

The Local Government Referendum

National General Assembly of Local Government, 18 June 2013

Local government has pursued the idea of recognition in the Australian Constitution for decades.

This latest phase began some five or six years ago and has involved numerous discussions around the country, a Constitutional Summit in Melbourne in 2008 and an expert panel appointed by the federal government and chaired by former New South Wales Chief Justice Jim Spigelman.

All this has culminated in the referendum question that local government wanted, the financial recognition of local government.

The federal government has acted on this by introducing into Parliament the Constitution Alteration (Local Government) 2013 legislation. Once passed, this will provide the ground for a referendum on the day of the 2013 federal election.

It speaks much the years of preparation and advocacy by local government that this proposal was passed overwhelmingly by the House of Representatives in a remarkable display of bipartisan support.

The change to the Constitution that Australians will vote on September 14 is simple and straightforward.

Section 96 of the Constitution already provides a means by which the Commonwealth can give money directly to the states. It says:

the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This section would be altered to read:

the Parliament may grant financial assistance to any State, *or to any local government body formed by a law of a State*, on such terms and conditions as the Parliament thinks fit

This is a modest, but important change the Constitution.

It is modest in the sense that it involves changing only a few words. By contrast, when in 1999 Australians were asked to vote on becoming a Republic, they had to improve 69 separate changes to the Constitution.

The change also does not mark a radical departure from the existing operation of the Constitution. It formalises what has been the practice for some years of the federal government providing funding to local councils.

It also only extends an existing provision that already recognises a power on the part of the Commonwealth to provide grants of financial assistance.

The change is undoubtedly significant though when it comes to the role and place of local government within the Australian Federation. Even limited recognition of this kind would be an important marker of local government within a community.

It is also of great importance to the financial position of local government and the long-term sustainability of the sector.

Why is this change needed?

It is difficult to convince Australians to vote yes at a referendum. History shows that people are more than willing to vote no to even modest changes to the Constitution. They have done so time and again in defeating 36 of 44 referendums held since 1901, and indeed have rejected every referendum put since 1977.

Australians need to be convinced that the change is needed, that it is safe and that it has support across the political spectrum.

This change meets all of these criteria. The task is to make the community aware of this, while at the same time overcoming the spoiling tactics of the No case.

The referendum will of course bring about a change to Australia's most important law. It is important then to understand that the change has a sound and well thought through legal basis.

This change is needed is a matter of law to safeguard federal funding for important services and infrastructure provided by local government to the community, and to enable such funding in the future.

Federal governments have provided this funding to local government for many years, but this is now under threat.

In *Pape v Federal Commissioner of Taxation* (2009), the High Court held that the Commonwealth does not have an unlimited spending power. The High Court was unanimous in deciding that the Commonwealth can only directly fund matters over which it otherwise has power.

Last year, in *Williams* the High Court applied this reasoning to strike down the federal chaplaincy program.

These High Court cases underline the capacity of the Commonwealth to directly fund local government. Local government is a State responsibility, and the Commonwealth has no general power over the sector. Given this, *Pape* and *Williams* cast doubt over current and future direct funding of local government by the Commonwealth.

For example, the Nation Building Roads to Recovery Program, set out in the *Nation Building Program (National Land Transport) Act 2009* (Cth), is now likely to be invalid. As a result, the Roads to Recovery Program is likely to be struck down if challenged in the High Court.

In response to the *Williams* decision, just one week after judgment was handed down, the Commonwealth Parliament enacted emergency legislation in the form of the *Financial Framework Legislation Act (No 3) 2012*. That Act sets out a list of grants of financial assistance (or direct funding) with the purpose of authorising Commonwealth spending in those areas.

That Act does nothing to fix the problem generally of whether the Commonwealth can fund local government directly. This is a constitutional problem that only the people can fix by voting at a referendum. This is not a matter of doing something new, but of restoring what people thought to be the position prior to *Pape* and *Williams*.

These decisions only affect the ability of the Commonwealth to give money directly to local government.

There is nothing to stop the Commonwealth channelling its money to local government via the states. It can do this under the existing terms of s 96 of the Constitution.

However, as noted by the Expert Panel, adopting this indirect method can be problematic. It has the potential to weaken the implementation of unified national policy at a local level and could introduce inefficiencies and delay.

We need also to be realistic about whether the Commonwealth will be prepared to funnel all of the money required by local government through the states. A pragmatic assessment recognises that this will not occur, and that some schemes will disappear,

or not be brought into existence first place, if they have to be joint initiatives of the commonwealth and the states.

Federal funding may not occur because the payoff to Federal politicians can be diluted when this has to go via the states, or it may simply be impractical to fund initiatives via the states when this needs to be done with great urgency, as was the case during the recent global financial crisis.

More broadly, the Federal government now raises the bulk of taxation revenue new in this nation. The long-term sustainability of local government requires a ready capacity to access this money. State revenue and indirect federal funding is likely to be insufficient.

It is important then that local government has a direct financial relationship with the Commonwealth. This is threatened by recent High Court decisions, and this referendum needs to be passed to overcome this.

This legal detail though will of course be something that very few Australians want to engage with. It's why your campaign will be run by your campaign director here, and not a constitutional lawyer.

That said, having looked carefully at what has worked and not worked in Australia's 44 referendum campaigns, I think the focus of this campaign should be along the lines of asking Australians to:

Vote yes to keep federal funding for your child-care centres, libraries and roads

Australians need to connect a yes vote to maintaining community services that they value. Ideally, each local government body should be able to link a yes vote into an important program or piece of infrastructure that has or might receive Federal funding. People need to see that a yes vote will make a real contribution to their community.

This is a similar argument to that which was run successfully in 1946. There, a referendum was passed to overcome a High Court decision that threaten the ability of the Commonwealth to fund pharmaceutical benefits for the community. People voted yes to retain these benefits.

People also need to understand the consequences of a no vote. If this referendum fails, schemes like roads to recovery may be struck down. If the Commonwealth does not channel that same money through the states, where will the funding come from?

The states don't have enough money as it is to properly fund their schools and hospitals.

Will roads then go unrepaired? Or will people have to pay more to their local government bodies through increased rates and other charges?

You will see that I have not cast the rationale for this referendum is being a vote for recognising local government in the Constitution. That is an understandable goal on the part of local government, but is not one that will translate into a strong yes vote.

Mere recognition is not the sort of thing that people will see as justifying the tens of millions of dollars being spent on this referendum. It does not present a problem that needs to be fixed. It is instead important to make this referendum about the community and the services and facilities that they and their families rely upon.

The question that will be on the ballot paper will help focus people's attention in this regard. In accordance with federal referendum machinery legislation, the ballot paper will state the title of the Constitution Alteration Bill:

A Bill for an Act to alter the Constitution to recognise local government by stating that the Commonwealth can grant financial assistance to local government, including assistance for community and other services

Voters will then be asked to indicate yes or no to the following question:

DO YOU APPROVE THIS PROPOSED ALTERATION?

Why will people be asked to vote no?

There are good arguments for why people should vote yes to this referendum. However, that is a long way off saying that the referendum will succeed. Many referendums have failed despite the sound arguments backing them.

The arguments that will be put against this referendum have been clear for some time. They represent the same sorts of arguments there tend to be pulled at almost every referendum. In this case they can be found on the website www.nopowergrab.com.au which has been formed by former politicians.

VOTE NO TO CANBERRA'S POWER GRAB

Our system of government isn't perfect, but it has helped make Australia the best country on earth. Now is not the time to remove the restrictions that hold Canberra politicians to account.

Don't be fooled: This is a massive power grab by Canberra politicians and bureaucrats!

Make no mistake: Letting Canberra control local government will:

- Force Councils to do what's good for Canberra, not communities**
- Harm Local Services**
- Increase rates**
- Lead to less accountability**

☒ Lead to more bureaucracy

☒ And mean even *more* political buck-passing.

In particular, they are following a familiar line that has proved successful in striking down most referendums of urging people to ‘vote no to Canberra’. This is no argument that plays out especially well in states such as Western Australia, Queensland and Tasmania.

Their arguments will need to be tackled head on so that voters can cast an informed, confident vote for preserving funding to community services. In most cases, the no arguments can be met with the sorts of reasons for why this referendum should be passed that I have already mentioned.

In addition, you might consider responses along these lines:

- This referendum will not confer new power on the Commonwealth, only remove uncertainty about its ability to continue funding local government to support things like the maintenance and repair of local roads
- the only change the Constitution is to section 96, which provides a limited power to the commonwealth to grant financial assistance. The High Court has made it very clear that this is not a power to make laws, only a power to provide money with the consent of the recipient. As Chief Justice Sir Owen Dixon said in *Second Uniform Tax Case* (1957), section 96 is confined ‘to granting money’.
- the wording of the referendum has been developed across several years to make sure that it is safe and does not take power away from the states. This is why the change will only allow the Commonwealth to provide financial assistance to a local government body *formed by a law of a State*.
- These words make sure that the states will retain the power to control and regulate local government. In fact, a state could, for example, pass a law that gives you say into whether local government actually receives Federal funding.

You could use this to make sure that the Commonwealth cannot use Federal funding to bypass state policies and plans.

The bottom line is that this change to section 96 will not alter the fact that local government is controlled and regulated by the States. Local government will just be able to receive money directly from the commonwealth to support things like local roads, child-care centres and libraries.

Conclusion

Changing the Constitution is hard, but in this case it is also worthwhile. Constitutional recognition of local government is one important step in securing recognition in place of local government in Australia's federal structure.

Importantly, this change can be made in a way that fixes a significant problem that threatens the funding of local government activities that the community values highly. This latter point is significant because the referendums that have tended to succeed in Australia are those that fix a known problem in order to provide a benefit to the community. It is for this reason that I believe that a referendum on the recognition of local government is there to be won.