1.5 billion in 2011-12), which are divided among the states on a population basis; and identified but untied roads grants (just under \$0.7 billion in 2011-12), which for historical reasons are allocated to the states on the basis of fixed shares. It is then for the states to distribute the funds to local councils in accordance with recommendations made by local grants commissions, which each have their own methodology but must adhere to the seven national principles for distribution as set out in the Act. These are replicated in the Box below:

government'. See further, Senate Select Committee on State Government Financial Management report, September 2008, Recommendation 11.

Box 1**National principles for allocation of financial assistance grants**

The State grants commissions are required to observe the National Principles relating to grants allocation under the *Local Government (Financial Assistance) Act 1995* (Commonwealth):

- *Horizontal equalisation* — this principle requires that each local governing body in a jurisdiction is able to function, by reasonable effort, at a standard not lower than the average standard of other local governing bodies in that State. Further, it takes account of differences in the expenditure requirement and revenue-raising capacity of local governing bodies.
- *Effort neutrality* — the revenue and expenditure policies of individual local governing bodies shall not, as far as practicable, affect grant determination through the assessment of revenue-raising capacity and expenditure requirements.
- *Minimum grant* — the minimum general purpose grant allocation for a local governing body is to be no less than 30 per cent of its per person share of the total amount of general purpose grants available for allocation among local governing bodies in the States or Territory.
- *Other grant support* — this principle requires recognition of other relevant grant support to local governing bodies to meet any expenditure needs.
- *Aboriginal peoples and Torres Strait Islanders* — financial assistance shall be allocated to councils in a way which recognises the needs of Aboriginal peoples and Torres Strait Islanders within their boundaries.
- *Council amalgamation* — where two or more local governing bodies are amalgamated into a single body, the general purpose grant provided to the new body for each of the four years following amalgamation should be the total of the amounts that would have been provided to the former bodies in each of those years if they had remained separate entities.
- *Identified road component* — the identified road component of the financial assistance grant should be allocated on the basis of the relative needs of local governing bodies for road expenditure. Relative needs should be determined based on length, type, and usage of roads in each local governing area.

Source: DOTARS (2007); CGC (2001).

Clearly, general purpose grants are supposed to supplement the ability of local government to support functions. However, FAGs have been reducing over time as a proportion of overall Commonwealth taxation revenue – in 1996 representing around 1.01% of Commonwealth taxation revenue, dropping to 0.68% in 2008-09. The Productivity Commission has observed that the current level of FAGs is insufficient to achieve horizontal fiscal equalisation²⁶ and grants commissions have reported that general purpose funding at current/recent levels is not achieving horizontal fiscal equity. Further, in the State of the Regions 2006-07 report commissioned by ALGA, National Economics concluded that:

‘...the quantum of grant availability only compensates approximately 30 per cent of the amount required to equalise resources available to councils because of inequalities in revenue available for standard effort.’²⁷

The Productivity Commission has recently said that ‘there is a case to review the provision of Australian Government general purpose grants to local government’ (finding 5.6). This confirms ALGA’s long-held view that the FAGs funding must be reconsidered if local government’s role

²⁶ Productivity Commission, 2008, op cit, p.23.

²⁷ State of the Regions 2006-07, op cit, p.82.

as an integral partner in Australia's Federal system of government is to be maintained and adequately supported.

The Commonwealth has announced a review into the equity and efficiency of the current funding provided through the FAGs program, which is due to be completed in 2012-13²⁸. Local government looks forward to working with the government on this review. FAGs which keep pace with local government service delivery and infrastructure responsibilities and more adequately reflect the demands of communities, are essential if local government is to continue to meet community needs. ALGA's 2011-12 Budget Submission has proposed as an interim measure that FAGs be restored to a level equal to at least 1% of Commonwealth tax revenue, excluding the GST pending a full review.

The rise of Direct Funding

While the Financial Assistance Grants for local government remain the primary mechanism for the transfer of funds from the Commonwealth to local government, federal governments from both sides of politics over the past decade have shown a preference for direct funding when establishing new programs to fund local government to achieve national objectives. The Roads to Recovery program, introduced by the Howard Government in 2001, was aimed at improving the quality of access for the local roads network, with expected economic and social benefits. The Government chose this mechanism rather than the alternative of increasing the Identified Roads Grants component on the FAGs.

Similarly, in 2008/9 the Rudd Government chose to establish the directly funded Regional and Local Community Infrastructure Program as part of its response to the Global Financial Crisis rather than an increase in FAGs.

Use of direct funding allows the Commonwealth to not only target specific investment to achieve national objectives but also allows the Commonwealth to establish a direct partnership with councils and to engage directly with local communities rather than operating through the filter of state governments. Without the option to provide direct funding to councils it is ALGA's view that these initiatives would not have been implemented and the funding would not have been provided to councils.

The need for financial reform

The growing role of local government and the case for financial assistance to local government has been highlighted since the 1970s.

In 1986 the Commonwealth Minister for Local Government and Administrative services noted that from the early 1970s local government has evolved from authorities dealing with roads, gutter, drains and garbage, to increasingly sophisticated multi-factional and multi-functional authorities dealing with human and community services.²⁹

²⁸ 2011-12 Budget Paper No. 3, p 101

²⁹ Tom Uren MP, Second reading Speech, *Local Government (Financial Assistance) Bill 1986*, House of Representatives Hansard, 2 may 1986

The House of Representatives Standing Committee on Economics, Finance and Public Administration 2003 report *Rates and Taxes: A Fair Share for responsible Local Government* outlined the cost shifting burden placed on local government through the services provided by local government on behalf of other levels of government. The bipartisan report supported the need for direct Commonwealth funding to local government. In 2006 the Local Government and Planning Ministers' Council signed an Intergovernmental Agreement to stop cost shifting.

Reviewing the operation of the Local Government Act in 2001, the Commonwealth Grants Commission identified five reasons for the increased demands on local government: devolution of responsibility from other levels of government; raising the bar of complexity of a service by another tier of government; cost shifting; increased community expectations; and councils choosing to expand their service provision.³⁰

A 2006 report by Pricewaterhouse Coopers identified a \$14.5 billion backlog in local government infrastructure renewal work due to the growing gap between councils' revenue base and the funding required to deliver a broader range of services to the community. It also estimated that 10-30% of councils had financial sustainability issues.

Despite delivering an increasing range of services, local government is under-funded as it is reliant on rates, fees and charges for its revenue base. Consequently the sector is reliant on external funding, which is insufficient to enable local government to provide the services that the community demands. Councils are unable to increase their rates and charges sufficiently and some states impose rate capping. As a result, the most significant challenge facing local government in Australia today is that of financial sustainability.

After a rigorous process of consultation across the political spectrum, social research into community attitudes, and advice of constitutional experts, ALGA has concluded that financial recognition is the most simple and practical option which is most likely to be successful at referendum. Despite this, ALGA is aware of the preparatory work which needs to be done to prepare Australians for such a change. Australian communities will be the primary beneficiaries of the reform.

³⁰ Commonwealth Grants Commission *Review of the Operation of the Local Government (Financial Assistance Act 1995)*, June 2001, pp 52-53