

## **ASU Submission to the Expert Panel on Constitutional Recognition of Local Government**

### **Introduction**

The Australian Services Union (ASU) broadly supports the recognition of local government in the Commonwealth Constitution. The ASU recognises the increasing role that local governments are playing in the administration of public life and the need for the role of local governments to be properly recognised and supported to not only continue to perform this role, but perform it efficiently and effectively.

The ASU understands the uncertainty caused by *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (*Pape*) and the need to remove doubt on the ongoing viability of some of functions of local government that are funded directly by the Commonwealth Government. Such funding arrangements can include specific and/or urgent grants that may arise as part of post natural disaster recovery funding or projects associated with issues surrounding councils in boarder regions. In addition, enabling the Commonwealth Government to directly fund local government on will help alleviate the perceived bureaucratic overlap between the three tiers of government and reduce the inefficiencies created through cost shifting.

Recognition of local government in the Constitution would not only assist to reduce this uncertainty, but provide greater credence to the legitimacy of local government and the role it plays in our society.

The ASU submits that any recognition of local government in the Commonwealth Constitution must not come at the expense of the current industrial relations framework arrangements that currently operate in each state or are provided under section 14 of the *Fair Work Act (2009)* (Cth) (see Attachment 1). The ASU is opposed to any change to the Constitution that would lead to obfuscation or blurring of the jurisdictions between State and Commonwealth industrial relations legislation as they currently apply to local governments and councils.

### **The Pape decision**

The ASU agrees with the Expert Panel that *Pape* has placed limits on the Commonwealth's wide view of its spending power, the Court finding the Commonwealth can only spend money in areas where it has a Constitutional mandate. Commonwealth funding of past, present and future local government initiatives must now be assessed on a case by case basis, as to whether such funding falls under Commonwealth power. The ASU agrees that the most effective way to ensure ongoing funding for important local government programs is to provide the Commonwealth with the constitutional power to fund local governments via a change to the constitution.

The ASU notes that there already exist a number of valid methods under section 51 of the Constitution via which the Commonwealth may fund local government bodies e.g. the power over 'quarantine' or 'marriage' could enable the Commonwealth to fund, respectfully, the local provision of quarantine infrastructure or counselling services related to marriage.<sup>1</sup> It has also been suggested that the broad base of the corporations power

---

<sup>1</sup> Section 51 (ix) and s 51 (xxi)

may provide some constitutional validity for the Commonwealth to fund local government,<sup>2</sup> where local government bodies are trading corporations for the purposes of this power. However, given legislation such as that provided in section 14 of the Fair Work Act, the corporations power provides an inadequate basis for the provision Commonwealth funding directly to local governments.

## **A successful referendum**

It is not the intention of this submission to make comment on which of the ideas put forward by the Expert Panel in its discussion paper will resonate with the public or their chances of success at a referendum. The Expert Panel is already well versed in the history of referendums on this issue.

However, the ASU will draw Expert Panel's attention to key role that State Government's played in past referendum campaigns. Kane notes that "when the Whitlam government proposed that the Australian Government have powers 'to borrow money for, and to make financial assistance grants directly to, any local government body', the proposal was voted down largely because the States opposed it." And although there currently appears to be greater political bipartisan support for constitutional recognition of local government, there is little evidence to suggest that the States have a genuinely increased appetite to see constitutional reform in this area. State Governments have historically opposed having their own powers divested through Commonwealth intervention in traditional State jurisdictions.<sup>3</sup>

---

<sup>2</sup> Section 51 (xx)

<sup>3</sup> Kane, J (2006) 'Constitutionalising Local Government' *Public Administration Today*; (8) July / September 2006: 24-26

The ASU submits that the keystone around which a public consensus is built will be that of State Government endorsement of any proposed constitutional reform.

## **Symbolic Recognition**

The ASU submits that local government should be provided recognition in the Australian constitution. With approximately 700 local government councils performing some of the most intrinsic functions to our day-to-day lives,<sup>4</sup> the ASU submits that the difficulties in funding arrangements presented by the *Pape* decision are a product of Australia's evolving democracy which were possibly not envisaged by the founders of the Commonwealth Constitution.

The ASU believes that reference to local government in the preamble of the Australian constitution may go some way to providing recognition of the integral role local governments' play in the daily governance of the Australian way of life. Constitutional recognition would, the ASU believes, provide a sound basis for the Commonwealth to bring some uniformity to the regulation of local government, such as their democratic make-up or the conduct and accountability of their financial activities, which at present differs markedly from State to State. However, the degree to which such reforms are required or even desirable is a matter for debate. Certainly the most immediate and practical reform must be aimed, in the least, at maintaining a functioning system of governance across the three tiers.

While the ASU welcomes such reforms that have this goal at their core, the ASU cautions against methods of recognition that present unknown or unintended consequences. Broad

---

<sup>4</sup> Productivity Commission, 2008, *Assessing Local Government Revenue Raising Capacity Research report*

statements of no specific intent may well have little legal meaning but as the Expert Panel has noted in its discussion paper, such statements may affect the approach the High Court will take to interpreting other provisions of the Constitution, of which there may be uncertain outcomes. One unintended consequence may be a reinterpretation of power's that confuses the jurisdiction of industrial powers between the State's and the Commonwealth. The ASU therefore submits that any symbolic recognition of local government in the constitution, whether it be in the preamble or in a statement of values, would need to be clear in its purpose.

## **Financial Recognition**

While local governments raise an average of over 80% of their total revenue through their own activities such as rates and other property charges,<sup>5</sup> the Commonwealth is still responsible for a significant amount of local government funding.

General purpose grants or Financial Assistance Grants (FAGS) paid to local governments by the Commonwealth account for about 7% of total local government revenue.<sup>6</sup> This funding is provided through the intermediary of the relevant State Government, which then allocates the funding in accordance with the national principles for allocation of financial assistance grants.<sup>7</sup>

The Commonwealth also provides direct funding to local governments in the form of specific arrangements such as the Australian governments Roads to Recovery Program.<sup>8</sup>

---

<sup>5</sup> Australian Local Government Association, 2010, *Submission to the Senate Select Committee Inquiry into Reform of the Australian Federation*. Retrieved 14/10/2011 from [http://www.alga.asn.au/submissions/2010/pdf/Sen\\_Select\\_Reform\\_Aust\\_Fed\\_20Aug\\_2010.pdf](http://www.alga.asn.au/submissions/2010/pdf/Sen_Select_Reform_Aust_Fed_20Aug_2010.pdf)

<sup>6</sup> *ibid*

<sup>7</sup> For a list of national principals see among others: Queensland Government, Department of Local Government and Planning, *National Principals*. Retrieved 14/10/2011 from <http://qlggc.qld.gov.au/about-us/national-principles.html>

<sup>8</sup> Australian Local Government Association, 2010 (see citation # 1)

However, as discussed, *Pape* has placed doubt upon the constitutional validity of such direct funding arrangements, the Court finding that section 81 of the Constitution (the power on which the commonwealth generally relies to support direct funding of Local Government) did not support such spending. French CJ said stated “*Substantive power to spend the public moneys of the Commonwealth is not to be found in s 81... but [must be found] elsewhere in the Constitution*”.<sup>9</sup>

As noted in the discussion paper issued by the expert panel, there is widespread support among local government bodies for the introduction of a constitutional provision which removes the legal uncertainty surrounding direct funding. The ASU generally supports this position.

*Do you agree with either of the following changes to section 96 of the Constitution?*

- 1. ... the Parliament may grant financial assistance to any State or to any local government body formed within the limits of a State or Territory on such terms and conditions as the Parliament thinks fit.*
- 2. ... the Parliament may grant financial assistance to any State or to any local government body on such terms and conditions as the Parliament thinks fit.*

**The ASU generally supports a change to the constitution which would provide the Commonwealth an explicit power to directly fund local government for purposes that are not envisaged, or have not been provided for, in the current constitutional arrangements.** It follows that the ASU supports a change to section 96 of the constitution, however, the ASU believes due consideration must be taken to preserve current industrial

---

<sup>9</sup> *Pape* at 111

relations arrangements between the Commonwealth, the States' and local governments. Any change section 96 of the constitution should not undermine the current industrial relations regime.

For this reason, **the ASU finds option 1 as the preferred option.** As stated in the discussion paper – this option *clearly affirms that the establishment of the system of local government is a matter for state and territory legislation.* Prima facie, option 1 may provide constitutional validity for the Commonwealth to provide direct funding to local governments while maintaining the status quo legal relationship between States and their local governments.

## **Democratic Recognition**

The ASU supports democratic elections for local governments and the right of the Australian people to exercise their right to representation. The ASU believes democracy can only be strengthened when citizens have a guaranteed right to vote for someone to represent their interests in public life.

However, enshrining the right to vote for local government in the Australian constitution is a vexed issue. The question that arises after guaranteeing that an election *must* take place is – how *will* that election to take place? As the Expert Panel is aware, each State and Territory has its own procedures and protocols for not only the election of local government bodies, but also the election of State and Territory governments. These laws are generally made up through a complexity of statutes and regulations, including State constitutions.

A change to the Commonwealth constitution would in the least, require the state and territory governments to undertake a resource intensive and potentially costly review of the entirety of their electoral processes as they pertain to local government to ensure that laws are constitutionally valid. Further, it may appear anomalous that local governments are guaranteed democratic elections when it is unclear whether the Commonwealth constitution guarantees State Government elections. This is a complex issue and is potentially divisive if poorly managed. Again the ASU would be supportive of guaranteed right to democratic elections insofar as that constitutionalising such a right does not lead to a clash of industrial relations regimes between the States and the Commonwealth.

*Which of the proposed provisions should be included in the Constitution?*

- 1. Each State shall, and each Territory may, establish and maintain a system of local government bodies directly chosen by the people.*
- 2. Each State shall, and each Territory may, provide for the establishment and continuance of a system of local government elected in accordance with the laws of the State or Territory.*

For the reasons outlined above, the ASU submits that option 2 as proposed by the Expert Panel would be the preferred wording if the Expert Panel were to pursue the task of having local government elections guaranteed in the Commonwealth Constitution. On its face, it appears to achieve the goal of guaranteeing elections while minimising interference in the status quo arrangements.



## Recognition through Federal Cooperation

The need for constitutional recognition of federal cooperation has been highlighted through a number of High Court decisions and the increased importance of the Council of Australian Governments (COAG) to initiate and implement a uniform approach to national reform.

A number of cooperative initiatives between the Commonwealth and State governments have been ruled invalid by the High Court, such as the initiative of 'cross-vesting' which was designed to overcome jurisdictional barriers between State and Federal courts.<sup>10</sup> In another case, an initiative undertaken by the Western Australian Government and the Commonwealth to allow the Commonwealth Directory of Public Prosecutions to prosecute offences against State law was ruled invalid by the Court, finding that this power did not extend to appeals against sentences.<sup>11</sup>

COAG is becoming an increasingly significant aspect of the Australian political landscape. Recent Federal initiatives such as those relating to reform of the health system and the Murray Darling Basin have highlighted how important COAG has been to national reform in Australia. The ASU believes that COAG is set to play an integral role in future national reforms and agree with the argument that COAG (or a body such as COAG) should be provided with constitutional validity through a provision in the Constitution that recognises the need for cooperative federalism in areas of significant national interest.<sup>12</sup>

---

<sup>10</sup> *Re Wakim; Ex parte McNally* [1999] HCA 27

<sup>11</sup> *Bond v R* [2000] HCA 13

<sup>12</sup> Kildea, P & Lynch, A, 2011, *Entrenching 'Cooperative Federalism': Is it Time to Formalise COAG's place in the Australian Federation?* [2011] UNSWLRS 25. Retrieved on 18/10/2011 from <http://www.austlii.edu.au/au/journals/UNSWLRS/2011/25.html#fn2>

Intergovernmental cooperation for local governments is not a foreign concept, with many local government bodies already aware of the need for sensible cooperation between local government boundaries. There is a growing recognition of the role of local governments being more involved with public administration than 'rates, roads and rubbish'. Indeed there has been a growing trend over recent years for local governments to act on their own initiative to form regional cooperative alliances and organisations to address broad policy issues as well as to promote economic development.<sup>13</sup>

As noted in the Expert Panel's discussion paper, specific issues pertaining to constitutional recognition of cooperative federalism are beyond the scope of the Expert Panel and indeed the expertise of the ASU. However, in broad terms, the ASU submits that any provision that seeks to reinforce cooperative federalism would need to include reference to local government and in doing so, provide recognition of the increasing role local government plays in Australia's governance arrangements.

## **Conclusion**

Local government plays an integral role in public policy and has become an essential tier of government in Australia. This submission has outlined the ASU's broad support for the constitutional recognition of local government by reference to the discussion paper issued by the Expert Panel.

However, the ASU is wary of substantive constitutional recognition of local government that may lead to High Court interpretations that bring about uncertainty in the industrial

---

<sup>13</sup> Kane, John (2006) 'Constitutionalising local government' *Public Administration Today* Issue 8 (July / September 2006)

relations arrangements between the States and the Commonwealth regarding local government. The ASU submits that the current State and Commonwealth industrial relations regimes should not be altered as a consequence of the amendment to the constitution.

The ASU submits the States' role in the regulation of local government should be given detailed consideration in implementing any constitutional amendments. The ASU believes that a referendum in relation to constitutional recognition of local government would have a greater chance of success if State governments are supportive of any proposed changes.

## Attachment

### FAIR WORK ACT 2009 - SECT 14

#### Meaning of national system employer

(1) A *national system employer* is:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
  - (i) a flight crew officer; or
  - (ii) a maritime employee; or
  - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

Note 2: Sections 30D and 30N extend the meaning of *national system employer* in relation to a referring State.

#### Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

#### Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the endorsement, revocation or amendment.

#### Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.