Chapter Eleven

Local Government and the Commonwealth Constitution
A Case Against Recognition

The Honourable Michael Mischin

Our Commonwealth's Constitution was the product of long and thoughtful debate among the then colonies to establish a national government that was paramount in what they thought were clearly defined and limited areas of responsibility. The negotiators did so as equals, recognising that a national government was desirable and important.

They were also vigilant to preserve the autonomy of their respective governments. They recognised then – possibly more clearly than many do now – the importance of keeping government at a level that is responsive to the needs and influence of local communities, rather than distant and potentially unrepresentative. It was with that in mind that the Senate was intended as the "States house", providing the necessary balance against the interests of the more populous States.

Local government was not unknown in the colonies. The creators of the Commonwealth made a conscious decision, however, not to include reference to local governments in the Constitution. This was a sound decision, as a matter of principle. The Commonwealth Constitution was not a manifesto of rights and obligations between the new Commonwealth Government and its citizens; it was a compact defining and regulating the relationship between the colonies and the new, federal level of government they were establishing.

Local governments, such as they were, had no role to play in that decision-making and, understandably, no status. The levels – or, perhaps more accurately – facets, of government that were recognised were the Commonwealth, the States, and Territories.

Local governments were, and have remained, the creatures of the individual States, drawing their legitimacy, responsibilities and powers from State legislation.

Since federation, the role of local governments has expanded. So, too, has the power of the Commonwealth at the expense of the States. However, the fundamentals of our federation remain.

There continue to be moves to amend the Constitution in a variety of respects; some symbolic, some substantive. One proposal for amendment is to accord constitutional recognition to local governments.

This paper will present, for the purposes of encouraging discussion, an argument against such recognition.

Previous referenda

Section 128 of the Constitution has a "double majority" requirement; there must be both a majority of electors voting for the proposal in a majority of States, and also a majority of all electors in the States and Territories.[1]

There have been two unsuccessful section 128 referenda – in 1974 and 1988 – on the question of including local government within the text of the Constitution. They are edifying not only as examples of how one might go about the exercise, but because of the arguments raised in opposition to them. Though different in approach, they nonetheless had in common a desire to increase Commonwealth power and influence at the expense of the States.

The 1974 referendum was initiated by the Whitlam Government and had its origins in Whitlam's

zeal to change the Australian body politic by increasing the influence of the Commonwealth Government in all levels of society. His objectives were not a secret. While in opposition Whitlam had advocated direct funding of local governments, whom he envisaged as "partners" in a "new federalism".[2] He had also made it plain that this was to be at the expense of the States:

> The State boundaries arranged at Whitehall (UK) in the middle of the last century, and the local government boundaries devised in the State capitals early this century, have little relevance to today's needs. Ideally, our continent should have neither so few State governments nor so many local government units.[3]

Naturally, the architect of this new structure would not be the States that, as colonies, had created the Commonwealth of Australia, but the creature that had since evolved from their vision.

Whitlam sought to use the Commonwealth's dominant financial position to achieve some of his national goals through local government channels, rather than work through or be impeded by the States. While lacking constitutional authority to intervene directly in local government, this did not prevent his Government from making "special purpose grants" to them, one example being the Regional Employment Development Scheme (an employment creation program to address unemployment at the local level).

The 1974 referendum was Whitlam's attempt to ensure that the Commonwealth-local government vision he was developing was constitutionally sound. The amendment proposed to allow the Commonwealth to fund local governments directly, rather than "passing" funds through the States, by inserting two new provisions into the Constitution, namely:

> s.51(ivA.) [the Commonwealth Parliament has power to make laws with respect to] The borrowing of money by the Commonwealth for local government bodies.
>
> s.96A. The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

Yet, despite purporting to improve the status of local governments, Whitlam seemed less concerned with strengthening them than with exploring various forms of "regionalism". He created 68 notional regions nationwide through which to distribute local government grants, each consisting of several existing local governments, and implemented a competing vision of regionalism, the Australian Assistance Plan (AAP).[4] In short, the recognition of and ability to fund local government "bodies"– whatever that term might embrace – was calculated to circumvent State governments and incorporate local governments into substitute quasi-States.

The electorate overwhelmingly rejected this proposal. It was passed in only one State, New South Wales, with a wafer thin majority of 50.79 per cent. The overall vote in favour of the proposal was only 46.85 per cent.

The voting was as follows:

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

Obtained majority in one State and an overall minority of 458 053 votes. *Not carried*

It is interesting to note that the greatest opposition to, and least enthusiasm for, the proposal was from the less populous States, Western Australia in particular being traditionally wary of Canberra-focussed centralism.

The 1988 referendum, initiated by the Hawke Government to implement one of the recommendations of the Constitutional Commission[5] (1985-88), proposed to amend the Constitution to add a new section 119A which would have stated:

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

By its terms, it sought to recognise the reality of local governments as State-created entities and required the States to create and maintain a system of local governments, without granting them any special powers or autonomy. In its report the Commission, however, averred that

> it is time for the recognition of Local Government as a third sphere of government in the Australian Constitution and that such recognition would "give Local Government *the necessary status* as a third sphere of government, and *the necessary standing* to enable it to play its full and legitimate role in the structure of government in Australia, and *as an equal partner* in consultations about the allocation of responsibilities and resources within that structure. [emphasis added][6]

In short, the Commission was untroubled by the idea of elevating a myriad of local authorities – subordinate creatures of the States, drawing their legitimacy, responsibilities and powers from their parent State's legislation – up to a level equal not only to that of their parent States but to that of the national government.

The result was more dismal than the earlier attempt. No State supported the proposed amendment and only 33.61 per cent of electors voted in favour of it:

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

Obtained majority in no State and an overall minority of 3 084 678 votes. *Not carried*

Forthcoming referendum proposal and its genesis

As part of the agreement with the Greens and Independent members of the House of Representatives,

Tony Windsor and Rob Oakeshott, which enabled them to form government following the 2010 election, the ALP committed to two referenda to amend the Constitution, to be put to electors at or before the next Commonwealth general election – one relating to Indigenous peoples, and the other concerning local government.[7]

The latter is consistent with ALP policy, at the 2007 election, to recognise local government constitutionally and to elevate the status of local government to that of being equal partners in the ALP's vision of "co-operative federalism".

Recognition is supported by the Australian Local Government Association (ALGA), on the basis that including local government in the Constitution is "the best way to ensure the future stability of local communities across Australia", as though that is somehow under threat. The argument in favour of recognition, at least from ALGA's perspective, seems to be that constitutional status will not only preserve the existence of local governments, but will make them "sustainable" by making them financially independent of, or less reliant upon, the States.[8]

As yet, not even a preliminary draft of the form of the proposed amendment or referendum question has been circulated. It is, therefore, impossible to consider the possible effects of any proposal other than in a general sense, based on broad principles.

Local government recognition may arguably take three forms:

(i) symbolic recognition in the preamble or body of the Constitution;

(ii) practical recognition in the body of the Constitution, whereby symbolic recognition is accompanied by measures designed to protect local government interests;

(iii) "financial recognition" in the body of the Constitution.[9]

All of these invite concern as to unforeseen consequences for the Federal compact.

A case against

Recognition of local governments in our Constitution would formally enshrine within this country's constitutional framework a level of government additional to the existing Commonwealth, States and Territories. In the context of Australian history, politics and constitutional law, such recognition would have fundamental consequences for our federation.

Recognition is undesirable for the following reasons, although depending on the specifics of the proposal, some may be more compelling than others, and other objections may emerge:

1. It would distort the federal structure.

As mentioned, the Constitution is a compact between the States and the Commonwealth. Giving local government status within the federal structure redefines the federation and the Constitution becomes something other than a compact defining the relationship between the States and the Commonwealth.

There may be arguments for recasting our constitutional compact and redefining our federation. But if that is to be done,

(a) it should be following comprehensive debate and with the full participation of the States, they being the parties to the Constitution; and

(b) after an exploration of the full implications and consequences and not piecemeal and for expediency.

If the proposed recognition is intended to be merely symbolic, then there seems to be no point to it. However, ominously, symbolic recognition of local government is consistent with ALP and ALGA policy to elevate local governments to "equal partnership" with the States that created them and to

which they are subject, and from which they draw their legitimacy. To accord them equal status is necessarily to distort and change the character of the federation.

2. Its effects cannot be known and there is the risk of unintended consequences.

As we do not yet know the precise terms of the proposed amendment, we cannot begin to guess the consequences that may radiate from it.[10] We do know, however, that the trend over the century or so since federation has been an increase in Commonwealth legislative and executive power, and momentum towards centralism, at the expense of the States, facilitated and aided by the High Court of Australia. The federation we have today would be unrecognisable to those who so cautiously negotiated it into existence in the late 19th century.

The 1974 referendum was a direct attempt to bypass the States. The 1988 referendum was not overtly so, but certainly did not demonstrate any change in philosophy or policy direction, and would have entrenched some form of local government as a legal obligation on each State.

How the High Court may have viewed the extent of that obligation, given its willingness now to discern in the Constitution implied "nationhood powers" and other concepts that were alien to the thinking of the drafters of the Constitution more than a century ago, is something upon which one can only speculate – but one finds no comfort in any educated speculation. It is not unreasonable to be concerned that any recognition of local government will be interpreted by the High Court in a manner that will attract to the Commonwealth legislative power and executive authority at the expense of the States.

To the extent that any such amendment expressly or impliedly enabled the Commonwealth Parliament to make laws about local government, section 109 of the Constitution would invalidate inconsistent State laws which also relate to local government – such as provisions in the *Local Government Act* 1995 (WA) and equivalent Acts in other States. The Commonwealth may well come to have a more direct role in the operation and control of local governments throughout Australia.[11]

3. It would lead to the eclipse of the States and their eventual irrelevance as a balance against the centralised power of the Commonwealth.

The federal structure created by the Constitution is the only means of arresting the trend towards centralism. The dangers were clearly recognised even before the federation came into being. Consideration was given in the course of constitutional conventions to whether individual, sub-state localities might be funded directly by the Commonwealth. In arguing, successfully, against the idea, Edmund Barton, the future prime minister, observed:

> The revenue and the financial position of the various colonies would be so impaired and hampered that they would become municipalities instead of self-governing communities.[12]

Campaigning against the proposed amendment at the 1974 referendum, the then Liberal-Country Party Opposition argued that it was calculated to increase Commonwealth centralisation and power at the expense of the States. As the then Leader of the Opposition, B. M. Snedden, pointed out:

> Once that centralism is achieved we will find that the grant of money will have a whole series of conditions attached to it which will deprive local government of its own freedom of action, and some bureaucrat in Canberra will decide the way in which local government ought to conduct its affairs.[13]

With some refinement, these can still stand today as the fundamental arguments against the recognition of local government in the Constitution. It is critical to sound governance that no one level of government has too much power. Recognition of local government may well fatally

disrupt the already increasingly precarious balance of power and be the seed for the perversion, if not destruction, of our federation.

Local governments see financial recognition as an opportunity to receive funding directly from the Commonwealth and so enhance their operational capacity and, doubtless, their status as the third tier of government. But the gift of funds is a Trojan horse. They may enjoy the patronage of the Commonwealth for a time, but that will come at the cost of financial dependence upon a government in Canberra, not their State or Territory capital. The negation of the States will ultimately work to the detriment of local governments and the communities they represent.

When the States wither and vanish, so too will local governments as autonomous authorities capable of being responsive to the interests of their ratepayers.

First, there are some 160-odd local governments in Western Australia alone, some with only several hundred ratepayers, and in the order of 560 throughout Australia. It is fanciful to suppose that they could have the same bargaining power at a national level as the six States and two self-governing Territories.

Second, to the extent that the Commonwealth becomes directly involved in the control, regulation and funding of local governments, these local governments would have to liaise and seek approval on all relevant issues with Canberra, not their State parliamentarians and responsible State ministers. Not only will that access be geographically more difficult and expensive, it will also mean that local governments throughout Australia will, for example, have to direct their concerns and requests to one Commonwealth local government minister and department instead of to their respective State ministers and departments. This situation would obviously be more difficult, time consuming, costly, and less efficient or responsive than the current position.

Third, there would be no effective restraint upon a Commonwealth government of the day re-shaping local governments to suit its political purposes; such as in the form of regional groupings designed with the imperatives of Canberra in mind, rather than the interests of local populations. Even limited "financial" recognition permitting direct funding would not prevent funds being tied to conditions that may not be desirable to local governments, such as amalgamation with neighbouring local government entities.

History suggests that the concerns that form the basis for the case against recognition are not fanciful. Indeed, one might think that from the Commonwealth's perspective, they constitute the point of the exercise.

Successive federal governments, across the political spectrum, have pursued the objectives of centralism and expansion of power and federal authority at the expense of the States, some more overtly than others. The current federal government is no exception, except to be possibly more determined in its approach. It would not be engaging in a referendum to recognise local government if it did not see an advantage to itself beyond mere symbolism.

The arguments against local government recognition in 1974 and 1988 – and, indeed, in 1897 – are as apposite now as they were then.

The *Pape* Case and funding local governments

More recently, advocates of constitutional recognition have argued that the High Court's decision in *Pape v Commissioner of Taxation*[14] necessitates an amendment that will overcome any adverse consequences of the case for local government funding. It is argued that *Pape* raises serious doubts about the Commonwealth's ability to apply monies from the Consolidated Revenue Fund directly to activities, programs and persons which are not within its legislative and executive powers.

On one view, if *Pape* has the effect of limiting the range of matters upon which the Commonwealth can expend money directly, it may, nevertheless, be a welcome check on its centralist ambitions. It is argued that the Commonwealth may be disinclined to devote funds to projects that may be of doubtful constitutional legality, thus putting many worthwhile programs at risk.

Although a convenient pretext for those advocating constitutional amendment, there is no certainty

that there is a problem. Indeed, Commonwealth funding continues to flow to local governments via the States.

As recently as June 2011, the Senate Select Committee on the Reform of the Australian Federation took the view that "Commonwealth funding to local government is not as precarious as some have suggested." Further, at paragraph 6.63:

> The committee also believes that the issue of funding for local government cannot be looked at in isolation. It is actually the product of broader issues around the vertical fiscal imbalance experienced by the Australian federation. If states had a greater capacity to raise revenue in line with their responsibilities, the incentive for states to cost shift towards the local government sector would be reduced.[15]

I suggest that the *Pape* case does not have detrimental implications for the funding of local government, for two reasons. First, the Commonwealth Parliament can still appropriate money directly for, and the Commonwealth executive can spend that money directly on, local government, where the expenditure is for purposes within existing Commonwealth powers, which powers have been expansively interpreted by the High Court.

Second, *Pape* does not limit other avenues of funding such as section 96 grants of financial assistance. Commonwealth funding may continue to be made to the States on the condition that those funds are immediately and directly given to local governments. Such specific purpose grants of Commonwealth funds are a routine means by which the Commonwealth provides funds to activities, programs or persons and its ability to fund local government by this mechanism is effectively unlimited.

It may be argued that indirect funding is inefficient. That may be right, but one ventures to suggest that a federal system by its very nature involves some level of inefficiency. Just as it may be said that "in a democracy, sometimes the other side wins", so it may be expected that in a federation, sometimes one or other of the tiers of government does not get to do what it wants in the manner that it prefers. Bicameral legislatures and separation of powers also give rise to inconveniences and inefficiencies for a government of the day, but that is not a sufficient reason to abolish them; quite the contrary. Diffusion of political power is essential to such power being used in a manner responsive to local conditions and local influence. Centralisation inevitably tends in the opposite direction and generally results in decision-making for the lowest common denominator.

The *Pape* decision, like other High Court cases (especially in the field of constitutional law), is open to varying and different interpretations. Government funding practices and further High Court consideration may provide clearer guidance as to the implications of *Pape* for Commonwealth funding generally.[16]

Relevantly, however, there is no imperative for constitutional amendment at this time based on *Pape*.

Endnotes

1. Until section 128 was amended by the *Constitution Alteration (Referendums) Act* 1977, the electors in Territories were not counted towards the majority of electors necessary to approve the proposed law.
2. Michael Wood, "The 'new federalisms' of Whitlam and Fraser and their impact on local government", *Australian Journal of Political Science*, vol 12(2), 1977, 104.
3. E. G. Whitlam, "A new federalism", *The Australian Quarterly*, vol 43(3), 1971, 11. However,

see the analysis of the conflicting themes articulated in the article by Geoffrey Sawer, "Towards a New Federal Structure?", *Labor and the Constitution 1972-1975: The Whitlam Years in Government*, Heineman, 1977, 5-8.

4. Lyndon Megarrity, *Local government and the Commonwealth: an evolving relationship* (2011), Commonwealth Parliament Library Research Paper No.10, 6-7 & 9-10 and citing constitutional lawyer Geoffrey Sawer that the regional organisation was "little more than a post office for transmitting applications from the member local governments", the successful applicants gaining Commonwealth funds via the States. The AAP provided regionally-organised funding for local social welfare programs such as emergency accommodation for women and children.

5. One member of the Constitutional Commission was the former prime minister, the Honourable E. G. Whitlam; the others were Sir Maurice Byers, QC, Professor Enid Campbell, the Honourable Sir Rupert Hamer, and Professor L. Zines.

6. Constitutional Commission, *Final Report of the Constitutional Commission*, vol 1, AGPS, Canberra, 1988, 442-443.

7. *The Australian Greens & The Australian Labor Party ("The Parties") – Agreement*, (1 September 2009) (agreeing to "Hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution.")

8. ALGA website www.alga.asn.au and statement by the ALGA President Geoff Lake. At its December 2008 'Constitutional Summit', ALGA resolved that "to ensure the quality of planning and delivery of services and infrastructure provided to all Australians, and the ongoing sustainability of local government, anyconstitutional 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."

9. N. McGarrity & G. Williams, "Recognition of local government in the Australian Constitution", *Public Law Review*, vol. 21(3), 2010, 164-187.

10. Advocates of recognition has suggested that the *Pape* "problem" could be overcome by an amendment to section 96 of the Constitution, which currently reads:

    > "The [Commonwealth] Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

    by adding, after the word "State", the words "or local government body". But this alone begs a number of questions. Is a local government "body" a local government established by a State or Territory? Can it include something more or less? A regional council established by two or more local governments under the *Local Government Act* 1995 *(WA)*? A regional subsidiary established under the *Local Government Act* 1999 *(SA)*? An agency subordinate to and created by, or forming part of, a local government established under those Acts?

11. For example, the High Court may have ample scope for imaginative interpretation in deciding what is meant by a "local government" or a "local government body".

12. E. Barton (speaking at the Australian Federal Convention, second session, 1897), cited in C Aulich and R. Pietsch, "Left on the shelf: local government and the Australian constitution", *Australian Journal of Public Administration*, Vol 61(4), 2002, 18.

13. B. M. Snedden (Leader of the Opposition), "Constitutional Alteration (Local Government Bodies) Bill 1974", Second reading speech, House of Representatives, Commonwealth Parliamentary Debates, 15 November 1973, 3437.

14. *Pape v Commissioner of Taxation* [2009] HCA 23. See generally Anne Twomey, 'Pushing the Boundaries of Executive Power – Paper, the Prerogative and Nationhood Powers', *Melbourne UniversityLaw Review*, vol. 34, 2010-11, 313.

15. Senate Select Committee on the Reform of the Australian Federation, *Australia's Federation: an agenda for reform*, 30 June 2011, 99.

16. For example, it may be that their functions and services make local government councils "trading corporations" for the purposes of the Commonwealth's section 51(xx) "corporations" power, so bringing them within the Commonwealth's power to directly fund activities, programmes and persons. There are High Court cases which point to the affirmative, including *Ex parte St George County Council* (1973) 130 CLR 533 and *Commonwealth v Tasmania* (1983) 158 CLR 1 which have considered the interpretation of the words "trading corporation". Otherwise, there are also implied Commonwealth legislative powers including the 'nationhood' power which was discussed in the *Pape* case, as well as legislative powers which may be applicable to specific purposes, such as that relating to interstate and overseas trade and commerce in section 51(i) and the external affairs power in section 51(xxix), the latter having been given an expansive interpretation by the High Court over the years.