



Premier of Victoria

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Ms Michelle Rowland MP
Chair, Joint Select Committee
Constitutional Recognition of Local Government
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Ms Rowland

Please accept this correspondence as the Victorian Government's submission to the Joint Select Committee on the Constitutional Recognition of Local Government.

The Victorian Government's position on these matters remains as outlined in the Government's submission to the previous Expert Panel (attached for the Select Committee's reference).

As emphasised in that submission, the Victorian Government greatly values the important contribution that local government makes to service delivery, infrastructure provision and community strengthening in Victoria.

With due respect to the work of the Expert Panel, and while noting the perceived uncertainties for specific current Commonwealth grants to local government that are cited by its proponents, the Victorian Government does not support the proposed amendment to the Commonwealth Constitution to allow the Commonwealth Government to fund local government directly in a similar manner to which it currently funds States under section 96 of the Commonwealth Constitution.

The Victorian Government recognises that the Commonwealth Government's track record in local government funding raises real concerns for the sector. The Commonwealth's contribution to local government through the well-established Financial Assistance Grants framework is predicted to fall from 1.02% of total Commonwealth taxation revenue in 1996-97 to just 0.57% by 2012-13. In this context the Victorian Government notes that the local government sector is hopeful that financial recognition in the Commonwealth Constitution will provide a solution to its financial sustainability and service delivery pressures.

However, the experience of the States and Territories suggests that establishing an additional and general constitutional power to provide direct funding from the Commonwealth will not resolve these substantive issues, and may in fact entail additional financial risks for the sector (as outlined in the Government's previous submission).

More broadly, however, seeking to resolve specific current concerns with a new general constitutional power risks substantial and long-term damage to Australia's federal system of government. A primary purpose of Australia's federal constitution is to expressly and deliberately limit the scope of the Commonwealth level of government. Establishing an additional and general Commonwealth power to provide direct funding to local government is thus contrary to the intended federal structure of the Constitution. It is also unnecessary, given the existing constitutional alternatives.

To the extent that current Commonwealth-level arrangements (implemented immediately after the High Court of Australia's important decision in *Williams v Commonwealth*) do not provide local governments with funding certainty on specific current programs, the Victorian Government stands ready to negotiate in good faith a timely National Partnership Agreement, or facilitate some other suitable intergovernmental arrangement, to support the continuation of affected Commonwealth programs with local government.

Finally, the current proposal for an additional and general Commonwealth funding power risks discouraging Commonwealth-State-local government collaboration, while further blurring intergovernmental roles and responsibilities. At the level of specific programs, the likely result of this situation would be poorer service delivery outcomes, through "one-size fits all" national templates and a reduced capacity for effective State-level whole-of-government co-ordination.

Making an unnecessary change to Australia's Constitution will not improve the financial sustainability of local government and puts at risk the benefits of our federal system of government. In the event of the current proposal proceeding to a referendum, the Victorian Government will seek to ensure that the Victorian and Australian public is aware of both the practical alternatives and substantial risks to good governance and community outcomes posed by such a constitutional change.

Regards

Ted Baillieu MLA
Premier

EXPERT PANEL ON CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

VICTORIAN GOVERNMENT SUBMISSION

EXECUTIVE SUMMARY

- 1. Victoria values local government.** The Victorian Government greatly values the important contribution that local government makes to service delivery, infrastructure provision and community strengthening in Victoria.
- 2. There are blurred roles and responsibilities in the Australian Federation.** The extreme level of vertical fiscal imbalance (VFI) in Australia blurs roles, responsibilities and accountability for all levels of government in the Australian Federation, including local government.
- 3. Comments on the specific recommendations in the Expert Panel on Constitutional Recognition of Local Government Discussion Paper:**

As an overarching comment, the Victorian Government's view is that constitutional reform should only be pursued if it offers certainty of improved outcomes.

Symbolic recognition: The Victorian Government's view is that even purely symbolic recognition of local government presents risks of constitutional uncertainty, whilst at the same time providing little to local government beyond its existing recognition in State Constitutions (entrenched in Victoria). The Victorian Government therefore does not support this option.

Financial recognition: The Victorian Government does not support a proposed amendment to the Commonwealth Constitution to allow the Commonwealth Government to fund local government directly in a similar manner to which it currently funds States under section 96 of the Commonwealth Constitution.

The effect of the extreme level of VFI in blurring roles, responsibilities and accountabilities in the Australian Federation would be exacerbated by the Commonwealth Government having constitutional power to provide further direct funding to local government. The crucial issue is that action continue to be taken by all governments in Australia (whether at a constitutional or sub-constitutional level) to rebalance the Australian Federation. This issue is considered further below.

While the local government sector is hopeful that financial recognition under the Commonwealth Constitution will provide a solution to financial and service delivery pressures, the experience of the States and Territories is that direct funding from the Commonwealth will not resolve these issues. In fact, the Victorian Government has deep concerns about how further direct funding from the Commonwealth to local government would be allocated, given issues relating to horizontal fiscal equalisation and the impact this may have on the local government sector in some jurisdictions, including Victoria.

The Victorian Government is also wary of any proposal that would undermine the current ability of the Victorian Government and local government to work together to deliver high quality outcomes for the community.

The Commonwealth Government's track record in local government funding raises real concerns for the sector. The Commonwealth contribution to local government through Financial Assistance Grants is predicted to fall from 1.02% of total Commonwealth taxation revenue in 1996-97 to just 0.57% by 2012-13.

It has also been argued that financial recognition of local government is necessary to address the effect of the decision of the High Court of Australia in *Pape v Commissioner for Taxation*. However, the Commonwealth Government is on record as noting that it does not consider the *Pape* decision an impediment to its direct funding of local government.

Democratic recognition: The Victorian Constitution already provides for the establishment, continuance, election and dismissal of a system of local government. The Victorian experience is that these provisions work well.

There is nothing to be gained by including similar provisions in the Commonwealth Constitution, particularly given the potential legal uncertainty that such an amendment may generate.

Recognition through federal cooperation: The more important issue to be addressed in the Australian Federation is how to rebalance it by reducing VFI. The States need to have greater fiscal capacity to compete to improve economic, social and environmental conditions (including services and infrastructure) for their residents. At the same time, the Victorian Government supports the ideas expressed by the Expert Panel in relation to further dialogue on how to encourage cooperation between all levels of government in Australia.

1. VICTORIA VALUES LOCAL GOVERNMENT

1.1 Local government plays a vital role in Victoria

- 1.1.1 The Victorian Government strongly supports the valuable contribution that the 79 local governments in Victoria make to their communities.
- 1.1.2 Local government activities in Victoria are diverse and extensive. Councils maintain significant infrastructure, provide a range of services and enforce various laws for their communities.
- 1.1.3 Community infrastructure maintained by councils in Victoria is estimated to be valued at over \$40 billion and includes roads, bridges, drains, town halls, libraries, recreation facilities, parks and gardens.
- 1.1.4 Services provided by Victorian local governments are diverse. They include property, economic, human, recreational and cultural services. Local governments also enforce State and local laws relating to such matters as land use planning, environment protection, public health, traffic and parking and animal management.
- 1.1.5 The importance of local government in Victoria, and the value placed on it by the Victorian Government, is well illustrated by Victoria's approach to recovery from the devastating 2011 floods. The Victorian Government entrusted affected Councils to undertake the primary service delivery role to rebuild infrastructure and promote well-being.
- 1.1.6 The view of the Victorian Government is that greater value can be derived from a partnership approach to the improvement of sector relations and sector performance.
- 1.1.7 The partnership approach focuses on supporting cooperation and building capacity between levels of government. This approach is being implemented through greater support for effective decision-making and improving governance structures to manage service-delivery funded through multiple funding streams. These measures will enhance the long term sustainability of local government through increased productivity and accountability.

1.2 Local government is recognised in all State and Territory Constitutions in Australia

- 1.2.1 Some form of local government has existed in Australia since before Federation. Local government has traditionally been regulated by the States and Territories.
- 1.2.2 The constitutions of all Australian States and Territories recognise local government and provide for its structures, powers and functions.
- 1.2.3 In Victoria, Part IIA of the *Constitution Act 1975* provides for the recognition of local government in Victoria as a "distinct and essential tier of government consisting of democratically elected councils".

1.2.4 Under Part IIA, the Parliament of Victoria has power to make laws with respect to Councils including laws about how they are constituted, their functions and powers and the functions, powers and responsibilities of Councillors.

1.2.5 The provisions of the Victorian Constitution relating to local government are entrenched and can only be expressly altered by referendum. A Council cannot be dismissed except by an Act of the Victorian Parliament. Short of dismissal, the constitutional provisions permit general laws to be made about the suspension and reinstatement of a Council.

1.3 **Additional recognition of local government**

1.3.1 The Victorian Government is aware that the local government sector is seeking additional recognition, including recognition in the Commonwealth Constitution.

1.3.2 This submission reflects the Victorian Government's views on specific proposals for recognition of local government in the Commonwealth Constitution, including those canvassed by the Expert Panel on Constitutional Recognition of Local Government in its Public Discussion Paper (**Discussion Paper**).

1.3.3 As noted in the Discussion Paper, the integral role of local government in Australian governance is acknowledged in many ways, including through the inclusion of the local government peak body (the Australian Local Government Association) in the Council of Australian Governments (**COAG**).

1.3.4 The Victorian Government notes that sub-constitutional forms of recognition of local government - such as consultation, funding levels and membership of bodies such as COAG - are of great practical importance, whereas constitutional recognition of local government may be an empty gesture. This extends even to financial recognition of local government in the Commonwealth Constitution, which is not a guaranteed method of obtaining further funding.

1.3.5 The recent Senate Select Committee Report on the Reform of the Australian Federation - *Australia's Federation: an agenda for reform* (June 2011) (**Senate Select Committee on Australia's Federation**) examined the issue of recognition of local government in the Commonwealth Constitution. The Senate Select Committee recommended that mechanisms for recognition of local government other than constitutional amendment be explored, perhaps by way of an agreement through COAG.

1.3.6 In addition, as has been noted by the Council for the Australian Federation, constitutional reform is difficult, expensive and can create greater uncertainty. Constitutional reform should be a last resort, where there is no reasonable alternative or other options have failed. Any such reforms should also offer certainty of improved outcomes. Constitutional change should not be used to resolve funding issues that can be dealt with through existing mechanisms.

2. **BLURRED ROLES AND RESPONSIBILITIES IN THE AUSTRALIAN FEDERATION**

2.1. **Federal financial relations in Australia**

2.1.1. One of the great lessons of Australian constitutional history is that the division of roles and responsibilities needs to be supported by enduring mechanisms for fiscal sustainability. Currently, there is a serious mismatch of spending responsibilities and revenue-raising capacities between the Commonwealth Government and State governments in Australia – a vertical fiscal imbalance (**VFI**).

2.2 **VFI**

2.2.1 While some level of VFI is not unusual in a federation, its extent in Australia is the most extreme of any federation in the industrialised world.

2.2.2. An excessive degree of VFI is undesirable, because it blurs roles, responsibilities and accountability between levels of government. Specifically, it can:

- **Weaken accountability** to the public by breaking the nexus between a government's decisions on the level of service provision and the revenue raised to fund it;
- **Reduce transparency** regarding who is responsible for which government services, allowing governments to avoid responsibility by shifting blame for funding and operational shortfalls to other spheres of government responsibility;
- **Create inefficiencies**, including through bureaucratic overlap, duplication and the cost of administering grants between governments;
- **Misallocate resources**, including inadequate or inappropriate funding of services; and
- **Slow the responsiveness of government** to the needs of communities.

2.2.3 As noted by the Senate Select Committee on Australia's Federation, local government funding issues – including whether there should be a referendum to allow the Commonwealth to fund local government directly – cannot be considered in isolation. Such issues must be considered in the context of federal financial relations in Australia, including the extreme vertical fiscal imbalance experienced within the Australian federation.

2.3 **Benefits of a healthy federation**

2.3.1 The Victorian Government encourages the Expert Panel to keep in mind the concrete benefits that our federal structure provides to the Australian public, some of which are not always acknowledged.

2.3.2 Federalism is often misconstrued as a costly and inefficient system of government. In fact, Australia's federal structure provides a number of significant benefits that outweigh the perceived costs:

- The customisation of policies to meet local needs;
- Incentives to innovate and experiment in policy and service delivery, including allowing new ideas to be pioneered by one jurisdiction and, if successful, adopted by others;
- Supporting choice and diversity;
- Opportunities for competition and comparison that supports continuous improvement;
- Greater scrutiny of national policies as a result of the need to achieve co-operation in areas where the Commonwealth lacks constitutional power; and
- Protection for the individual by checking the concentration of power.

3. COMMENTS ON THE SPECIFIC RECOMMENDATIONS SET OUT IN THE EXPERT PANEL DISCUSSION PAPER

3.1 Symbolic recognition

- 3.1.1 The Victorian Government does not support the symbolic recognition of local government in the Commonwealth Constitution. Local government is the responsibility of State Governments.
- 3.1.2 The Victorian Government echoes the concerns of the Expert Panel regarding the symbolic reference to local government in a statement of values (or otherwise) in the text of the Commonwealth Constitution, given the potential unintended or unforeseen consequences for the interpretation of other provisions of the Constitution.
- 3.1.3 It is further noted that purely symbolic recognition of local government in the Commonwealth Constitution would not provide any practical benefit to the local government sector, given the provisions in the State Constitution that already recognise local government. In Victoria those provisions are entrenched, making them very difficult to amend (see also section 3.4 below).

3.2 Financial recognition

- 3.2.1. The Victorian Government opposes any proposed amendment to the Commonwealth Constitution to allow the Commonwealth Government to fund local government directly in a similar manner to which it currently funds States under section 96 of the Commonwealth Constitution.
- 3.2.2 The effect of the extreme level of VFI in blurring roles, responsibilities and accountabilities in the Australian Federation would be exacerbated by the Commonwealth Government having Constitutional power to provide further direct funding to local government.
- 3.2.3 Enhanced Commonwealth Government ability to provide direct funding to local government means an enhanced ability to provide tied funding (that is, funding that carries specific conditions).
- 3.2.4 The problem of increased Commonwealth power was observed in *Australia's Federal Future* (Glenn Withers and Anne Twomey, April 2007):
- Most complaints about the operation of the federal system concerning duplication, buck-passing, excessive administrative burdens, lack of accountability and lack of coordination can be traced back to the use of specific purpose payments (SPPs) by the Commonwealth Government.*
- 3.2.5 Significant action has been taken by Australian Governments in recent years, including through COAG, to attempt to provide a better balance of roles and responsibilities in the Australian Federation. This includes the negotiation of the 2008 Intergovernmental Agreement on Federal Financial Relations through COAG.
- 3.2.6 The crucial issue is that action continues to be taken by all governments in Australia (whether at a constitutional or sub-constitutional level) to rebalance, rather than exacerbate the current imbalance in the Australian Federation.

- 3.2.7 While the local government sector is hopeful that financial recognition under the Commonwealth Constitution will provide a solution to financial and service delivery pressures, the experience of the States and Territories is that direct funding from the Commonwealth will not resolve these issues.
- 3.2.8 In fact, the Victorian Government has concerns about how further direct funding from the Commonwealth to local government would be allocated between jurisdictions (given issues relating to horizontal fiscal equalisation) and the impact this may have on the local government sector in some jurisdictions, including Victoria.
- 3.2.9 The Victorian Government is also concerned about the potential for the Commonwealth to change the distribution of funding to local government within a State in a manner that would disadvantage one or more councils, whether through bilateral agreements with individual councils or otherwise. Victoria opposes any approach that discourages local councils from striving for higher performance and increased productivity.
- 3.2.10 The Victorian Government is also wary of any proposal that would undermine the current ability of the Victorian Government and local government to work together to deliver high quality outcomes for the community.
- 3.2.11 The Commonwealth Government's track record in local government funding raises real concerns for the sector. The Commonwealth contribution to local government through Financial Assistance Grants is predicted to fall from 1.02% of total Commonwealth taxation revenue in 1996-97 to just 0.57% by 2012-13.
- 3.2.12 It has also been argued that financial recognition of local government is necessary to address the effect of the decision of the High Court of Australia in *Pape v Commissioner for Taxation*. However, the Commonwealth Government is on record as noting that it does not consider the *Pape* decision an impediment to its direct funding of local government. The Senate Select Committee on Australia's Federation notes that Commonwealth officials have reviewed the constitutionality of direct payments to local government and have determined that they can continue.

3.3 **Democratic recognition**

- 3.3.1 Victoria already has strong democratic recognition of local government in its Constitution. The Victorian Constitution contains entrenched provisions regarding the establishment, continuance, election and dismissal of a system of local government.
- 3.3.2 The Victorian experience is that these provisions work well.
- 3.3.3 There is nothing to be gained for Victoria by altering the Commonwealth Constitution to insert similar local government provisions to those in the Victorian Constitution. In fact, it may lead to constitutional uncertainty through High Court interpretations of new provisions that differ from the original intent.

3.4 **Recognition through federal cooperation**

- 3.4.1 The more important issue to be addressed in the Australian Federation is how to rebalance it by reducing VFI. The States need to have greater fiscal capacity to compete in improving economic, social and environmental conditions (including services and infrastructure) for their residents. At the same time, the Victorian

Government supports the ideas expressed by the Expert Panel in relation to further dialogue on how to encourage cooperation between all levels of government in Australia.