CONSTITUTIONAL RECOGNITION FOR LOCAL GOVERNMENT

Explanatory Notes for fact sheets contained in the Council Resource Kit

A Resource for the Facilitators of Council Conversations

AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
Local Government Association of NSW
Shires Association of NSW
WALGA
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND INC
MAV MUNICIPAL ASSOCIATION OF VICTORIA
lga Local Government Association of South Australia
LGANT LOCAL GOVERNMENT ASSOCIATION OF THE NORTHERN TERRITORY
LGAT Local Government Association Tasmania

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Prologue – Determining what Constitutional Recognition of Local Government is

Local government fulfils a significant and increasingly important role within the Australian Federation, a fact acknowledged by the Commonwealth through local government's inclusion in the Council of Australian Government (COAG), and in other key Ministerial Councils.

Despite this, Australia is yet to follow the lead of many other nations and recognise the roles and functions of local government in our national constitution.

The failure to recognise local government remains one of the significant omissions of the Australian Constitution.

This failure to recognise local government and its role as the primary institution of local democracy has been highlighted in recent times by unilateral state government action without appropriate consultation.

Local government views the 2006 Federal Parliament Resolution on Local Government as an important stepping stone towards the longer-term goal of full constitutional recognition.

In this context, the election of a new Federal Government on 24 November 2007 was an important development.

The Australian Labor Party went into the election with a platform commitment to constitutional recognition of local government.

It promised:

> An important aspect of reform of the federation is to recognise and make more efficient the work of the third tier: **local government**. Labor has committed to a Council of Australian Local Governments to assist local government representatives to have a more effective voice at COAG. One of the first tasks of the new Council will be to develop a plan for a national referendum on the constitutional recognition of local government.[1]

This offers a golden opportunity for the local government sector to achieve some degree of constitutional recognition – something long wished by the sector.

Members of the Australian Local Government Association (ALGA) have reaffirmed ALGA's wish to have local government recognised in the Australian Constitution, a view activated at successive general assemblies.

For example, the 2003 National General Assembly of Local Government resolved:

> That the ALGA seek support for the principle from all political parties and the cooperation of the State and Federal Governments in achieving constitutional recognition for local government and

further that the Australian Local Government Association approach the Federal Government with a view to having a referendum held in conjunction with the next Federal election to canvass the constitutional recognition of local government.[2]

It also passed the *Principles of Local Democracy*. They included:

1. Local Government seek constitutional recognition in the Australian Constitution

2. Local Government calls for the immediate establishment of a national *constitutional convention* to specifically consider constitutional recognition of local government and review the efficiency, effectiveness and responsibilities of the three spheres of government.

3. A broad competence power must be granted to all local government authorities in Australia so that those authorities may respond to the needs of their communities in the most appropriate manner. There must be no limits imposed by other governments on the performance of local government's legitimate activities.

4. The Federal Government should recognise the legitimacy and independence of local government and must not interfere directly or indirectly in local government boundary issues.

5. State governments should not have the right to dismiss duly elected councils. Where the report of a properly constituted investigation so recommends, a Council may be suspended provided it has been afforded the opportunity to respond to such a report, but a duly elected council must be reinstated as soon as possible and no later than six months from the time of the suspension.

Australian states have recognised local government in their respective constitutions in this manner:

New South Wales	Victoria	Queensland
Part 8 Local Government **51. Local Government** (1) There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government. (2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature. (3) The reference in subsection (2) to laws of the Legislature shall be read as a reference to laws that have been enacted by the Legislature, whether before or after the commencement of this section, and that are for the time being in force. (4) For the purposes of this section, the Western Lands Commissioner, the Lord Howe Island Board, and an administrator with all or any of the functions of a local government body, shall be deemed to be local government bodies.	**Part IIA Local Government** **74A. Local Government** (1) Local government is a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district. (1A) Subject to section 74B, each Council- (a) is responsible for the governance of the area designated by its municipal boundaries; and (b) is constituted by democratically elected Councillors as the governing body which is- (i) accountable for its decisions and actions; and (ii) responsible for ensuring good governance; and (c) includes an administration which (i) implements the decisions of the Council; and (ii) facilitates the performance of the duties and functions of the Council. (2) An elected Council does not have to be	**Chapter 7 – Local Government** **Part 1 – System of Local Government** **70 System of Local Government** (1) There must be a system of local government in Queensland. (2) The system consists of a number of local governments. **71 Requirements for a Local Government** (1) A local government is an elected body that is charged with the good rule and local government of a part of Queensland allocated to the body. (2) Another Act, whenever made, may provide for the way in which a local government is constituted and the nature and extent of its functions and powers. (3) Despite subsection (1), another Act, whenever made, may provide for the appointment of 1 or more bodies or persons to perform all or any of a local government's functions and to exercise all or any of a local government's powers and to be taken to be a local government— (a) during a suspension of a local

	constituted in respect of any area in Victoria- (a) which is not significantly and permanently populated; or (b) in which the functions of local government are carried out by or under arrangements made by a public statutory body which is carrying on large-scale operations in the area. **74B. Local Government Laws** (1) Parliament may make any laws it considers necessary for or with respect to- (a) the constitution of Councils; and (b) the objectives, functions, powers, duties and responsibilities of Councils; and (c) entitlement to vote and enrolment for elections of Councils; and (d) the conduct of and voting at elections of Councils; and (e) the counting of votes at elections of Councils; and (f) the qualifications to be a Councillor; and (g) the disqualification of a person from being or continuing to be a Councillor; and (h) the powers, duties and responsibilities of Councillors and Council staff; and	government's councillors under section 74; or (b) if a local government is dissolved or unable to be properly elected—until a local government has been properly elected. (4) In subsection (3)— "local government" includes a joint local government. **Part 2 – Procedure Limiting Dissolution of Local Government and Interim Arrangement** **72 Definition for pt 2,** In this part— "Minister" means the Minister who administers the provision under which the local government may be dissolved. **73 Dissolution of local government must be tabled** The Minister must, within 14 days after an instrument purporting to dissolve a local government is made, table a copy of the instrument in the Legislative Assembly. **74 Suspension until dissolution ratified**

	(i) any other act, matter or thing relating to local government administration. (2) A Council cannot be dismissed except by an Act of Parliament relating to the Council. (3) Parliament may make laws for or with respect to- (a) the suspension of a Council; and (b) the administration of a Council during a period in which the Council is suspended or dismissed; and (c) the re-instatement of a Council which has been suspended; and (d) the election of a Council if a suspended Council is not re-instated; and (e) the election of a Council where a Council has been dismissed.	From the time an instrument purporting to dissolve a local government is made until it is ratified under section 75 or its effect ends under section 76, it has the effect only of suspending the local government's councilors from office. *Note—* Section 71 permits another Act to provide for the appointment of 1 or more bodies or persons to perform all or any functions and exercise all or any powers of the local government and to be taken to be the local government during the suspension. **75 Ratification of dissolution** (1) The Legislative Assembly, on the Minister's motion, may ratify the dissolution of the local government within 14 sitting days after a copy of the instrument purporting to dissolve the local government is tabled. (2) If the Legislative Assembly ratifies the dissolution, the local government is dissolved in accordance with the instrument from the time of ratification. **76 No tabling or ratification of dissolution** (1) This section applies if— (a) a copy of the instrument purporting to dissolve the local government is not tabled under section 73; or

		(b) the Legislative Assembly refuses to ratify the dissolution of a local government moved by the Minister; or (c) at the end of 14 sitting days after a copy of the instrument purporting to dissolve the local government is tabled (i) the Minister has not moved that the dissolution be ratified; or (ii) the Legislative Assembly has not ratified the dissolution, even though the Minister has moved that it be ratified. (2) The effect of the instrument purporting to dissolve the local government ends. (3) The suspension from office of the local government's councilors ends and they are reinstated in their respective offices. (4) The appointment of a body or person appointed to perform all or any functions and exercise all or any powers of the local government because of its purported dissolution ends. **Part 3 – Special Procedures for Particular Local Government Bills** **77 Procedure for Bill affecting a local government** (1) This section applies for a Bill for an Act that would—

		(a) be administered by a Minister who administers a provision of the *Local Government Act 1993*; and (b) affect local governments generally or any of them. (2) The member of the Legislative Assembly who proposes to introduce the Bill in the Legislative Assembly must, if the member considers it practicable, arrange for a summary of the Bill to be given to a body representing local governments in the State a reasonable time before the Bill is introduced in the Legislative Assembly. **78 Procedure for Bill ending system of local government** (1) This section applies for a Bill for an Act ending the system of local government in Queensland. (2) The Bill may be presented for assent only if a proposal that the system of local government should end has been approved by a majority vote of the electors voting on the proposal. (3) The Bill has no effect as an Act if assented to after presentation in contravention of subsection (2). (4) The vote about the proposal must be

		taken on a day that is more than 1 month but less than 6 months before the Bill is introduced in the Legislative Assembly. (5) The vote must be taken in the way prescribed by an Act. (6) An elector may bring a proceeding in the Supreme Court for a declaration, injunction or other remedy to enforce this section either before or after the Bill is presented for assent. (7) In this section— "elector" means a person entitled to vote at a general election for members of the Legislative Assembly.

South Australia	Western Australia	Tasmania
64A—Constitutional guarantee of continuance of local government in this State (1) There shall continue to be a system of local government in this State under which elected local governing bodies are constituted with such powers as the Parliament considers necessary for the better government of those areas of the State that are from time to time subject to that system of local government. (2) The manner in which local governing bodies are constituted, and the nature and extent of their powers, functions, duties and	**52. Elected local governing bodies** (1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide. (2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted. **53. Certain laws not affected**	**Part IVA – Local Government** **45A. Elected municipal councils** (1) There shall be in Tasmania a system of local government with municipal councils elected in such manner as Parliament may from time to time provide. (2) Each municipality shall have such powers as Parliament may from time to time provide, being such powers as Parliament considers necessary for the welfare and good government of the area in respect of which the municipality is constituted.

responsibilities shall be determined by or under Acts of the Parliament from time to time in force. (3) No Bill by virtue of which this State would cease to have a system of local government that conforms with subsection (1) of this section shall be presented to the Governor for assent unless the Bill has been passed by an absolute majority of the members of each House of Parliament.	Section 52 does not affect the operation of any law — (a) prescribing circumstances in which the offices of members of a local governing body shall become and remain vacant; or (b) providing for the administration of any area of the State — (i) to which the system maintained under that section does not for the time being extend; or (ii) when the offices of all the members of the local governing body for that area are vacant; or (c) limiting or otherwise affecting the operation of a law relating to local government; or (d) conferring any power relating to local government on a person other than a duly constituted local governing body.	**45B. Certain laws not affected** Section 45A does not affect the operation of any law – (a) prescribing circumstances in which the offices of members of a municipal council shall become and remain vacant; (b) providing for the administration of any area of the State – (i) to which the system referred to in that section does not for the time being extend; or (ii) when the offices of all the members of the municipal council for that area are vacant; or (c) conferring any power relating to local government on a person other than a municipal council. **45C. Municipal areas** Any division of Tasmania into municipal areas is not to be altered without the recommendation of the Local Government Board established under the Local Government Act 1993.

However, despite these provisions, the sector has always suffered from the spectre of forced amalgamations or dismissals by State Governments. The recent amalgamations in Queensland illustrate this.

Local government has also suffered significantly from cost shifting – where state and federal governments expect local government to provide infrastructure and services ranging from roads to services provided under schemes such as the Health and Community Care Program (HACC). This was something recognised by the now well known Hawker Report.[3]

Now is the time for local government to take the best chance in a generation to have the sector recognised in the Constitution.

It is therefore incumbent on local government to determine precisely what it would like to see reflected in the Constitution – would it like to see:

- symbolic recognition – a reference in the preamble to the Constitution recognising the existence of local government in local government;
- institutional recognition – imposing a duty on States to retain a system of local government, and that a council ought not be amalgamated or dissolved without fair hearing; or
- financial recognition – a recognition that local government requires a more secure revenue stream from the Commonwealth to provide the services and infrastructure expected by the community.

This resource document:

- is designed to assist the conversations to be held within the local government sector as it determines how it wishes to see local government recognised in Australia's most important political document;
- sets out some basic facts about the Constitution, as well as how constitutional amendments can be made; and
- finally, provides some information and some things to bear in mind when considering precisely what change should be proposed to the Constitution.

What is the Constitution?

The Australian Constitution commenced operation on 1 January 1901, it:

- creates a new set of central government authorities – starting with the Parliament, the Public Service and the Armed Forces - and outlines their functions and powers;
- recognises the existence of the six Australian colonies of Great Britain as they were in 1900, and confers on these colonies the status of States. It also allows for the continuation of the States, their constitutions, government arrangements and bodies of law, except as these are changed by the new constitution;
- regulates the relations between the Commonwealth and the States;
- establishes an Australian common market – free trade between the States and a common external customs tariff; and
- makes some express and implied provisions concerning the relation of the individual citizen to the Commonwealth government, and to a lesser extent, State governments. An example of this sort of power is the acquisition of property by the government on just terms. [4]

The way the Constitution is drafted gives rise to three classes of powers:

- the **exclusive powers** of the Commonwealth, which gives the Commonwealth a monopoly to make laws, or do things. An example of this is the power to coin money; [5]
- the **concurrent powers** – section 51 lists subject areas where both the Australian and states can make laws. However, if the Commonwealth makes a law, the state law yields. An example of this is how the WorkChoices legislation, in which the previous government used the power to regulate corporations to largely supersede state level workplace relations legislation [6]; and
- the **residuary legislative powers** – everything else which is not listed. These remain the responsibility of the States.

Responsibility for local government is not mentioned anywhere in the Constitution, and is therefore the responsibility of the states.

The High Court has read the concurrent powers contained in section 51 widely.[7]

This means the Commonwealth has the power to make laws in many areas that are not immediately apparent on a first reading of the document.

For example, the power to make laws with respect to 'foreign affairs' was used by the Commonwealth to pass a law allowing the Australian Electoral Commission to conduct plebiscites to measure support for council amalgamations in Queensland to protect the human rights of:

- holding opinions without interference;

- to ensure a right of freedom of expression and
- to take part in the conduct of affairs, directly or through freely chosen representatives.[8]

The Commonwealth has also used its powers to make laws with respect to taxation to effectively squeeze out the capacity of the States to impose taxes on incomes.

This has created what is called 'vertical fiscal imbalance' – where central government controls revenue raising while spending responsibilities rest with other spheres of government.

Finally, the Commonwealth can use the Budget to directly fund projects, on the basis of terms determined by the Commonwealth.

The Roads to Recovery program is an example.[9]

All this has meant:

- that the states and local government are largely dependent upon the Commonwealth's allocation of funds to fulfil their responsibilities; with,
- this funding dependence allowing the Commonwealth to implement policies in areas where it cannot directly legislate.[10]

It is in this context that local government seeks to be recognised by Australia's paramount political document – the Constitution.

How to change the Constitution

The Constitution can only be changed in the following manner.

A Bill must pass through the House of Representatives and the Senate by an absolute majority – that is, 50% of all members of the House of Representatives and the Senate must approve the proposed constitutional amendment.

This practically means that there can be no constitutional change without the support of the government of the day, as it controls the business of the parliament.

The question must then go to a referendum.

A majority of voters in a majority of Australian voters must support the measure.

A majority of states must also support the measure – that is 4 out of the 6 states must vote yes. The two territories do not count as states for this purpose, although votes in the territories do count towards the overall majority. This is what is called the double majority.

The referendum is to be held throughout Australia on the same day.[11]

Within 4 weeks of a referendum question being passed by the Parliament, the Electoral Commissioner must publish a booklet containing:

- an argument of less that 2000 words approved by: the majority of parliamentarians who voted 'yes' to the proposed referendum question; and

- an argument of less that 2000 words approved by: the majority of parliamentarians who voted 'no' to the proposed referendum question.[12]

The Australian Government is otherwise prevented by law from supporting either the yes or no case. So the government cannot spend money to advocate either a 'yes' or 'no' case.

The voter must vote either 'yes' or 'no' to the question put in the ballot paper, which is the title of the Bill that passed the Parliament.

This is what a ballot paper looks like:

Commonwealth of Australia

BALLOT-PAPERS

[*Here insert name of State or Territory*]

Referendums on proposed Constitution alterations

DIRECTIONS TO VOTER

Write ‘YES’ or ‘NO’ in the space provided opposite each of the questions set out below.

_____

1. [*Here set out the title of the first proposed law*]

DO YOU APPROVE THIS PROPOSED ALTERATION? ☐

_____

2. [*Here set out the title of the second proposed law*]

DO YOU APPROVE THIS PROPOSED ALTERATION? ☐

Voting is compulsory.

If the double majority is achieved, the Constitution is amended.

There have been previous attempts to recognise local government in the Constitution. They are discussed in the next chapter.

The Track Record of Constitutional Recognition of Local Government

1973/1974

The first attempt at amending the *Constitution* to recognise local government was made on 8 November 1973, when the Whitlam Government introduced the *Constitutional Alteration (Local Government Bodies) Bill* into Federal Parliament.

The Bill proposed adding a pl. 51(ivA) to the *Constitution*, which read:

> (ivA.) The borrowing of money by the Commonwealth for local government bodies.

It also proposed adding a new s.96A, which read:

> 96A. The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

These provisions would allow the Commonwealth to fund local government in the same way it can the states.

Whilst not giving local government taxing powers, it:

- implicitly recognised the fact that there are local government areas; and
- unambiguously allowed the Federal Government to directly fund local government, without 'passing' grants through state governments and Local Government Grants Commissions.[13]

In introducing the measure, the Prime Minister (Mr Whitlam) said:

> It was high time an Australian Government used its authority and resources to make it easier for local governments to have access to the funds they need to help the people in relation to their streets, drains, sewerage and other local civic services to which as taxpayers they are entitled. The Australian Government is wholly committed to this. As I said in my policy speech last year:
>
> Let there be no mistake about Labor's determination to make local government a genuine partner in the Federal system.[14]

The Bill was opposed by the Liberal and Country parties in the House of Representatives.

The position of the Opposition is made clear in the House of Representatives speech of the Leader of the Opposition (Mr Snedden) when he said:

> The third Bill, the Constitutional Alteration (Local Government Bodies) Bill 1974 (No.2) is fraudulent because it states that the proposed alteration is just a mere provision to borrow money for local government and to grant money for local government. If honourable members read the title of the Bill it indicates nothing about conditions being imposed, interest rates being high or for wiping out State governments. For that reason, it is fraudulent.[15]

The following table sets out the result:

Result

State	*Number on rolls*	*Ballot papers issued*	*For*	*%*	*Against*	*%*	*Informal*
New South Wales	2 834 558	2 702 903	1 350 274	50.79	1 308 039	49.21	44 590
Victoria	2 161 474	2 070 893	961 664	47.38	1 068 120	52.62	41 109
Queensland	1 154 762	1 098 401	473 465	43.68	610 537	56.32	14 399
South Australia	750 308	722 434	298 489	42.52	403 479	57.48	20 466
Western Australia	612 016	577 989	229 337	40.67	334 529	59.33	14 123
Tasmania	246 596	237 891	93 495	40.03	140 073	59.97	4 323
Total	**7 759 714**	**7 410 511**	**3 406 724**	**46.85**	**3 864 777**	**53.15**	**139 010**

Obtained majority in one State and an overall minority of 458 053 votes

1976, 1985 and 1988

There was a Constitutional Convention in 1976.

It passed a resolution which, amongst other things, invited the States to consider formal recognition of local government in State Constitutions.

By 1985, three of the six states had recognised local government in their constitutions.

In that year, a constitutional convention was convened by the Hawke Government.

The Convention had before it a proposed *Declaration as to the Principles to be Applied in the Constitutional Operation and Regulation of Local Government Authorities in Australia*, that was attached to Local Government Report of the Convention Structure of Government Sub-Committee.[16]

The declaration read:

> Recognising the fundamental role of local government in the system of local government in Australia:
>
> Recognising the value of local government in ensuring that local communities may participate to the maximum extent in the management and regulation of their districts:
>
> Desiring to promote continuing intergovernmental co-operation and further to acknowledge the principles which should be applicable to local government do hereby declare that:-
>
> (1) Within every jurisdiction in Australia there be a system of local government.

(2) The system extend to all areas in which a sufficient number of people reside to warrant a local authority in their area.

(3) Except in special circumstances the local authority be elected by all adults resident – but not as to exclude property owners – in the area administered by the local authority.

(4) Local authorities be granted adequate powers and the right to manage and regulate the affairs of the local community within the framework of the laws applying to such local authorities.

(5) Each local authority be provided with access to adequate funds to enable it to perform its function with equity and efficiency.

(6) A local authority not be subject to arbitrary dismissal or suspension

The declaration set out the issues that still face local government today.

The Convention endorsed a constitutional amendment proposed by the Australian Council of Local Government Associations (as ALGA was then called), which read:

> *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 the powers to make by-laws for the peace order and goods government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf.*[17]

A Constitutional Commission was created after the Convention. The Government accepted the recommendation from it suggesting that local government be constitutionally recognised.

This is because the Commission advised:

- it was time for local government to be recognised as the third sphere of government;
- local government had been in existence since Federation; and
- its scope had grown markedly in scope and importance since.[18]

The Government accordingly proposed a section 119A be added to the Constitution, reading:

> 119A. Each State shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.

The explanatory memorandum to the *Constitution Alteration (Local Government) Bill 1988* said:

> The constitutional obligation will be to establish and continue a system of local government. The essential elements of the system will be elected local government bodies empowered to administer and to make by-laws for their respective areas. It will be a matter for State Parliaments to determine the manner of elections, the area to be covered by each local government body, the manner of administration and the manner of exercise and the extent of the power to make by-laws. Section 119A is not intended to preclude local government bodies to be amalgamated with other such bodies. Nor is it intended to preclude laws providing for the dismissal of a local government in appropriate circumstances, subject to a new local government body being elected within a reasonable period. (emphasis in the original)

It proposed 'institutional' protection:

- similar in structure to; and
- as practically effective as

the recognition offered local government in state constitutions.

The Liberal/National Party opposed the amendment.

Presenting a no case on behalf of the Opposition in 1988, Senator Alston (Lib Vic) quoted an observation of the (then) recently retired Chief Justice of the High Court (Sir Harry Gibbs) as saying:

> The history of constitutional interpretation in Australia and the United States shows that it is impossible to predict what meaning will, in the future, be given to any provision of the Constitution which is expressed in words of generality. That is not necessarily bad but gives the courtroom to adapt the Constitution as philosophies and situations alter. But it also means that one cannot safely assume that any general provision will have no more than a symbolic effect. One can understand how some may feel that a constitutional provision may in time prove to be the nether millstone on which the power of the States will be ground exceedingly small; the upperstone, the Commonwealth, being held firmly in place.[19]

The proposed amendment laws were put forward in a referendum on 3 September 1988 and lost heavily. This was the result:

Result

State	*Number on rolls*	*Ballot papers issued*	*For*	*%*	*Against*	*%*	*Informal*
New South Wales	3 564 856	3 297 246	1 033 364	31.70	2 226 529	68.30	37 353
Victoria	2 697 096	2 491 183	882 020	36.06	1 563 957	63.94	45 206
Queensland	1 693 247	1 542 293	586 942	38.31	945 333	61.69	10 018
South Australia	937 974	873 511	256 421	29.85	602 499	70.15	14 591
Western Australia	926 636	845 209	247 830	29.76	584 863	70.24	12 516
Tasmania	302 324	282 785	76 707	27.50	202 214	72.50	3 864
Australian Capital Territory	166 131	149 128	58 755	39.78	88 945	60.22	1 428
Northern Territory	74 695	56 370	21 449	38.80	33 826	61.20	1 095
Total	**10 362 959**	**9 537 725**	**3 163 488**	**33.61**	**6 248 166**	**66.39**	**126 071**

Obtained majority in no State and an overall minority of 3 084 678 votes.

Some lessons learnt:

- there have been 44 Referendums since 1906
- the success rate is 8/36 (22%)
- whilst times might have changed, most unsuccessful referenda have failed because they centralise power in 'Canberra'.

A document, which excellently discusses the reasons why referenda failed, is the Parliamentary Research Service publication called *The Politics of Constitutional Amendment*.[20]

It notes some of the reasons referenda lose including:

- government clumsiness – proposing a number of reforms in one question so that if you don't like one of them, you are obliged to vote against the lot;
- party politics – with the ALP generally supporting enlarged Commonwealth powers, and the coalition parties (as constituted from time to time) opposing them;
- asking too many questions at once – prompting naysayers to suggest to voters to just vote NO;

- trying to do too much at the one time;
- strong political opponents (including States) advocating opposition; and
- political context (or perhaps the wrong question at the same time) – it was suggested the 1944 '14 powers' referendum, which proposed significant transfers of power to the Commonwealth was defeated because of waning support for wartime controls and a concern about 'too much bureaucracy'.

Therefore, to maximise the chances of success at a constitutional referendum, it is incumbent on local government to find a set of words that:

- can be supported by both sides of politics – it is noted that whilst the Liberal Party platform supports the right for local government to have taxing powers commensurate with their responsibilities, they have never expressly supported constitutional recognition of local government;[21]
- can be explained to the community; and
- preferably put separate from other proposed amendments to the Constitution.

Earlier, three types of constitutional recognition were identified:

- symbolic recognition – a reference in the preamble to the Constitution recognising the existence of local government in local government;
- institutional recognition – imposing a duty on States to retain a system of local government, and that a council ought not be amalgamated or dissolved without fair hearing; or
- financial recognition – a recognition that local government requires a more secure revenue stream to provide the services and infrastructure expected by the community.

These are now discussed in greater detail.

Styles of Constitutional Recognition

Symbolic

The current preamble to the Constitution reads:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

It clearly illustrates the fact that federation was all about bringing together five (and, after WA subsequently agreed to join the Commonwealth after the presentation of the *Commonwealth of Australia Bill* to the Imperial Parliament, six) colonies into one body politic under the Crown.

And that's all. It is a specific clause designed to declare one thing: the federation of a number of British colonies into one commonwealth.

A reference to local government in the current preamble would appear out of place – it would need to be rewritten.

A new preamble was proposed as part of the 1999 republic referendum package.

That read:

> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.
>
> We the Australian people commit ourselves to this Constitution:
>
> - proud that our national unity has been forged by Australians from many ancestries;
> - never forgetting the sacrifices of all who defended our country and our liberty in time of war;
> - upholding freedom, tolerance, individual dignity and the rule of law;
> - honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;
> - recognising the nation-building contribution of generations of immigrants;
> - mindful of our responsibility to protect our unique natural environment;
> - supportive of achievement as well as equality of opportunity for all;
> - and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

A new preamble would probably look something like that, with a particular bit directly referring to local government.

The last parliament passed a parliamentary resolution recognising the role of local government. It read:

> That the House/Senate:
>
> 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.
>
> 6) commends local government elected officials who give their time to serve their communities.

The first two paragraphs are of a style suitable for incorporation into a preamble.

The effect of a symbolic reference to local government in the preamble

The general role of a preamble in legislation is to provide the reasoning behind the passing of a piece of legislation, and can therefore be used sometimes in working out how an ambiguous piece of legislation should be interpreted.

A preamble **usually** does not create rights and obligations.[22]

On that presumption, recognition of local government in the Constitution would have no legal effect.

That said, some **could** argue that recognition in the preamble could give rise to an implied constitutional right – that is, rights that are implied from the wording or concept within an express provision of the Constitution.[23]

The High Court has found that some implied rights are contained in the Constitution.

It is for that reason that when a new preamble to the Constitution was proposed as part of the 1999 republic referendum, a new provision was also to be inserted making clear that the terms of the preamble were not to be used when interpreting the Constitution.

A proposed section 125A was to be added to the Constitution, reading:

> **125A Effect of preamble**
>
> The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

Therefore, whilst the better view is that recognition of local government in the preamble **probably** is only symbolic, and has no legal effect, over the long term the High Court **could** decide that such a reference may have some legal consequences. Only time will tell.

Institutional Recognition of Local Government

One can have institutional recognition of local government, in which states are required to maintain a system of local government in a way similar to proposal put to the Australian people in 1988.

This would impose a duty on the states to maintain some sort of local government structure.

The Constitution already imposes other duties on states. For example, the states must make space in their prisons for Commonwealth prisoners.[24]

The proposal therefore:

- adopts a legislative design already contained in the Constitution;
- leaves the detail of how local government is structured in a particular state to that state.

However, it is noted that the 1988 referendum question only required the retention of 'a' system of local government.

It was silent on whether procedural fairness should be shown prior to amalgamating or dismissing a council.

Read literally, a state government could remove a council in the manner permitted by the law of the state. And as was recently discovered in Queensland, the presence of an established mechanism is no protection if a state government intends to rationalise the local government sector.

The issue, therefore, is whether institutional recognition of local government can or should expressly provide that procedural fairness should apply before a local government area is amalgamated or a Council dismissed.

Finally, there are grounds to argue that the Constitution could provide that local government not be amalgamated without a referendum. There is some constitutional precedent for this proposal.

For example, section 123 of the Constitution permits the change of state boundaries, but only after the consent of the state parliament and the approval by voters at a referendum.

However, both the last two proposals could draw opposition from state governments as unduly affecting their capacity to administer the state.

Financial Recognition of Local Government

Some argue that local government requires a more secure revenue stream from the Commonwealth to provide the services and infrastructure expected by the community.

While local government receives Financial Assistance Grants from the Commonwealth, the payments are made as grants via the States, largely because of doubt about the legal ability of the Commonwealth to make direct payments to local government.

The creation of a direct financial relationship lay at the heart of the proposed 1974 referendum on constitutional recognition of local government.

Despite this, payments are made direct to local government for the Roads to Recovery Program, although there have been indications in the past that one or more states might challenge this arrangement in court.

Any further strengthening of the direct financial relationship between the Commonwealth and local government could result in a legal challenge.

Taxing Powers

Some argue that local government should have the right to levy its own levels of taxation.

Some federations in other countries permit this.

In Germany, for example, Article 28 of the *Basic Law* provides a degree of constitutional protection and recognition of the communes in the German Federation. It reads:

> (1) The constitutional order in the States must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Constitution. In each of the States, counties, and communes, the people has to be represented by a body chosen in general, direct, free, equal and secret elections. During elections in counties and communes, persons who possess the citizenship of a European Community country are eligible to vote and being elected according to the *laws* of the European Community. In communes, the communal assembly can take the place of an elected body.
> (2) The communes must be guaranteed the right to regulate, on their own responsibility, all the affairs of the local community within the limits set by statute. Within the framework of their statutory functions, the associations of communes have such right to self-government as may be provided by statute. **The right to self-government also encompasses the foundations of financial accountability; part of this foundation is the communes' right to raise their tax shares according to local economic performance**.

While this appears attractive at first look, a major disadvantage is that a council with a limited population or industry base would have little capacity to raise the revenue necessary to maintain services and infrastructure.

A Share of Taxation

Others have suggested that a fixed proportion of taxation revenue (say 1% of Commonwealth tax revenue, excluding the GST) should be provided to local government. This is called hypothecation**.**

Many economists have opposed hypothecation of taxation revenue for any purpose.

As Michael Keating, a former Secretary of the Australian Treasury said:

> In the past, however, hypothecation of taxation has been opposed by many economists for the very good reason that hypothecation limits the fiscal freedom of governments to adjust to changing priorities. It is argued that in our system of representative democracy such choices are best made by our elected representatives who are better able to comprehend the necessary trade-offs involved and who will thus limit the chances of a policy change having unforeseen consequences.[25]

This proposal that local government receive a fixed share of taxation revenue would require the Australian Government to give up some of its revenue stream, which could be controversial, particularly as the states do not have a similar constitutional guarantee.[26]

There is also a question of who and how should revenue be allocated through local government areas:

- by way of population?
- by way of need? If so, who determines need? Should it be the Australian Government or a Grants Commission applying something like the National Principles established under the *Local Government (Financial Assistance) Act 1995?*

Moving Forward

It is clear that local government enjoys the goodwill of the Australian community.

A survey conducted by the Local Government Association of South Australian during 2003 found that people trusted local councils more than state or Commonwealth politicians and that councils perform better and provide better value for money than other governments, the same result as in NSW.

The same survey indicated that the majority of people want councils to take on more service delivery from Commonwealth governments and have a greater say in state and Commonwealth services.

If local government is to have a stable platform to provide the services that the Australian community deserves, local government requires a stable flow of revenue as well as a stable institutional structure.

The recommendations contained in this paper suggest possible changes to the Australian Constitution.

However, to achieve the goals of financial and institutional security for local government, broad community support is required.

This requires a clear articulation of *what* is meant by constitutional recognition and *why* it is necessary.

Frequently Asked Questions

Current powers of the Australian Government

Q. Can the Australian Government pass a Local Government Act like a state government can?

A. Not directly. Local government is not a subject matter set out as a matter over which the Australian Parliament can legislate. It would take a most expansive reading of the Australian parliament's constitutional power to even suggest that it could.

Conducting a referendum

Q. Can my local government area run a constitutional referendum?

A. No. The Australian Electoral Commission runs constitutional referenda.

Q. We can have the issue of constitutional referenda considered pretty quickly in our local government area. Do we have to wait for everyone else?

A. Yes. A referendum must be held on the same day throughout Australia.

Q. Can a constitutional amendment be conducted at the same time as a federal election?

A. Yes

Q. Who writes the amendment to the Constitution we are voting on?

A. The Government. It is contained in a Bill that must pass an absolute majority of both Houses of Parliament before a referendum is put to the people.

Q. Can we expect public funding for the referendum?

A. It depends on the Government. Usually, the answer would be no. In particular, referendum legislation restricts what the Government can spend money on once the mechanism to change the Constitution commences.

However, the Government funded a neutral education campaign prior to the republic referendum, and provided the non-party political 'yes' and 'no' groups with $7.5m each to fund advertisements. It should be noted that the republic debate

was different to most referendum questions as there was no division on party lines as to whether or not there should be a republic.

Q. What rules apply to a referendum campaign?

A. As a general proposition, the rules that apply to federal election campaigns also apply to referendum questions.

Q. Can we prevent other proposals to amend the Constitution at the same time as a constitutional amendment recognising local government?

A. It all depends on the Government. If they want to, they can ask any number of questions proposing any number of constitutional amendments on the one day, so long as they are able to have Bills passed with an absolute majority of both houses of parliament.

Q. When can we expect the referendum to be conducted?

A. This depends on the Government. However, it is unlikely to have a referendum soon if local government is not clear on what it would like to see contained in the Constitution.

Q. Why didn't previous referenda succeed?

A. A number of reasons:

- **government clumsiness – proposing a number of reforms in one question so that if you don't like one of them, you are obliged to vote against the lot;**
- **party politics – with the ALP generally supporting enlarged Commonwealth powers, and the coalition parties (as constituted from time to time) opposing them;**
- **asking too many questions at once – prompting naysayers to suggest to voters to just vote NO;**
- **trying to do too much at the one time;**
- **strong political opponents (including States) advocating opposition; and**
- **political context (or perhaps the wrong question at the same time)**

Q. What do we need to do to maximise the chance of success of any constitutional amendment recognising local government?

A. To maximise the chance of success at a constitutional referendum, it is incumbent on local government to find a set of words that:

- **can be supported by both sides of politics – it is noted that whilst the Liberal Party platform supports the right for local government to have taxing powers commensurate with their responsibilities, they have never expressly supported constitutional recognition of local government;**
- **can be explained to the community; and**

- **preferably is put separate from other proposed amendments to the Constitution.**

Moreover, local government's will need to spend time and resources to make their constituents aware of the benefits of constitutional recognition, so they are more likely to support the proposal.

Symbolic recognition of local government in the Constitution

Q. What is a preamble?

A. A preamble generally establishes the context that led to a law being made.

Q. Would constitutional recognition of local government in the preamble mean that my council could not be sacked?

A. Probably not.

Q. Would constitutional recognition of local government in the preamble mean that my Council could expect to receive more money from other tiers of Government?

A. Probably not.

Q. So, does recognition in the preamble achieve anything?

A. Not in a legal sense. A preamble usually does no more than establish the context by which legislation is made. It does not create any rights or obligations.

In the long term, the High Court might decide that the preamble could create an implied right to say, a right not to be dissolved or dismissed without a hearing, but it would depend on how the preamble was drafted. It certainly would have no legal impact if the Constitution was amended to make clear that the preamble does not create any rights or obligations, as was the case in 1999.

Q. So, why recognise local government in the constitution? After all, in 1901 the subject matter of local government was left to the states.

A. Because local government existed prior to Federation. It is appropriate for local government to be recognised in the Constitution, which is the paramount political document in the Federation given the increased role the sector has in providing services and infrastructure to Australians.

It certainly removes any doubt that local government is one of the three spheres of government.

Q. Are there any political risks in proposing amendments to the preamble?

A. It would not necessarily impact on the role of the states. However, if the preamble was amended in a way that removed a reference to the Crown could be argued by some to be 'republicanism by stealth'.

Institutional recognition of local government in the Constitution

Q. The role of local government was recognised by the Federal Parliament. Isn't that enough?

A. Technically, a resolution of a parliament is no more than an expression of opinion of that particular parliament. It has no legal effect.

Q. Would recognition of a system of local government in the Constitution mean that the Australian Government can pass something like a Local Government Act?

A. No. The structure of local government would remain a state responsibility.

Q. Would recognition of a system of local government mean that my Council could be sacked or amalgamated?

A. The law of the state relating to dissolution, dismissal or amalgamation would apply.

Q. Would recognition of a system of local government mean that my Council could expect to receive more money from other tiers of Government?

A. Probably not.

Q. So, does recognition of a system of government in the manner proposed in 1988 achieve anything?

A. The states must retain 'a' system of local government. At its narrowest, that probably means retaining at least two local government areas, although the High Court could construe the requirement to require the states to retain a 'meaningful' system of local government.

Although in the long term the High Court might decide that retaining a system of local government could create an implied right to, for instance, require some sort of consultation before a council is dissolved or amalgamated, much would depend on

how the provision was drafted.

If this is desired, it should be specified in the proposed amendment. However, the more requirements contained in the proposed amendments, the more likely that states would object on the grounds that it would affect their capacity to discharge their responsibilities to efficiently administer the state.

Q. So, why recognise local government in the constitution?

A. Because local government existed prior to Federation. It is appropriate for local government to be recognised in the Constitution, which is the paramount political document in the Federation given the increased role the sector has in providing services and infrastructure to Australians.

Q. Are there any political risks?

A. Broad recognition of a system of local government in the Constitution was proposed in 1988. It was heavily defeated. There are risks in proposing something that has already been rejected once.

Furthermore, the more requirements that any constitutional amendment imposes before a local government area can be dissolved/amalgamated (eg. requiring a referendum to be held before proceeding) the more states could oppose the proposal on the basis that the preconditions can damage the efficient management of the state.

Financial recognition of local government in the Constitution

Q. What is 'taxation'?

A. Taxation is the compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered.[27]

Q. 1% of taxation is only a small amount of the overall tax take? This isn't unreasonable, is it?

A. It could be controversial because as a general rule, governments do not like hypothecation as it means that funds cannot be used to deal with unexpected circumstances. It also provides a constitutional guarantee of revenue that states don't have.

Q. Are there any political risks in asking for taxing powers?

A. The Australian Government may object on the grounds that it could affect the manner by which it manages the Australian economy. States may object on the ground that it provides local government with a constitutionally guaranteed stream of revenue that they themselves do not possess.

Including symbolic, institutional and financial recognition into the Constitution

Q. Finally, you have mentioned three types of constitutional recognition – symbolic, institutional, and financial. Can't we have the lot?

A. The more complex the proposal, the greater the chance of opposition as either the Federal Government or the states may think their capacity to discharge their responsibilities could be affected.

Therefore, the more local government requests, the more time and resources it must find to make the case to the Australian people.

Endnotes

1 Bob McMullan MP: Federation Reform Program media statement 6 September 2007

2 Resolution 59.0 moved by Great Lakes Council

3 House of Representatives Standing Committee on Economics, *Finance and Public Administration Rates and Taxes: A Fair Share for Responsible Local Government* (the Fair Share Report)

4 Aitkin and Orr, Sawer's *The Australian Constitution* Third edition p.23

5 Section 115 of the Constitution

6 Section 109 of the Constitution provides that where there is any inconsistency between a Commonwealth and State Act in an area where the entities have concurrent power, the Commonwealth law prevails

EXAMPLE: Both the Commonwealth and NSW Governments passed laws relating to racial discrimination. The NSW Government acted under its plenary powers, the Commonwealth under the External Affairs power, to give effect to the Convention Against all Forms of Racial Discrimination. The High Court held the Commonwealth had legislated so comprehensively in the area, it intended to 'cover the field'. This meant the State could not legislate in the area. - . *Viskauskas v. Niland* 153 CLR 280. The Commonwealth changed its legislation, to make clear the Commonwealth hadn't covered the field, and so if it was possible to follow both State and Federal laws, that part of State legislation could remain.

This has had a significant, yet anticipated, effect on the relative strength of the state and federal governments. Two of the founders of Federation John Quick, and Sir Robert Garran (Australia's first public servant) wrote *The Annotated Constitution of the Australian Commonwealth*.

It was effectively Australia's first constitutional law text. In describing the effect of s.107 of the Constitution (which saves the powers of State Parliaments), they say:

The Parliament of each State is a creation of the Constitution of the State. The constitution of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent to which their original legislative authority and jurisdiction has been transferred to the Commonwealth Parliament. In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Commonwealth legislation becomes more active and extensive the powers contemplated by the Constitution will be gradually withdrawn from the State Parliaments and be absorbed by the Commonwealth Parliament. The powers to be so withdrawn may be divided into two classes – 'exclusive and concurrent'. Exclusive powers are those absolutely withdrawn from State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those that may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating to the subject, the Federal law prevails, and the State law to the extent of its inconsistency is invalid – see Quick and Garran *The Annotated Constitution of the Australian Commonwealth*. The relevant discussion is at pp.933 – 937 of the 1995 Legal Books reprint of the 1901 edition of the text.

7 As early as 1908 in the case of *Jumbunna Coal Mine, No Liability v, Victorian Coal Miners' Association* 6 CLR 309 at 367-8 , the High Court said:

It must be remembered that we are interpreting a Constitution broad and general in its terms…..the question is whether the Constitution has used an expression in the wider or the narrower sense, the Court should…..always lean to the broader interpretation unless there is something in the context or the rest of the Constitution to indicate that the narrower interpretation will best carry out its object or purpose.

8 Commonwealth Electoral Amendment (Democratic Plebiscites) Act 2007 (Act 157,2007). The then Government argued that the legislation was necessary to ensure that rights contained in the International Covenant on Civil and Political Rights - a foreign treaty entered into by the Commonwealth – were protected.

9 Section 81 of the Constitution reads:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges imposed by this Constitution.

s. 61 reads:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth.

As Gareth Evans has said:

The Whitlam Government did embark upon a genuine adventure with the Constitution in relation to its so-called 'spending' power, founded upon ss 81 and 61 of the Constitution. Given the financial dominance of the Commonwealth in the Australian Federal System, it was obvious that the establishment of an unlimited power to appropriate and disburse Federal funds would signify a vital shift in the balance of power, relieving the Commonwealth of the necessity to involve the States in non-regulatory programmes." Evans and Crommelin in Explorations and Adventures with Commonwealth Powers in Gareth Evans (ed) *Labor and the Constitution 1972-1975* at 41.

In 1974, the *Appropriation Act (No.1) 1974-1975* appropriated money for the Australian Assistance Plan.

Money was to be spent through Regional Councils for Social Development. The Plan was neither established nor regulated by legislation.

Victoria claimed it was unconstitutional. However, the net result of a very complex judgement was that the appropriation (and thus the scheme) was constitutional. *Victoria v. Commonwealth and Hayden* (also known as the AAP case) 134 CLR 338

The High Court has also held the Commonwealth can legislate using s.61 where the proposed legislation cannot be said to affect the Commonwealth distribution of powers.

Hence legislation facilitating the celebration of the bicentenary was declared constitutional as something prominently the business and concern of the Commonwealth. *Davis v. Commonwealth* 166 CLR 79

It is through this construction of the Constitution that local government can get funding through legislation such as the Roads to Recovery Act 2000.

As Professor Lane has remarked:

Thus, by simply using its appropriation and expenditure powers, the Commonwealth appropriated, expended, planned and administered an on-going scheme in general social and community welfare……So now the Commonwealth Government can appropriate and spend federal moneys on social and community welfare, local government and education and similar general programmes. It is only when the Commonwealth attempts to back up this spending by a regulatory law that it will run the risk of invalidity….. Hence in the field of public moneys (see s.81), but not in the field of regulative power (for example, sections 51 and 61) the Commonwealth can disregard the federal division of power and the enumerated powers doctrine. P.H. Lane A *Manual of Australian Constitutional Law* pp.85-6

10 As academic observers have noted,: "The Commonwealth was and is in a much stronger financial position than the States. The problem is further amplified because the High Court has assisted in bolstering the Commonwealth's fiscal dominance by gradually expanding the scope of s.90 of the Constitution and upholding the Commonwealth's quasi income tax monopoly as constitutional **South Australia v. Commonwealth* (1942) 65 CLR 373. This monopoly on income taxes ensued because the Commonwealth decided to impose income taxes at a level which made it effectively impossible for the States to maintain their own income tax regimes. Thus the Commonwealth went financially from strength to strength while the States retained many of their original responsibilities including, for example, law enforcement, education and health. Consequently, Australia today has a significant vertical fiscal imbalance in favour of the Commonwealth. Ratnapala, John, Karean and Koch *Australian Constitutional Law Commentary and Cases* p .522

11 Section 15 of the *Referendum (Machinery Provisions) Act 1984*

12 Section 11

13 State Governments must establish Local Government Grants Commissions, that distributes funds to local government areas under National Principles determined by the Australian Government – see sections 5 and 6 of the *Local Government (Financial Assistance) Act 1995*

14 House of Representatives *Hansard* 8 November 1973 p.3057

15 House of Representatives *Hansard* 5 March 1974 p.52

16 Appendix D to the Australian Constitutional Convention Structure of Government Sub-Committee Local Government Report April 1984

17 The *Final Report of the Constitutional Commission* Volume 1 paragraph 8.13

18 *Ibid* paragraphs 8.42 and 8.43

19 Richard Alston, The No Case, in Galligan and Nethercote (eds) *The Constitutional Commission and the 1988 Referendums* Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration (ACT Division)

20 PRS Research Paper 11 2002-2003

21 The Liberal Party of Australia Federal Platform reads (at p.12):
Australian federalism reflects the fact that, while some tasks of government are best performed nationally, many responsibilities are better carried out by other spheres of government. Liberals strongly support federalism.
• Federalism, including the territories and local governments established under State legislation, takes government closer to local people, creating higher levels of democratic participation and government more closely reflecting the people's wishes and regional needs. Federalism reduces the chance of laws appropriate only to one area being imposed on another.
• Federalism allows for policy experiments, so that governments can learn from each other's successes and failures and can compete with each other for citizens and business by offering the best possible policy frameworks.
• A strong federal system requires commitment from the governments of the States and the Commonwealth. Responsibilities should be divided according to federal principles, without the Commonwealth taking advantage of powers it has acquired other than by referendum. All spheres of government should possess and exercise taxing powers commensurate with their responsibilities.

At the 2004 election, it promised to pass the parliamentary resolution contained in appendix 6, which parliament passed during 2007. The Party took no specific promise relating to constitutional recognition to the 2007 election.

22 *Wacando v. Commonwealth* (1981) 37 ALR 317 at 333; also Pearce and Geddes *Statutory Interpretation of Legislation in Australia* 5th edition para 4.39

23 According to one constitutional text, "implied rights refer to those rights which do not have an existence owing to a clearly expressed right in a constitution but are implied from the wording or concept within an express provision of the Constitution. These implied rights are discovered through judicial reasoning. Ratnapala *et.al op.cit* p.693

An example of this is the implied right of free political communication, implied from the fact that the Constitution established a system of representative democracy and responsible government –see *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.

24 See section 120 of the Constitution

25 Michael Keating *The Case for Increased Taxation* Academy of the Social Sciences in Australia Occasional Paper 1/2004 p.23

26 The states have a right to receive a proportion of the GST. However, the right is only contained in an intergovernmental agreement, endorsed by a statute. This could be changed if the Australian Parliament passed an Act of Parliament

27 *Matthews v. Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276; *State of Victoria v. The Commonwealth* (Pay-Roll Tax) (1971) 122 CLR 353 at 416