SOLVING THE DEMOCRATIC DEFICIT PROBLEM FOR INSOLVENT LOCAL GOVERNMENT AUTHORITIES

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The administration of financially distressed Central Darling Shire Council and Central Coast Council raises concerns regarding the effective management of insolvent local government authorities ('LGAs') in New South Wales and Australia generally. When administrators are appointed to manage LGAs (sometimes for extended periods of time), local communities are democratically underrepresented and adversely impacted in the absence of local voice. There is a lack of uniform regulation and a lack of timely and clear insolvency and restructuring processes embedded in the statutory frameworks which govern local government insolvency across the Australian states and the Northern Territory. These insolvency processes require reconsideration and reform. It is recommended that clearly articulated provisions replace some of the broad discretions of the local government legislation to prescribe clear specifications for the timely return of insolvent LGAs to solvency and to democratic elections.

I INTRODUCTION

This paper considers processes put in place to manage the fiscal distress and insolvency of local government authorities ('LGAs') and addresses the effectiveness of those processes in meeting the needs of relevant stakeholders, including the needs of the local Australian community members which the LGAs represent. LGAs play a significant role in the lives of Australians across the states and in the Northern Territory ('NT') ('relevant Australian jurisdictions').[1] LGAs deliver important local and regional priorities through the provision of amenities and services to local areas and are concerned with localised regulatory tasks intended to address the differing needs and priorities of their local communities, 'reflected in such activities as drainage, immunisation, public toilets, water coolers, waste disposal and the cleaning and maintenance of local streets, footpaths

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1 The Australian Capital Territory does not have a separate system of local government: see 'Three Levels of Government: Governing Australia', *Parliamentary Education Office* (Web Page, 19 July 2022) <https://peo.gov.au/understand-our-parliament/how-parliament-works/three-levels-of-government/three-levels-of-government-governing-australia/>.

and roads'.[2] LGAs are also an important representative of local communities through which local 'voice' and local 'choice' can be realised: through local government, members of local communities are given the opportunity to voice and realise their local aspirations and highlight local concerns.[3]

Fears have been raised regarding the funding of LGAs that have questioned their future viability throughout Australia.[4] It is recognised, both in Australia, and internationally, that LGAs must be 'fiscally sustainable' in order to carry out their important tasks.[5] The Local Government Association of South Australia has suggested that an LGA's

> long-term financial performance and position is sustainable where planned long-term service and infrastructure levels and standards are met without unplanned increases in rates or disruptive cuts to services.[6]

While there has been extensive debate (and disagreement) as to the precise definition, measure, and achievement of 'fiscal sustainability', there has been considerably less academic contemplation as to the best way to regulate and manage the insolvency of LGAs.[7]

The *Corporations Act 2001* (Cth) ('*Corporations Act*'), pertaining to the management of insolvent and financially distressed corporations, defines 'solvency' as the ability to meet all debts 'as and when they become due and payable', and defines 'insolvency' with reference to a failure to meet that test for solvency.[8] A similar definition for insolvency is proposed by this paper in consideration of LGAs. The concept of 'fiscal distress' or 'fiscal failure' may be described as the situation where an LGA is not generating, or does not have,

2 Lyndon Megarrity, 'Local Government and the Commonwealth: An Evolving Relationship' (Research Paper No 10, Parliamentary Library, Parliament of Australia, 31 January 2011) 2.

3 Michael Clarke and John Stewart, 'The Local Authority and the New Community Governance' (1994) 20(2) *Local Government Studies* 163, 168.

4 See, eg, Brian Dollery and Lin Crase, 'A Comparative Perspective on Financial Sustainability in Australian Local Government' (Working Paper No 01-2006, Centre for Local Government, University of New England, September 2006) 4; Brian Dollery and Bligh Grant, 'Financial Sustainability and Financial Viability in Australian Local Government' (2011) 11(1) *Public Finance and Management* 28, 29.

5 Some recent academic examples of this include: Thomas Ahrens and Laurence Ferry, 'Financial Resilience of English Local Government in the Aftermath of COVID-19' (2020) 32(5) *Journal of Public Budgeting, Accounting and Financial Management* 813; Joseph Drew, 'Sort[ition]ing Out Local Government Financial Sustainability' (2020) 44(2) *Public Administration Quarterly* 262; Abe Mbulawa, 'Understanding the Impact of Financial Sustainability on South African Municipalities' (2019) 15(1) *Journal for Transdisciplinary Research in Southern Africa* 150.

6 'LGA Policy Manual', *Local Government Association of South Australia* (Web Page) <https://www.lga.sa.gov.au/about/overview-of-the-lga/corporate-documents/lga-policy-manual/financial-sustainability/7.1-financial-sustainability-and-governance>.

7 Dollery and Crase (n 4) 2–4; Brian Dollery, Lin Crase and Joel Byrnes, 'Overall Local Council Sustainability in Australian Local Government' (Working Paper No 02-2006, Centre for Local Government, University of New England, September 2006) 2.

8 *Corporations Act 2001* (Cth) s 95A ('*Corporations Act*').

sufficient revenue to meet its financial obligations as and when they fall due. However, it must be acknowledged that applying such a definition is inherently difficult in practice. There have been considerable differences of opinion academically and judicially as to the meaning of solvency and insolvency and it must be recognised that *ex ante* determination of insolvency is extremely challenging.[9]

The first case of LGA financial failure in Australia occurred with Central Darling Shire in December 2013 and further cases have followed. There are concerns that the financial impacts of COVID-19 and recent years of fiscal downturn will have flow-on effects for LGAs. This concern is supported by the Local Government Information Unit, a local authority membership organisation which released a summary of the financial impacts of COVID-19 on Australian LGAs and reported significant revenue decreases throughout Australia, including in Sydney, Adelaide, and Fremantle, and also noted that in the Victorian City of Greater Geelong more than 500 staff members had been stood down due to financial hardship.[10] While state governments had put in place local government economic stimulus packages, it is evident that a number of LGAs have suffered dire financial hardship due to the pandemic and due to ongoing financial challenges in recent years. Commentators on this topic have also suggested that there are more Australian LGAs facing fiscal collapse who do not realise their grim financial situations and that there is a pattern of dysfunction emerging in local government.[11] Further LGA fiscal distress or insolvency is therefore probable, and it is important that effective processes exist to manage LGA insolvency and to protect relevant stakeholders and local community members.

This paper seeks to demonstrate the shortcomings in the insolvency processes for LGAs. In Part II it will establish that the existing legislation across relevant Australian jurisdictions is inconsistent, and does not facilitate clear, transparent, and timely administrations of insolvent LGAs. With reference to New South Wales ('NSW') case examples in Part III, it will establish that it is possible for administrations to run for exceptionally long periods of time under broad discretions to the detriment of local community members who are left without democratically elected local representation. The constitutional standing of local government is considered in Part IV to inform recommendations for reform. It is recommended that clearly articulated provisions replace some of the broad discretions of the local government legislation, which could be modelled on the *Corporations Act*. A comparison of existing local government insolvency

9 For a discussion of this difficulty in the context of s 588G of the *Corporations Act* (n 8) and the directorial duty to avoid insolvent trading, see, eg, David Morrison, 'The Australian Insolvent Trading Prohibition: Why Does It Exist?' (2002) 11(3) *International Insolvency Review* 153, 157.

10 Mark Davies, 'Financial Impacts of COVID-19 on Australian Local Governments', *Local Government Information Unit* (Web Page, 28 April 2020) <https://lgiu.org/briefing/financial-impacts-of-covid-19-on-australian-local-governments/>.

11 See some discussion of these opinions in Olivia Ralph, 'Local Governments Face Their Financial Future as "Patterns of Dysfunction" Emerge', *ABC News* (online, 3 December 2021) <https://www.abc.net.au/news/2021-12-03/local-governments-face-financial-future/100672458>.

processes with the management of insolvency corporations under the *Corporations Act* demonstrates that a flexible process could still be achieved while also providing greater clarity, transparency, accountability, and timeliness to better protect the interests of stakeholders, and members of local communities.

II CURRENT FRAMEWORK FOR THE REGULATION OF FISCALLY DISTRESSED LGAS

Each relevant Australian jurisdiction has enacted separate and different legislation which generally provides for the appointment of an administrator (or commissions as they are called in Tasmania and Western Australia, or official managers as they are called in the NT) to replace elected councillors for a variety of reasons relating to deficiencies in the conduct of the LGA's affairs, including the insolvency of the LGA.[12] There is no distinct process for the management of insolvency which considers insolvency-specific concerns.

The removal of elected councillors in the event of insolvency is arguably analogous with the removal of directors in an administration or liquidation under the *Corporations Act*, where the insolvency of the company means that an impartial insolvency practitioner is best placed to manage investigation and control of the company while its future is determined, or while creditors are paid distributions and the company is dissolved.[13] However, there are several important and distinct differences in the regulation of insolvent LGAs under local government legislation, compared with the regulation of insolvent corporations under the *Corporations Act*, and several concerning inadequacies in the existing local government legislation. First, there are different purposes which LGAs serve and societal interests which should be better protected by local government legislation. Secondly, unlike the nationally applicable *Corporations Act*, there are separate and distinct statutes governing insolvent LGAs in each relevant Australian jurisdiction which use inconsistent terminologies and provide different laws. Further, unlike the highly detailed *Corporations Act* under which specialist insolvency practitioners are appointed, local government statutes prescribing the administration of insolvent LGAs are largely silent on the prescribed timings,

12 *Local Government Act 1993* (NSW) ch 9 pt 2 div 6 ('*Local Government Act NSW*'); *Local Government Act 2019* (NT) pt 17.3 ('*Local Government Act NT*'); *Local Government Act 2009* (Qld) ch 5 pt 1 div 3 ('*Local Government Act Qld*'); *Local Government Act 1999* (SA) ch 13 pt 3 div 1 ('*Local Government Act SA*'); *Local Government Act 1993* (Tas) pt 13 div 2 ('*Local Government Act Tas*'); *Local Government Act 2020* (Vic) pt 7 div 7 ('*Local Government Act Vic*'); *Local Government Act 1995* (WA) pt 2 div 7 ('*Local Government Act WA*'). For a further summary of the relevant laws, see Elizabeth Streten, 'Local Public Entities in Distress: A Critical Analysis of the Australian Approach' in Laura Coordes, Yseult Marique and Eugenio Vaccari (eds), *When Liquidation Is NOT an Option: A Global Study on the Treatment of Local Public Entities in Distress* (Academic Paper, Insol International, 2022) 50 ('Local Public Entities in Distress').

13 External administration of companies is regulated pursuant to *Corporations Act* (n 8) ch 5, with provisions pertaining to administration at pt 5.3A (see also at pt 5.3B), and liquidation at pts 5.4–5.6. See also at ch 5A pertaining to, inter alia, deregistration.

processes, and rights of stakeholders, leaving much of the process to the broad discretions of state government officers and their local government appointees.

Each of these matters is considered in turn below and collectively demonstrates that the existing statutes would benefit from reform to ensure that they effectively manage local government insolvency in a timely, consistent, and transparent manner and in the interests of all stakeholders.

A *The Purpose of Local Government*

Australian academics have deliberated upon the purpose of LGAs throughout Australia. Dollery and Grant, for example, have reflected upon the 'complex multi-dimensional nature' of LGAs having a function in 'democratic, economic, environmental, and social' aspects of society.[14] Similarly Dollery, Crase, and Byrnes, with reference to Aulich, have recognised multiple purposes of Australia's LGAs: firstly, providing for 'local choice and local voice' in decentralised governance facilitating 'local differences and system diversity' and, secondly, through the efficient provision of local services.[15] Megarrity has described local government as a way to ensure that local communities function effectively on a day-to-day basis and provide basic services and facilities to Australian suburbs, towns, and rural areas, and further as a way to potentially build 'local identity and social cohesion'.[16]

An important aspect of local government is the ability for local communities to elect their own representatives who are accountable to those local communities, and dependent upon them for any re-election.[17] This is arguably of particular importance to local communities during tumultuous times, such as recent and present years where the COVID-19 pandemic and ongoing inflation and fiscal uncertainty have heavily impacted upon local businesses, local communities, and vulnerable people within communities, such as Indigenous groups within rural local government areas.

Local representation and accountability are displaced during any period when an LGA's council members are removed and replaced with an unelected administrator, commissioner, or official manager. That unelected officer fulfils the functions of a councillor, but unlike a councillor the officer is not appointed through, and is not subject to re-election by, the local community. Rather, the appointment is made under the legislation and is subject to that legislation and state or NT oversight. It is therefore important to ensure that administration periods are limited to only such time as is absolutely necessary to achieve the administration's purposes and that LGAs are returned to democratically elected councillors as soon as possible.

14 Dollery and Grant (n 4) 29.

15 Dollery, Crase and Byrnes (n 7) 4, quoting Chris Aulich, 'Australia: Still a Tale of Cinderella?' in Bas Denters and Lawrence E Rose (eds), *Comparing Local Governance: Trends and Developments* (Palgrave Macmillan, 2nd ed, 2005) 193, 198.

16 Megarrity (n 2) 2.

17 Clarke and Stewart (n 3) 165.

In the case of an insolvent LGA, the purpose of the administration would seem to encompass the management of creditor rights in accordance with priorities and principles mirroring the *Corporations Act*, except for necessary modifications to account for local government-specific concerns, and the return of the local government council to a state of solvency or fiscal positivity under the management of those democratically elected. It is not inconsistent with insolvency law policy to address objectives beyond the maximisation of creditor distributions. While Australian literature has historically given little consideration to the role and goals of its insolvency laws,[18] previous inquiries into corporate insolvency law have indicated that Australian corporate insolvency law remains creditor-focused but also values broader social purposes.[19] In any event, the policies pertaining to insolvent LGAs are distinguishable from the policies pertaining to insolvency of private corporations given LGAs' role in governing and serving local Australian communities. The societal role of LGAs demands that public interests be considered in legislative policy.

This is not to suggest that the interests of the public local community supersede the interests of creditors in the insolvency of an LGA. It is a fundamental principle of private insolvency law that creditor interests become paramount in circumstances of insolvency. The cases of *Walker v Wimborne* and *Kinsela v Russell Kinsela Pty Ltd* support the position that where the company is insolvent, or near insolvency, then the duty to a company as a whole may, in appropriate cases, require directors to consider the interests of creditors.[20] Creditor rights and creditor participation in insolvency processes are acknowledged to be a necessary component of an effective insolvency regime as evident in recommended insolvency international benchmarks.[21] However, in the case of public local government, the process for administration must not only ensure the timely and transparent priority distribution to creditors, but also the timely and transparent resolution of insolvency in the interests of returning local government to solvency and to the important elected representation of local community.

The public administration of local government is distinguishable from private administration or private liquidation. Unlike in a private liquidation, any insolvency does not lead to winding up of the local government itself, but rather, upon cessation of the local government's administration it returns to democratically elected representatives whether through reinstatement of previous councillors or new elections. A private liquidation is undertaken by an insolvency specialist — an insolvency practitioner — and at its completion the company is

18 Ross P Buckley, 'The Systemic Benefit of Insolvency Law: A Lacuna in the Australian Literature' (2003) 11(1) *Insolvency Law Journal* 38, 38.

19 Australian Law Reform Commission, *General Insolvency Inquiry: Summary of Report* (Report No 45, 13 December 1988) 2.

20 *Walker v Wimborne* (1976) 137 CLR 1, 7 (Mason J, Barwick CJ agreeing at 3); *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722, 732 (Street CJ, Hope JA agreeing at 733, McHugh JA agreeing at 733).

21 Roman Tomasic, 'Creditor Participation in Insolvency Proceedings: Towards the Adoption of International Standards' (2006) 14(3) *Insolvency Law Journal* 173, 187.

deregistered and ceases to exist,[22] whereas the LGA does not necessarily have an insolvency specialist appointed and it continues in perpetual succession (albeit the governments of the relevant Australian jurisdictions may dissolve or amalgamate an LGA under their legislative powers).[23] LGAs remain an important service provider and voice for local community. Therefore, the removal of elected representatives and their delayed replacement may result in community disempowerment, or at least perceptions of unfairness and dissatisfaction with local government decisions and outcomes, particularly for members of minority groups or vulnerable members of the community. Indeed, this occurred in Australia where local Aboriginal elders felt unheard during the COVID-19 pandemic while their local council was subject to a long period of external administration.[24]

Subject to any established wrongdoing, local communities are arguably best served by the representatives that they elect, who are accountable to their communities for any re-election and are best able to represent the will, voice, and identity of their local communities.[25] Of course, there is merit in removing councillors from office and imposing penalties and/or disqualifications upon them where they are found guilty of fraud, breach of duty, or some other wrongdoing. This is similar to the civil, criminal, and/or disqualification penalties that may be imposed upon directors found guilty of wrongdoing, such as a breach of their duty to prevent insolvent trading.[26]

However, to minimise community frustrations and to facilitate community cohesion, any removal of elected representatives should be for a clearly and transparently legislated purpose and with clearly transparent legislated processes to be undertaken in a timely manner. There is a need for the timely management of the administration, just as there is recognised merit in the timely management of any private administration or liquidation of a fiscally distressed or insolvent company under the *Corporations Act*.[27]

The *Corporations Act* provides strict timelines in administrations and liquidations to facilitate efficient and expedient external administrations by the appointed insolvency practitioner, such as the timing of creditor meetings and the issuing of

22 *Corporations Act* (n 8) ss 601AC–601AD.

23 *Local Government Act NSW* (n 12) s 220; *Local Government Act NT* (n 12) s 37; *Local Government Act Qld* (n 12) s 11; *Local Government Act SA* (n 12) s 35; *Local Government Act Tas* (n 12) s 19; *Local Government Act Vic* (n 12) s 14; *Local Government Act WA* (n 12) s 2.5.

24 Sean Rubinsztein-Dunlop and Tynan King, '"Our Opinion Was Never Valued": Wilcannia Speaks Out', *ABC News* (online, 28 October 2021) <https://www.abc.net.au/news/2021-10-28/wilcannia-tells-their-side-of-covid-outbreak-story/100558160>.

25 Clarke and Stewart (n 3) 168.

26 *Corporations Act* (n 8) s 588G.

27 John Glover and John Duns, 'Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9(3) *Insolvency Law Journal* 130, 138.

reports to creditors.[28] The legislation governing insolvent LGAs should similarly facilitate timeliness and as swift a return to democratic election as possible. Unfortunately, it will be demonstrated below that this is not always achieved, especially in NSW where there are broad discretions in timings with respect to the cessation of an administration and the return of democratic elections.

B *The Lack of Consistent, Clear, and Transparent Regulation*

The regulation of local government across the relevant Australian jurisdictions is not uniform and regulation 'differ[s] between the various States and the Northern Territory in accordance with the provisions of the applicable Local Government Acts and associated acts and regulations'.[29] Each relevant Australian jurisdiction has its own different main governing legislation: the *Local Government Act 1993* (NSW) ('*Local Government Act NSW*'), the *Local Government Act 1989* (Vic) and the *Local Government Act 2020* (Vic), the *Local Government Act 1999* (SA), the *Local Government Act 2009* (Qld), the *Local Government Act 1993* (Tas), the *Local Government Act 1995* (WA), and the *Local Government Act 2019* (NT). These governing statutes are not replicas of each other. Indeed, even the terminology for local government is inconsistent across the relevant Australian jurisdictions; they can be called 'councils',[30] 'local governments',[31] 'district councils',[32] 'county councils',[33] 'municipal councils',[34] or 'regional councils'.[35] However, the statutes do share a significant similarity in the broad discretionary power which they afford to respective government officers, and a broad similarity in the lack of detailed provisioning for the processes, timings, and rights of stakeholders in the administration of an insolvent LGA.

Each state has taken legislative steps to recognise local government in its respective state constitution: the *Constitution Act 1902* (NSW),[36] the *Constitution Act 1975* (Vic),[37] the *Constitution Act 1934* (SA),[38] the *Constitution of Queensland*

28 By way of example, an administrator under the *Corporations Act* (n 8) must hold a first meeting of creditors within eight business days of being appointed, unless the court allows an extension of time, and at least five business days' notice of the meeting must be given to creditors: at s 436E.

29 Streten, 'Local Public Entities in Distress' (n 12) 55. A further summary of the relevant laws and discussion of this lack of uniformity is at 55–6.

30 *Local Government Act Vic* (n 12) pt 2.

31 *Local Government Act Qld* (n 12) ch 2.

32 *Local Government Act SA* (n 12) ch 3.

33 *Local Government Act NSW* (n 12) pt 5.

34 *Local Government Act SA* (n 12) ch 3.

35 *Local Government Act NT* (n 12) ch 21.

36 *Constitution Act 1902* (NSW) s 51.

37 *Constitution Act 1975* (Vic) ss 74A–74B.

38 *Constitution Act 1934* (SA) s 64A.

2001 (Qld),[39] the *Constitution Act 1934* (Tas),[40] and the *Constitution Act 1889* (WA).[41] The regulatory frameworks are also similar in that they generally involve a department of local government, a local government grants commission, and ancillary regulatory bodies, and similar in that all governments of the relevant Australian jurisdictions have oversight of their local governments.[42]

There are several differences with respect to the regulations of local governments from jurisdiction to jurisdiction, including regulations beyond the administration process itself. Some significant examples relate to the ability of LGAs to form organisations to serve their communities, the ability to borrow money, and the ability to raise revenue. These will be discussed briefly for completeness and context, before a more detailed consideration of the administration processes follows.[43]

The ability of LGAs to form organisations to serve their communities varies from jurisdiction to jurisdiction, as does the terminology referring to these organisations. In Queensland and Victoria organisations may be formed called 'beneficial enterprises'.[44] The NT can form 'local government subsidiaries'.[45] In NSW, there is the ability to form 'county councils', but LGAs in NSW 'must not form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity, except' with Ministerial consent or as provided for by the *Local Government Act NSW*.[46]

Even the sourcing of revenue is inconsistent across the relevant Australian jurisdictions. The main source of income for LGAs is often the collection of rates,

39 *Constitution of Queensland 2001* (Qld) ch 7.

40 *Constitution Act 1934* (Tas) pt IVA.

41 *Constitution Act 1889* (WA) pt IIIB.

42 Brian Dollery, Sue O'Keefe and Lin Crase, 'State Oversight Models for Australian Local Government' (2009) 28(4) *Economic Papers* 279, 280; Streten, 'Local Public Entities in Distress' (n 12).

43 For a further summary of these laws, see Streten, 'Local Public Entities in Distress' (n 12).

44 See *Local Government Act Qld* (n 12) ch 3 pt 2 div 1. Also, under the *Statutory Bodies Financial Arrangements Act 1982* (Qld) pt 9 ('*Financial Arrangements Act*'), a local government may need the Treasurer's approval before entering into particular financial arrangements. See also *Local Government Act Vic* (n 12) pt 5 div 3.

45 *Local Government Act NT* (n 12) pt 4.4. The Minister for Local Government may approve a local government subsidiary to come into existence on a specific date as a body corporate that has the powers and functions conferred or assigned by its constitution in order to carry out functions related to local government on behalf of its consistent council or councils: at ss 67–8. The constitution must be approved by the Minister: at s 69(1). By way of example, the Minister has approved the constitution of CouncilBiz: see 'Local Government Act 2019', *Northern Territory Government Department of the Chief Minister and Cabinet* (Web Page, 2024) <https://cmc.nt.gov.au/supporting-government/local-government/local-government-act-2019>.

46 *Local Government Act NSW* (n 12) s 358.

and it has been estimated that rates form roughly 38% of their revenue.[47] A significant difference in the ability of LGAs to raise revenue is due to statutory rate caps. NSW and Victoria have a cap on the amount of rates they can collect.[48] Rate capping can significantly restrain revenue options, especially in relation to LGAs that already have a very narrow revenue-raising range due to different and 'non-discretionary' characteristics,[49] such as location and population size.[50] By way of example, rural or regional local governments may have a large physical locality with a small population size that minimises the ability to raise significant funds. A discussion of the benefits (such as protecting ratepayers from extortionate increases) and disadvantages (such as limiting the accrual of revenue for LGAs) of rate capping is beyond the scope of this paper. But it is relevant to note the inconsistent approach across different states.

There are also inconsistencies with the approach to borrowing, which is not identical across the relevant Australian jurisdictions. In NSW, a local government can borrow and provide security for borrowings 'by way of overdraft or loan or by any other means approved by the Minister',[51] but the 'Minister may, from time to time, impose limitations or restrictions … [upon] particular council[s] or councils generally'.[52] Revised Borrowing Order 09-21 retains a 'limitation on councils to borrow only in Australia and in Australian currency' and states that borrowing is 'not a function that council can delegate'.[53] In contrast, in Queensland a local government is required to obtain the Treasurer's approval to undertake any borrowings not sourced from the Queensland Treasury Corporation,[54] whereas in Victoria, a local government 'cannot borrow money unless the proposed borrowings were included in the budget or a revised budget'.[55]

47 'Background on Local Government Funding', *Australian Local Government Association* (Web Page, 2024) <https://alga.com.au/policy-centre/financial-sustainability/background-on-local-government-funding/>.

48 *Local Government Act 1989* (Vic) s 185D; *Local Government Act 1993* (NSW) s 509. See also Brian Dollery and Dana McQuestin, 'No Panacea: Rate-Capping in South Australian Local Government' (2017) 56 *Economic Analysis and Policy* 79, 79–80.

49 Brian Dollery, Joel Byrnes and Lin Crase, 'A Typology of the Sources of Council Sustainability' (Working Paper No 04-2007, Centre for Local Government, University of New England, March 2007) 15.

50 Ibid 7.

51 *Local Government Act NSW* (n 12) s 622.

52 Ibid s 624.

53 Ross Woodward, 'Circulars: 09-21 Revised Borrowing Order', *Office of Local Government NSW* (Web Page, 2024) <https://www.olg.nsw.gov.au/council-circulars/09-21-revised-borrowing-order/>, discussing Minister for Local Government (NSW), *Local Government Act — Borrowing Order* (09-21, 13 May 2009).

54 *Financial Arrangements Act* (n 44) pt 5 div 2, pt 7A; *Statutory Bodies Financial Arrangements Regulation 2019* (Qld) s 5, sch 2; Queensland Treasury, *Statutory Body Handbook: A Practical Guide to Establishment and Management of Statutory Bodies* (Handbook, February 2021) 8. See also Streten, 'Local Public Entities in Distress' (n 12) 58–9.

55 *Local Government Act Vic* (n 12) s 104.

Turning specifically to the administration of insolvent LGAs, elected councillors are replaced in each of the relevant Australian jurisdictions in certain circumstances, including insolvency of the LGA, and replaced by an administrator (or commissioners as they are called in Tasmania and Western Australia, and official managers as they are called in the NT).[56] Hereafter, for the purposes of brevity, the term 'administrator' will be used to signify the appointment of an administrator, commissioner, or official manager in this respect. There is no separate distinct process for managing insolvency. The administrator, once appointed, assumes the role of the elected councillors, who no longer hold office, and undertakes the functions of the councillors until the appointment ends.[57] State and NT officers have extensive discretions in overseeing the appointee, including in determining salary.[58]

Significantly, there are also various discretions as to the timings to terminate administrations.[59] Some statutes prescribe timeframes for the return of elected representation; for example in the NT the legislation prescribes that no later than 12 months after placing the LGA under 'official management', and after considering any submissions made in response to an investigator's report, the relevant Minister must reinstate the suspended council members or dismiss them from office, and upon any choice to dismiss them the Minister must call a general election immediately.[60] If no choice is made within 12 months, then within 90 days from the cessation of the 12-month period, the Minister must call a general election.[61] However, a number of statutes provide for open-ended or extended renewal of the appointment period. The NSW local government legislation leaves open the time period for return to elections; the Governor there is empowered to appoint an administrator for a 'specified term' until the time after a fresh election is called or, if the administration is terminated at an earlier time by the Governor, at that earlier time.[62] Similarly, the South Australian legislation empowers appointment of an administrator where an LGA is declared 'a defaulting council'

56 *Local Government Act NSW* (n 12) ch 9 pt 2 div 6; *Local Government Act NT* (n 12) ch 17; *Local Government Act Qld* (n 12) ch 5 pt 1 div 3; *Local Government Act SA* (n 12) ch 13 pt 3 div 1; *Government Act Tas* (n 12) pt 13 div 2; *Local Government Act Vic* (n 12) pt 7 div 7; *Local Government Act WA* (n 12) pt 2 div 7.

57 *Local Government Act NSW* (n 12) s 258(1); *Local Government Act NT* (n 12) ss 321(1)–(2); *Local Government Act Qld* (n 12) s 124; *Local Government Act SA* (n 12) s 273(9); *Local Government Act Tas* (n 12) s 232; *Local Government Act Vic* (n 12) ss 230–1(1)(a); *Local Government Act WA* (n 12) s 2.38. See also Streten, 'Local Public Entities in Distress' (n 12).

58 *Local Government Act NSW* (n 12) s 258(2); *Local Government Act NT* (n 12) ss 321(3)–(4); *Local Government Act Qld* (n 12) ss 124(6)–(7); *Local Government Act SA* (n 12) s 273(11); *Local Government Act Tas* (n 12) s 233; *Local Government Act Vic* (n 12) s 231(1)(c); *Local Government Act WA* (n 12) sch 2.4 cl 5.

59 *Local Government Act NSW* (n 12) ch 9 pt 2 div 6; *Local Government Act NT* (n 12) ss 318–19; *Local Government Act Qld* (n 12) s 123; *Local Government Act SA* (n 12) s 273; *Local Government Act Tas* (n 12) s 231; *Local Government Act Vic* (n 12) s 230.

60 *Local Government Act NT* (n 12) ss 318–19.

61 Ibid s 319(2).

62 *Local Government Act NSW* (n 12) ss 256–8. See also Streten, 'Local Public Entities in Distress' (n 12) for further summary of these laws.

and provides that the administrator will 'administer the affairs' of the LGA until it 'ceases to be a defaulting council'.[63] The Tasmanian legislation provides for a 12-month appointment which may be extended for 'any further period or periods of 12 months'.[64]

As established above, it is of considerable importance to local communities that their local voice is empowered through the democratically elected local representatives. However, the local government legislation across each relevant Australian jurisdiction varies significantly in prescribing timeframes to facilitate the cessation of administrations and the timely return of LGAs to democratic elections. While the NT contemplates a maximum timeframe of some 12 months, NSW, Tasmania, and South Australia permit rolling extensions or open-ended periods of administration determined under broad discretions. This enables the removal of elected councillors, and their replacement with non-elected officers, where the opportunity to hold fresh elections for replacement councillors is delayed for potentially long and inconsistent periods of time.

This is in stark contrast to private administration under the *Corporations Act,* where there is a succinct and prescribed timeframe, usually some 20–5 business days from commencement, before the administrator recommends, and creditors choose, one of three options: (1) to end the voluntary administration and return the company to directorial control; (2) to approve a deed of company arrangement which is then administered under its terms, including terms regarding its timeframe, by a deed administrator; or (3) to a appoint a liquidator to wind up the company for its ultimate dissolution.[65] Contrary to a private administration where directors are removed for a finite and legislated period of time pending resolution of the company's future by creditors under the management of an insolvency specialist, the administration of insolvent local government involves councillors being removed for inconsistent discretionary periods of time while a state- or NT-elected local government officer assumes the council role. In the case of NSW there is the potential for the removal of councillors for unknown extended discretionary periods of time,[66] and indeed Part III will demonstrate that in the case of Central Darling Shire Council ('CDSC') it has resulted in an LGA administration extending past a decade. This is a concerningly long period for a local community to be electorally unrepresented.

At times, but not always, a public inquiry is a prerequisite to the removal of councillors and appointment of an administrator. In NSW, for example, the Governor has power to 'declare all civic offices' of an LGA to be vacant after a public inquiry has been held and where 'the Minister has recommended that the Governor make such a declaration'.[67] Under the same proclamation, the Governor

63 *Local Government Act SA* (n 12) s 273.

64 *Local Government Act Tas* (n 12) s 231.

65 *Corporations Act* (n 8) pt 5.3A. See especially at ss 439A–439C.

66 *Local Government Act NSW* (n 12) ch 9 pt 2 div 6.

67 Ibid s 255(1).

also has power to appoint an administrator.[68] However, there are some limited legislated circumstances in which an administrator may be appointed without an inquiry.[69] This opens the door for private inquiries, or an absence of any inquiry, which may prevent transparency and accountability. In Part III, another case example of the Central Coast Council ('CCC') will demonstrate this possibility.

There remains a broad discretion in the hands of each separate relevant Australian jurisdiction in the management of insolvent or financially distressed LGAs. There is an absence of clear and consistent legislated requirements, processes, and outcomes required of the administrators, and at times an absence of clearly articulated circumstances for the cessation of insolvency administrations. This raises concerns for the application of statutes in a way that ensures the effective, consistent, timely, and transparent management of financially distressed local government. An examination of NSW case examples in Part III demonstrates some of the negative consequences of this discretionary regime.

III INSTANCES OF FINANCIAL DISTRESS IN NSW LGAS

Two examples will be discussed: the CDSC and the CCC. These cases demonstrate that the broad discretions granted, and the absence of consistent, clear, timely, and transparent processes, have negatively impacted upon local NSW communities.

A *CDSC*

One significant example, and the first occasion of local government financial failure in Australia, relates to the financial failure of the CDSC. The CDSC is a concerning ongoing example of a financially and structurally challenged local government council being operated under state discretion by an unelected administrator for an extraordinarily long period of time. Indeed, the administration has continued (1) even though the administrator advised that the council had been returned to a financially positive standing, and (2) even through a national emergency pandemic that left, at least parts of, its constituents vulnerable and frustrated.[70]

CDSC is a prime example of a regional LGA hampered by large diverse regional locality with a small population from which to levy limited rate revenue. The CDSC is the largest LGA in NSW having a total area of 53,000 square kilometres,

68 Ibid s 256.

69 Ibid s 257. For further discussion, see Streten, 'Local Public Entities in Distress' (n 12) 61.

70 Central Darling Shire Council, *Annual Report 2019–20* (Report, 2020) 9 ('*CDSC Annual Report*'); Rubinsztein-Dunlop and King (n 24). For further discussion, see Streten, 'Local Public Entities in Distress' (n 12); Elizabeth Streten, 'Local Government Insolvency in an Indigenous Australian Community' (March 2022) *Insol I-Read Student Newsletter* ('Local Government Insolvency').

but with the smallest population of some 1,725 people.[71] This rural shire encompasses several communities in the far west of NSW, including Menindee, Ivanhoe, White Cliffs, and Wilcannia, which have diverse commercial, geographical, and cultural dynamics.[72] The administrator of the council commented on the challenge this caused on 3 August 2021, noting that the

> limited rate base means that [the council relies] heavily on government funding to ensure essential services are provided to the community, including roads, water and sewerage services and waste management.[73]

One particular concern of the CDSC is the provision of affordable housing, with the region facing 'unique housing challenges particularly for Aboriginal housing, linked to diverse economic, environmental, and social pressures, and a complex Policy context'.[74]

The CDSC reported adverse financials from January 2011 and had made numerous requests seeking government financial assistance.[75] In December 2013, the NSW Minister for Local Government suspended the council and an interim administrator was appointed.[76] Following this appointment there were various endeavours to address the financial and structural concerns pertaining to the sustainability of the council; this included provision of an administrator's report and 'recovery plan',[77] and the Minister for Local Government's appointment of a commissioner to hold a public inquiry into, inter alia, the financial management and asset management by the council and to consider whether the elected council had the capacity to resolve the outstanding issues pertaining to the council's future sustainability.[78] The Commission's final report was handed down on 22 October 2014, and recommended, inter alia, that 'all civic offices at Central Darling Shire Council be declared vacant and that an Administrator be appointed until the Council elections in 2020'.[79]

71 Central Darling Shire Council, 'Your Council', *Central Darling Shire Council* (Web Page, 2024) <https://www.centraldarling.nsw.gov.au/Council/Organisation?BestBetMatch=largest%20council%20area%20in%20nsw.%20covering|7a3d1385-9017-458a-b205-cc1004af53a0|2a3bb99a-8170-42b9-9861-b58b172651a8|en-AU>.

72 Ibid; 'Central Darling', *NSW Government* (Web Page, 2024) <https://www.yourcouncil.nsw.gov.au/council-data/central-darling/2021/>.

73 Bob Stewart, 'Local Government Week 2021' (Media Release, Central Darling Shire Council, 3 August 2021).

74 RK Stewart, Submission to NSW Regional Housing Taskforce, Parliament of New South Wales (August 2021).

75 A historical summary is provided in Joseph Drew and Nicole Campbell, 'Autopsy of Municipal Failure: The Case of Central Darling Shire' (2016) 22(1) *Australasian Journal of Regional Studies* 79, 89–91. See also Streten, 'Local Public Entities in Distress' (n 12) 68–70; Streten, 'Local Government Insolvency' (n 70).

76 Drew and Campbell (n 75) 79.

77 Ibid 91; Richard Colley, *Central Darling Shire Council Public Inquiry* (Report, 22 October 2014) 4.

78 Colley (n 77) 3; Streten, 'Local Public Entities in Distress' (n 12) 69.

79 Colley (n 77) 5.

Further extension of the administration period has continued, resulting in the CDSC entering its 10th year of administration in 2023, and as at the time of writing the administration is expected to continue until at least September 2024.[80] This is despite the administrator noting that the council was 'in a positive financial position', citing the need for the administration to continue because 'there is still much work to be done with … financial and governance systems to ensure … s[us]tainability in the long term'.[81] The result is an extraordinary period of administration, totalling over a decade. During this time, there has been an absence of council elections and, in the 2019–20 Annual Report, the administrator for the council recognised that '[t]his continues to cause concern for some residents in the community, regarding the loss of local democracy and community advocacy to other levels of government'.[82] The duration of the administration and lack of council elections, well past the council apparently being in positive financial position, begs a number of questions as to the purpose, duration, and clear frameworks of administration for financially distressed LGAs.

The COVID-19 pandemic has arguably raised even more challenges for the CDSC. As its administrator communicated to the community:

> The 2019–20 Financial Year has been one of many challenges of drought, floods, fire and COVID19. All have contributed to the challenges of maintaining services and governance which has demanded considerable organisational capacity at the expense of day to day issues. … We continue to address the many outstanding legacy issues that face Central Darling Shire, such as the sale of land for unpaid rates was a big step forward.[83]

There were COVID-19 positive cases throughout Central Darling Shire in 2021, which raised particular concerns in the Indigenous communities of Wilcannia.[84] The media has reported that some members of this community 'caught COVID-19 as the virus tore through overcrowded houses in Wilcannia, mostly public

80 Shelley Hancock, 'Central Darling Administration Extended' (Media Release, NSW Government, 4 October 2019); Oliver Brown, 'Central Darling Shire Council's 10-year Administration under Review by NSW Government', *ABC News* (online, 4 July 2023) <https://www.abc.net.au/news/2023-07-04/central-darling-shire-council-administration-review-nsw-gov/102560114>; Central Darling Shire Council, 'Council Will Struggle to Afford 2024 Local Government Election' (Media Release, 18 December 2023).

81 *CDSC Annual Report* (n 70) 9. For further discussion, see Streten, 'Local Public Entities in Distress' (n 12); Streten, 'Local Government Insolvency' (n 70).

82 *CDSC Annual Report* (n 70) 7. See also Streten, 'Local Public Entities in Distress' (n 12).

83 *CDSC Annual Report* (n 70) 7–8.

84 Bob Stewart, 'A Message from the Administrator', *Central Darling Shire Council* (Web Page, 18 August 2021) <https://www.centraldarling.nsw.gov.au/News-articles/COVID-Admin-message>; Susan Green, 'COVID in Wilcannia: A National Disgrace We All Saw Coming', *The Conversation* (online, 16 September 2021) <https://theconversation.com/covid-in-wilcannia-a-national-disgrace-we-all-saw-coming-167348>; Lorena Allam, 'Wilcannia Covid Crisis: Governments Sidestep Responsibility as Response to Outbreak Labelled "a Joke"', *The Guardian* (online, 31 August 2021) <https://www.theguardian.com/australia-news/2021/aug/31/wilcannia-covid-crisis-governments-sidestep-responsibility-as-response-to-outbreak-labelled-a-joke>; Streten, 'Local Government Insolvency' (n 70).

housing'.[85] It was reported that the community had approached the CDSC seeking emergency funding for tents and sleeping bags, and the council itself had sought accommodation from the state-established Local Emergency Management Committee to isolate the most at-risk members of that community.[86] However, it is reported that 'Wilcannia's community leaders left the [Local Emergency Management Committee] because they said their voices were not heard'.[87] Measures taken to protect this community from the pandemic, including the provision of vaccinations, were heavily criticised and the subject of political finger-pointing between state and federal tiers of government.[88] CDSC general manager Greg Hill was reported telling the Australian Broadcasting Corporation that warnings about overcrowding in the community had fallen upon 'deaf ears at the state level'.[89]

The long period of administration and the approach to administration is subject to the discretion of the state, even past the council's alleged return to a positive financial position. The elected councillors were removed from office, essentially from December 2013, and as at the time of writing there is no intention to hold a democratic election now until September 2024 at the earliest. Until that time, the administrator, currently Robert Stewart, 'performs all the functions of an elected Council and is supported by the General Manager and two Directors'.[90] Even the administrator has recognised that members of the community have concerns pertaining to the absence of local democracy and community advocacy to other levels of government during this decade-long administration.[91]

The NSW state government has been empowered with extremely broad discretions to determine when external administration will end, and in this instance has exercised those discretions to leave the local community without elected councillors for over a decade, notwithstanding the LGA's return to fiscal positivity and notwithstanding clear concerns raised by members of the community. This local community has been unrepresented for a significant timeframe, even during the global COVID-19 pandemic, with at least some community members left frustrated and feeling voiceless. While there may be ongoing concerns and difficulties with the LGA achieving long-term financial sustainability it is questionable whether only a state-appointed administrator is capable of managing the LGA after its return to a positive fiscal position/solvency. A decade is an exceedingly long time for the community to have been unrepresented and this case illustrates that there is a need for improved processes in the administration of financially distressed LGAs to bring an end to administration processes in a timely

85 Rubinsztein-Dunlop and King (n 24).

86 Ibid.

87 Ibid.

88 Allam (n 84).

89 Rubinsztein-Dunlop and King (n 24).

90 'Our Administrator', *Central Darling Shire Council* (Web Page, 2024) <https://www.centraldarling.nsw.gov.au/Council/Organisation/Administrator>.

91 *CDSC Annual Report* (n 70) 7.

and efficient manner and to facilitate the democratic election of council members to represent constituents. It demonstrates a clear need for clearly articulated provisions regarding the termination of an administration in prescribed circumstances, which in the case of an insolvency administration should include a return to fiscal positivity/solvency.

B *CCC*

Another example is the sixth largest council in Australia, the CCC, located north of Sydney in NSW. The council members were suspended on 30 October 2020 and a subsequent inquiry has taken place while an administrator has been appointed to the council. The three-week public inquiry was completed in October 2021. The terms of reference for the inquiry were heavily focused on reviewing financial decisions and the financial position of the CCC,[92] given that the council has been described by its administrator Richard Mark Persson as the 'greatest financial calamity' in NSW's local government history.[93]

In April 2021, the administrator released his final report which detailed a 'financial collapse' of the CCC and was careful to stress that the collapse was not attributable to the earlier 2016 merger of Gosford City Council and Wyong Shire Council into the larger CCC, but rather due to 'mismanagement of their budget over the years following the merger'.[94] This no doubt was a response to unpopularity of forced mergers. Experts have cautioned against compulsory consolidation in Greater Sydney councils being sought to enhance financial sustainability.[95] The administrator also acknowledged that the unusual circumstances for CCC in relation to the 'IPART water pricing decision, bushfires, floods and COVID … exacerbated and accelerated the collapse of the operating budget'.[96] The report of the public inquiry was released on 10 February 2022 and while it acknowledged that these factors did make it harder, they were known factors to the governing body in its budgetary decisions.[97] It considered poor budgeting decisions, which were not restrained in response to these factors, and included a recommendation that the Department of Local Government should consider developing and implementing training programs for local government staff and councillors in financial management and planning.[98]

92 Roslyn McCulloch, *Central Coast Council Public Inquiry Report* (Report, 10 February 2022) 4–8.

93 Mary-Louise Vince and Emma Simkin, 'Central Coast Council's Dire Finances, Including More than $565 Million of Debts, Laid Out in Damning Report', *ABC News* (online, 2 December 2020) <https://www.abc.net.au/news/2020-12-02/central-coast-council-runs-up-565-million-in-debt/12944496>, discussing Dick Persson, *Administrator's 30 Day Interim Report* (Report, 2 December 2020).

94 Dick Persson, *Administrator's Final Report* (Report, 15 April 2021) 4.

95 Joseph Drew and Brian Dollery, 'The Impact of Metropolitan Amalgamations in Sydney on Municipal Financial Sustainability' (2014) 34(4) *Public Money and Management* 281, 287.

96 Persson (n 94) 4.

97 McCulloch (n 92) 80–1.

98 Ibid 14.

On or about 31 May 2022, the Minister for Local Government, the Hon Wendy Tuckerman MP, announced that a 'local government election for CCC will be held on 14 September 2024' to return the local government to elected representatives representatives.[99] This is a timelier administration than the prior example.

However, Coast Community News reported on a private inquiry being held behind closed doors and that the Commission had determined that it would not release the names or transcripts of the persons interviewed in private.[100] This raises concerns about accountability and transparency in the inquiry process towards creditors and other stakeholders. It has clearly raised such concerns in local community news.[101] It would be beneficial to improve the regulatory framework by including clearer and more transparent statutory provisions dealing with public inquiries into fiscally distressed LGAs, and clearer explanations of any permitted exceptions for private hearings. This could avoid community uncertainty and concern and increase transparency in the process.

IV NECESSARY REFORMS

The existing legislative framework is largely dependent on discretion and lacks clearly prescribed processes for insolvent LGAs. There are also considerable inconsistencies between each state and the NT. This might lead to a suggestion that the legislation should be replaced with federal nationwide legislation which would ensure a more consistent approach. However, the historical and constitutional status of local government does not facilitate this due to: (a) the context and legal standing of local government in Australia; and (b) the lack of standing for any federal legislation.

Local government remains unrecognised within the *Constitution* and is unlikely to be constitutionally recognised anytime in the immediate future. The consequence is that each Australian state, and the NT, is empowered to make laws pertaining to LGAs, not the federal government.

The federal Parliament is granted specific power, concurrent with each of the states, to make laws pertaining to bankruptcy and insolvency.[102] Under this power, the federal government has enacted a suite of legislation providing the framework

99 Central Coast Council, 'Central Coast Council Local Government Election Date Set for 2024' (Media Release, 31 May 2022).

100 Merilyn Vale, 'Council Public Inquiry Hearings Over but No Timeframe for Report', *Coast Community News* (online, 28 October 2021) <https://coastcommunitynews.com.au/central-coast/news/2021/10/council-public-inquiry-hearings-over-but-no-timeframe-for-report/>.

101 Kevin Brooks, 'The Not-So-Public-Inquiry', *Coast Community News* (online, 13 August 2021) <https://coastcommunitynews.com.au/central-coast/news/2021/08/the-not-so-public-inquiry/>.

102 *Constitution* s 51(xvii).

for bankruptcy of natural persons,[103] and a separate suite of legislation which includes a framework, inter alia, for the insolvency of corporate entities.[104] This segregated approach is the subject of criticism and there is an increasing call for Australia's corporate insolvency and bankruptcy laws to be amalgamated.[105] Recent reforms have seen an increasing harmonisation of corporate insolvency and personal insolvency regulation.[106] Further, the Parliamentary Joint Committee on Corporations and Financial Services has handed down a report on corporate insolvency in Australia which recommends a comprehensive review of both personal and corporate insolvency in Australia to consider, inter alia, further recommendations on options to 'enhance public interest objectives and the effectiveness of, and interaction between, the personal and corporate insolvency systems' which may result in further steps towards harmonisation.[107]

As it stands, at the time of writing, Australian insolvency law remains segregated. The Commonwealth also does not infrequently carve out exceptions for state involvement or assistance in particular circumstances.[108] Even in the context of Australia's *Corporations Act*, there is no entire Commonwealth uniform law, and pt 1.1A for example enables 'a state enactment … [to] declare a particular matter to be an "excluded matter" in relation to the whole or some specified portion of the *Corporations Act*'.[109]

In this respect, the regulation of local government, and the management of insolvent and/or financially distressed LGAs, is separate and falls within the purview of local government legislation enacted by each state and the NT. Therefore, it is the states and the NT rather than the federal government that may enact laws pertaining to the administration of financially distressed and insolvent LGAs, and it seems very unlikely that this position will change any time soon.

There are a number of reasons for local government's lack of constitutional recognition: firstly, local government was originally excluded from the *Constitution*, arguably as a consequence of the constitutional founders' perceptions of local government at that time; secondly, there are considerable difficulties

103 This includes the *Bankruptcy Act 1966* (Cth), the *Bankruptcy Regulations 2021* (Cth), and the *Insolvency Practice Rules (Bankruptcy) 2016* (Cth).

104 This includes the *Corporations Act* (n 8), the *Corporations Regulations 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth), and the *Insolvency Practice Rules (Corporations) 2016* (Cth).

105 See, eg, Andrew Keay, 'The Unity of Insolvency Legislation: Time for a Re-Think?' (1999) 7(1) *Insolvency Law Journal* 4.

106 An example of such harmonisation was seen in relation to the regulation of corporate and personal insolvency practitioners introduced by the *Insolvency Law Reform Act 2016* (Cth).

107 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency in Australia* (Final Report, July 2023) 92 ('*Corporate Insolvency Report*'). At the time of writing the consequent reforms are unknown.

108 Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is It Time to Formalise COAG's Place in the Australian Federation?' (2011) 39(1) *Federal Law Review* 103, 105–6.

109 RI Barrett, 'Towards Harmonised Company Legislation: "Are We There Yet"?' (2012) 40(2) *Federal Law Review* 141, 158, quoting *Corporations Act* (n 8) s 5F(1).

involved in altering the *Constitution*; thirdly there is an arguable lack of incentive, and debatable benefit, in doing so; and fourthly it is improbable that the state governments would politically support any centralisation of powers in favour of the federal government and/or any loss of state control over local government processes and oversight. These reasons are discussed briefly in turn below.

A *Exclusion from the* Constitution

At the time of Federation, local government was not foreseen as a third tier of government but rather as an extension of the colonial states in the provision of services to local areas.[110] Arguably, the founders generally perceived local government to be a matter purely of domestic concern for the state colonies.[111] The *Constitution* omitted reference to local government and no recognition was awarded to it in 1901. Further, all later attempts to rectify this have been wholly unsuccessful.[112]

B *Endeavours to Amend the* Constitution

Although there have been various debates and attempts to amend the *Constitution* to recognise local government, the mode to amend is set at a high standard.[113] Section 128 of the *Constitution* provides that it may be amended by a law passed with an absolute majority of both Houses of Parliament before being submitted to the Australian people to consider by referendum at least two months, but less than six months, after being passed by Parliament. In prescribed circumstances, the law to amend the *Constitution* may be submitted to referendum where it has passed only one of the two Houses of Parliament on two separate occasions.[114] At referendum the law must receive voting approval of the Australian people through a double majority, meaning that the referendum will only pass if it receives: (1) a majority of voters in a majority of states; and (2) a majority of voters across Australia.[115] This high standard means that any referendum is unlikely to succeed without significant support and campaigning from all involved.

There have been numerous, failed attempts to alter the *Constitution* by this mode including in 1974, when financial recognition of local government was proposed, and in 1988, when a more symbolic recognition was proposed.[116] In 2008, Brown established three primary reasons for the failure to achieve constitutional

110 Megarrity (n 2) 3.

111 Discussions regarding the 'founding fathers' individual positions and reasonings are set out in ibid, quoting *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 September 1897, 205–6 (Edmund Barton).

112 AJ Brown, 'In Pursuit of the "Genuine Partnership": Local Government and Federal Constitutional Reform in Australia' (2008) 31(2) *University of New South Wales Law Journal* 435, 440–9.

113 See ibid for a summary of these debates.

114 *Constitution* s 128.

115 Ibid.

116 Brown (n 112) 440–5.

recognition for local government: (1) the symbolic value of recognising local government has not convinced many Australians of a sufficiently substantive or practical value in recognition; (2) many Australians held 'a negative opinion of the effectiveness and capacity of local government to function as a "genuine" constitutional partner'; and (3) many did 'not see the entrenchment of local government' as the best way to achieve larger federal reform.[117] There has, in essence, been a failure to convince the Australian people of the merit of constitutional recognition for local government.

A further attempt was again made in 2013 with the Constitution Alteration (Local Government) Bill 2013 (Cth) on the financial recognition of local government. While the Bill passed Parliament, political circumstances and controversy meant that it was not put to a referendum.[118] The calls for constitutional recognition have not subsided, but these historical failures suggest that a more holistic consideration of local government and a more robust and considered approach are required to achieve any successful recognition. It would also require a well thought out campaign to champion the merits of local government recognition. The problem is that there is arguably no political impetus for such a campaign at the current time, and the benefits of recognition are debatable.

C *The Debate Regarding the Benefits of Constitutional Recognition*

Arguably, a practical benefit of constitutional recognition is achieving greater recognition of the role of local government leading to reform for a stronger, better funded and, more competent local government system.[119] However, it is debatable whether there is an existing 'problem' flowing from the current lack of constitutional recognition of local government that needs to be, or would be, 'fixed' through constitutional amendment.[120]

One argument frequently made in favour of constitutional recognition of local government is that any direct funding of local government by the federal government is subject to constitutional challenge. As shown in the court decisions of *Pape v Federal Commissioner of Taxation*[121] and *Williams v Commonwealth*,[122] the absence of a constitutional head of power supporting the expenditure of such funds called into question the ability of the federal government to validly provide direct funding to local government under its Roads to Recovery Program and other

117 Ibid 436.

118 AJ Brown and Paul Kildea, 'The Referendum That Wasn't: Constitutional Recognition of Local Government and the Australian Federal Reform Dilemma' (2016) 44(1) *Federal Law Review* 143, 143.

119 Brown (n 112) 464.

120 Anne Twomey, 'Always the Bridesmaid: Constitutional Recognition of Local Government' (2012) 38(2) *Monash University Law Review* 142, 161–2 ('Always the Bridesmaid').

121 (2009) 238 CLR 1.

122 (2012) 248 CLR 156 ('*Williams*').

programs such as the Local Government Energy Efficiency Program and the Safer Suburbs Program.[123]

Given the clear challenges for local government being adequately funded,[124] it is highly important that federal funding avenues remain open and not subject to constitutional challenge. However, arguably the capacity for federal funding is already available under a different avenue. Section 96 of the *Constitution* facilitates federal grants to state governments 'on such terms and conditions as the [federal] Parliament thinks fit'. While s 96 does not permit the making of *direct* grants to local governments, *indirect* grants could be made by way of grants to the state governments with a relevant condition that the grant be conferred to local government or for local government purposes. This suggests that there is a sufficient mechanism by which federal funding may be made to LGAs, albeit subject to state governments' choosing to accept or reject the funding on the conditions determined and to pass the funding on to local governments.

Furthermore, there is an important consensual element to s 96 which arises from 'the fact that it is up to the states [to choose] whether to accept or reject funding upon the conditions made'.[125] If constitutional recognition were included to facilitate direct federal funding it would enliven the potential for the federal government to circumvent state governments and to fetter their ability make laws for local government.[126] Any refusal for federal government to fund local government without the political benefits attached to funding it directly would seem churlish and in aid of such a political agenda.[127] There are certainly significant weaknesses in the argument that the funding of local governments *cannot* be achieved without constitutional amendment.

An argument could be made that the absence of constitutional recognition and constitutional amendment prevents the federal government from facilitating consistent and adequate nationwide insolvency legislation for the administration of insolvent LGAs. However, it is not the intention of this paper to suggest that the state governments are themselves *incapable* of introducing legislation which ensures consistent, timely, transparent, and effective management of insolvent LGAs. To the contrary, there exist examples where the states have worked together to create uniform legislation, which is the same or substantially the same across all or several jurisdictions through national applied laws or national model legislation or otherwise. By way of example, the *Uniform Consumer Credit Code* is an illustration of how the states have previously worked together to form unified

123 Twomey, 'Always the Bridesmaid' (n 120) 151–3.

124 See, eg, Dollery and Crase (n 4); Dollery and Grant (n 4).

125 Anne Twomey, *Local Government Funding and Constitutional Recognition* (Constitutional Reform Unit Report No 3, January 2013) 35, citing *Williams* (n 122) 235 [148] (Gummow and Bell JJ), 270 [248] (Hayne J), 347 [501] (Crennan J).

126 Twomey, *Local Government Funding and Constitutional Recognition* (n 125) 75; Twomey, 'Always the Bridesmaid' (n 120) 164–5, 168–172.

127 This is discussed in Twomey, *Local Government Funding and Constitutional Recognition* (n 125) 92.

legislation with respect to consumer credit law across each of their jurisdictions, albeit that legislation was subject to criticism regarding its disparity, such as in Western Australia, and was later repealed and replaced with a national regime.[128]

It is not argued that the states are incapable of legislating consistent, transparent, and timely regulation of insolvent LGAs. Rather, the argument posed is that the existing legislation does not achieve this and warrants reconsideration and reform. Consequently, while it will be demonstrated that there are several clear problems with the existing regulation of LGAs, it is problematic to suggest that federal constitutional recognition of LGAs is the necessary cure-all solution.

That being said, there may be some benefit to the constitutional recognition of local government on the basis of acknowledging its role and importance in the Australian government system and constitutionally protecting it from abolition. In this regard, it is relevant to note the debate as to whether there should be an Indigenous constitutional recognition to facilitate an Indigenous voice and constitutional reform intended to address ongoing 'Indigenous constitutional vulnerability and powerlessness'.[129] The need for an Indigenous constitutional recognition is arguably more than symbolic; it is a practical step to reform an 'unfair power relationship' between the Indigenous people and their colonisers through a 'constitutional empowerment' acting as a 'circuit-breaking solution to Indigenous constitutional vulnerability and powerlessness'.[130] It is intended to address the 'constitutional and structural' disadvantage of Indigenous Australians by recognising that Indigenous peoples are a 'constitutional entity' within Australia worthy of a recognised 'sovereign status'.[131] A voice for Indigenous Australians established only by legislation would be vulnerable to abolition or modification or defunding by the government, whereas a constitutionally enshrined voice would be better protected and only subject to change by the involved high mode required to amend the *Constitution*, as described above.[132] Some parallel may be drawn to local government, where constitutional recognition would arguably also be a 'constitutional empowerment' and recognition of local government sovereignty impacting upon any ability to abolish local government.[133] However, it is notable that the Indigenous constitutional recognition referendum was unsuccessful in meeting the required double majority.

128 For a discussion of the *Uniform Consumer Credit Code*, see David Niven and Tim Gough, *The Operation of the Uniform Consumer Credit Code* (Report, August 2004). With thanks also to Nicola Howell, Queensland University of Technology, for her insights into this legislation.

129 Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) *University of New South Wales Law Journal* 629, 629.

130 Ibid 643.

131 Ibid 643–4.

132 Sally McNicol and James Haughton, 'Indigenous Constitutional Recognition and Representation', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/BriefingBook47p/IndigenousConstitutionalRecognitionRepresentation>.

133 Morris (n 129) 643.

D *Absence of Political Motivation*

There would be difficulty convincing the Australian people and relevant politicians of any benefits for local government constitutional recognition. Further, the general Australian population arguably has little regard for the Australian constitutional document itself, in stark contrast with the USA where American citizens would seem to recite their own constitution regularly.[134] This may be because there was no bloody war which was fought to procure its establishment; and rather the *Constitution* was the result of a series of meetings and conventions during the 1890s attended by representatives of the colonial states, then the subject of referendum approval and the passage of legislation by the British Parliament.[135] This gives rise to limited incentives for the public to engage with the *Constitution* and matters of referenda to facilitate local government recognition. This in turn removes political motivation for any change fuelled by popular demand.

There are also other political matters to consider. As it stands, the state governments have power and discretion over almost all aspects of local government. In the words of David Mitchell, barrister and Tasmanian delegate to the 1998 Australian Constitutional Convention, LGAs are not a 'third tier … of government' or indeed any 'tier' of government but rather a 'means used by the state governments for exercising aspects of their own administrative governmental functions' with local government 'created and maintained by state government legislation', their geographical extent 'determined by the state governments', the powers of local government 'determined by and conferred by state governments' and the authority to make regulations 'delegated and supervised by the state governments'.[136] With reference to any federal government involvement with local government, even direct funding support, Mitchell used vivid language, voicing 'a direct attack on state sovereignty and state government' and a statement that it 'dramatically moves the balance of governmental power from the states even further towards the Commonwealth', being a 'dramatic power shift'.[137] This impassioned response illustrates concerns surrounding political power in a complex federal versus state relationship. There is a concern that any federal constitutional recognition of local government would diminish state governments and their role.[138]

134 Greg Craven, 'The New Centralism and the Collapse of the Conservative Constitution' (Research Paper No 44, Parliamentary Library, Parliament of Australia, January 2006).

135 Ibid; 'Australian Constitution', *Parliamentary Education Office* (Web Page) <https://peo.gov.au/understand-our-parliament/how-parliament-works/the-australian-constitution/australian-constitution/#:~:text=The%20Constitution%20was%20approved%20in,new%20Australian%20Parliament%20was%20formed>.

136 David Mitchell, 'Why Local Government Should Not Be Recognised in the Constitution' (2012) 56(4) *Quadrant* 42, 42.

137 Ibid 45.

138 See, eg, Narelle Miragliotta, 'The Perils of Constitutional Recognition of Local Government', *The Conversation* (online, 24 May 2013) <https://theconversation.com/the-perils-of-constitutional-recognition-of-local-government-14471>.

E *State-Based Reforms*

Constitutional recognition of local government remains unlikely to occur in the short to medium-term future, if at all.[139] It is therefore incumbent upon each state government, and the NT government, to ensure the effective and consistent regulation of LGAs, including insolvent LGAs. This paper has demonstrated that the current legislation does not achieve this and that there is a democratic deficit problem for insolvent LGAs which needs to be solved.

It is in the interests of creditors and broader stakeholders, including community members, for far-reaching discretions to be moderated through reformed, clear, consistent, timely, and accountable legislative regulation, which returns insolvent LGAs to solvency and to democratic representation as swiftly as possible. The regulation could be modelled on the existing *Corporations Act* but adjusted to address the differences between private processes and the needs of local government insolvency administrations. The modified legislation should include prescribed processes for the realisation and cessation of the insolvency administration upon the occurrence of set events, such as the LGA's return to solvency, to facilitate the election of council representatives as soon as possible. This is not to suggest that a 20–5 business day model be adopted for LGAs, similar to private administration under the *Corporations Act*. The process of private administration for corporations under the *Corporations Act* serves an entirely different function from the administration of LGAs and would not be workable in the context of insolvent LGAs. Rather, it is suggested that a comprehensive review be undertaken, with reference to the *Corporations Act*, in order to recommend legislative options to enhance public interest, and to solve the democratic deficit problem for LGAs, through more proscriptive provisions which provide consistent, timely, and accountable processes for the management of insolvent LGAs.

The *Corporations Act* is not without its criticisms, and significant recommendations have recently been made for its improvement.[140] However, there is precedent for state government use of its provisions in the case of local government-related insolvency. In the case of Cudgegong (Abattoir) County Council trading as Mudgee Regional Abattoir, a sch 9 was added to the *Local Government Act NSW* which applied the insolvency provisions of the *Corporations Act* to the winding up of the county council as if it were a company. Alterations were made to the application of the *Corporations Act* in the schedule to address local government specific concerns; by way of example, the schedule facilitated a transference of the county council's liabilities to Mudgee Shire Council or Rylstone Shire Council (or to both) to the extent, and in proportions, to be specified in a

139 Bligh Grant and Joseph Drew, 'Local Government and the Australian Federation: Regionalisation, Regionalism and the Struggle for Constitutional Recognition' in Bligh Grant and Joseph Drew (eds), *Local Government in Australia: History, Theory and Public Policy* (Springer, 2017) 83, 114; Brown (n 112) 451.

140 *Corporate Insolvency Report* (n 107).

proclamation.[141] This case dealt with a county council, not a LGA itself. While this is a different scenario, it does evidence some measure of workability of the *Corporations Act* in the management of insolvency in local government matters.

It is not suggested that the *Corporations Act* be wholly adopted in the management of insolvent LGAs. There are acknowledged significant differences that must be managed; one significant example is the nature of LGAs to continue in existence, unlike the deregistration of corporations in liquidation. However, there is a need to address the lack of articulated management for insolvent LGAs. The case examples demonstrate particular concerns in NSW as to the duration of administrations, and the transparency and clarity of administration processes, which require redress in order to better protect local community members. The same scenario could also arise elsewhere, such as in South Australia and Tasmania where the legislation also leaves open extended periods of time for the appointment of an administrator while democratically elected councillors are removed from office. The legislation requires greater consistency and clarity across jurisdictions. The states and the NT could adopt uniform legislation, which is the same or substantially the same, through national applied laws or national model legislation which incorporates clearly articulated purposes and timeframes for the administration of insolvent LGAs and clearly articulated and consistent timeframes for cessation of these administrations to facilitate their return to democratic elections. The exact timings to be adopted should be determined after a comprehensive review.

V CONCLUSION

Local representation and accountability are displaced during any period when an LGA's council members are removed and replaced with an unelected officer. This impedes an important social and democratic function of local government in providing a voice for local communities and facilitating the development of local identity and local unity through local representatives who are accountable to the local community for re-election. The timeframe for the administration of an insolvent LGA must be minimised to only what is absolutely necessary to realise clearly articulated objectives in order to ensure that democratically elected representatives resume or assume the role of elected councillors as soon as possible.

Currently, local government legislation does not achieve this. A public inquiry is not always a prerequisite for the removal of elected councillors, and it is possible for administrations to commence without full public scrutiny of the decision to do so. Further, the legislation is inconsistent, and a number of jurisdictions do not clearly prescribe timeframes to facilitate expeditious return to democratic election: by way of example, the NSW local government legislation leaves open the time period for return to elections, and the Tasmanian legislation provides for a 12-month appointment which may be extended repeatedly for any further period or

141 *Local Government Act 1993 NSW* (n 12) sch 9. For further discussion, see New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 October 2003, 4397–400 (Cherie Burton); Streten, 'Local Public Entities in Distress' (n 12) 62–4.

periods of 12 months. It is therefore possible for administrations to run for exceptionally long periods of time to the detriment of local community members who are left without democratically elected local representation. While there is admittedly a need for flexibility to be retained, it is extremely undesirable for the legislation to provide broad discretions that enable administrations of extended periods of time. In NSW this has resulted in an administration of up to a decade, or more, even where the LGA was returned to a positive financial position. Too much is left to the broad, unarticulated discretion of state officers.

In the case of an insolvency administration or liquidation of a corporation under the *Corporations Act*, there are clearly prescribed outcomes, processes, and steps which the appointed insolvency practitioner must meet. A similar prescription should be included in local government legislation. While it is recognised that LGAs are not the same as corporations and that some modification and flexibility may be warranted, the *Corporations Act* models clear prescriptions and timelines which could be modified and relevant aspects incorporated into local government legislation.

Reform is needed to ensure that local government legislation in each state and the NT provides consistent, timely, and transparent regulations that detail clearly articulated processes to be undertaken within relevant timeframes by administrators appointed to insolvent LGAs. At minimum, the legislation should clearly articulate the termination of an insolvency administration in prescribed circumstances, which should include a return to fiscal positivity or solvency. Discretions should not be open-ended and undefined. Rather, the interests of stakeholders should be clearly taken into account including through transparent requirements for the return of LGAs to democratic election as soon as possible and through clear timeframes and accountability requirements incorporated into LGA insolvency administration processes.