

Chapter 6

Local government

6.1 Australia's local governments provide an increasing range of services beyond the 'roads, rates and rubbish' functions with which they are traditionally associated. Yet despite their significant responsibilities and close relationship with citizens at the level of suburb, town, city and region, local governments in Australia are relatively poorly funded, lack constitutional recognition, and are vulnerable to cost shifting.

6.2 This chapter examines funding levels for local government, particularly Commonwealth funding, and the constitutional issues relevant to funding and to recognition of local government.

The funding of local government

6.3 According to the Australian Local Government Association (ALGA), while local governments receive funding from the Commonwealth and state/territory governments, the third tier of government raises approximately 80% of its revenue.¹ Local governments' revenue raising powers are derived from state and territory legislation. Local government may raise resources through rates and charges on property, user fees, fines and other penalties, developer contributions and charges, and through accumulating interest on financial accounts. Rates are the only form of tax that local governments may impose.² In 2007–08, rates earned local government \$10 116 million, which constituted 2.9 per cent of taxes raised across the levels of government.³

6.4 It is apparent that, far from having autonomy regarding its role and responsibilities, local government's functions may be imposed by the other levels of government within Australia's federation. Local government revenue raising can serve to make up any shortfall between Commonwealth and state/territory funding and the cost of service delivery. Mr Mark Newman, Chief Executive Officer, Mandurah City Council advised:

Our Grants Commission funding is around about three per cent of our total operational revenue and we might get another two or three per cent from capital revenues. So we are very focused on revenues from either rates or service charges. In fact, I would have to say in the City of Mandurah we have made significant effort in recognising the operational shortfall in funding and that our own resources were the only way to go. We have had

1 ALGA, *Submission 24*, p. 9.

2 ALGA, *Submission 24*, p. 9.

3 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, 2010, p. 11.

significant rate increases over the last 10 years, which probably sees us as one of the most highly rated councils in the state.⁴

6.5 The ALGA stated that local governments' capacity to meet funding shortfalls, and thereby to ensure sufficient resources to meet responsibilities adequately, is constrained. The Association advised that the state government may restrict local governments' ability to impose rates to generate revenue. Limitations include imposing a cap on the rates that may be levied, exempting areas of land from rate levies and requiring concessions for certain persons such as pensioners. The ALGA also submitted that the utility of rates as a source of funding is being limited through demands for local government to provide an increasing range of services:

[R]ates 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.⁵

Funding from State and Territory governments

6.6 With the exception of the ACT Government, which combines the functions of both local and territory government,⁶ the states and the Northern Territory governments provide funding to local government. Figures released by the former Department of Infrastructure, Transport, Regional Development and Local Government in 2010 relating to the 2006-07 financial year indicate that grants can be made for a variety of purposes.

4 Mr Mark Newman, Chief Executive Officer, Mandurah City Council, *Committee Hansard*, 9 March 2011, p. 27.

5 ALGA, *Submission 24*, p. 10.

6 Geoffrey Lindell, 'Lessons to be learned from the Australian Capital Territory self-government model', in *Peace, order and good government : state, constitutional and parliamentary reform*, Macintyre, C., Williams, J., (eds), Wakefield Press, Kent Town, 2003, p. 47.

Figure 6. 1 State and territory grants to local governments, by purpose, 2006-07⁷

Purpose	NSW	Vic. ^a	Qld	WA	SA	Tas.	NT	Total
	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m
Agriculture, forestry, fishing and hunting	-	2	1	1	1	-	-	4
Education	5	26	1	1	-	-	-	32
Fuel and energy	-	-	-	-	3	-	-	4
General public services	23	15	63	7	1	-	26	136
Health	6	7	3	2	2	2	3	25
Housing and community amenity	105	39	201	10	12	4	24	395
Mining, manufacturing and construction	1	-	6	-	-	-	2	9
Public order and safety	34	3	38	13	-	-	3	90
Recreation and culture	50	77	85	25	19	6	7	268
Social security and welfare	67	342	25	31	15	1	2	483
Transport and communications	215	243	244	153	53	32	9	950
Other economic affairs	2	10	18	2	2	-	4	37
Other purposes	457	297	201	124	91	29	2	1 202
Total	967	1 060	886	368	199	74	82	3 637

6.7 The ALGA stated that state grants predominantly 'represent reimbursements for concessions mandated by them on the sector or contract payments for the maintenance of state government-owned roads.'⁸

Funding from the Commonwealth government

6.8 In addition to state funds, local government receives financial assistance from the Commonwealth. Professor Brown submitted that the current system of Commonwealth funding for local government commenced with the Whitlam Government's introduction of 'a system of local government funding via grants to the states'. According to Brown, the grants were introduced as part of a commitment to 'building its [local government's] role as a fundamental element of Australia's national system of governance, alongside the role of the States'.⁹ Since 1974-75, the

7 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, 2010, p. 19.

8 ALGA, *Submission 24*, p. 11.

9 Professor A. J. Brown, *Submission 41*, Attachment 7, pp 440 – 443.

Commonwealth has provided approximately \$35 billion in grants to local government.¹⁰

6.9 Currently, local government funding is provided in the form of Financial Assistance Grants (FAGs) under the *Local Government (Financial Assistance) Act 1995*. In establishing the FAG scheme, the Commonwealth intended to 'increase the transparency and accountability of the allocation of funds by the states and territories to local governing bodies', and to 'achieve equitable levels of services by local governing bodies'.¹¹ In doing so, the Commonwealth's objective was to improve the operation of local government through improving:

- the capacity of local government bodies to provide their residents with an equitable level of services;
- the certainty of funding for local government bodies;
- the efficiency and effectiveness of local governing bodies; and
- the provision by local governing bodies of services to Aboriginal and Torres Strait Islander communities.¹²

6.10 FAGs are an example of centralisation; that is, the national government determining budgetary entitlements of the other government over matters not expressly stated in sections 51 or 52 of the Constitution. In sections 9 and 12 of the *Local Government (Financial Assistance) Act*, the Commonwealth has declared that the state and territory governments are entitled to Commonwealth assistance to fund local government. In providing the funding, however, the national government places conditions on the states regarding the use of the funding. While the grants are made to the state and territory governments, the Commonwealth does not provide the states and territories with discretion to determine their use. As noted by the former Department of Infrastructure, Transport, Regional Development and Local Government, FAGs 'are paid to the states and territories on the condition that they are passed on to local government.' In contrast, when the grants are passed on by the states and territories they are untied for local government, giving local government discretion to spend the money to meet locally identified priorities.¹³

6.11 Additional Commonwealth funding is provided to local governments through the Roads to Recovery Program, the Regional and Local Community Infrastructure Program and the Black Spot Program. Grants provided as part of the Roads to Recovery program and the Regional and Local Community Infrastructure Program are

10 Department of Regional Australia, Regional Development and Local Government, 'Financial Assistance Grants to Local Government', <http://www.regional.gov.au/local/assistance/index.aspx>, (accessed 27 May 2011).

11 *Local Government (Financial Assistance) Act 1995*, ss. 3(4).

12 *Local Government (Financial Assistance) Act 1995*, s. 3.

13 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, p. 24.

transferred directly from the Commonwealth to local governments.¹⁴ Under the Roads to Recovery Program, for 2009-10 to 2013-14, \$1.75 billion will be distributed to local governments, and also to state and territory governments in areas not under the jurisdiction of local governments.¹⁵ A further source of funding exists in the form of the Regional and Local Community Infrastructure Program announced in November 2008. Since its commencement, over \$1 billion has been granted to local governments to assist with construction, major renovation or refurbishment of assets including gardens, art spaces, swimming pools, sports stadiums, walkways, tourist information centres, playgroup facilities and senior citizen centres amongst others.¹⁶

Concerns with Commonwealth and state/territory funding for local governments

6.12 Evidence to the committee highlighted two concerns with the Commonwealth and the state and territory local government funding arrangements. First, submissions questioned whether the funding is adequate for local governments to fulfil their responsibilities. Second, submissions questioned the constitutionality of Commonwealth grants to local government.

Responsibilities versus resources

6.13 Evidence before the committee highlighted the extensive and indeed ever expanding responsibilities of local governments across a broad range of matters. The ALGA reported that local government:

- maintains over 80 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, natural resource management,
- administers community education and local environmental programs;

14 Department of Infrastructure and Transport, 'Roads to Recovery funding conditions', http://www.nationbuildingprogram.gov.au/funding/r2r/r2r_funding_conditions.aspx/, (accessed 31 May 2011); Department of Regional Australia, Regional Development and Local Government, Guidelines: Regional and Local Community Infrastructure Program Round 3 – 2010/11 – \$100 Million, 2010, p. 1.

15 Department of Infrastructure and Transport, 'Roads to Recovery funding allocations 2009–2014', <http://www.nationbuildingprogram.gov.au/funding/r2r/> (accessed 31 May 2011).

16 The Department of Regional Australia, Regional Development and Local Government website, *Regional and Local Community Infrastructure Guidelines* http://www.regional.gov.au/local/cip/files/RLCIP_Round3_100m_Guidelines_26Oct2010.pdf (accessed 22 June 2011).

- 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 Home and Community Care) to the promotion of public health and public safety).¹⁷

6.14 The former Department of Infrastructure, Transport, Regional Development and Local Government has characterised the role of local government in a similar way. The responsibilities of local government were characterised as:

- administration (of aerodromes, quarries, cemeteries, parking stations and street parking)
- building (inspection, licensing, certification and enforcement)
- community services (child care, aged care and accommodation, refuge facilities, meals on wheels, counselling and welfare)
- cultural/education (libraries, art galleries and museums)
- engineering (public works designs, construction and maintenance of roads, bridges, footpaths, drainage, cleaning, waste collection and management)
- health (water sampling, food sampling, immunisation, toilets, noise control, meat inspection and animal control)
- planning and development approval
- recreation (golf courses, swimming pools, sports courts, recreation centres, halls, kiosks, camping grounds and caravan parks)
- water and sewerage (in some states)
- other (abattoirs, sale-yards, markets and group purchasing schemes).¹⁸

6.15 These reflect a trend over recent decades in which there has been a considerable expansion of the role of local government. The ALGA attributed the expansion of local government responsibilities to two primary causes. First, increased community expectations due to demographic changes, changing settlement patterns, for example, 'sea and tree changers', and differing economic conditions. Second, a realignment of responsibilities of the three levels of government in the Australian federation, with 'other levels of government' transferring functions to local

17 ALGA, *Submission 24*, p. 7.

18 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, 2010, p. 37.

government.¹⁹ As local governments are established by state and territory legislation, the states and territories can determine the scope of local governments' responsibilities. As the ALGA stated, a shift in local government responsibilities can occur when 'another level of government has raised the requirements associated with the services being delivered by local government, or has changed the operating environment in which local government services are delivered.'²⁰

6.16 It was put to the committee that the expansion of local government responsibilities has not been combined with a correlative growth in local government funding. It was argued that Australia's federal structure facilitates cost-shifting to local government. For example, the ALGA stated that '[o]ne of the things that characterises local government and its relationship with state governments has been a tradition of cost shifting.'²¹ The Association further submitted that '[o]n many occasions in the past, devolution of responsibilities to local government has simply been caused by another sphere of government engaging in responsibility and/or cost shifting.'²²

6.17 Professor Brown also noted that transfer of responsibility may not be 'fully funded', and submitted that 'the functional and financial position of Australian local government has also remained weak by international standards.'²³

6.18 The Gold Coast City Council submitted that the current funding model requires review:

The sustained growth of the Gold Coast, and many other areas of Australia, has clearly shown that the current mix of Commonwealth funding, State funding, grants through State Local Government Grants Commissions, developer contributions and rates and charges is no longer providing outcomes for cities that will enable them to contribute to national efficiency and productivity objectives.²⁴

6.19 The Council also stated that Australia's state and territory governments fail to collaborate effectively to ensure local government receives adequate funding:

At the broader level there appears to be no effective coordination between the Commonwealth and the States in relation to the drivers of population growth (natural increase and migration) and the policies and expenditure flows to systematically identify and meet the needs of the population. The gap between the community's legitimate demands for infrastructure and

19 ALGA, *Submission 24*, p. 8.

20 ALGA, *Submission 24*, p. 8.

21 Mr Adrian Beresford-Wylie, Chief Executive Officer, ALGA, *Committee Hansard*, 5 May 2011, p. 8.

22 ALGA, *Submission 24*, p. 8.

23 Professor A. J. Brown, *Submission 41*, Attachment 7, pp 438 - 439.

24 Gold Coast City Council, *Submission 36*, p. 5.

services and the supply to meet those demands at the local level is even greater for rapidly growing areas like Gold Coast City.²⁵

6.20 Professor Brown submitted that the discrepancy between local government resources and responsibilities necessitates 'a better target for the overall share of responsibility and resources that we believe local government should be carrying.'²⁶ The ALGA also argued that the gap between responsibility and resources requires increased allocation of funds to local government from national and state governments.²⁷

The constitutional basis for Commonwealth funding of local government

6.21 Evidence was presented to the committee arguing that the Commonwealth's constitutional authority to fund local government rested on two heads of power. First, Section 96 of the Constitution, which allows the Commonwealth to provide financial assistance to the States 'on such terms and conditions as the Parliament this fit.'²⁸ FAGs are an example of such funding. As the Hon Christian Porter MLA, Western Australian Attorney-General, noted, section 96 grants cannot go directly to local government as the section 'requires Commonwealth funds to be provided only to the States before going to third parties.'²⁹ This power is reinforced by the provisions of Section 81 of the Constitution which permits the Commonwealth to authorise the expenditure of monies from the Consolidated Revenue Funds 'for the purposes of the Commonwealth.'

6.22 It was noted in evidence before the committee that funding schemes under which money is transferred directly by the Commonwealth, such as the Roads to Recovery Program, may be made on the basis of section 81.³⁰ It was put to the committee that the constitutionality of the arrangements is in doubt following the High Court of Australia's decision in *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009).³¹

6.23 *Pape v Commissioner of Taxation* (the Pape case) concerned the Commonwealth's power to provide taxpayers with one-off payments from the

25 Gold Coast City Council, *Submission 36*, p. 5.

26 Professor A.J. Brown, *Submission 41*, p. 10.

27 ALGA, *Submission 24*, p. 23.

28 *Commonwealth of Australia Constitution Act*, s. 96.

29 Western Australian Government, *Submission 44*, p. 4.

30 Australian Local Government Association, *Submission 24*, p. 13; Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

31 Australian Local Government Association, *Submission 24*, p. 13; Family Voice Australia, *Submission 8*, p. 6; Gold Coast City Council, *Submission 36*, p. 7.; Regional Development Australia Sunshine Coast Inc., *Submission 15*, p. 4; Western Australian Local Government Association, *Submission 33*, p. 5.

Consolidated Revenue Fund. While upholding the payments, the High Court rejected the view that the Commonwealth has broad powers to authorise this type of expenditure. Section 83 of the Constitution prevents monies from being spent unless authorised under a valid law of the Commonwealth. A Commonwealth law is invalid if outside the scope of the Commonwealth's constitutional authority. The High Court held that section 81 is not a substantive head of power; funds may be appropriated only for matters for which the Commonwealth has authority under the Constitution:

The provisions of ss 81 and 83 do not confer a substantive 'spending power' upon the Commonwealth Parliament. They provide for parliamentary control of public moneys and their expenditure. The relevant power to expend public monies, being limited by s 81 'for the purposes of the Commonwealth', must be found elsewhere in the Constitution or statutes made under it.³²

6.24 Commentators have considered the implications of the Pape decision for the Commonwealth's capacity to fund local governments.³³ Professor George Williams has argued that, given the structure of Australia's federation as established by the Constitution, the decision casts doubt on Commonwealth/local government funding arrangements:

There is no express or implied provision in the Constitution that grants the Commonwealth responsibility over local government. The consequence is that the Commonwealth has no general power to directly fund local government bodies or activities under section 81 of the Constitution. This reflects the fact that the Constitution was drafted and structured with a view to local government being the primary responsibility of the States and not the Commonwealth.³⁴

6.25 Professor Williams concluded that it cannot be assumed that Commonwealth grants to local government are constitutional. Rather, each proposal for

32 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, para 8 per French CJ.

33 Bligh Grant, Brian Dollery, 'Constitutionalism, Federalism and Reform? *Pape v Commissioner of Taxation & Anor* – A conversation with Bryan Pape, *Public Policy*, Volume 5, 1 (2010), pp 53 – 63; Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth constitution', (2010) 21 PLR 164, p p 185 – 186; George Williams, *Advice re Pape v Commissioner of Taxation and direct federal funding of local government: opinion*, 12 August 2009, Part C, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_130809.doc (accessed 20 April 2011).

34 Dr George Williams, *Advice re Pape v Commissioner of Taxation and direct federal funding of local government: opinion*, para 27, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_130809.doc (accessed 20 April 2011).

Commonwealth funding for local government should be assessed to determine whether the funding falls within a head of power.³⁵

6.26 This view was shared by other witnesses giving evidence to the committee. Dr Twomey, for example, submitted that the Pape case 'lends some doubt over some of the Commonwealth's funding.' She contended that the case has the following effect.

[T]he practice, which has been increasing of late, of funding local government directly is not supported by section 96 of the Constitution and is not supported by section 81 of the Constitution. The only way you can find anything in the Constitution to potentially support it is some kind of nationhood power implied from the Constitution and drawn from a combination of the executive power and the legislative incidental power. That in itself is a little bit dodgy—well, probably a lot dodgy!—so local governments are particularly worried now about the direct grants that they get.³⁶

6.27 Similarly, the ALGA submitted that as a result of the Pape case 'there must be doubts about the validity of the Roads to Recovery program which relied on a broad interpretation of Section 81.'³⁷ Mr Bryan Pape himself has argued that the decision casts doubt on the validity of the Regional Partnerships Program, the *Roads to Recovery Act 2000* and the *Australian Sports Commission Act 1989*.³⁸ The Western Australian Local Government Association concurs with these views, stating: 'the doubt created by Pape is anathema to the concept of an effective 21st century Australian democracy.'³⁹

6.28 These views on the effect of the Pape case were not necessarily shared by all who presented evidence to the committee. The Council for the Australian Federation (CAF) submitted that the consequences of the case for Commonwealth funding of local government 'should not be overstated.'⁴⁰ The Hon Christian Porter MLA argued that 'the Pape case does not have obvious detrimental implications for funding of Local Government.'⁴¹ It was noted that payments under section 81 of the Constitution are but one mechanism through which the Commonwealth may fund local

35 Dr George Williams, *Advice re Pape v Commissioner of Taxation and direct federal funding of local government: opinion*, para 28, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_130809.doc (accessed 20 April 2011).

36 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, pp 5–6.

37 Australian Local Government Association, *Submission 24*, p. 13.

38 Bligh Grant, Brian Dollery, 'Constitutionalism, Federalism and Reform? *Pape v Commissioner of Taxation & Anor* – A conversation with Bryan Pape, *Public Policy*, Volume 5, 1 (2010), p. 55.

39 Western Australian Local Government Association, *Submission 33*, p. 5.

40 Council for the Australian Federation, *Submission 38*, p. 6.

41 Western Australian Government, *Submission 44*, Appendix 1, p. 4.

governments. Mr Porter argued that the case leaves unchallenged the Commonwealth's ability to provide funding under section 96 of the Constitution.⁴² Similarly, CAF stated:

[T]he Commonwealth continues to be able (at a minimum) to expend federal funds wherever it has a specific legislative power, or provide funding to (or through) the States.⁴³

6.29 This view was consistent with the view taken by representatives of the Australian Government. Officers from the Department of the Prime Minister and Cabinet advised that following the Pape case the constitutionality of payments to local governments was reviewed, and it was determined that current payments to local government could continue.⁴⁴ The Department concluded:

Taking into account the implications of the Pape decision, the Commonwealth remains able to make grants under its general powers in the Constitution as well as make payments to the states for purposes relevant to their responsibilities, which do include local government currently.⁴⁵

6.30 The committee was informed that this conclusion was reached following advice from the Commonwealth Attorney-General 'that we should continue with current arrangements unless a demonstrated need arises to change them.'⁴⁶

Committee view

6.31 There is evident and reasonable concern among local government bodies and others about the current and continuing validity of funding arrangements. The committee heard considerable evidence of cost shifting towards local government as the responsibilities of local government expand, as well as the critical role local government plays in the provision of community services. Based on the evidence submitted to the committee, however, it is not entirely clear that the constitutionality of direct payments from the Commonwealth to local government is in doubt.

6.32 The Treasury and the Department of the Prime Minister and Cabinet reviewed the constitutionality of Commonwealth payments in the wake of the Pape case and, based on advice from the Attorney-General, found that payments could continue. A similar position was reached by the Western Australian Government and the Council for the Australian Federation.

42 Western Australian Government, *Submission 44*, Appendix 1, p. 4.

43 Council for the Australian Federation, *Submission 38*, p. 6.

44 Mr Dominic English, First Assistant Secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42; Mr Ronald Perry, Assistant Secretary, Department of Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 43;

45 Mr Dominic English, First assistant secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42.

46 Mr Dominic English, , First assistant secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42.

6.33 The committee believes that until Commonwealth payments to local government authorities are shown definitely not to be constitutional, and given the poor record of referenda in relation to local government, that mechanisms other than constitutional amendment, such as through COAG, should be explored in an attempt to put local government authorities at ease regarding funding.

6.34 The committee understands that certainty of funding is only one element of the push for local government recognition in the constitution. Discussion of the other issues around constitutional recognition occurs later in this chapter.

Constitutional recognition

History of local government referenda

6.35 The Australian people have twice been asked to consider amending the Constitution to recognise local government and on both occasions it has rejected the proposal. On the first occasion in 1974 the *Constitutional Alteration (Local Government Bodies) Act 1974* proposed to 'enable the Commonwealth to borrow money for, and to grant financial assistance to, local government bodies.' The referendum considered the proposed following additions to the Constitution.

- New subsection 51(ivA) to provide that the Commonwealth may make laws for the borrowing of money by the Commonwealth for local government bodies.
- New section 96A to provide that the Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

6.36 Professor Brown stated that the referendum would have served 'both a symbolic and a substantive (functional and financial) purpose.'⁴⁷ The second reading debates indicate that the intention behind the amendment was to strengthen the role of local government as a member of Australia's federal system of government:

We want to extend the role of local government. We do not want to restrict it but to make it even more powerful. If local government gets funds through the Grants Commission, which will be an equalising grant, and can get unrestricted access to carry out some of its major responsibilities then of course it will be a much more viable organisation.⁴⁸

6.37 The referendum did not succeed, with only 46.85 per cent of voters and one state, New South Wales, approving the proposal.⁴⁹ Arguments against the referendum

47 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 441.

48 Senator Gietzelt, *Senate Hansard*, 13 March 1974, p. 286.

49 Australian Electoral Commission, 'Referendum Dates and Results 1906 – Present', http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 31 May 2011).

included that the amendments were unnecessary and would grant the Commonwealth direct control over local government.⁵⁰ According to Professor Brown, the 'No' campaign characterised the proposal as a 'centralist' measure'.⁵¹

6.38 The second referendum, in 1988, proposed to include in the Constitution a new section 119A. The proposed section was in the following terms:

Each State shall provide for the establishment and continuance of a system of government, with local government bodies elected in accordance with laws of a State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.⁵²

6.39 Again, the referendum was not passed, receiving only 33.62 per cent of votes. The proposal did not receive a majority of votes in any state.⁵³ The 'No' campaign challenged the proposal on the basis that the amendment would be of little practical effect. The amendment was also opposed on the grounds that it would lead to greater centralisation of power.⁵⁴ Professor Brown characterised the referendum as being largely symbolic, stating that '[d]emonstrably, whereas the recognition proposal of 1974 has at least some substantive merit to accompany its symbolism, the 1988 proposal had very little'.⁵⁵

The case for Constitutional recognition

6.40 Several submissions to this enquiry pressed the case for a Constitutional amendment to recognise local government. Broadly, two reasons were put forward, namely, to ensure local government's effectiveness and to secure local government's existence.

6.41 It was submitted that constitutional recognition of local government is required to ensure that local government receives adequate funding, and therefore remains an effective part of Australia's federal system. The ALGA stated that the decision in the Pape case 'strongly supports the need for constitutional reform'.⁵⁶

50 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 168.

51 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal*. Vol. 31. No. 2, p. 441. Presented as Attachment 7 to *Submission*, 41.

52 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal*. Vol. 31. No. 2, p. 446. Presented as Attachment 7 to *Submission*, 41.

53 Australian Electoral Commission, 'Referendum Dates and Results 1906 – Present', http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 31 May 2011).

54 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 169.

55 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal*. Vol. 31. No. 2, p. 447. Presented as Attachment 7 to *Submission*, 41.

56 Australian Local Government Association, *Submission* 24, p. 13.

Similarly, Naracoorte Lucindale Council and Regional Development Australia Sunshine Coast Inc submitted that constitutional recognition is required to guarantee Commonwealth funding of local government.⁵⁷ Councillor Blumel, on behalf of that RDA, argued that direct funding would increase economic and administrative efficiency:

I think it is primarily about the financial capacity of the federal government to directly fund local government. Why it is so important is to do with efficiency. If everything has to go through COAG, be funded through the state and then the state's agenda put over—sometimes in terms of their implementation policy—all of that takes time. But a federal government being directly responsive to strong local governments, recognised local governments, takes the middleman out; it brings our federal capital closer to the people. I want to see our federal parliamentarians being relevant in advocating for our needs directly to the federal government.⁵⁸

6.42 The second argument for constitutional recognition of local government is to secure, in the words of Williams and McGarrity, local governments' 'existence and status.'⁵⁹ McGarrity and Williams argued that while state and territory constitutions ensure the 'continued existence of a "system" of local government...local government is otherwise given little or no protection'.⁶⁰ McGarrity and Williams concluded that, without Constitutional status, 'recognition of local governments in State Constitutions is likely always to be subject to repeal by a subsequent ordinary statute of the State Parliament'.⁶¹

6.43 Similar views were expressed in other evidence to the committee. Dr Twomey stated that local governments are seeking Constitutional recognition as a means to prevent state governments from 'unilaterally abolishing' or amalgamating local governments.⁶²

6.44 The Australian Local Government Association is actively pushing for constitutional recognition for local government, arguing that non-recognition jeopardises funding.

57 Naracoorte Lucindale Council, *Submission 5*, p. 1; Regional Development Australia Sunshine Coast Inc, *Submission 15*, p. 4.

58 Councillor Debbie Blumel, Chair, Regional Development Australia Sunshine Coast, *Committee Hansard*, 1 February 2011, p. 20.

59 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 164.

60 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 166.

61 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 168.

62 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

Because local government is not recognised under the Constitution, there are significant legal doubts about the extent to which the Commonwealth can constitutionally provide financial support directly to local government.⁶³

6.45 Regional Development Australia Sunshine Coast Inc. submitted that Constitutional recognition assures the legitimacy of local government:

In the hypothetical scenario of local government taking a particular view and the state government taking an alternative view, how might those different models play out in actual decision making?...If the federal government recognises local government in its Constitution, then I think there is a legitimacy there. They would soon set up mechanisms and processes to give meaning to that recognition, and you would soon see some processes and mechanisms which give more direct effect to giving the local councils voice.⁶⁴

6.46 There was, however, a lack of consensus about the form constitutional recognition could take. The ALGA, despite being committed to constitutional reform, recognises the obstacles that exist to achieving constitutional change and has considered other options.

In the absence of referenda to bring about sensible and necessary constitutional change, it appears that the High Court is the only mechanism by which change can be promoted. This leaves local government, and the Federal system more generally, in a precarious position that does not necessarily reflect the modern Australian democracy.⁶⁵

6.47 Professor Galligan argues that reform to Australian federation is less likely to occur through amendments to the constitution.

The most promising avenues for reforming Australian federalism are political rather than constitutional ones. This is contrary to the approach of constitutional lawyers and others who, when they perceive a problem with Australian federalism, reach for the Constitution and set about devising constitutional remedies. Constitutional change is an unlikely vehicle for federal change, however, and in any case most of what needs reforming can be done via sub-constitutional politics.⁶⁶

6.48 Professor Galligan comes to the conclusion that while referenda and judicial review by the High Court are able to effect constitutional change, they are 'unlikely avenues for practical reform.'⁶⁷

63 ALGA, *Submission 24*, p14.

64 Councillor Blumel, Regional Development Australia Sunshine Coast, *Committee Hansard*, 1 February 2011, pp 22–23.

65 ALGA, *Submission 24*, p14.

66 Professor Brian Galligan, *Submission 46*, p. 3.

67 Professor Brian Galligan, *Submission 46*, p. 5.

Obstacles in the path of Constitutional recognition

6.49 The evidence highlighted four primary concerns with amending the Constitution to include reference to local government. These are the extent of popular support for the proposal; the potential for unintended consequences for Constitutional interpretation; whether an amendment is necessary to secure the proponents objectives; and the merits of symbolic, as opposed to substantive, recognition.

Popular support

6.50 The ALGA is very conscious of the size of the task of seeking to amend the constitution. It advocates the use of a comprehensive education program, the establishment of a Referendum Panel, and a national civics campaign to engage voters ahead of any referendum.⁶⁸ Based on the research it has undertaken, the ALGA believes that 'the end of 2012 or 2013 offer the best options for a referendum to include local government in the Constitution.'⁶⁹

6.51 This is in contrast to views in other submissions which highlighted concerns that there may not be sufficient support for Constitutional recognition of local government unless it is part of a broader approach. Based on the administration and analysis of a major national public opinion survey, Professor Brown is of the opinion that:

First, far more than simply symbolic constitutional recognition of local government is needed if any change is to prove either worthwhile or electorally viable. Second, given the complex interrelationship of these issues, the process for determining the scope of any constitutional alteration needs to occur within a wider process of governance reform, rather than simply focusing on recognition of local government. Getting the overall picture right is likely to be a vital prerequisite for advancing any specific constitutional reforms relating to local government.⁷⁰

6.52 Dr Anne Twomey, in evidence presented at the December hearing of the committee, commented: 'I think if you bring up that sort of referendum you will have a lot of contention because people do not want bad local governments entrenched.'⁷¹

Unintended consequences for Constitutional interpretation

6.53 A second concern in relation to recognition of local government in the constitution is the possibility of unintended consequences. Dr Twomey argues that 'anything prescriptive in nature concerning local government funding or the way in

68 ALGA, *Submission 24*, p. 17.

69 ALGA, *Submission 24*, p. 15.

70 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 436.

71 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

which local governments can be established or abolished may become more of a problem than a benefit in the future when circumstances change.⁷²

6.54 A similar concern was echoed by the Western Australia Attorney General. In the Western Australian Government submission, he noted that, '[t]here are several reasons why elevating local government into a constitutionally entrenched position in the Commonwealth Constitution would adversely affect the nature of Australia's federal system of government.'⁷³ Chief amongst these were that:

The recognition by the Commonwealth Constitution of local governments would weaken or detract from the federal structure of the Constitution and federalism generally. In my view, that would be regrettable especially because the federal structure of the Commonwealth Constitution is one of the means of limiting an expansion of centralism.⁷⁴

6.55 However, such concerns were not shared by all who presented evidence to the inquiry. Professor Brown submitted:

Actually ensuring that constitutionally the current federal system works with recognition of all three levels does provide the key reason for recognising local government in the Constitution. It just simply is not good enough from an organisational point of view to simply continue to preserve the idea that this is a system based on the Commonwealth raising money and redistributing a lot of that money to the states and that everything else will then look after itself. The system obviously does not work like that currently, should not work like that and will never work like that.⁷⁵

Is Constitutional recognition necessary?

6.56 It was put to the committee that Constitutional amendment to include reference to local government is not necessary to secure local government's part of Australia's federal system. Family Voice Australia submitted that '[t]here is no obvious reason for recognition of local government in Australia.'⁷⁶ It is a view with which the Tasmanian Government concurred.

The role of local government is well entrenched under Tasmanian legislation. Part IVA of the Tasmanian *Constitution Act 1934* protects the existence of local government and prevents the boundaries of local government areas being altered without a review by the Local Government Board.⁷⁷

72 Dr Anne Twomey, *Submission 32*, p. 4.

73 Western Australian Government, *Submission 44*, p. 3.

74 Western Australian Government, *Submission 44*, p. 7.

75 Professor A. J. Brown, *Committee Hansard*, 1 February 2011, p. 45.

76 Family Voice Australia, *Submission 8*, p. 6.

77 Tasmanian Government, *Submission 40*, p. 9.

6.57 The Tasmanian Government went on to outline how local government is already acknowledged at the national level within the federation by way of:

- the Intergovernmental Agreement on cost shifting (2006);
- representation of local government on COAG by the Australian Local Government Association (ALGA);
- ALGA's membership of eight Ministerial Councils and observer status on a further five; and
- the Commonwealth parliamentary resolution on recognition of local government (2006).⁷⁸

6.58 Additionally, as outlined above, the argument that constitutional amendment is required to secure Commonwealth funding is inconclusive. It has also to be determined whether constitutional amendment is the best means of securing Commonwealth funding, if indeed the Commonwealth's ability to fund local government is in doubt. Professor Williams and Nicola McGarrity, Directors of the Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, have concluded that there are three options available to the Commonwealth to address the issue:

In order to gain a secure constitutional foothold for its direct local government funding programs, it may be necessary for the Commonwealth to adopt one of three options in the future. The first option is to funnel these programs through the States under s 96... The second option is to limit the subject matters in relation to which it gives funding to those over which the Commonwealth has a legislative or executive power in the Commonwealth Constitution. The final option is the amendment of the Commonwealth Constitution by either of the methods described above to give the Commonwealth the power to make direct grants of financial assistance to local government.⁷⁹

Symbolic recognition

6.59 Several submissions queried the value of symbolic recognition of local government in the Constitution. Dr Anne Twomey stated that:

it remains unclear as to what it is intended to achieve. If it is purely symbolic – effectively a pat on the head to make local government feel important and appreciated – it would be a waste of money and effort.⁸⁰

6.60 The Gold Coast City Council expressed a similar view. 'A constitutional change to recognise local government without correspondingly addressing financial reform would be an empty gesture.'⁸¹

78 Tasmanian Government, *Submission 40*, p. 9.

79 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 186.

80 Dr Anne Twomey, *Submission 32*, p. 4.

Committee view

6.61 The committee is aware of the desire of local government to be recognised in the constitution. Local government is crucial to the delivery of services in the community. The committee recognises that the services local government provides are changing and expanding and that the current federal fiscal arrangements leave it vulnerable to cost shifting by the states.

6.62 As noted earlier, however, the committee believes that Commonwealth funding to local government is not as precarious as some have suggested. Until such time as it becomes clear that constitutional amendment is the only way of providing funding certainty to local government, the committee believes that plans to change the constitution to recognise local government run considerable risk of failure.

6.63 The committee also believes that the issue of funding for local government cannot be looked at in isolation. It is actually the product of broader issues around the vertical fiscal imbalance experienced by the Australian federation. If states had a greater capacity to raise revenue in line with their responsibilities, the incentive for states to cost shift towards the local government sector would be reduced.

6.64 Despite the ALGA's carefully considered plans for a referendum on the issue of recognition of local government, it seems likely that a short term ad hoc constitutional amendment would not be successful. The committee believes that Professor Brown's assessment is probably correct when, reflecting on his recent research, he says 'a base, bare majority level of support for the principle of federal constitutional recognition exists, but stands ready to evaporate – as it has done previously – under even mild political contestation or pressure.'⁸²

6.65 He goes on to argue that:

If constitutional reform on the subject of local government is pursued as an ad hoc measure, without being seen as part of a reform plan that addresses the perceptions of citizens who support reform but do not currently value local government, then any attempted alteration is clearly much more likely to fail.⁸³

6.66 While the committee acknowledges that recognition of local government in the Constitution has some strong advocates, the greatest likelihood of success of such an amendment lies in a 'hasten slowly'⁸⁴ approach that places such an amendment in the broader context of a coherent plan for overall constitutional reform.

81 Gold Coast City Council, *Submission 36*, p. 7.

82 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 464.

83 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 464.

84 Professor A.J. Brown, *Submission 41*, Attachment 7, p. 466.

Recommendation 12

6.67 The committee recommends that the issues of funding and constitutional recognition of local government be among the matters proposed for inquiry by the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 13

6.68 Pending the outcome of this inquiry, the committee recommends that mechanisms other than constitutional amendment, perhaps by way of agreement through COAG, be explored to place Commonwealth funding of local government on a more reliable long term foundation.