

# ALWAYS THE BRIDESMAID — CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

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*Despite two failed referenda on the subject, local government bodies have been persistent in their campaign for the constitutional recognition of local government. It is not clear, however, what is really intended to be achieved by constitutional recognition and whether sufficient thought has been given to the potential ramifications of the proposal. This article seeks to place the claim for constitutional recognition of local government in its context, especially with regard to the funding of local government. It critically analyses the current proposals for constitutional recognition of local government and points to the potential unwanted consequences of success.*

## I INTRODUCTION

In 2010, after the election of a hung Parliament, the agreements negotiated between the independents, Greens and the Gillard Government included promises that the Government would hold a referendum at or before the next general election upon the ‘recognition of local government in the *Constitution*’ and upon ‘indigenous constitutional recognition’.<sup>1</sup> ‘Expert Panels’ were established to report on the various options and public support for them. The report of the ‘Expert Panel on Constitutional Recognition of Indigenous Australians’ was handed down in January 2012 to much fanfare and even more public debate.<sup>2</sup> The issue of the constitutional recognition of local government, however, has remained always the bridesmaid and never the bride. The report of the ‘Expert Panel on the Constitutional Recognition of Local Government’<sup>3</sup> was handed down in December 2011 to little fanfare and almost no debate at all.

The Expert Panel recommended that a referendum be held to amend s 96 of the *Commonwealth Constitution* to allow the Commonwealth Parliament to make grants of financial assistance to ‘any local government body formed by State or

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- 1 The Australian Greens and the Australian Labor Party — Agreement, (1 September 2010) 2 [3(f)] <[http://greens.org.au/sites/greens.org.au/files/Australian%20Greens\\_ALP%20agreement.pdf](http://greens.org.au/sites/greens.org.au/files/Australian%20Greens_ALP%20agreement.pdf)>; The Australian Labor Party & The Independent Members (Tony Windsor and Rob Oakeshott) — Agreement, (7 September 2010) annex B [4.3] <[http://www.minister.regional.gov.au/files/Regional\\_Agreement.pdf](http://www.minister.regional.gov.au/files/Regional_Agreement.pdf)>; Julia Gillard & Andrew Wilkie — Agreement, (2 September 2010) 2 [3.2(f)] <[http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/176826/upload\\_binary/176826.pdf](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/176826/upload_binary/176826.pdf)>.
- 2 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012).
- 3 Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011) <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/ExpertPanel-FinalReport.pdf>>.

Territory Legislation on such terms and conditions as the Parliament sees fit'.<sup>4</sup> This recommendation was made subject to conditions, one of which was that the 'Commonwealth negotiate with the States to achieve their support for the financial recognition option'.<sup>5</sup>

Part II of this article explains the current status of local government under the *Commonwealth Constitution*. Part III addresses how local government has been, and is currently, funded in Australia. This is essential to obtain an understanding of the potential ramifications of the proposed reform. It also discusses the cases of *Pape v Federal Commissioner of Taxation* ('Pape')<sup>6</sup> and *Williams v Commonwealth* ('Williams')<sup>7</sup> which have raised doubt as to the constitutional validity of direct Commonwealth funding for local government and are being used as an impetus for reform. Part IV discusses the latest campaign for constitutional recognition of local government. It provides a critical analysis of the Expert Panel's report and the various reasons given by local government for constitutional recognition. It then proceeds to discuss the potential financial consequences of direct Commonwealth funding of local government, including the potential winners and losers. Part V concludes by expressing doubts as to whether the outcomes of successful constitutional reform will actually meet the aims of those proposing it. It also suggests that the prospects of success for such a referendum appear to be slim.

## II LOCAL GOVERNMENT AND THE COMMONWEALTH CONSTITUTION

The *Commonwealth Constitution* establishes Australia's federal system. It is a classic dualist federal system,<sup>8</sup> in which powers and functions are allocated to two levels of government, with local governments being 'mere creatures of states, existing at their will and having no independent relations with the federal government'.<sup>9</sup>

At the time of federation, it would have been most unusual if local government had been recognised as a separate level of government. The United States Constitution made no reference to local government. The Canadian *British North America Act 1867* only mentioned 'municipal institutions of the Province' through its inclusion in a list of powers exclusively held by the Provinces.<sup>10</sup> In Australia, local

4 Ibid 8.

5 Ibid 2.

6 (2009) 238 CLR 1.

7 (2012) 86 ALJR 713.

8 Cheryl Saunders, 'Constitutional Recognition of Local Government in Australia' in N Steytler (ed), *The Place and Role of Local Government in Federal Systems* (Konrad-Adenauer-Stiftung, 2005) 47, 60; Alan Fenna, 'Federalism and Local Government in Australia', *Public Administration Today* (Belconnen, ACT) January–March 2008, 47–8.

9 Nico Steytler, 'Comparative Conclusions' in N Steytler (ed), *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen's University Press, 2009) 393.

10 *British North America Act 1867* (UK), c 3, s 92(8).

government, since its inception by colonial legislation,<sup>11</sup> remained subordinate to the colonies, and later the States, and is not a separate level of government. The States, in the exercise of their plenary legislative powers, have the power to establish local government in whatever form they wish and give it such powers, functions and responsibilities as they choose.

Jenks, writing in 1891 in *The Government of Victoria*, noted that in England some ‘local organs date back to a time far older than the central government itself’. He observed that the position in Victoria was quite different:

In the true sense of the term, there never has been any local government in Victoria. That is, there has never been any local unit evolved spontaneously and independently of the central power. Every local authority is a creation either of the Imperial or the colonial legislature, and is a subordinate body deriving its existence from a higher source.<sup>12</sup>

After federation, the same view was taken by the High Court. In one of the first cases concerning local government, Griffith CJ noted that under the *Commonwealth Constitution* ‘the Commonwealth and the State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution’.<sup>13</sup> Included within that sovereign power was the right of taxation, which is a right of a State that can only be exercised by a municipality if delegated to it by the State.<sup>14</sup> O’Connor J also observed:

The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interest, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it.<sup>15</sup>

Hence, from a legal point of view, local government has no status or powers of its own. It does not exist as a spontaneous or independent creation of the people. Its existence and powers are derived from State legislation, including recent amendments to State Constitutions.<sup>16</sup> Local government is a subordinate body of the State, exercising its powers by delegation from the State and under the State’s supervision and authority.

Under the *Commonwealth Constitution*, local government is not explicitly recognised. It does however, fall within the meaning of the term ‘State’. It is

11 See generally F A Larcombe, *The Origin of Local Government in New South Wales, 1831–58* (Sydney University Press, 1973).

12 Edward Jenks, *The Government of Victoria (Australia)* (Macmillan, 1891) 325.

13 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 231.

14 *Ibid* 230 (Griffith CJ).

15 *Ibid* 240.

16 *Constitution Act 1902* (NSW) s 51; *Constitution of Queensland 2001* (Qld) s 71; *Constitution Act 1934* (SA) s 64A; *Constitution Act 1934* (Tas) s 45A; *Constitution Act 1975* (Vic) s 74A; *Constitution Act 1889* (WA) s 52.

therefore subject to the same obligations as the States under the *Commonwealth Constitution*,<sup>17</sup> and receives the same implied protection as the States.<sup>18</sup> This is relevant to any effort to make local government a third level of government, independent from the others.

### III THE FUNDING OF LOCAL GOVERNMENT IN AUSTRALIA

Local government, from its inception in Australia, has been largely funded by property taxes, imposed in the form of rates. The role of local government has accordingly primarily concerned the provision of services to property. The biggest expense is the construction and maintenance of local roads. In 1923 the Commonwealth Government made its first grant to the States under s 96 of the *Constitution* for the construction of new roads.<sup>19</sup> The money was then passed on to local government bodies, which took responsibility for constructing the roads. The intent of the Commonwealth's grant was both to relieve growing unemployment and to open up country areas for settlement and development. Hence the aims were national in nature, while the means of fulfilling those aims was local. The grants, which had to be matched by State funding, were allocated by reference to a formula which balanced the geographical size of a State against its population. Two-fifths of the grant was based upon the area of the State and three-fifths by reference to its population. This formula was used for roads funding until 1959.<sup>20</sup>

#### A Roads Funding — 1926–1972

In 1926, the Commonwealth increased its funding to the States for road construction, basing it upon agreements with the State in the form set out in the Schedule.<sup>21</sup> The States had to match the grants and could pass on no more than half of this obligation to local government. The States became concerned that this funding mechanism was too prescriptive and was undermining their autonomy. The Victorian Government challenged its validity in the High Court. It was argued that the law was not supported by a head of Commonwealth legislative power, because it was a law with respect to road-making, not financial assistance to the States. Even if it were an Act for the grant of financial aid to

17 For example, local government cannot impose rates upon Commonwealth property because of the application of s 114 of the *Commonwealth Constitution* which prohibits a 'State' from taxing Commonwealth property: *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208.

18 Note that the implied constitutional protection of the States from Commonwealth legislation that discriminates against them or impedes their capacity to exercise their constitutional powers was first established in a case concerning the capacity of a local government body to enter into banking transactions: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

19 *Main Roads Development Act 1923* (Cth). Note, that an earlier grant for roads construction in 1922 did not come under s 96 of the *Commonwealth Constitution*.

20 R H Burke, 'History of Commonwealth Government Legislation Relating to Roads and Road Transport, 1900–1972' (Occasional Paper No 8, Bureau of Transport Economics, October 1977) 3.

21 *Federal Aid Roads Act 1926* (Cth).

the States, it was argued that the conditions attached to it could only be financial terms and conditions and could not amount to the exercise of a legislative power beyond those conferred upon the Commonwealth in s 51 of the *Commonwealth Constitution*.<sup>22</sup>

The Commonwealth, in reply, attempted to attach such spending to its powers with respect to immigration and defence, arguing that road construction was necessary to support its immigration program and the resettlement of soldiers on Crown land in rural areas.<sup>23</sup> The High Court upheld the validity of the *Federal Aid Roads Act 1926*. In a judgment, noted for its uncharacteristic brevity, if not for its display of reasoning, the Court did not appear to require any further head of power beyond s 96 of the *Constitution*,<sup>24</sup> effectively allowing the Commonwealth to fund any matters through grants to the States upon any conditions that it wished to apply.

Between 1931 and 1959, grants to the States for roads were calculated by reference to a proportion of the revenue received by the Commonwealth from fuel taxes. The revenue, and hence the grants, fluctuated greatly, particularly due to petrol rationing during the war and the significant rise in car ownership and fuel consumption in the 1950s. In 1959, this link to fuel tax was cut, with fixed amounts being granted to the States for roads. The Commonwealth's focus shifted from opening up country to urban arterial roads and the avoidance of congestion. The formula for the allocation of grants was based one-third upon area, one-third upon population and one-third upon the number of registered motor vehicles.<sup>25</sup>

## **B The Whitlam Government — Increased Financial Assistance to Local Government**

The Whitlam Government completely changed the funding system. It had a great antipathy towards the States and saw raising the status of local government and the development of regions as a means of eventually supplanting the States. In some cases funding was given directly to local government, through programs such as the Regional Employment Development Scheme.<sup>26</sup> The amounts involved were significant. At the height of this program, direct payments exceeded general purpose grants, amounting to \$93.9 million.<sup>27</sup> However, the scheme was inefficient and ineffective because insufficient work had been done to develop programs that would turn local government into an effective source of job creation.<sup>28</sup>

22 See the arguments of Robert Menzies, who was the Attorney-General of Victoria at the time: *Victoria v Commonwealth* (1926) 38 CLR 399, 405.

23 *Ibid* 402–4.

24 *Ibid* 406. The judgment comprised three sentences.

25 Burke, above n 20, 9.

26 Lyndon Megarrity, 'Local Government and the Commonwealth: An Evolving Relationship' (Research Paper No 10, 2010–2011, Parliamentary Library, Politics and Public Administration, 31 January 2011) 8.

27 Margaret Bowman, 'Local Government and Specific Purpose Grants' in *National Inquiry into Local Government Finance (Australia)* (Australian Government Publishing Service, 1985) vol 2 — Research and Consultancy Reports, 22.

28 *Ibid* 22.

Other programs, such as the Australian Assistance Plan,<sup>29</sup> were focused on regions and did not utilise the existing structure of local government authorities. A High Court challenge to the direct funding of regional organisations through the Australian Assistance Plan failed, although the judgment did not result in a clear majority either way on whether the Commonwealth's capacity to spend was limited to purposes supported by its legislative and executive powers, as the Court was split and the seventh Justice decided the case upon the issue of standing only.<sup>30</sup>

Whitlam's support for regionalism was seen as overshadowing his government's commitment to local government,<sup>31</sup> or even as hostile to it.<sup>32</sup> Funds allocated upon a regional basis were usually for 'programs administered by development corporations with little local government involvement in policy formulation and implementation.'<sup>33</sup> New funding which was initially greeted with 'euphoria' eventually gave rise to 'difficulties and mistrust'.<sup>34</sup> The price of increased roads funding was far greater Commonwealth involvement in the planning of roads and oversight of the spending of the grant. The Commonwealth required the States to get its approval for all expenditure on urban arterial roads, regardless of whether it was funded by State or Commonwealth money, even though the Commonwealth had no expertise in relation to roads.<sup>35</sup>

### **C The 1974 Referendum on the Direct Funding of Local Government**

The Whitlam Government also sought to amend the *Constitution* to legitimise its direct funding of local government and to allow it to borrow money for local government bodies.<sup>36</sup> The referendum was put at the 1974 election. It is worth considering the various arguments made in relation to this referendum, because the 1974 referendum proposal is similar to that proposed by the Expert Panel.

The official 1974 'Yes' case stressed the need for increased funding for better roads, sewerage, health and childcare services, recreation facilities and cleaner rivers and beaches, without increasing rates. It argued that it is 'unnecessary for national money to be provided to local government through middle-men, the States, particularly as this only increases administrative costs'. It concluded that

29 See generally Geoffrey Sawer, *Federation Under Strain* (Melbourne University Press, 1977) 22–4.

30 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 ('AAP Case').

31 Megarrity, above n 26, 9–10.

32 Bowman, above n 27, 22.

33 *National Inquiry into Local Government Finance (Australia)* (Australian Government Publishing Service, 1985) vol 1, 45.

34 *Ibid.*

35 Bureau of Transport Economics, 'Road Grants Legislation in Australia: Commonwealth Government Involvement 1900–1981' (Occasional Paper No 48, September 1981) 38–40.

36 *Constitution Alteration (Local Government Bodies) 1974* (Cth).

the Commonwealth should be able to ‘deal with local government on the same terms as with the States’.<sup>37</sup>

The official ‘No’ case stressed that grants to local government would be made on ‘terms and conditions’ allowing ‘Canberra’s bureaucratic fingers into every one of Australia’s 1,000 Council Chambers’. It argued that local government would not ‘get money for nothing’. It claimed that such an amendment would require the creation of another expensive administration in Canberra that would examine the affairs of 1000 municipalities to ascertain how much assistance they needed. The ‘No’ case accepted that local government needed more money, but argued that it should be done under the current mechanism of s 96 of the *Constitution*, with grants passing to local government via the States. It concluded that the Commonwealth should seek ‘co-operation instead of confrontation’ and that this referendum was ‘completely unnecessary’.<sup>38</sup>

The Leader of the Opposition, Billy Snedden, attacked the referendum proposal on a number of fronts. He pointed to the uncertainty of meaning of the term ‘local government bodies’, noting that such bodies were created and defined by the States. He also argued that as the Commonwealth would most likely fund local government on an equalisation basis, it would create a ‘monster body’ to assess the needs and operations of nearly 1000 councils. He argued that it was much more efficient for the States to do this, as the States already have the relevant information to make such assessments.<sup>39</sup>

The editorial in *The Sydney Morning Herald* on election and referendum day was highly critical of the standard of arguments in the debate. While it characterised the local government referendum question as ‘relatively innocuous’, it went on to say:

But it implies that the Commonwealth cannot now financially help local government. Of course it can, channelling the money through the States. And it ignores the very real prospect that the money it hands out directly in future (if a ‘yes’ vote is registered) will have very tight strings attached to it. How responsive, then, will local government be to local (as distinct from Canberra) opinion?<sup>40</sup>

The referendum failed nationally by a margin of 458 053 votes, and in all States except New South Wales.<sup>41</sup>

37 F L Ley, Chief Australian Electoral Officer, Yes/No Case for the 1974 Referendums (26 March 1974, Canberra) 14.

38 Ibid 16.

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1973, 3436–41.

40 Editorial, ‘Questions Begged’, *The Sydney Morning Herald*, 18 May 1974, 8.

41 For the more detailed statistics, see House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Constitutional Change* (1997) 102.

## **D The Fraser Government — Tax-Sharing**

The Fraser Government terminated direct grants to local government and abandoned the pursuit of ‘regionalism’. Instead, it opted for a tax-sharing arrangement, with local government receiving a percentage of personal income tax revenue. It was distributed amongst the states according to percentages determined by the Commonwealth Grants Commission and then distributed within each State to local government bodies with 30 per cent distributed according to population and the rest on an equalisation basis.<sup>42</sup> Local Government Grants Commissions in each State were utilised to make recommendations upon equalisation methods and outcomes.

## **E The Hawke Government — A Return to Fixed s 96 Grant Funding**

The Hawke Government terminated tax-sharing and returned to the use of fixed s 96 grants. Financial Assistance Grants (‘FAGs’) to the States were distributed by reference to population and grants to local government were linked to the amount granted to the relevant State.<sup>43</sup> The Commonwealth maintained the formula for distributing grants to local government within each State, providing a minimum grant to each local government body of 30 per cent based upon population and distributing the rest of the money on an equalisation basis determined by a Local Government Grants Commission.<sup>44</sup>

Roads funding continued to be granted to the States under s 96 and passed on to local government bodies according to local needs. However, in 1990, it was agreed that this funding should become ‘untied’ (meaning it would no longer be required to be used for the purposes of roads). It was also agreed not to fold this funding into the FAGs, because this would involve it being distributed amongst the States on a per capita basis, disadvantaging some States. So these grants were isolated as ‘identified local road grants’ and distributed according to a fixed historic formula, even though the money could be spent for purposes other than roads.

## **F The Howard Government and Direct Funding of Roads**

The Howard Government introduced a goods and services tax (‘GST’) to replace FAGs to the States. It was also originally intended to cover funding for local government, but the renegotiation of the GST with the Australian Democrats reduced its potential yield, so that it could not be used for funding local

42 *Local Government (Personal Income Tax Sharing) Act 1976* (Cth).

43 *Local Government (Financial Assistance) Act 1986* (Cth).

44 In 1995 the Commonwealth added a requirement that the Local Government Grants Commission’s recommendations be made in accordance with national principles of equalisation determined by the Commonwealth Minister. The 30 per cent per capita minimum distribution remained. See *Local Government (Financial Assistance) Act 1995* (Cth).

government too. Hence FAGs to local government were retained and calculated by reference to grants made in previous years, with an ‘escalation factor’ based upon population growth and the consumer price index.<sup>45</sup>

In December 2000 the Howard Government introduced the ‘Roads to Recovery’ program, directly funding local government roads rather than using s 96 grants to the States.<sup>46</sup> The rhetoric behind the program has been described as ‘Whitlamesque’ in nature.<sup>47</sup> The money is allocated in a two stage process. First, it is distributed to the States on the basis of a formula that takes into account both population and road length. It is then allocated within the States to individual local government bodies by using the State Local Government Grants Commissions’ formulae with respect to the identified local roads component of financial assistance grants.<sup>48</sup> This calculation is done behind the scenes, with the amounts allocated to each local government body simply being listed so that it has the appearance of a present from the Commonwealth, rather than a scheme that relies upon the work of State Local Government Grants Commissions, similar to s 96 grants.

This program was only intended to run for four years. In 2005 the program was reconstituted under pt 8 of the *AusLink (National Land Transport) Act 2005* (Cth) for another four years. It was again reconstituted under pt 8 of the *Nation Building Program (National Land Transport) Act 2009* (Cth). The current program runs from 2009–10 to 2013–14 and involves \$1.75 billion in funding for roads which is paid directly to local government bodies (or in the case of unincorporated areas, to States). This program is in addition to the ‘identified local road grants’ which continue to be untied and paid according to the old formula. For example, in 2011–12, the Commonwealth paid out \$836.9 million in ‘identified local road grants’ under s 96 of the *Constitution* and \$349.8 million in the Roads to Recovery program.<sup>49</sup>

## G The Rudd/Gillard Governments

Under the Rudd and Gillard Labor Governments, the funding of local government has continued as under the Howard Government. The Roads to Recovery program was extended. The method for the distribution of local government funding to the States on a per capita basis was maintained. Local government bodies also

45 *Local Government (Financial Assistance) Amendment Act 2000* (Cth); Richard Webb, ‘Commonwealth General Purpose Financial Assistance to Local Government’ (Research Paper No 9, Parliamentary Library, Parliament of Australia, 2007) 10.

46 *Roads to Recovery Act 2000* (Cth).

47 Megarity, above n 26, 12.

48 Commonwealth Department of Transport and Regional Services and Australia Local Government Association, *Report on the Roads to Recovery Programme* (February 2003) 7–8, 34; Brian Dollery, Lin Crase and Andrew Johnson, *Australian Local Government Economics* (UNSW Press, 2006) 114.

49 Commonwealth, *Budget: Australia’s Federal Relations: Budget Paper No 3* (2012–13) 98, 114.

received funding through national partnership schemes<sup>50</sup> and benefited from increased infrastructure expenditure during the global financial crisis.<sup>51</sup>

In 2011–12, the Commonwealth gave \$2 722 866 000 in financial assistance grants to local government, which passed through the States as s 96 grants.<sup>52</sup> It also made direct grants to local government in the sum of \$623 786 000 (which is less than a fifth of total Commonwealth funding to local government).

## H *The Pape and Williams Cases and the Commonwealth's Response*

Direct funding, outside of s 96 grants, came under challenge in 2009. In this case, it was not direct funding to local government that was challenged, but payments made directly to tax-payers to stimulate the economy. While the High Court upheld the validity of these payments in *Pape*,<sup>53</sup> its reasoning led to doubts about the constitutional validity of Commonwealth payments made directly to local government, including payments made under the Roads to Recovery program.

Until 2009, the Commonwealth had argued that it had the power under s 81 of the *Constitution* to appropriate and spend money for such purposes as the Commonwealth Parliament chose. This view had previously been supported by some judges,<sup>54</sup> while others took the view that the 'purposes of the Commonwealth' is a matter for the courts to determine by reference to the distribution of powers within the *Constitution*.<sup>55</sup>

### 1 *The Pape Case*

In *Pape*, the High Court rejected the Commonwealth's argument, holding that s 81 itself did not support the expenditure of money appropriated by the Parliament.<sup>56</sup> A head of power was needed. This pushed the debate from one concerning 'purposes of the Commonwealth' to one concerning whether other constitutional powers support the expenditure of appropriated funds.<sup>57</sup> In particular, the issue

50 See, eg, the National Water Security for Cities and Towns Program and the Community Wastewater Management Systems Program, both of which are components of the National Partnership on Water for the Future.

51 See, eg, the Regional and Local Community Infrastructure Program.

52 Commonwealth, above n 49, 114, 158.

53 (2009) 238 CLR 1.

54 *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 254 (Latham CJ), 273 (McTiernan J) ('*Pharmaceutical Benefits Case*'); *AAP Case* (1975) 134 CLR 338, 369 (McTiernan J), 396 (Mason J), 417 (Murphy J).

55 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 271 (Dixon J), 282 (Williams J); *AAP Case* (1975) 134 CLR 338, 360–3 (Barwick CJ), 373 (Gibbs J).

56 (2009) 238 CLR 1, 55 [111] (French CJ), 73 [178], 74 [183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon J).

57 '[I]t is now settled that [ss 81 and 83 of the *Constitution*] ... do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth': *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ).

arose as to whether an express legislative head of power was needed, or whether the executive power and the incidental legislative power would suffice.<sup>58</sup>

A majority of the Court held in *Pape* that the combination of ss 61 and 51(xxxix) of the *Commonwealth Constitution*, sometimes known as the ‘nationhood power’, was sufficient to support a law that employed short-term fiscal measures to respond to a global financial crisis by stimulating the economy.<sup>59</sup> Gummow, Crennan and Bell JJ stated that the *Pape* case could be ‘resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation’.<sup>60</sup> French CJ wasn’t even prepared to go quite that far, arguing that this power should not be equated with a ‘general power to manage the national economy’<sup>61</sup> or a power to make laws with respect to matters of ‘national concern’ or ‘national emergencies’.<sup>62</sup> He appeared to be sensitive to the need to confine the scope of his finding.

The consequence of the *Pape* case was that the Commonwealth could no longer rely on ss 81 and 83 of the *Constitution* as support for legislation which authorises the making of grants directly to local government bodies, such as pt 8 of the *Nation Building Program (National Land Transport) Act 2009* (Cth). This led to concern that the legislation which underpins the Roads to Recovery program was invalid as it is not supported by any obvious head of Commonwealth legislative power.

## 2 The Williams Case

The Commonwealth also provides direct funding to local government under a range of executive programs that are not supported by legislation. Examples include the Local Government Energy Efficiency program and the Safer Suburbs program. These came under additional threat in 2012 as a consequence of the High Court’s judgment in *Williams*.<sup>63</sup> In that case, the High Court held that it was beyond the executive power of the Commonwealth to enter into an agreement to fund a chaplaincy program in a school and to make payments under that agreement without statutory authority to do so.

A majority of the Court in *Williams* rejected the Commonwealth’s ‘broad’ proposition that it had the capacities of a legal person to enter into contracts and expend money on any subject matter, regardless of whether it came under a

58 For further discussion of this case, see Cheryl Saunders, ‘The Sources and Scope of the Commonwealth Power to Spend — *Pape v Federal Commissioner of Taxation*’ (2009) 20(4) *Public Law Review* 256; Anne Twomey, ‘Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313; Andrew McLeod, ‘The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*’ (2010) 32(1) *Sydney Law Review* 123; Duncan Kerr, ‘Executive Power and the Theory of its Limits: Still Evolving or Finally Settled?’ (2011) 13(2) *Constitutional Law and Policy Review* 22.

59 (2009) 238 CLR 1, 24–5 [8]–[9], 63–4 [133]–[134] (French CJ), 91–2 [241]–[243] (Gummow, Crennan, Bell JJ).

60 *Ibid* 91 [241].

61 *Ibid* 63 [133].

62 *Ibid* 24 [10].

63 (2012) 86 ALJR 713.

Commonwealth head of legislative power,<sup>64</sup> and its ‘narrow’ proposition that its executive power extends to actions that *could* be authorised by Commonwealth legislation, even though no such statute has been enacted.<sup>65</sup> While the majority recognised that there were some categories of executive power involving expenditure that could be exercised without statutory authority, such as prerogative powers,<sup>66</sup> the ordinary administration of government departments<sup>67</sup> and the nationhood power,<sup>68</sup> this particular funding program did not fall within any of those categories and therefore required the enactment of valid legislation to support it.

These two cases have left much of the direct Commonwealth funding to local government vulnerable to constitutional challenge. Those direct funding programs, such as the Roads to Recovery program that rely on Commonwealth legislation could be struck down as constitutionally invalid because there is no constitutional head of power to support the Commonwealth’s legislation. Those programs that are based solely on Commonwealth executive power would need authorisation by a valid Commonwealth statute. In both cases the difficulty will be finding a head of legislative power to support the statute.

### 3 The Commonwealth’s Response

After *Pape*, the Commonwealth largely ignored the Court’s decision. One can only assume that it drew from the fact that the Court upheld the validity of the \$900 tax bonus, a conclusion that the High Court would always, ultimately, uphold Commonwealth expenditure, no matter how much the Court opined upon the need for accountability and compliance with the distribution of powers under the *Commonwealth Constitution*. In other words, it appeared to conclude that the High Court was a constitutional watchdog that might growl but would never bite when it came to Commonwealth expenditure.

The Commonwealth therefore took what former Chief Justice, the Hon James Spigelman has described as an ‘aspirational’ view<sup>69</sup> that its legislation concerning direct funding to local government remained valid. Officers of the Department of the Prime Minister and Cabinet told a Senate Select Committee that it had received advice from the Attorney-General’s Department ‘that we should continue with

64 Ibid 720 [4] (French CJ); 754 [159] (Gummow and Bell JJ); 757 [182], 773 [253] (Hayne J); 820 [534] (Crennan J); and 830 [595] (Kiefel J). Heydon J found it unnecessary to decide: at 801 [407].

65 Ibid 720 [4] (French CJ); 751 [138] (Gummow and Bell JJ); 822 [544] (Crennan J). Hayne J, 778 [286] and Kiefel J, 826 [569], found it unnecessary to decide the point because the expenditure could not have been supported by valid legislation in any case. Heydon J, 786 [340]–[341], 779–800 [404], was the only Justice who supported the Commonwealth’s narrow proposition.

66 Ibid 720 [4] (French CJ); 812 [484] (Crennan J); 828 [582] (Kiefel J).

67 Ibid 720 [4], 727 [34] (French CJ); 751 [139] (Gummow and Bell JJ); 812 [484], 814 [493] (Crennan J); 828 [582] (Kiefel J).

68 Ibid 720 [4], 727 [34] (French CJ); 760 [194] (Hayne J); 812 [485] (Crennan J). See also: 799 [402] (Heydon J).

69 James Spigelman, ‘A Tale of Two Panels’ (Speech to the Gilbert + Tobin Centre of Public Law’s Constitutional Law Conference and Dinner, 17 February 2012) 3.

current arrangements unless a demonstrated need arises to change them'.<sup>70</sup> The Department advised that having taken into account the High Court's judgment in *Pape*, 'the Commonwealth remains able to make grants under its general powers in the Constitution'.<sup>71</sup> It did not specify what these 'general' powers were. It appears, however, from its arguments in *Williams*, that the Commonwealth assumed that it had a broad general power to spend that fell within its executive power. The High Court, in *Williams*, begged to differ.

This time the Commonwealth could not ignore the High Court's judgment as there was considerable pressure from those persons and bodies funded by the Commonwealth under its purported executive power for the matter to be rectified. The Commonwealth rushed through Parliament, with only cursory debate, the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). It came into force on 28 June 2012, despite only having been introduced into Parliament on 26 June. The Act inserts s 32B in the *Financial Management and Accountability Act 1997* (Cth), which purports to give statutory authority to Commonwealth expenditure under arrangements or grants where the expenditure could not otherwise be supported by executive power alone. The relevant arrangements and grants must also be specified in the *Financial Management and Accountability Regulations 1997* or be for the purposes of a program specified in the Regulations.

The Regulations were also amended (directly by the Act — presumably to avoid scrutiny and the prospect of disallowance if the changes had been made by amending Regulations) to insert a Schedule 1AA which contained a list of over 400 government programs. In many cases these programs are so broadly described that a vast swathe of potential future Commonwealth expenditure would fall under them.<sup>72</sup> This avoids the prospect of new Commonwealth programs facing possible scrutiny — which the amendment of the Regulations might entail — as long as the new programs can be shoehorned under the existing, broad, categories in the Regulations.

The difficulty with the Act is that there is no obvious head of Commonwealth legislative power to support it. The *Financial Management and Accountability Act 1997* (Cth) is most likely supported by s 97 of the *Constitution*, regarding audit laws, in combination with s 51(xxxvi). It could also be supported by s 64 of the *Constitution*, regarding the administration of Commonwealth departments in conjunction with s 51(xxxix) of the *Constitution*. It is doubtful, however, that either source would extend to support the new div 3B of pt 4 of that Act which purports

70 Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: An Agenda for Reform*, 2011, 91.

71 Ibid 91. See also Mr English's reference to 'our general capacity to make grants off the Commonwealth's own authority': Evidence to Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, Canberra, 5 May 2011, 42 (Dominic English).

72 In relation to local government, for example, program 421.002 is described as 'to build capacity in local government and provide local and community infrastructure'. It could cover all sorts of future Commonwealth expenditure without the need for future amendments to the Regulations. Note Spigelman's view that some programs are 'identified in such general language that they could not withstand constitutional scrutiny': James Spigelman, 'Constitutional Recognition of Local Government' (Speech delivered at the 116<sup>th</sup> LGAQ Annual Conference, Brisbane, 24 October 2012) 10.

to authorise Commonwealth expenditure generally and not just in relation to the ordinary administration of government. It is also doubtful that a ‘nationhood power’ could be regarded as supporting such a broad range of Commonwealth expenditure given that, in *Williams*, the nationhood power was not regarded as capable of supporting Commonwealth expenditure on chaplains.<sup>73</sup> Indeed, Hayne J noted that if the combination of s 61 and s 51(xxxix) of the *Constitution* were regarded as supporting a power to spend, as the Executive chooses, regardless of the purposes for which the expenditure is to be applied, then this would ‘work a very great expansion in what hitherto has been understood to be the ambit of Commonwealth legislative power’.<sup>74</sup>

The best argument that one could make for the validity of s 32B is that it is supported by a web of constitutional heads of power, to the extent that each program specified in the Regulations falls within the subject matter of a head of power. This argument would then lead to difficult questions about reading down and severance in relation to those programs that do not fall within a head of power and their purported statutory authorisation. This provision is therefore vulnerable to constitutional attack. Even if it survives intact, the most it will do is shore up the validity of direct grants from the Commonwealth to local government which were previously unsupported by statutory authority, where the subject matter of those grants falls within a Commonwealth head of legislative power. For example, the ‘Clean Energy Future — Low Carbon Communities’ program, which provides funding to local government, might be regarded as supported by the external affairs power in s 51(xxix) of the *Constitution*, to the extent that it implements treaty commitments.

## **I The Constitutional Validity of the Roads to Recovery Program**

The *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) did not affect the Roads to Recovery program because it only dealt with executive funding programs which were not already supported by statute. The Roads to Recovery program is currently authorised by pt 8 of the *National Building Program (National Land Transport) Act 2009* (Cth). What head of legislative power supports it? There are two possibilities: (a) the corporations power, and (b) the nationhood power.

### **1 Corporations Power**

There are three main problems with reliance on s 51(xx) to support the Roads to Recovery program. First, the legislation does not confine the making of payments under the Roads to Recovery program to foreign, trading or financial corporations (‘constitutional corporations’). Section 87 of the *Nation Building*

73 (2012) 86 ALJR 713, 741 [83] (French CJ); 743 [96] (Hayne J); 799 [402] (Heydon J); 815 [498] (Crennan J); 830 [594] (Kiefel J).

74 Ibid 770 [241]–[242].

*Program (National Land Transport) Act 2009* (Cth) simply refers to a ‘person or body’ who is to be the recipient of payments. It does not require that the person or body be a corporation, let alone a constitutional corporation.

The same problem arose in *Williams*, where the chaplaincy program did not specify that the recipient of funding had to be a corporation. Only two judges considered the application of the corporations power, but both held that it could not support a law that permitted agreements with bodies that were not constitutional corporations.<sup>75</sup>

Secondly, not all local government bodies are trading corporations. After the *Work Choices Case*,<sup>76</sup> the States of New South Wales and Queensland terminated the status of local government bodies as bodies corporate and brought them back under the Crown.<sup>77</sup> An attempt to reverse the status of local government bodies in NSW was defeated in the Legislative Council in March 2012.<sup>78</sup> Hence, local government bodies in Queensland and New South Wales are not corporations at all, but still receive funding under the Roads to Recovery program.

Further, even amongst those local government bodies that have a corporate status, not all would be regarded as ‘trading’ or corporations. It would depend upon whether the ‘trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation’.<sup>79</sup> This may well differ between council and council, and in relation to the same council over a period of time. For example, in *Australian Workers’ Union, Queensland v Etheridge Shire Council*,<sup>80</sup> Spender J of the Federal Court held that the Etheridge Shire Council was not a constitutional corporation because trading was not its predominant and characteristic activity and did not form a sufficiently significant proportion of its overall activities.

Thirdly, it could be argued that the law that establishes and implements the Roads to Recovery program is not a law with respect to the activities, functions, powers or relationships of trading corporations. In *Williams*, the two Justices who considered the corporations power appeared to imply that simply granting money to a corporation was not enough to attract the application of s 51(xx). Kiefel J said:

Any statute authorising the Funding Agreement could not be said to be concerned with the regulation of the activities, functions, relationships and business of a corporation, the rights and privileges belonging to a

75 Ibid 775 [267], [271] (Hayne J); 827 [575] (Kiefel J).

76 *New South Wales v Commonwealth* (2006) 229 CLR 1.

77 See *Local Government Amendment (Legal Status) Act 2008* (NSW) sch 1 cl 1; *Local Government and Industrial Relations Amendment Act 2008* (Qld) pt 3 cl 17.

78 New South Wales, *Parliamentary Debates*, Legislative Council, 28 March 2012, 10018.

79 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 233 (Mason J).

80 (2008) 171 FCR 102.

corporation, the imposition of obligations upon it, or the regulation of the conduct of those through whom it acts.<sup>81</sup>

Hayne J also distinguished a law concerning the funding of chaplains from a law supported by the corporations power, observing:

Unlike the law considered in *New South Wales v Commonwealth (Work Choices Case)* it would not be a law authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it would not be a law regulating the conduct of those through whom a constitutional corporation acts nor those whose conduct is capable of affecting its activities, functions, relationships or business.<sup>82</sup>

While these comments were only made by two Justices (as the others did not address the issue), they raise the distinct possibility that merely giving a grant to a constitutional corporation is not enough in itself to attract the support of s 51(xx).

For these three reasons, it would seem extremely unlikely that the High Court would regard the legislation enacting the Roads to Recovery program as supported by s 51(xx) of the *Constitution*.

## 2 Nationhood Power

Section 3 of the *Nation Building Program (National Land Transport) Act 2009* (Cth) provides that the object of the Act is ‘to assist national and regional economic and social development by the provision of Commonwealth funding aimed at improving the performance of land transport infrastructure’. This suggests that the Commonwealth might be relying on the ‘nationhood’ power on the ground that its legislation provides for the development of national infrastructure, which is a truly national activity that could not be otherwise carried on by the States for the benefit of the nation.

The ‘nationhood power’ finds its modern source in a statement made by Mason J in the *AAP Case* that

there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.<sup>83</sup>

81 (2012) 86 ALJR 713, 827 [575] referring to the touchstones of the corporations power as identified in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83] (Gaudron J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 114–5 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

82 Ibid 775 [272].

83 *AAP Case* (1975) 134 CLR 338, 397.

Despite the fact that the *Williams* case did not directly concern the nationhood power, the Court did review the authorities on it and placed stress upon the following aspects of it:

- (a) the enterprise or activity must be peculiarly adapted to the government of a nation and be a truly ‘national’ endeavour;<sup>84</sup>
- (b) the enterprise or activity must be one that cannot otherwise be carried on for the benefit of the nation by the States or others;<sup>85</sup>
- (c) the Commonwealth’s executive power cannot be expanded outside its heads of power simply because it is ‘convenient’ to do so;<sup>86</sup>
- (d) s 96 of the *Constitution* must not be rendered otiose — so there must be large areas of activity which are outside the executive power of the Commonwealth which can only be entered by way of a s 96 grant;<sup>87</sup> and
- (e) the Commonwealth’s exercise of executive or legislative power must involve no real competition with the States.<sup>88</sup>

All five of these propositions, when applied to the funding of the Roads to Recovery program, would suggest that it is not supported by the nationhood power.

#### (a) *National Endeavour*

While the funding of national infrastructure, such as a railway line across several States, might be regarded as a truly ‘national’ endeavour — and one peculiarly adapted to the government of a nation — it is hardly likely that the funding of the construction and maintenance of local roads would be regarded the same way. Kiefel J observed in *Williams* that ‘there is nothing about the provision of school chaplaincy services which is peculiarly appropriate to a national government’ as such services are ‘the province of the States, in their provision of support for school services’.<sup>89</sup> Much the same could be said of the provision of local roads.

In *Pape*, it was the magnitude and urgency of the subject that moved it into the sphere of the nationhood power.<sup>90</sup> Gummow, Crennan and Bell JJ observed that ‘only the Commonwealth has the resources available to respond promptly to the present financial crisis on the scale exemplified by the Bonus Act.’<sup>91</sup> Hayne J, in *Williams*, suggested that this extended the nationhood power to matters ‘peculiarly

84 (2012) 86 ALJR 713, 727 [34] (French CJ); 760–1 [196] (Hayne J); 812 [485] (Crennan J); 828–9 [583] (Kiefel J).

85 Ibid 760–1 [196] (Hayne J); 815 [498] (Crennan J); 828–9 [583] (Kiefel J).

86 Ibid 790–1 [363] (Heydon J); 816 [504] (Crennan J); 829 [587] (Kiefel J).

87 Ibid 770 [243], 812 [247] (Hayne J); 815 [501], 816 [503] (Crennan J); 830 [592] (Kiefel J). See also 751 [143] (Gummow and Bell JJ) regarding s 96 of the *Constitution* and federal considerations.

88 Ibid 726 [31] (French CJ); 751–2 [144] (Gummow and Bell JJ); 773 [256] (Hayne J); 816 [505] (Crennan J); 829–30 [588] (Kiefel J).

89 Ibid 830 [594].

90 (2009) 238 CLR 1, 63–4 [133] (French CJ); 91–2 [242] (Gummow, Crennan and Bell JJ).

91 Ibid 91 [241].

within the capacity and resources of the Commonwealth Government'.<sup>92</sup> While it could be argued that the amount needed to fund local government roads is large, and that a Commonwealth contribution is therefore needed,<sup>93</sup> the same could be said for almost all areas of expenditure (eg schools or hospitals). Moreover, the need for funding is ongoing and the funding is provided regularly. There is no emergency with which only the Commonwealth can deal promptly and adequately.

*(b) Cannot Otherwise Be Carried On*

The High Court in *Williams* laid significant emphasis on the fact that the Queensland Government already ran its own chaplaincy funding program.<sup>94</sup> A number of Justices noted that no party could have argued that a chaplaincy program was something that could not be carried on without Commonwealth involvement, as manifestly the State was not only capable of doing so but was actually doing so.<sup>95</sup>

Similarly, the States, through their local government bodies, have constructed and maintained roads since the inception of local government. The combination of State grants and local government own-source revenue makes up approximately 91.5 per cent of local government revenue, with Commonwealth contributions coming to approximately 8.5 per cent.<sup>96</sup> It is really not plausible to claim that the construction and maintenance of local roads 'cannot otherwise be carried on for the benefit of the nation' except by direct Commonwealth funding.

*(c) Convenience*

Crennan J observed in *Williams* that

the fact that an initiative, enterprise or activity can be 'conveniently formulated and administered by the national government', or that it ostensibly does not interfere with State powers, is not sufficient to render it one of 'truly national endeavour' or 'pre-eminently the business and the concern of the Commonwealth as the national government'.<sup>97</sup>

The mere fact that it might be regarded by local government as 'convenient' to receive direct funding from the Commonwealth rather than through s 96 grants is most unlikely to trigger the application of the nationhood power.

92 *Williams* (2012) 86 ALJR 713, 760–1 [196], referring to *ibid* 63–4 [133] (French CJ).

93 Note, however, that Commonwealth financial assistance only makes up around 8.5 per cent of local government operating revenue: Productivity Commission, *Assessing Local Government Revenue Raising Capacity* (2008) xxii; Australian Local Government Association, Submission No 24 to the Senate Select Committee Inquiry into Reform of the Australian Federation, *Inquiry into the Reform of the Australian Federation*, 20 August 2010, 8.

94 (2012) 86 ALJR 713, 722 [12] (French CJ); 752 [146] (Gummow and Bell JJ); 773 [257] (Hayne J); 810 [469] (Crennan J); 830 [591] (Kiefel J). Cf Heydon J at 781 [308].

95 *Ibid* 752 [146] (Gummow and Bell JJ); 760–1 [196] (Hayne J); 815 [498], 816 [506] (Crennan J); 830 [591], [594] (Kiefel J).

96 Productivity Commission, above n 93, xxii.

97 (2012) 86 ALJR 713, 816 [504]. See also 829 [587] (Kiefel J).

*(d) Section 96*

A number of Justices in *Williams* regarded s 96 as indicating that Commonwealth executive power is not unlimited. They considered that s 96 should not be rendered otiose by a broad interpretation of Commonwealth executive power.<sup>98</sup> They exhibited concern that s 96 was being bypassed for no adequate reason,<sup>99</sup> and they noted the importance of the ‘consensual’ aspect of s 96 which arises from the fact that it is up to the States whether to accept or reject funding upon the conditions made.<sup>100</sup>

The Commonwealth has funded roads through s 96 grants since 1923. It continues to give ‘untied’ roads funding under s 96 grants in addition to the Roads to Recovery program. There appears to be no adequate reason why s 96 has been bypassed other than the political reason of the Commonwealth seeking to obtain greater credit for its expenditure on local roads. Such a reason would not be likely to hold sway in the High Court. Given the long history of the funding of local roads through s 96 grants, it would be very difficult indeed to justify why s 96 is being bypassed in favour of direct funding, and why Commonwealth executive power (combined with legislative power under s 51(xxxix)) extends to such expenditure.

*(e) No Competition*

It had previously been suggested by the High Court that in matters purely involving the grant of Commonwealth funds, this could not amount to competition with the States. For example, Deane J observed in the *Tasmanian Dam Case* that

[e]ven in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours.<sup>101</sup>

This approach was also followed in a more limited fashion by French CJ in *Pape*, where he contended that ‘it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional distribution of powers.’<sup>102</sup> Only Heydon J expressed concern that Commonwealth laws regulating the expenditure of money, or regulating a ‘national economy’ might override State laws.<sup>103</sup>

In *Williams*, Hayne J contended that the ‘provision of funding to an organisation to provide chaplains to schools involves direct competition with State executive and legislative action’.<sup>104</sup> This was reinforced by the Queensland Government’s

98 Ibid 770 [243], 771 [247] (Hayne J); 815 [501] (Crennan J); 830 [592]–[593] (Kiefel J). See also *Pape* (2009) 238 CLR 1, 199 [569] (Heydon J).

99 (2012) 86 ALJR 713, 751 [143], 752 [146] (Gummow and Bell JJ); 816 [503] (Crennan J).

100 Ibid 752 [148] (Gummow and Bell JJ); 772 [248] (Hayne J); 815 [501] (Crennan J).

101 *Commonwealth v Tasmania* (1983) 158 CLR 1, 252–3.

102 Ibid 60 [127].

103 Ibid 182–3 [522].

104 (2012) 86 ALJR 713, 773 [257].

chaplaincy program.<sup>105</sup> Kiefel J focused on the fact that both governments ‘require adherence to their respective guidelines as a condition of funding’ and that ‘there is clearly the potential for some disparity or inconsistency in what is required’.<sup>106</sup> She concluded that ‘it cannot be said that no competition may be involved between the State and Commonwealth Executives.’<sup>107</sup>

In the case of the funding of local roads, there is certainly the potential for Commonwealth conditions on funding to clash with State requirements (eg regarding priorities in road building and maintenance). It may be, for example, that for reasons of safety, a State might wish to prohibit signs upon roads that do not deal with road safety warnings. Even the condition that existing funding be maintained potentially interferes with State budgetary priorities.

### **3 Vulnerability of Roads to Recovery to Constitutional Challenge**

Taking into account all the above arguments, it is unlikely that pt 8 of the *Nation Building Program (National Land Transport) Act 2009* (Cth), which currently contains the Roads to Recovery program, would be supported by a ‘nationhood’ power. In the absence of another available head of legislative power, the constitutional validity of the Roads to Recovery program would appear to be vulnerable to constitutional challenge if anyone had the standing and motivation to take such an action.<sup>108</sup>

## **IV THIRD TIME LUCKY? — THE LATEST CAMPAIGN FOR CONSTITUTIONAL RECOGNITION**

### **A Local Government’s Continuing Campaign for Constitutional Recognition**

The campaign by local government for constitutional recognition has continued unabated despite the failed 1974 referendum, a further failed referendum in 1988,<sup>109</sup> and recognition in all State Constitutions. The stated basis for the campaign, however, has changed over time. More recently it has latched onto the *Pape* and *Williams* decisions as showing that there is a ‘problem’ that needs to be ‘fixed’ by

105 Ibid. Note also the rejection by Gummow and Bell JJ of the ‘false assumption’ that funding agreements are non-coercive in nature. They pointed out that ‘[f]inancial dealings with the Commonwealth have long attached to them the sanctions of federal criminal law’: at 754 [158].

106 Ibid 830 [590].

107 Ibid.

108 Spigelman too has concluded that the Roads to Recovery program is more probably than not constitutionally invalid: Spigelman, ‘Constitutional Recognition of Local Government’, above n 72, 9.

109 Constitution Alteration (Local Government) Bill 1988 (Cth). See further Saunders, above n 8, 57; George Williams and David Hume, *People Power — The History and Future of the Referendum in Australia* (UNSW Press, 2010) 168.

constitutional recognition. However, the High Court's judgment in *Pape*,<sup>110</sup> which was handed down in 2009, came well after local government's campaign was already in full swing. The Australian Local Government Association ('ALGA') had already held a Local Government Constitutional Summit in December 2008 which concluded with a declaration that:

any constitutional amendment put to the people in a referendum by the Australian Parliament (which could include the insertion of a preamble, an amendment to the current provisions or the insertion of a new Chapter) should reflect the following principles:

The Australian people should be represented in the community by democratically elected and accountable local government representatives;

The power of the Commonwealth to provide direct funding to local government should be explicitly recognised; and

If a new preamble is proposed, it should ensure that local government is recognised as one of the components making up the modern Australian Federation.<sup>111</sup>

The *Williams* decision reinforced that Commonwealth direct funding to local government was vulnerable to constitutional challenge if it was not supported by a valid statute.<sup>112</sup> It showed that the High Court's judgment in *Pape* should be taken seriously, as should the relevance of 'federal considerations' in the interpretation of the scope of executive power.<sup>113</sup> But neither case threatened, at all, the *capacity* for the Commonwealth to fund local government, as this may still validly occur through s 96 grants.

ALGA is well aware from its own polling, and that of others, that a referendum on the constitutional recognition of local government is unlikely to succeed unless it can establish that there is a real problem that can only be fixed by a constitutional amendment.<sup>114</sup> As a general principle, Australian voters are unwilling to amend the *Constitution* unless it is both necessary and will produce tangible benefits.<sup>115</sup> The *Pape* and *Williams* cases are therefore being used to establish a 'problem' which constitutional amendment can purportedly fix. The implication is that this

110 (2009) 238 CLR 1.

111 Australian Local Government Association, *Constitutional Recognition of Local Government Summit Declaration* (11 December 2008) Australian Local Government Association <[http://alga.asn.au/site/misc/alga/downloads/constit-rec/Final\\_Declaration.pdf](http://alga.asn.au/site/misc/alga/downloads/constit-rec/Final_Declaration.pdf)>.

112 (2012) 86 ALJR 713.

113 *Ibid* 727–8 [37]–[38] (French CJ); 751–2 [142]–[147] (Gummow and Bell JJ); 759–61 [192]–[199], 770 [240], 773 [256]–[257] (Hayne J); 815–16 [497]–[503] (Crennan J); 830 [594] (Kiefel J).

114 Local Government Association of South Australia, *Constitutional Recognition of Local Government* (June 2008) Local Government Association of South Australia <[http://www.lga.sa.gov.au/webdata/resources/files/Constitutional\\_Recognition\\_of\\_Local\\_Government\\_-\\_McGregor\\_Tan\\_Research\\_-\\_Final\\_Report.pdf](http://www.lga.sa.gov.au/webdata/resources/files/Constitutional_Recognition_of_Local_Government_-_McGregor_Tan_Research_-_Final_Report.pdf)>; Australian Local Government Association, Submission No 21 to the House Legal and Constitutional Affairs Committee, *Inquiry into the Machinery of Referendums*, October 2009 <[http://alga.asn.au/site/misc/alga/downloads/submissions/2009/ALGA\\_Ref\\_submission\\_9\\_October2009.pdf](http://alga.asn.au/site/misc/alga/downloads/submissions/2009/ALGA_Ref_submission_9_October2009.pdf)>.

115 This conclusion was also reached by the Newspoll polling undertaken on behalf of the Expert Panel: Expert Panel, above n 3, 10, 43, 64.

will also bring tangible benefits to local government — ie greater funding for local government and better services to residents. Whether there is a genuine ‘problem’ (given that the same Commonwealth funding can currently be given to local government through s 96 grants via the States) and whether an amendment will give rise to any tangible benefits (given that the Commonwealth can already grant as much money as it wants to local government) remain matters of debate.

## **B Submissions to the Expert Panel**

The Commonwealth’s Expert Panel received a large number of submissions concerning the constitutional recognition of local government. Approximately half were from private individuals, the vast majority of whom opposed constitutional recognition of local government. Around 43 per cent were from local councils, the vast majority of which supported local government constitutional recognition. The remaining 7 per cent were from governments, politicians, academics and advocacy groups, giving mixed views.<sup>116</sup>

Previous referendum campaigns, however, have shown that it is critical for any proposal to receive both bipartisan support and support from the States.<sup>117</sup> The submissions to the Expert Panel made by political parties and the States are therefore significant.

The Leader of the federal Opposition, Mr Tony Abbott, stated in a submission to the Expert Panel that:

the Coalition will only support a referendum that is limited to facilitating direct Commonwealth funding of local government. A referendum that sought to usurp the role of the States, or otherwise change the current order of governance of Australia, would be highly problematic and is not something the Coalition would be likely to support.<sup>118</sup>

The New South Wales Government, however, appeared reluctant to support the direct funding of local government. It argued that:

financial recognition of local government could raise expectations that the Commonwealth will intervene in local government administration, thereby creating confusion about Federal, State and local government responsibilities and blurring the lines of accountability that exist between governments and their constituents.<sup>119</sup>

116 Overall, 42.8 per cent of submissions were from local councils that supported constitutional recognition and 42.3 per cent were from private individuals who opposed it. In addition a small number of individuals offered support for constitutional recognition and two local councils opposed it. See *ibid* 27.

117 Williams and Hume, above n 109, 218–21, 244–6.

118 Tony Abbott, Submission No 695 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 7 December 2011 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/TonyAbbott15122011.pdf>>.

119 New South Wales Government, Submission No 694 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 25 November 2011 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/NSWGovernment.pdf>>.

It also expressed concern that direct Commonwealth funding would sidetrack or undermine major State government policies regarding local government.

The Victorian Government took a stronger line against constitutional recognition of local government. It argued that constitutional reform should be a last resort when there is no reasonable alternative and that it should not be used 'to resolve funding issues that can be dealt with through existing mechanisms'.<sup>120</sup> With respect to the financial recognition of local government, it stated:

The Victorian Government opposes any proposed amendment to the Commonwealth Constitution to allow the Commonwealth Government to fund local government directly in a similar manner to which it currently funds States under section 96 of the Commonwealth Constitution.<sup>121</sup>

The Victorian Government expressed concern that a constitutional amendment would exacerbate the blurring of roles, responsibilities and accountabilities in the federal system, and doubt about whether such a change would result in increased funding to local government. It pointed to the experiences of the States and the problems that can arise from conditions placed upon funding. It concluded by noting that:

the Victorian Government has concerns about how further direct funding from the Commonwealth to local government would be allocated between jurisdictions (given issues relating to horizontal fiscal equalisation) and the impact this may have on the local government sector in some jurisdictions, including Victoria.

The Victorian Government is also concerned about the potential for the Commonwealth to change the distribution of funding to local government within a State in a manner that would disadvantage one or more councils, whether through bilateral agreements with individual councils or otherwise. Victoria opposes any approach that discourages local councils from striving for higher performance and increased productivity.<sup>122</sup>

The Western Australian Government also expressed strong objections to financial recognition of local government in the *Commonwealth Constitution*. It argued that proposed amendments to s 96 would 'both constitutionally and practically downgrade and circumvent the States'.<sup>123</sup> It pointed out that even if the *Pape* case resulted in the Commonwealth not being able to fund local government directly, it did not prevent the Commonwealth from funding local government through s 96

120 Government of Victoria, Submission No 654 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 4 November 2011, 4 <[http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/3\\_November\\_CRLG\\_Expert\\_Panel\\_Victorian\\_Government\\_Submission.pdf](http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/3_November_CRLG_Expert_Panel_Victorian_Government_Submission.pdf)>.

121 Ibid 7.

122 Ibid 8.

123 Government of Western Australia, Submission No 572 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 3 November 2011, 1 <[http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/572\\_WA\\_Govt\\_Submission.pdf](http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/572_WA_Govt_Submission.pdf)>.

grants to the States. It also noted that, to the extent that local councils are ‘trading corporations’, they can already be directly funded by the Commonwealth.<sup>124</sup>

The Tasmanian and South Australian Governments expressed general sentiments in favour of some form of constitutional recognition but reserved their positions until they could see and study a final recommendation.<sup>125</sup> The Queensland Government also reserved its position. However, it expressed ‘in-principle’ support for a referendum with the objective of allowing the Commonwealth to provide direct funding to local government, provided that any amendment ‘should maintain, not diminish, the state’s primary constitutional responsibility for local government’, including the State’s supervisory powers over local government.<sup>126</sup>

### C The Expert Panel’s Findings

In December 2011 the Expert Panel on the Constitutional Recognition of Local Government presented its report to the Commonwealth Government. It stated that a ‘majority of panel members concluded that financial recognition is a viable option within the 2013 timeframe indicated by the terms of reference’,<sup>127</sup> although the report does not state who supported and who rejected the recommendation, shrouding its members in a cloak of anonymity.

The reluctance on the part of Panel members to declare their hand also appears to be reflected in the diffidence shown in the recommendation. On the one hand it gives the appearance of being a recommendation in favour of the holding of a referendum. On the other hand, it is made subject to two conditions, at least one of which, depending upon how it is read, is likely to be unachievable. It is therefore in substance, rather than form, a recommendation against a referendum. The report states:

The majority of panel members support a referendum in 2013 subject to two conditions: first, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and second, that the Commonwealth adopt steps suggested by ALGA necessary to achieve informed and positive public engagement with the issue ... Steps include allocating substantial resources to a major public awareness campaign and making changes to the referendum process.<sup>128</sup>

124 Ibid 1–2.

125 Tasmanian Government, Submission No 683 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 20 November 2011, 1 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/TasGovernment.pdf>>; Government of South Australia, Submission No 682 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 24 November 2011, 1 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/SAGovernment.pdf>>.

126 Queensland Government, Submission No 675 to the Expert Panel on Constitutional Recognition of Local Government, *Constitutional Recognition of Local Government*, 11 November 2011, 2 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/QueenslandGovernmentSubmission.pdf>>.

127 Expert Panel, above n 3, 2.

128 Ibid 2.

The second condition would involve the Commonwealth in substantial expenditure above and beyond the cost of a normal referendum. The last time an ‘education’ campaign of this kind was held was for the republic referendum in 1999, which was unsuccessful.<sup>129</sup> Other elements of this condition include an inquiry by a Joint Select Committee of the Commonwealth Parliament, the removal of the legislative limit on spending during the referendum campaign and the allocation of funds to the ‘Yes’ and ‘No’ cases ‘based on those parliamentarians voting for and against the Bill’, being funding equivalent to that ‘provided for elections’ (whatever that might mean). The latter recommendation will be particularly controversial, as it would entrench funding in favour of a ‘Yes’ vote at referenda, as a referendum bill would not pass and be put to referendum unless it was favoured by a majority in the House of Representatives.<sup>130</sup>

The Panel has noted that without such substantial Commonwealth funding the referendum is likely to fail. It stated in its Report:

The panel has no information as to whether the Commonwealth Government would be prepared to adopt and appropriately fund the awareness campaign advocated above. In the absence of such a campaign, however, the panel is of the view that there is a very real risk that any referendum will fail and that the possibility of local government being recognised in the *Constitution* would be removed from the political agenda for decades.<sup>131</sup>

The first condition, that the Commonwealth negotiate with the States to achieve their support is ambiguous. Must the Commonwealth merely negotiate or must it actually achieve that support? Is such support required of all States or only a majority? The submissions show that Western Australia and Victoria are clearly opposed to the direct funding of local government and that NSW has strong reservations. The other States reserved their positions. Given the various arguments that may be made against the direct funding of local government (discussed below), it would appear unlikely that all, or a majority of States would support such a referendum. As at July 2012, there do not appear to have been any substantive negotiations with the States. Moreover, the relevant Commonwealth Minister appeared to take the view that it was the responsibility of local government to win over the support of the States and the community.<sup>132</sup>

The report notes that several members of the panel do not think that there is sufficient support for a successful referendum, even if the two conditions are met,

129 The education campaign cost \$4.5 million, while the ‘Yes’/‘No’ media campaigns cost \$15 million. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No?* (2009) 20 [3.31]–[3.32].

130 Note that technically, a proposed constitutional amendment may be put to referendum if it is passed twice by the Senate in the timeframe required by s 128 of the *Constitution* but rejected by the House of Representatives. However, if no Minister advises the Governor-General to put it to referendum, it is unlikely that the Governor-General will do so.

131 Expert Panel, above n 3, 17.

132 Simon Crean, ‘Speech to the National General Assembly of Local Government’ (Speech delivered at the National General Assembly of Local Government, Canberra, 18 June 2012) <<http://www.minister.regional.gov.au/sc/speeches/2012/CS28.aspx>>.

and that ‘proceeding to another unsuccessful referendum would damage rather than advance the interests of local government’.<sup>133</sup>

### **D The Wording of the Proposed Amendment**

After suggesting a number of alternatives in its Discussion Paper, the Expert Panel concluded in its Final Report that it would be preferable to make the following italicised amendment to s 96 of the *Commonwealth Constitution*:

the Parliament may grant financial assistance to any State *or to any local government body formed by State or Territory Legislation* on such terms and conditions as the Parliament sees fit.<sup>134</sup>

The Panel was particularly concerned not to cause interpretative difficulties. It noted the risk that a reference to local government in the *Commonwealth Constitution* ‘could be held by the High Court to prohibit a state from altering the fundamental characteristics of the system of local government and the High Court could determine what those characteristics were’.<sup>135</sup> This is what has occurred with respect to other constitutional terms, such as references in the *Constitution* to ‘courts’ and ‘juries’.<sup>136</sup> Hence the High Court might find that a fundamental characteristic of ‘local government’ is that it is an ‘elected’ body, and that this does not permit dismissal of elected councillors or the appointment of administrators. However, this risk would be most significant if the *Constitution* required that a system of local government continue to exist, as had been suggested under the ‘democratic recognition’ proposal. Such a requirement would have obliged the States to maintain a system of local government which satisfied minimum characteristics implied by the High Court from the meaning of the constitutional term ‘local government’. The Panel considered that it had avoided this trap in relation to financial recognition:

It does not appear that there is any significant risk with respect to the panel’s majority proposal for financial recognition. If, in the future, the system of local government of a particular State were to be changed in such a manner that it no longer answered the constitutional concept of ‘local government’, the effect would be that the Commonwealth would not be able to make grants to the local councils of that State. Nothing in the existing jurisprudence of the High Court suggests that a State is obliged to create a system that complies with the constitutional expression.<sup>137</sup>

While this may be true and a State could have a system of local government which did not meet the minimum requirements implied by the High Court, the effect would be that its local government bodies could not receive direct

133 Expert Panel, above n 3, 2.

134 Ibid 8.

135 Ibid 16.

136 See the further analysis in appendix E to the Expert Panel’s report: Ibid 92.

137 Ibid 16.

Commonwealth funding. There would therefore be enormous pressure on a State to ensure that its system of local government complied with any minimum characteristics identified by the High Court to avoid missing out on direct funding programs, such as the Roads to Recovery program. This would be particularly so if, as is likely, (a) all Commonwealth funding to local government were shifted to direct funding; and (b) the Commonwealth refused to provide funding to local government through the States where the local government system in a State did not satisfy the High Court's assessment of the minimum characteristics of local government. Accordingly, the High Court's interpretation of the term 'local government' would still be of critical importance to both States and local government bodies.

### **E The Expert Panel's Reasoning**

The Panel had started with four potential options for constitutional recognition of local government. It dismissed symbolic recognition in a preamble and recognition as part of a broader package of cooperative federalism, as extending beyond the Panel's terms of reference. This was because both options raised much wider issues.<sup>138</sup> It rejected the idea of 'democratic recognition' on the ground that it received little support and considerable opposition and had 'no reasonable prospect of success at a referendum'.<sup>139</sup>

Financial recognition was accepted as the preferred option on the basis that it 'has the broadest base of support among the political leadership at both federal and State levels', even though it was recognised that there was opposition to such a proposal from Victoria, Western Australia and New South Wales.<sup>140</sup> It also has the support of a majority of local councils<sup>141</sup> and a substantial level of support in the broader community (although 'polling also suggests that such support may not carry through to a referendum').<sup>142</sup> The Panel noted that the general community might support a 'form of limited recognition that addresses a perceived problem, such as the current uncertainty arising from the *Pape* case'.<sup>143</sup>

138 Ibid 1, 10–11.

139 Ibid 1, 8–9.

140 Ibid 1–2.

141 Of those local government bodies that made submissions to the Expert Panel, only two did not support recognition. One council suggested that there was not a compelling case for constitutional change and the other was concerned that financial recognition might 'enhance Commonwealth dominance over the States, and future dominance over Local Government': Ibid 14.

142 Ibid 2. See also 18–19 where it is suggested that the polling results are 'fragile' and that without a major education campaign there is real doubt whether the polling results could 'translate into a majority at a referendum.'

143 Ibid 2.

Apart from assessments of support for the financial recognition proposal, there is little in the Panel's Report to suggest *why* such an amendment would be a good thing.<sup>144</sup> The only reasoning provided arises in the following obscure sentence:

All members of the panel consider that it is appropriate that the Commonwealth's right to have a direct funding relationship with local government, when it is acting in the national interest, be acknowledged in the *Constitution*.<sup>145</sup>

It is not clear from this sentence how this is a Commonwealth 'right' and how this is consistent with the existing federal system. Nor is it clear who decides whether something is done 'in the national interest' and how this notion would act as a fetter on the proposed constitutional amendment (which makes no reference to the national interest).

The Panel also accepted that 'there is a very real doubt about the constitutional validity of direct grant programs that do not fall under a head of Commonwealth legislative power',<sup>146</sup> but acknowledged that it is constitutionally possible to make the same grants to local government through the States under s 96 of the *Constitution*.

The Panel noted that local government provided a number of arguments as to why direct Commonwealth funding is preferable to funding via the States under s 96 of the *Constitution*. These arguments included the following:

1. 'The Commonwealth may prefer to use local government as a means to implement its own priorities, even when those differ from State priorities'.<sup>147</sup> Indirect funding of local government through s 96 grants reduces the capacity of the Commonwealth to use local government to impose its policies over those of the States.
2. The *Constitution* should recognise local government 'as a legitimate third tier of government in the Australian system'.<sup>148</sup>
3. Funding via the States 'is inefficient, ineffective and may result in a reduction of the money flowing to local government by reason of deductions for administrative expenses'.<sup>149</sup>
4. The Commonwealth is more likely to fund local government if it can do so directly 'with all the political advantages that entails'.<sup>150</sup>

144 The Panel's terms of reference asked it to assess 'the level of support for constitutional recognition' and to provide options for that recognition. It did not expressly ask the Panel to assess the merit of those options, although it was asked to 'have regard to the benefits and risks of different options as well as outcomes that may be achieved': Ibid 24.

145 Ibid 2.

146 Ibid 4.

147 Ibid.

148 Ibid.

149 Ibid 5.

150 Ibid 4.

5. Direct funding ‘can create a relationship that supports, facilitates and drives collaboration among all three levels of government’, unlike funding via the States.<sup>151</sup>

Of these arguments, numbers 1 and 2 raise issues of federalism that are of serious concern to the States. Arguments 3 and 4 raise funding issues that, when more closely examined, expose flawed reasoning and arguments that the Commonwealth might not wish to take to a referendum. These arguments are discussed below. Argument 5 is simply inexplicable. The use of direct funding to allow the Commonwealth to by-pass the States and deal directly with local government, especially where this is done to implement Commonwealth policies against the wishes of the States, would not seem to involve collaboration among all three levels of government. On the contrary, Commonwealth grants to local government through the States seem the most obvious way of establishing cooperation and collaboration amongst all the participants. Direct funding is used to cut out the States.

## **F The Federalism Arguments**

### **1 The Use of Commonwealth Grants to Implement Commonwealth Policies**

The first argument — that the Commonwealth seeks to use local government as a tool to implement its own policies, even when they are contrary to State policies — raises to the fore a genuine issue of concern to the States and one that should also be of concern to local government. The Expert Panel, in an understated manner, described this as giving rise to a ‘tension’:

There is a tension between accepting local government as an instrument of national policy in whichever manner the Commonwealth decides, on the one hand, and the traditional subordination of the activities and powers of local government to State decision-making, on the other hand.<sup>152</sup>

Many would describe this as more than a mere ‘tension’. A constitutional amendment that permitted the Commonwealth to make grants to local government, ‘on such terms and conditions as the [Commonwealth] Parliament thinks fit’, would provide a further means for the Commonwealth to interfere with and potentially override State policies. It would therefore undermine the federal system of government.

It would also shift government further away from the people, reducing the capacity of local government to implement the policies desired by local residents and the capacity of the State Governments to implement the policies that they were elected to fulfil. Instead, Commonwealth policies would prevail through conditions placed upon grants to local government.

<sup>151</sup> Ibid 6.

<sup>152</sup> Ibid 7.

Another problem is that direct funding of local government is likely to damage the federal system by blurring lines of accountability, leaving local government accountable to all and none. Hartwich criticised the idea of establishing a constitutional relationship between the Commonwealth and local government, observing:

Ultimately, it would make accountability impossible in any reasonable sense. A council would then be simultaneously accountable to both its state and the Commonwealth, while democratic accountability would remain with the local electorate. There is a danger that this kind of recognition would in the end strengthen the Commonwealth government and weaken federalism ...<sup>153</sup>

It would be naïve of local government to assume that if it had a direct relationship with the Commonwealth it would be treated better than the Commonwealth treats the States. As Fenna has noted, '[b]y and large the centralising dynamics that are adversely affecting the constituent units of federal systems [ie the States] are going to have a similar effect on local government'.<sup>154</sup> Hence, the use of tied grants to interfere in policy would be a phenomenon likely to affect local government, if the Commonwealth was entitled to make direct grants to local government.

Professors Aroney, Prasser and Birks in their submission to the Expert Panel also raised federalist concerns. They argued that:

affirming the power of the Commonwealth to make financial grants to local government, though superficially attractive, will not necessarily strengthen local government, but have every potential, especially in the long term, to increase the power of the Commonwealth (and of the High Court) over local government. Local government may appear to benefit from a relatively greater level of independence from the States and from the establishment of a constitutionally secure source of funding, but it would do so at the expense of greater subordination to the Commonwealth, a much more distant government that is inherently less likely to be responsive to the concerns of particular local communities than the governments of the States. Moreover, the prospect of having the State and federal governments effectively sharing responsibility for local government will have the potential to create an even more uncertain environment for the effective and democratically responsible management of local government affairs. The federal constitution is not the appropriate place to recognise local government, and any attempt to do so would be inconsistent with the fundamental principles of its design and structure,

153 Oliver M Hartwich, *Beyond Symbolism: Finding a Place for Local Government in Australia's Constitution: Issues Analysis No 104* (Centre for Independent Studies, 2009) 9 <<http://www.cis.org.au/images/stories/issue-analysis/ia104.pdf>>.

154 Fenna, above n 8, 48.

and would be liable to give rise to all manner of unintended consequences, no matter how carefully drafted.<sup>155</sup>

Local government bodies would be left in the invidious position of being slaves to two masters. They would be subject to the conditions imposed by the Commonwealth on its funding (which conditions could extend well beyond the use of the grants to any other type of policy that the Commonwealth wished local government to pursue) as well as being subject to State laws, ministerial directions and policies.

Interesting constitutional questions would arise as to how to deal with the likely conflict between the requirements of the Commonwealth and those of the States. Any amendment to s 96 of the *Constitution* which gave the Commonwealth power to make grants to local government on such terms and conditions as the Commonwealth Parliament thinks fit, would also give rise to a legislative power under s 51(xxxvi) of the *Constitution* to make laws with respect to such grants and under s 51(xxxix) to make laws with respect to matters incidental to the making of such grants. The Commonwealth could therefore pass legislation that appropriated money for these grants to local government and set out the terms and conditions of the grant. If a local government body accepted a Commonwealth grant which was made subject to conditions set out in Commonwealth legislation (eg requiring the local government body to implement a particular policy) and if State legislation prohibited the local government body from implementing that policy, a question would arise as to whether 109 of the *Commonwealth Constitution* would be triggered and whether the conditions set out in the Commonwealth law would override the State legislation.<sup>156</sup> If so (and one would need to assess both laws in each particular case to see if there is a s 109 inconsistency), this would amount to a further shift in the federal balance towards the Commonwealth, allowing it to implement its policies in relation to State matters by using its financial power over local government.

## 2 Local Government as a Third Tier of Government

The second argument is that local government should be recognised in the *Constitution* 'as a legitimate third tier of government in the Australian system'.<sup>157</sup> If the intention is to give local government its own status, independent of the

155 Nicholas Aroney, Scott Prasser and Mitchell Birks, Submission No 641 to Expert Panel on Constitutional Recognition of Local Government, *Inquiry into the Constitutional Recognition of Local Government*, December 2011 <[http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/641\\_Local\\_Government\\_Submission\\_Aroney\\_Prasser\\_and\\_Birks.pdf](http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/641_Local_Government_Submission_Aroney_Prasser_and_Birks.pdf)>. See also Greg Craven, Submission No 606 to Expert Panel on Constitutional Recognition of Local Government, *Inquiry into the Constitutional Recognition of Local Government*, December 2011.

156 Note that this issue has not arisen in relation to grants to a State because a State can simply refuse to accept a grant which comes with conditions that it does not wish to implement. The difficulty in relation to local government is that if the local government body accepts the grant, then a s 109 issue potentially arises as to the status of the conditions as part of a Commonwealth law and whether a State law is inconsistent with the Commonwealth law.

157 Expert Panel, above n 3, 4.

States and as an equal participant in a tripartite federal system, then this would potentially have far-reaching consequences.

For example, local government may lose some of the protection that it currently gains by being part of a State. Section 114 of the *Commonwealth Constitution* provides that the Commonwealth may not ‘impose any tax on property of any kind belonging to a State’. The High Court has held that a ‘State’ includes a local government body.<sup>158</sup> Hence, under the existing *Constitution*, the Commonwealth cannot tax the property of a local government body. However, if local government became a third level of government, rather than being part of a State, it would lose this protection unless s 114 were amended or reinterpreted to accommodate it.

If local government were to become a third level of government in the Australian constitutional system, then issues would arise with respect to its powers and what rule would apply when local government by-laws were inconsistent with Commonwealth or State laws. The existing rule set out in s 109 of the *Commonwealth Constitution* would not necessarily apply and some kind of implication would need to be drawn. This could potentially lead to limitations on the operation of Commonwealth and State laws.

Constitutional implications derived from federalism would also need to be adjusted to accommodate a third level of government. For example, at present the constitutional recognition of the Commonwealth and the States as separate levels of government whose existence and independence is constitutionally mandated, has given rise to constitutional implications, often described as the *Melbourne Corporation* and *Cigamic* principles, concerning inter-governmental immunities and the capacity of one sphere of government to legislate in a manner that binds the other.<sup>159</sup> These complex principles would be even more difficult to apply to three levels of government if each were to retain its independence and its constitutional powers unhindered by other levels of government.

If local government were to be made a genuine third, independent tier of government within our federal system, it would make that system extraordinarily complex and would most certainly ‘make intergovernmental relations more complicated than they need ... to be’.<sup>160</sup>

It is doubtful that those who seek constitutional recognition of local government in order to establish it as a ‘third level of government’ have ever seriously thought through this proposition and how it would operate under the present dualist federal *Constitution*.

The Expert Panel recognised the risk that:

the very insertion of an express reference to local government in Australia’s foundational political and legal document, even of this limited character

158 *Sydney Municipal Council v Commonwealth* (1904) 1 CLR 208, 240–1.

159 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (as reinterpreted in *Austin v Commonwealth* (2003) 215 CLR 185); *Commonwealth v Cigamic Pty Ltd* (1962) 108 CLR 372 (as reinterpreted in *Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410).

160 Hartwich, above n 153, 7.

[ie financial recognition] provides recognition of local government as the third tier of government in Australia.<sup>161</sup>

However, in its proposed wording for a constitutional amendment, the Expert Panel appears to have sought to ameliorate this risk by referring to ‘any local government body formed by State or Territory Legislation’.<sup>162</sup> This would appear to be intended to negate any suggestion that local government was intended to become a third tier of government.

## G *The Financial Arguments*

### 1 *The Inefficiency and Cost of State ‘Middlemen’*

The third argument presented by local government for direct funding of local government is that funding via the States is inefficient and ultimately results in reduced amounts flowing to the local government. This argument has previously been put a number of ways, including assertions that:

the States ‘cream off’ a proportion of the grants from the Commonwealth, so that local government does not receive the full amount — it would therefore receive more money if it were directly funded by the Commonwealth;<sup>163</sup> and

the costs of the State as the ‘middleman’ are deducted from the Commonwealth grants before they reach local government — so if the middleman were eliminated, local government would receive more funding.<sup>164</sup>

There does not appear to be any evidence to back up these assertions, despite the fact that they are often repeated and seem to be entrenched beliefs. First, the vast bulk of money given by the Commonwealth to local government through the States takes the form of FAGs. The FAGs are given to the States as tied grants, with the condition that the full amount goes to local government. The States are required to pay the grants in full, without undue delay, and this must be certified by the Auditor-General.<sup>165</sup> There is no evidence that the States ‘cream off’ any of this money. They cannot legally do so.

It is clear that in making s 96 grants to the States, the Commonwealth has full control over how the money is allocated. The Commonwealth may impose conditions on grants that ensure that every cent is passed on to local government. Accordingly, if this is a problem at all (and there does not appear to be any

<sup>161</sup> Expert Panel, above n 3, 7.

<sup>162</sup> Ibid 8.

<sup>163</sup> A J Brown and Ron Levy, ‘Trust the People on Constitutional Change’, *The Australian*, 2 October 2010. The Leader of the National Party, the Hon Warren Truss, has also noted that ‘Councils believe that if Federal money for Local Government is provided through the States, the States may not pass all the money through to them’: Letter from Warren Truss to James Spigelman, 2 November 2011, Submission No 550 <<http://localgovrecognition.gov.au/sites/localgovrecognition.gov.au/files/Truss.pdf>>.

<sup>164</sup> John Kane, ‘Constitutionalising Local Government’ [2006] (July–September) *Public Administration Today* 24, 25; Nicola McGarrity and George Williams, ‘Recognition of Local Government in the Commonwealth Constitution’ (2010) 21 *Public Law Review* 164, 184.

<sup>165</sup> *Local Government (Financial Assistance) Act 1995* (Cth) s 15.

evidence that it is) it is not a problem that requires a constitutional solution. It can be resolved simply by changing the conditions imposed by the Commonwealth.

The Expert Panel also sought evidence from local government associations across Australia to substantiate such allegations. Those of New South Wales, Victoria, Western Australia and Queensland asserted that they were unaware of any such problem.<sup>166</sup> Others pointed to issues such as delays in receiving funding for ‘urgent or new programs which lack existing processes and structures to distribute the funds to councils’ (which no doubt would also have occurred if the Commonwealth had been providing the funding directly), and the fact that national competition payments made to the States were not always shared with local government, despite there being no obligation to do so. The Panel concluded that:

Although there may be delays, nothing presented to the panel suggests that these are substantial. Nor was the panel able to conclude that there has been a significant diminution of funds by reason of State deduction of administrative charges.<sup>167</sup>

The argument about cutting out the ‘middleman’ also appears to be based upon intuitive assumptions rather than facts. The research conducted by Newspoll on behalf of the Expert Panel noted that because the people surveyed could not see any tangible benefits arising from the financial recognition of local government in the *Constitution*, they conjured up benefits including:

possibly ‘cutting out the middle man’ (ie state government) resulting in less red tape, fewer delays and fewer opportunities for states to ‘take their cut’ out of it ...<sup>168</sup>

Academic commentators have tended to direct such arguments at FAGs and the complexity of the horizontal fiscal equalisation process undertaken by the State Local Government Grants Commissions. Kane has argued, in reference to State Local Government Grants Commissions, that:

councils resent the fact that around \$18 million a year is absorbed by State administrative and resource costing. One of the advantages they anticipate from Constitutional recognition is an increase in revenue brought about by cutting out the State’s middleman role.<sup>169</sup>

The assumption appears to be that the administration involved in undertaking the horizontal fiscal equalisation process is time-consuming and costly, and that these costs are deducted from the Commonwealth’s grants before they are passed on to local government. Again, there is no evidence to support this assumption. The costs of running the State Local Government Grants Commissions are borne by the States and are not deducted from the Commonwealth grants given to local

166 Expert Panel, above n 3, 5.

167 Ibid.

168 Ibid 64.

169 Kane, above n 164, 25. The same point was repeated in McGarrity and Williams, above n 164, 184.

government through the States.<sup>170</sup> Local government does not bear the cost of the ‘middleman’. Moreover, the Commonwealth relies upon the assessments made by these State bodies even in allocating its direct funding to local government through the Roads to Recovery program. If the Commonwealth were to move exclusively to direct funding of local government and the State Local Government Grants Commissions were shut down, the cost of administering this funding would be passed to the Commonwealth. The Commonwealth would most likely take the view that it should deduct its own administrative costs from any grants it makes (as the Commonwealth currently does in relation to its costs in administering the GST). Hence, direct funding could have the effect of reducing Commonwealth funding to local government because of the shift of administrative cost to the Commonwealth.

The ‘efficiency’ of having a central distribution system is also doubtful. In order to make the relevant assessments, the central agency would need information about every different local government body. This information is held by States because they establish, monitor and oversee local government bodies. However, if the Commonwealth agency had to deal with each local government body separately in order to collect the information that it needed, this would appear to be both expensive and inefficient. As the Commonwealth Grants Commission has noted, it would also be extremely difficult to establish a central formula for an equalised distribution of funds to local government that takes account of the vast differences between local government bodies across different States.<sup>171</sup>

It has also been claimed that ‘a centralised system means that there will be less potential for cost and blame shifting between the three tiers of government’.<sup>172</sup> It is not clear why this should be so. Local government would still receive grants from two different sources: the Commonwealth and the States. Each could still blame the other for insufficient funding and each could still shift responsibilities on to local government, which are not adequately funded. Indeed, the existence of two separate sources of funding would appear more likely to blur responsibility and accountability, exacerbating cost and blame shifting.

## **2 The Relationship Between Commonwealth Funding and Vote-Buying**

The fourth argument — that the Commonwealth might give more money to local government if it could give it directly — might have more substance to it. On a logical basis, there would appear to be no reason why the Commonwealth would give one cent more to local government if it could give the money directly, rather than through the States. This was confirmed by Commonwealth officers

170 House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Rates and Taxes: A Fair Share for Responsible Local Government* (2003) 127 [6.113], 206; PriceWaterhouseCoopers, *National Financial Sustainability Study of Local Government* (2006) 53.

171 Commonwealth Grants Commission, *Special Report 1979 on Financial Assistance for Local Government* (1979) 18.

172 McGarrity and Williams, above n 164, 184.

in evidence before a Senate Select Committee, where it was stated that any constitutional change allowing direct funding of local government would not make ‘a material difference’ to the amount of funding given to local government.<sup>173</sup>

Arguments that constitutional recognition of local government is ‘required to guarantee Commonwealth funding of local government’<sup>174</sup> are flawed, because the mere fact that the *Constitution* is amended to *permit* the Commonwealth to make grants directly to local government, rather than through the States, does not in any way *guarantee* that it will give more money, or indeed, any money. It is not an obligation to fund local government, or to fund it to a particular level.

The Expert Panel noted that through its consultations it found that there was a ‘widely held assumption that ensuring the Commonwealth can directly fund local government would result in increased funding for local government.’<sup>175</sup> ALGA’s submission to the Expert Panel also seemed to be based upon the assumption that direct funding will result in *more* funding for local government and *secure* funding.<sup>176</sup> It is not clear why either should be the case, as even if such an amendment were passed, the Commonwealth could still increase or reduce its funding to local government as it does now. The Expert Panel observed that ‘the level of Commonwealth funding to local government will always depend on Commonwealth political and policy decisions’. Merely permitting direct funding will not necessarily change the level of funding. The Panel also pointed out that ‘the Commonwealth had long acted on the basis that it could make direct grants on any subject matter, and continues to do so’.<sup>177</sup> Hence it would be unrealistic to expect any significant increase in Commonwealth funding to local government as a consequence of a constitutional amendment which entrenches a position that the Commonwealth Government believes already exists.

However, the usually unexpressed argument is that the Commonwealth Government is more interested in buying the support of voters than properly distributing public revenue to the States and local government so that they can fulfil their responsibilities. The underlying contention is that the Commonwealth is therefore more likely to provide additional funds to local government if it can get the benefit of public appreciation by erecting signs everywhere claiming Commonwealth benevolence. The Expert Panel coyly referred to this as the ‘political advantages’ of direct funding.<sup>178</sup> Persistent pork-barrelling through

173 Senate Select Committee on the Reform of the Australian Federation, Committee Transcript, 5 May 2012, 42.

174 Evidence to Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, Canberra, 5 May 2011, 94, referring to the submission of the Naracoorte Lucindale Council and Regional Development Australia Sunshine Coast Inc.

175 Expert Panel, above n 3, 6.

176 Australian Local Government Association, Submission No 334 to Expert Panel on Constitutional Recognition of Local Government, *Inquiry into the Constitutional Recognition of Local Government*, October 2011, 15–16.

177 Expert Panel, above n 3, 6.

178 Ibid 4.

regional funding programs by all sides of politics<sup>179</sup> and the littering of Australian roads and schools with signs proclaiming Commonwealth funding would seem to give such an argument some credence.

However, a problem arises if this is the true argument that underpins a proposed constitutional amendment. Which Commonwealth Minister will publicly proclaim that a constitutional amendment is necessary because the Commonwealth Government is not prepared to give adequate financial support to local government unless it can buy sufficient votes and kudos by doing so directly (with signs), rather than through the States? If this is the *real* reason for the constitutional amendment, how can it ever be put to the people? Should the *Constitution* be amended to accommodate poor behaviour on the part of the Commonwealth? Again, the preparedness of the Commonwealth to distribute its public money is ultimately a political issue. A constitutional amendment of this kind is unlikely to achieve such an outcome.

## **H Potential Financial Consequences of Direct Commonwealth Funding**

If the *Constitution* were to be amended to permit the Commonwealth to fund local government directly, it is likely that all Commonwealth funding to local government would be allocated directly and that the allocation of financial assistance grants through the States would cease. A further likely consequence is that the per capita distribution to the States would cease, as grants would no longer be made to each State, and that instead the Commonwealth would make the distribution amongst local government bodies on an equalisation basis.

Back in 1991 the Commonwealth Grants Commission considered that the distribution of local government general purpose grants amongst States should eventually move to an equalisation basis.<sup>180</sup> However, the potential results of its redistribution according to different methods would have had an extreme effect on some States. For example, its redistribution of funds according to ‘institutional relativities’ would have resulted in the NSW distribution of \$243.1 million in 1990–91 being reduced to \$74 million — a loss of \$169.1 million or over two thirds of Commonwealth funding for local government in the State. Victoria would have lost \$142.2 million and Queensland would have gained \$172.6 million.<sup>181</sup> The Commonwealth Grants Commission concluded:

In principle, we believe it would not be appropriate to continue indefinitely an interstate distribution of general purpose assistance for local

179 See, eg. Australian National Audit Office, *Performance Audit of the Regional Partnerships Programme* (ANAO, Audit Report No 14 vol 1, 2007–08) 21–6.

180 Commonwealth Grants Commission, *Report on the Interstate Distribution of General Purpose Grants for Local Government 1991* (1991) xxv.

181 *Ibid* 58. See also the table setting out the losses for NSW and Victoria under a ‘complementary relativities’ approach at 65.

government on a basis (equal per capita) which departs so markedly from fiscal equalisation.

In practice, however, there are several considerations which governments would need to take into account in considering any change to the present basis of distribution. They include the following:

- (i) The per capita basis of distribution is simple and predictable. An equalisation basis would be much more complex and would deliver less predictable outcomes, particularly in the early years.
- (ii) A change to an equalisation system would entail extra administrative costs for both the Commonwealth and the States. These costs have to be considered in relation to the relatively small size of the pool.
- (iii) A move to an equalisation basis would be very disruptive to local authorities in New South Wales and Victoria.<sup>182</sup>

Despite these issues, the House of Representatives Standing Committee on Economics, Finance and Public Administration proposed that 'FAGs should be distributed on the basis of equalisation principles and not on a per capita basis'.<sup>183</sup>

Given that the most likely consequence of a successful constitutional amendment allowing direct funding of local government is that the Commonwealth will move to a direct funding formula, and given that such a formula will most likely be an equalisation one (as there would be no point in allocating money to each State once grants to local government cease being made through the States), the most likely result would be a significant and devastating loss of funding for local government in New South Wales and Victoria (which are the States that benefit most from the current per capita distribution). While it will no doubt be argued that the Commonwealth would avoid such a step because of the political ramifications, a successful constitutional change could well provide the justification for change and for the implementation of a 'fairer' system which is supported by the Grants Commission and parliamentary committees. Once the people of those States become aware of this risk during a referendum campaign, it is doubtful whether majorities in either States would support such a referendum. It would only require the failure of the referendum in one other State, such as Western Australia, for it to be lost overall.

## V CONCLUSION

Perhaps the reason why the constitutional recognition of local government has remained always the bridesmaid but never the bride is that constitutional

182 Ibid xxv.

183 House of Representatives Standing Committee, above n 170, 112.

recognition is an end in itself lacking cogent reasons and serious consideration of the likely consequences. Most supporters of the campaign, who are by and large members of local government bodies, appear to think that constitutional recognition will improve their status and the respect accorded to local government and that it will give rise to rivers of gold. Yet, respect is earned by deeds, not by constitutional recognition, as most State governments would acknowledge.

As for the rivers of gold, they might yet turn to rivers of tears for local government bodies in the more populous areas if an equalisation approach to direct funding was taken by the Commonwealth. Funding would also most likely become tied to conditions that impose uniform Commonwealth policies on local government bodies, reducing their autonomy and their capacity to serve the particular interests of their own communities.

The main problem with this referendum proposal, however, is that it is difficult to find any compelling reason for it. Even if direct Commonwealth funding of local government is in peril, exactly the same amount of funding can still be given to local government using s 96 grants. If additional funding is desired from the Commonwealth, then additional funding may also be given through s 96 grants. There is no cost to local government and no 'inefficiency' in these grants being made through the States. Indeed, it is likely to be more costly and more inefficient if they are centralised in a Commonwealth body which does not have the relevant information and understanding of local government.

The most plausible argument that can be made out is that the Commonwealth will inadequately fund local government unless it can gain the kudos attached to funding it directly. It is unlikely, however, that the Commonwealth would wish to make this argument in support of a constitutional referendum. Indeed, Australian voters should not be exhorted to change the *Constitution* to accommodate poor behaviour on the part of the Commonwealth.

Finally, the Attorney-General, Nicola Roxon, in a speech on constitutional reform, has pointed to the fact that 'constitutional reform is a high stakes contest' where 'the potential benefits need to be carefully weighed against the certain costs', both financial and in time and effort.<sup>184</sup> She warned with respect to the constitutional recognition of local government that there is 'a very real prospect that to proceed and lose would be a final death knell for local government recognition — future governments would just not waste the time and effort on a fourth attempt'. She added that 'support needs to come from a broad base of the community' and that so far there has not been sufficient leadership and engagement from the community with respect to local government constitutional recognition.<sup>185</sup> Unless such leadership and community engagement is clearly shown, local government might not make it to referendum altar at all this time around.

184 Nicola Roxon, 'A Static Constitution? — A Very Australian Standoff' (Speech delivered at the Melbourne University Centre for Comparative Constitutional Studies 2012 Conference on Recent Developments in Constitutional Law, Melbourne, 19 July 2012) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Third%20Quarter/19July2012-AstaticConstitutionAVeryAustralianStandoff.aspx>>.

185 Ibid.