IN PURSUIT OF THE 'GENUINE PARTNERSHIP': LOCAL GOVERNMENT AND FEDERAL CONSTITUTIONAL REFORM IN AUSTRALIA

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I INTRODUCTION

The position of local government in Australia's federal system has long been a topic of debate. Many federations do not formally recognise their local tier of government in their constitutions, instead leaving its establishment and regulation to the legislative competence of state or provincial governments. However, in Australia, debate over federal constitutional recognition of local government has also provided an important touchstone for public discussion about wider issues of reform.

While many of these issues concern the national harmonisation of laws and relief from constitutional limits on national legislative power, other reform issues have concerned – since before Federation itself – the centralised nature of state legislative, political and administrative traditions. Since the late 1830s, the constitutional development of local government has been an important part of the debate over how sub-national government as a whole should be structured – intersecting with pressures for colonial subdivision, the formation of 'new States', and alternative forms of regional governance with or without state governments.

This article examines the history and immediate prospects of proposals to formally recognise local government in Australia's federal *Constitution* – a crucial expression of these debates. The first part of the article reviews the history of local government and failed attempts to alter the *Constitution* to recognise local government in 1974 and 1988. Despite these failures, by 1995 the Commonwealth Government was again committed to federal constitutional recognition, and the election of the Rudd Labor Government in November 2007 brought with it a fresh policy of 'consulting with relevant parties, including the

Australian Local Government Association, on the process for achieving constitutional recognition'.[1]

What are the likely prospects of such a constitutional change? The second part of the article answers this question by presenting select results of a major national public opinion survey, conducted in May 2008 by Newspoll Limited as part of an Australian Research Council-funded project led by the author.[2] The survey shows that the base support for federal constitutional recognition of local government is currently barely enough to support such a change in a referendum, meaning that in the context of a real referendum debate, any proposals similar to those of 1974 or 1988 would almost certainly be destined to fail.

Why, when a majority of Australians appear to support the need for debate over structural reform of the federal system, is this support not greater? The third part of the article answers this further question, using the survey results to explore why support for such constitutional recognition appears to remain relatively limited. Three reasons, in particular, stand out for why general support for reform does not currently translate into support for constitutional recognition of local government:

- The symbolic or 'token' value of recognising local government has yet to be overtaken by proposals of sufficiently substantive or practical value to convince many Australians, although there is significant potential for this to occur.
- Many Australians have a negative opinion of the effectiveness and capacity of local government to function as a 'genuine' constitutional partner, although this is also clearly a 'chicken and egg' problem, rather than an absolute one.
- Many of those who do see a need for larger federal reform, even when they believe this should include political devolution, do not see the entrenchment of local government as the most logical means of achieving this reform.

The fourth part of the article discusses the implications of these results for further deliberations over the pursuit of constitutional recognition. It also discusses the main options for how the constitutional, political and financial position of local government might be enhanced, taking into account the different

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1 Australian Local Government Association, *Constitutional Recognition for Local Government*, Fact Sheet 7 – Styles of Constitutional Recognition (2008) 1 <http://www.alga.asn.au/constitutionalrecognition/pdf/FactSheet7_StylesofRecognition.pdf> at 6 August 2008.

2 Australian Research Council Discovery Project 0666833, *Federalism in Australia* <www.griffith.edu.au/federalism> at 6 August 2008.

dimensions of reform now being widely canvassed for the federal system as a whole.

That the future of local government is an important part of federal reform is undisputed, as shown for example by the outcomes of Australia's 2020 Summit of April 2008. However, there are two primary conclusions from this analysis. First, far more than simply symbolic constitutional recognition of local government is needed if any change is to prove either worthwhile or electorally viable. Second, given the complex interrelationship of these issues, the process for determining the scope of any constitutional alteration needs to occur within a wider process of governance reform, rather than simply focusing on recognition of local government. Getting the overall picture right is likely to be a vital prerequisite for advancing any specific constitutional reforms relating to local government.

II THE CONSTITUTIONAL POSITION OF LOCAL GOVERNMENT: A BRIEF HISTORY

The usual starting point for debate over the position of local government in Australia's federal system is the fact that the *Constitution* is silent about its existence. The sense of omission flowing from this silence is evident in the widespread belief that 'at none of the three Constitutional Conventions held in the 1890s was local government discussed',[3] having supposedly been considered unimportant to the creation of the federation. The same sense of omission is found in assertions that, consequently, 'Australian federal theory says nothing about local government'.[4]

In fact, neither of these claims is correct. Local government *was* mentioned at various points in the Federation conventions, in a manner that demonstrated the founders' understanding that they were creating not a two-tiered but three-tiered system. Consider, for example, when the leader of the 1897–89 conventions, Edmund Barton, described to the Sydney Convention that government was organised at three levels: 'general', 'provincial' and 'municipal'.[5] Indeed, the relationship between provincial and municipal government, as mentioned in the Convention Debates, helped define how the founders did *not* wish to shape the relationship between the federal and provincial levels.[6] The way in which local government's character formed a point of distinction, or contrast, with the proposed character of State governments under the *Constitution* was to re-emerge in potent arguments against federal constitutional recognition of local government during and since the 1970s.

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3 Ralph Chapman and Michael Wood, *Australian Local Government: The Federal Dimension* (1984) 30.

4 Michael Jones, *Transforming Australian local government: making it work* (1993) 39.

5 A J Brown, 'Subsidiarity or Subterfuge? Resolving the Future of Local Government in the Australian Federal System' (2002) 61(4) *Australian Journal of Public Administration* 24, 27.

6 Ibid 37–9. Cf Christopher Aulich and Rebecca Peitsch,'Left on the Shelf: Local Government and the *Australian Constitution*' (2002) 61(4) *Australian Journal of Public Administration* 14.

The real reasons for the emergence of a seemingly irrepressible campaign for federal constitutional recognition of local government lie long before Federation. The primary reason is that Australian local government has always been a comparatively weak creation, and in most jurisdictions has typically operated as much in conflict with the State governments under whose constitutional control they fall, as an agreed part of colonial, State or later federal constitutional arrangements.[7] In Anglo-Australia, centralised colonial structures provided the key machinery of public control and services from the outset, with local institutions arriving in the 1830s and 1840s either second in time or directly in their shadow. While there are important variations between the States,[8] in general this history contrasts with that of other English and Anglo-American political systems. In these, local institutions effectively developed as the first tier of government, with a major early call on community resources and political loyalties, on or over which intermediate and national institutions were then built.

The significance of the structural weakness of local government has been compounded by the fact that Australia's federal system has also never developed beyond a relatively small number of relatively centralised State governments. Since its inception, the constitutional development of local government has been just one important part of the debate over how sub-national government as a whole should be structured, and the subject of a range of colonial constitutional principles and home-grown reform movements. Intersecting pressures have included those for further colonial subdivisions, the formation of 'new States', and alternative forms of regional governance with or without State governments.[9] Across much of the 'island continent', the general problem of institutionalising an appropriate 'balance' between centripetal and centrifugal imperatives in governance has never gone away. The tensions implicit in the structurally centralised nature of Australia's federal system are often better recognised in the international literature on federalism than they tend to be at home.[10]

Local government, in particular, has suffered from the resulting tensions. Despite being of vital and growing political and administrative importance, the functional and financial position of Australian local government has also

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7 Chapman and Wood, above n 3, 22–4.

8 See generally John Power, Roger Wettenhall and John Halligan, *Local Government Systems of Australia, Advisory Council for Intergovernment Relations* (Information Paper No 7, 1981) 20, 22.

9 See A J Brown, 'Constitutional Schizophrenia Then and Now: Exploring federalist, regionalist and unitary strands in the Australian political tradition' (Paper presented at the Senate Occasional Lecture Series, Parliament House, Canberra, 19 March 2004) <http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/190304.pdf> at 9 August 2008; A J Brown, 'One Continent, Two Federalisms: Rediscovering the Original Meaning of Australian Federal Ideas' (2004) 39 *Australian Journal of Political Science* 485; A J Brown, 'Regional Governance and Regionalism in Australia' in Robyn Eversole and John Martin (eds), *Participation and Governance in Regional Development: Global Trends in an Australian Context* (2005) 17; A J Brown, 'The Constitution We Were Meant to Have: Re-examining the strength and origins of Australia's unitary political traditions' (Paper presented at the Senate Occasional Lecture Series, Parliament House, Canberra, 22 April 2005) <http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/220405.pdf> at 9 August 2008.

10 See, eg, Ronald L Watts, *Comparing Federal Systems in the 1990s* (1996) 64.

remained weak by international standards.[11] Even after various financial reforms in the 1970s and 1980s, discussed below, local governments' share of own-purpose public expenditure is only around six per cent of total government spending – as against about 18 per cent in Canada and 24 per cent in the United States.[12]

The frequent dependence of State and federal governments on local institutions, however, has seen continual 'cost-shifting' (known in America as 'unfunded mandates'), in which responsibilities for services and regulation are pushed down to local government despite this relatively frozen – and in some cases capped – financial position.[13] Since local government is a creature of State legislation, this trend has been generally attributed to State governments, but an increasing array of federal grants to local government also involve transfers of responsibility that are not necessarily fully funded. Over the period of rapid globalisation in which community reliance on local government has increased, local governments' ability to fill the voids left by the retreat of other levels of government and non-government actors has also been stretched. Local government has been described as something of a 'lame duck of Australian politics, limping along in a battle for survival … in many cases not being able to do much for those injured by the shifting foci of economic activity and wealth creation'.[14]

At the same time, the capacity issues thrown up by the weak state of local government have led to State policies aimed at rationalising it – for example, through compulsory amalgamation programs – despite the fact that on most objective analyses the primary need to grow the sector as a whole has remained. After local government reforms in Victoria in the early 1990s, it was widely believed that amalgamation based on 'crass simplicities' had been a temporary policy fad.[15] It was nevertheless repeated in New South Wales ('NSW') in 2005 and Queensland in 2007. The volatile political debates around local government reform have further contributed to convictions about the need for a better sub-national constitutional settlement generally, and in particular, one addressed to local government.

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11 Margaret Bowman, 'Local government in Australia' in Margaret Bowman and William Hampton (eds), *Local democracies: a study in comparative local government* (1983) 165, 166–9; Jones, above n 4, 8–9; Judy McNeill, 'Local government in the Australian federal system' in Brian Dollery and Neil Marshall (eds) *Australian Local Government: Reform and Renewal* (1997) 17, 18–19.

12 Brown, 'Subsidiarity or subterfuge?', above n 5, 28; A J Brown, 'Federalism, regionalism and the reshaping of Australian governance' in A J Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2007) <http://epress.anu.edu.au/anzsog/fra/html/frames.php> at 5 August 2008.

13 House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Rates and Taxes: A Fair Share for Responsible Local Government* (2003).

14 Maurice Daly, 'The Challenges for Local Government in the 21st Century' in Bill Pritchard and Phil McManus (eds), *Land of Discontent: The Dynamics of Change in Rural and Regional Australia* (2000) 195, 216.

15 Anne Vince, 'Amalgamations' in Brian Dollery and Neil Marshall (eds), *Australian Local Government: Reform and Renewal* (1997) 151, 156–60.

Proposals for federal constitutional recognition of local government have this complex mix of issues as their political backdrop. Far from a mere textual omission correctable at the stroke of a pen, the *Constitution*'s silence on local government has become important because of the complex and fundamental questions of Australian federalism that it exposes. This underlying reality of Australia's local government debates is demonstrated both by the reasons proposed for constitutional alterations to fill this apparent silence since the 1970s and the reasons successfully advanced against them.

A Financial Recognition 1974

The Whitlam Government came to office in 1972, after 23 years in Opposition, with a range of new Australian Labor Party ('ALP') policies on local government and regional governance. Local government policy was focused on pragmatic strategies for building its role as a fundamental element of Australia's national system of governance, alongside the role of the States. As then Opposition Leader E G Whitlam said in his policy speech of November 1972: 'Let there be no mistake about Labor's determination to make local government a genuine partner in the federal system.'[16] However, the ALP had also only recently abandoned its policies for entirely abolishing the States in favour of an alternative provincial system.[17] Consequently, the new local and regional policies continued to be directly associated with notions regarding the obsolescence of State governments and of federalism in general – at least by Labor's critics, if not the Labor Government itself.

The Whitlam Government engaged with local government through the facilitation of a new framework of Regional Organisations of Councils ('ROCs'), as well as direct engagement through a somewhat messy and uncoordinated array of different regional programs. The primary institutional and constitutional reforms were aimed at the most tangible, practical problem – the financial weakness of local government. In fact, federal governments had funded a variety of local programs such as roads since at least 1923, but had always done so through the States, in keeping with section 96 of the *Constitution*. While expressing a preference to work with the States, the Whitlam Government's policies were aimed at directly addressing at least some of the functional and structural imbalances in the Australian federal system, by bringing local government into the formal 'partnership' of federal–State relations, for example, into the post-1927 Financial Agreement and Loans Council arrangements.

The Whitlam Government legislated for local government representation on the Commonwealth Grants Commission in 1973. However, it was still generally regarded as undesirable, if not impossible, to provide direct Commonwealth

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1973, 3057 (E G Whitlam, Opposition Leader).

17 Brian Galligan, *A federal republic: Australia's constitutional system of government* (1995) 91ff; A J Brown, 'Can't wait for the sequel: Australian federation as unfinished business' (2001) 27 *Melbourne Journal of Politics* 47.

funding to local government without amending the *Constitution*, given that the section 96 'grants power' referred only to grants to the States. The proposed *Constitution Alteration (Local Government Bodies) 1974,* introduced in November 1973, would have given constitutional recognition both a symbolic and a substantive (functional and financial) purpose, being: 'An Act to alter the *Constitution* to enable the Commonwealth to borrow money for, and to grant financial assistance to, local government bodies.' Had it succeeded, the alteration would have inserted two new provisions in the *Constitution*, paragraph 51(ivA) and section 96A:

> 51 The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (iv) Borrowing money on the public credit of the Commonwealth:
>
> *(ivA) The borrowing of money by the Commonwealth for local government bodies*:
> ...
>
> 96 During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.
>
> *96A The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.*

As shown below in Table 1, when put to the electors of the six States in May 1974, the proposal succeeded in only one State (NSW), and then only barely; with the national vote showing only 46.9 per cent support. A number of other proposed alterations also failed.

Table 1: 1974 Referendum Results

18 May 1974						
State	*Ballot papers issued*	*For*	*%*	*Against*	*%*	*Informal*
New South Wales	2 702 903	1 350 274	50.8	1 308 039	49.2	44 590
Victoria	2 070 893	961 664	47.4	1 068 120	52.6	41 109
Queensland	1 098 401	473 465	43.7	610 537	56.3	14 399
South Australia	722 434	298 489	42.5	403 479	57.5	20 466
Western Australia	577 989	229 337	40.7	334 529	59.3	14 123
Tasmania	237 891	93 495	40.0	140 073	59.9	4 323
Total	**7 410 511**	**3 406 724**	**46.9**	**3 864 777**	**53.2**	**139 010**

Obtained majority in one State and an overall minority of 458 053 votes.

Not carried

The most obvious reason for the failure was the decision of the federal opposition parties, at the outset, to oppose the referendum 'violently' and 'do all that they can to defeat the referendum if it is held'.[18] As with most constitutional alterations, the absence of bipartisanship and direct intrusion of a party–political campaign made it unlikely that the referendum could ever succeed.[19] Nevertheless, an examination of the five reasons against the alteration advanced by the Opposition in Parliament provides instructive lessons for future debates.

The first and most important reason related to the potential implications in constitutional theory. The Opposition argued that a provision to allow direct funding would give local government implicit constitutional equivalence to State governments and lead in practice to wider, backdoor constitutional change. The creation of a new 'direct umbilical cord' between local councils and the Commonwealth would, it was argued, allow the States to be bypassed on a range of crucial matters, leaving the States 'like cut roses in a vase ... fair to behold but doomed to die'.[20] With direct references to the abandoned policies of the Australian Labor Party ('ALP'), the Opposition maintained that the Government in fact still saw 'the proper structure of government in Australia as a unitary system' in which the States were replaced with 'some sort of amorphous provincial system of representation'. For this reason, federal constitutional recognition of local government was painted not as a decentralist measure, but as part of a larger proposal to achieve the 'centralism' and 'concentration of power in Canberra' that the ALP still allegedly wanted.[21]

It has long been recognised that the institutional threat to the States from direct funding of local government, or associated regional policies, was always more conceptual and rhetorical rather than 'actual'.[22] At the time these charges were met with a vigorous and at least partially persuasive response, but one confirming the issue had been reduced to a set-piece party battle:

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1973, 3440–1 (Bill Snedden).

19 Cheryl Saunders, *The Parliament as Partner: A Century of Constitutional Review*, Parliamentary Research Paper No 3 2000–01 (2000) <http://www.aph.gov.au/library/Pubs/rp/2000-01/01RP03.htm> at 4 August 2008.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1973, 3446 (Douglas Anthony).

21 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1973, 3436–7 (Bill Snedden).

22 Geoffrey Sawer, 'The Whitlam Revolution in Australian Federalism: Promise, Possibilities and Performance' (1976) 10 *Melbourne University Law Review* 315, 325–6.

> Let us not be fooled by the charge of centralism. It is a worn out cliché, just as the cliché about communism which the former Government employed for 20–odd years has now become worn out because President Nixon has gone to China and the Soviet Union. We have now found a new cliché that seems to be a dirty expression – 'centralism'. If there is any real centralism, it is in the States, particularly Queensland, New South Wales and Victoria, which centralise their power in Brisbane, Sydney and Melbourne. They are the centralists. Let us face the issue.[23]

Of the remaining four reasons for opposing the alteration, several would return in the debates 15 years later when the next reform was attempted:

- Process: the Constitutional Convention had established a committee to examine the position of local government, and the Government's alteration was gazumping that process.
- Lack of necessity: local government borrowing was already successfully incorporated in the annual borrowing activities of the national Loan Council through an informal 'gentlemen's agreement', and federal funds for local government could, and should be directed through the States via the existing section 96 grants process.
- Technical fears: the term 'local government bodies' would be uncertain and likely to be litigated, given that the existence and meaning of local government continued to lie within the legislative discretion of the States.
- Scaremongering: a range of largely spurious speculations that local government could end up paying more for finance if the Commonwealth was formally empowered to conduct the borrowing; that tied grants could end up destroying local government; and that federal per capita grants to local government would not do anything to address regional financial disparities and inequities.

As with other unsuccessful referenda, perhaps the most persuasive reason for voting 'no' was the reputed lack of necessity for the reform ('if it ain't broke, don't fix it'). The Government overcame the referendum defeat by instituting a system of local government funding via grants to the States, an arrangement then further institutionalised by subsequent governments – of both political persuasions – through the system of local government grant commissions for distributing Commonwealth assistance within each State (*Local Government (Personal Income Tax Sharing) Act 1976* (Cth)*, Local Government (Financial Assistance) Act 1995* (Cth)). Moreover, the apprehended constitutional bar on direct Commonwealth grants to local governments – or anyone else – was removed by the decision of the High Court shortly after in *Victoria v Commonwealth and Hayden*,[24] upholding the entitlement of the Commonwealth to grant funds to agents of its choosing under section 81 of the *Constitution*.

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23 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1973, 3442 (Thomas Uren).

24 (1975) 134 CLR 338 ('*AAP Case*').

These developments relieved some of the immediate pressures for financial recognition of local government. However the speed with which the debate returned, despite the referendum result in 1974, makes it plain that the underlying pressures for reform had always been more fundamental – even if not clearly stated – than simply the need to adjust the technical machinery of federal financial relations.

B Symbolic ('Token') Recognition 1988

The fact that the proposal to recognise local government served symbolic and political purposes, as well as practical ones, was not lost on any participants in the debates of 1972–75. In response to the failure of the 1974 referendum, but also in response to the evidence of widespread support for an upgrading of the political status of local government, the State and Commonwealth governments pursued an alternative path of securing formal recognition or entrenchment of local government in State constitutions.

This strategy was assisted by the deliberations of a Fraser Government initiative, the formation of the Advisory Council for Intergovernmental Relations ('ACIR'). This body confirmed that whatever arguments had been mounted against formal recognition of local government as a direct 'partner' in the federal system, there was no turning back the clock on the political principle that the federal system consisted of three interdependent tiers or spheres. Section 5 of the *Advisory Council for Inter-government Relations Act 1976* (Cth) set out the Council's objectives of examining 'the relationships which should exist between federal, state and local governments'.[25]

State constitutional recognition of local government followed fairly quickly, in Victoria (1979), Western Australia (1979), South Australia (1980), and NSW (1986). At the same time, many States took the opportunity to formally recognise that the role of local government had extended beyond traditional domains of property services ('roads, rates and rubbish'), by giving local governments quasi-plenary powers to provide for the 'peace, order and good government' of their own jurisdictions, wherever such provision was not inconsistent with the legislative or executive will of the State.[26]

In part, these moves were intended to relieve the continuing pressure for direct federal intervention in local government affairs, by allowing the States to 'show their good faith in local government' and rebuild their own authority and legitimacy.[27] Through the ACIR, governments also heeded the advice of constitutional scholars, particularly Cheryl Saunders, that even symbolic inclusion of local government in the *Constitution* could fracture local governments' legal basis and encourage pointless legal conflict.[28]

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25 Ralph Chapman, 'Intergovernmental Relations' in Dollery and Marshall (eds), above n 11, 40, 46.

26 Ed Wensing, 'The process of local government reform: legislative changes in the states' in Dollery and Marshall (eds), above n 11, 89, 96, 102.

27 Commonwealth, Advisory Council for Intergovernmental Relations, *Constitutional Recognition of Local Government* (Discussion Paper 3, 1980) 17.

28 Ibid 35–40.

The Council also adopted the same language of 'partnership' to explain its preferred position. Significantly, though, it did so using a somewhat strange metaphor with elements of implied subservience, rather than a concept of partnership in which local government had a measure of autonomy or equality:

> [T]he fact that [local government] is also a democratically elected organisation … implies that it is a partner to the State in government, much as the adult son working the family farm with his father is a partner in the family enterprise, rather than a hired hand bound to do the employer's bidding.[29]

Following election of the Hawke Government in 1983, a similar position was taken by the Constitutional Commission's Advisory Committee on the Distribution of Powers, established in 1985 and which reported in 1987. Its three primary reasons for recommending against federal constitutional recognition were the inability of local government representatives to agree on one proposal, the lack of adequate explanation as to why State constitutional recognition was not sufficient, and that the addition of any significant new constitutional provision 'would lead to the entrenchment of yet another level of government and one which, moreover, would be in competition with the States'.[30] Interestingly, the objection to 'yet another level' tended to suggest, whether accidentally or by design, that the constitutional entrenchment of *State* governments itself already represented a problem. Put thus, the Committee's view implied that, try as one might to approach the issue purely in terms of local government and technicalities of constitutional harmony, pressures for recognition were intersecting with Australia's longer, wider debates over federal reform.

In the end, the Advisory Committee's view did not prevail. In 1985, the ACIR's last word in response to the rebuilding pressure for recognition – in the eighth report from its Relationships Reference, *Implications of Constitutional Recognition for Australian Local Government* – was to recommend that recognition take place in State constitutions *and* the federal *Constitution*.[31] The final meeting of the Australian Constitutional Convention in Brisbane, also in 1985, confirmed the rebirth of the proposal for federal constitutional recognition.

This time the proposal was substantially different. Assisted by the Constitutional Commission, but not its Advisory Committee, the proposed *Constitution Alteration (Local Government) 1988* was introduced in May 1988. The proposal had no specific practical, functional or financial aspects, being simply symbolic: '*A Proposed Law to alter the Constitution to recognise local government*'. Had it succeeded, the alteration would have inserted one new provision in the Chapter V of the *Constitution*, dealing with the States:

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29 Commonwealth, Advisory Council for Intergovernmental Relations, *Revenue Sharing for Local Government: A Submission to the National Inquiry into Local Government Finance* (1985).

30 Chapman, above n 25, 40, 47.

31 McNeill, above n 11, 17, 21.

> 119A 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 to make by-laws for, their respective areas in accordance with the laws of the State.

As shown in Table 2, the result at referendum on 3 September 1988 was a spectacular failure. In large part, again, the failure resulted from party–political opposition to the suite of four proposals, including the Government's own failure to construct a process with a higher chance of bipartisan support. The day before the vote, *The Australian*'s Paul Kelly assessed the Opposition's campaign, led by Mr Peter Reith, as having been successfully 'based on ignorance and distortion', having 'obviously left many sincere and well-informed people wary and confused'.[32] The Municipal Association of Victoria reported that some members of the Opposition privately still supported the proposal but had decided that 'people will be confused if they advocate a "no" vote for some questions and a "yes" vote for others'.[33]

Table 2: 1988 Referendum Result

3 September 1988

State	*Ballot papers issued*	*For*	*%*	*Against*	*%*	*Informal*
New South Wales	3 297 246	1 033 364	31.7	2 226 529	68.3	37 353
Victoria	2 491 183	882 020	36.1	1 563 957	63.9	45 206
Queensland	1 542 293	586 942	38.3	945 333	61.7	10 018
South Australia	873 511	256 421	29.9	602 499	70.2	14 591
Western Australia	845 209	247 830	29.8	584 863	70.2	12 516
Tasmania	282 785	76 707	27.5	202 214	72.5	3 864
ACT	149 128	58 755	39.8	88 945	60.2	1 428
Northern Territory	56 370	21 449	38.8	33 826	61.2	1 095
Total	**9 537 725**	**3 163 488**	**33.6**	**6 248 166**	**66.4**	**126 071**

Obtained majority in no State and an overall minority of 3 084 678 votes.

Not carried

While the opportunity for parliamentary debate on the proposal had been unwisely limited by the Government, the Opposition's plans for their planned negative campaign are again instructive. This time, as the alteration proposed to do no more than legitimise State authority over local government, there were few

32 Paul Kelly, 'Myths and bogeys: The referendums', *The Australian* (Sydney), 2 September 1988, 11.
33 Commonwealth, *Parliamentary Debates*, Senate, 31 May 1988, 3228 (Senator J F Powell).

attempts to invoke constitutional theory, at least expressed in terms of States' rights: only Queensland's Senator Florence Bjelke-Petersen warned of the need to 'be careful that this Bill does not herald the reintroduction of regionalism that was so favoured by Mr Whitlam'.[34] Indeed this time, the opposition tended to complain that rather than doing too much that might interfere with State powers, the proposal appeared to do too little, pointing to its failure to include many of the elements requested by local government representatives:

> [T]he wording of the proposed amendment to the *Constitution* does not touch substantively the needs or wishes of local government. For example, the word 'Commonwealth' is not even mentioned in the clause. It provides for no recognition of local government by the Commonwealth Government. There is no reference to revenue sharing arrangements, which of course are the very essence of what local government has been looking for. ... There is no reference at all to the ability of local government to deal directly with the Federal government, there is no guarantee against wrongful dismissal of a local council, there is no guarantee against forced amalgamations of local governments, and there is no substantive recognition of any of the other matters of which local government is seeking recognition.[35]

Apart from this reversal of the reasoning used in 1974, the objections to the proposal were again based on technical dangers, a perceived lack of necessity, and process (that is, to heed the Constitutional Commission's Advisory Committee). The symbolic value of recognition of this kind was dismissed, with some justification, as simply a 'political ... exercise' or act of 'tokenism'.[36]

Demonstrably, whereas the recognition proposal of 1974 had at least some substantive merit to accompany its symbolism, the 1988 proposal had very little. In both cases, party–political opposition was the key to the proposals' demise. However, it was also apparent that many commentators failed to understand the extent to which the question was based neither on any technical necessity to provide for local government, nor on the symbolic value of recognition alone. Rather, the issue retained political currency as an opportunity to do something more substantive to address perceived dysfunctions in the spatial distribution of government, the roles of different tiers, and the availability of resources to fulfil those roles. Thus, once again, the issue was not resolved.

C Third Time Lucky? Recognition in the 21st Century

It took the Australian Local Government Association ('ALGA') only seven years – half the previous lacuna – to extract a further Commonwealth government commitment to pursue federal constitutional recognition. In 1995, at the Second National General Assembly of local government, an 'accord' between the Commonwealth and ALGA renominated this goal, along with promising local

34 Commonwealth, *Parliamentary Debates*, Senate, 31 May 1988, 3232 (Senator Florence Bjelke-Petersen).
35 Commonwealth, *Parliamentary Debates*, Senate, 31 May 1988, 3226–7 (Senator James R Short).
36 Commonwealth, *Parliamentary Debates*, Senate, 31 May 1988, 3226–7 (Senator Frederick M Chaney); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1988, 3226–7 (Senator James R Short).

government representation in the Council of Australian Governments ('COAG') and other intergovernmental fora.[37]

While the Howard Government did not pursue constitutional recognition, its parliamentary inquiry into cost-shifting[38] deflected the continuing pressure into parliamentary motions of recognition, passed in September and October 2006.[39] In August 2007, the Labor Opposition undertook to recommence, if elected, a process of consultation regarding constitutional recognition of local government[40] – alongside, but without direct reference to, other proposed processes for reform of federal–State relations.[41] At the present time, discussion is underway within the local government community regarding the contemporary objectives and desired form of any recognition.

Since the failed 1988 referendum, some of the broad objectives of local government recognition have become clearer, in three ways. First, it has become clear that the pressure for federal constitutional recognition is not about resolving minor technical issues, nor mere symbolism, but about strengthening the political status of local government in its dealings with its own communities, State governments and the federal government. Evoking the notion of 'partnership' again, Chapman described local government as requiring national recognition 'in order to provide the necessary status to be a full partner in the governing processes', with State constitutional recognition unable to 'provide sufficient legitimacy' to local government to bring about this shift.[42] As with the Australian republic debate, a clearer argument has emerged that a key justification for recognition lies in the potential for an enhanced system of democracy, based on the principle that 'without constitutional backing, Australian local government institutions cannot be truly regarded as legitimate democratic entities'.[43]

Second, it has become clearer that recognition should be a vehicle for reappraising the overall governance share carried by local government, and ensuring that its share of public resources remains commensurate. This is in part a technical financial issue, but not of the kind sought to be addressed in the 1970s, relating simply to the mechanics of how tax revenues would find their way from Canberra to local councils. Rather, it is now acknowledged that the structural issues obstructing the ability of local government to play their role are

37 Chapman, above n 25, 40, 54.

38 House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Rates and Taxes: A Fair Share for Responsible Local Government* (2003).

39 Paul Bell, 'How local government can save Australia's federal system' in Brown and Bellamy (eds), above n 12.

40 Australian Local Government Association, above n 1.

41 Bob McMullan, 'Reforming the Federation: A Once-in-a-Lifetime Opportunity' (Speech delivered at the Institute of Public Administration Australia Roundtable, Canberra, 18 May 2007) <http://www.bobmcmullan.com/node/233> at 8 August 2008.

42 Chapman, above n 25, 66.

43 Paul May, 'Amalgamation and Virtual Local Government' in Brian Dollery, Neil Marshall and Andrew Worthington (eds), *Reshaping Australian local government: finance, governance and reform* (2003) 79, 85. See also John Kane, 'Constitutionalising Local Government' (2006) 8 *Public Administration Today* 24.

fundamentally akin to those of which State governments complained of prior to the introduction of the Goods and Services Tax.[44]

Thirdly, it is clearer that these political and structural issues now inform a call not simply for 'recognition', but a measure of constitutional 'autonomy'[45] – a concept never suggested in the 1970s, and certainly not heeded in the 1980s. This combination of political upgrading and structural reform is seen as necessary to overcome the problem that 'functionally oriented [State] agencies still ignore local government interests in making their decisions',[46] and to relieve 'the constitutional fact that local governments are typically statutory creatures of higher tiers of government [which] generally implies that they are manipulated and constrained by state and federal governments'.[47]

III CONTEMPORARY SUPPORT FOR CONSTITUTIONAL RECOGNITION

How would an alteration, aimed at federal constitutional recognition of local government, fare if undertaken at the present time? The remainder of this article addresses this question, using the results of a national survey of 1201 adult citizens and permanent residents of Australia conducted for the author and colleagues by Newspoll Limited in May 2008.[48] In the final section, the article further analyses the implications of the answers for the purposes of attempting to structure a productive constitutional debate.

In order to gauge the base level of support among Australian voters for constitutional recognition of local government, after introductory questions and a dummy question explaining the *Australian Constitution*, the survey posed a 'dichotomous statement'. This approach was chosen as a more realistic simulation of the likely reality of a referendum choice, than simply asking respondents whether they agreed or disagreed with a simple positive statement in favour of recognition. The question was posed thus:

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44 Andrew Worthington and Brian Dollery, 'The Debate on Australian Federalism: Local Government Financial Relationships with State and Commonwealth Governments' (2000) 59(4) *Australian Journal of Public Administration* 25; Bell, above n 39. See also Productivity Commission, *Assessing Local Government Revenue Raising Capacity* (2008).

45 Australian Local Government Association, above n 1.

46 Chapman, above n 25, 40, 67.

47 Brian Dollery, Neil Marshall and Andrew Worthington, 'Introduction' in Dollery, Marshall and Worthington (eds), above n 43, 1.

48 The survey was conducted across a stratified random sample of adult permanent residents, conducted by telephone (random digit dialling) across 68 Newspoll data quota areas distributed nationally, and collected 1–11 May 2008. Results weighted by age, gender, location, highest level of education completed, and voting intention (to the average of the two most contemporaneous Newspoll voting intention surveys). Results provided are for all respondents who indicated they were eligible to vote in elections (1155 persons or 96.2 per cent of the sample), unless otherwise indicated. Frequencies shown are for weighted results (ie, population estimates whereby 1155 voter respondents corresponds to 14 948 000 citizens).

> At the moment, the [Australian] *Constitution* does not actually mention or officially recognise that local government exists in Australia. Which one of the following comes closest to your view?
>
> 'The existence of local government should be officially recognised in the *Constitution*'
>
> OR 'There is no real benefit in making this change to the *Constitution*.'

The results for all States and Territories are shown in Table 3.

Table 3: Base Support for Federal Constitutional Recognition of Local Government (2008)

	NSW % ('000)	VIC % ('000)	QLD % ('000)	SA % ('000)	WA % ('000)	TAS % ('000)	ACT % ('000)	NT % ('000)	Total % ('000)
The existence of local government should be officially recognised in the *Constitution*.	46.9% (2289)	46.8% (1754)	**66.9% (1953)**	**58.8% (666)**	**55.9% (844)**	**59.5% (216)**	47.4% (120)	35.4% (51)	**52.8% (7893)**
There is no real benefit in making this change to the *Constitution*.	48.3% (2355)	49.4% (1850)	**29.0% (847)**	**35.7% (405)**	**37.8% (571)**	**32.5% (118)**	52.6% (133)	56.9% (82)	**42.6% (6361)**
Neither / don't know.	4.8% (234)	3.8% (143)	4.1% (120)	5.5% (62)	6.3% (95)	8.0% (29)	.0% (0)	7.6% (11)	4.6% (694)
Total	100.0% (4878)	100.0% (3747)	100.0% (2920)	100.0% (1133)	100.0% (1510)	100.0% (363)	100.0% (253)	100.0% (144)	100.0% (14948)
Ineligible to vote / missing	(247)	(174)	(147)	(61)	(37)	(0)	(0)	(1)	(667)
Total	(5125)	(3921)	(3067)	(1194)	(1547)	(363)	(253)	(145)	(15615)

The results suggest that the base support for federal constitutional recognition of local government is currently barely enough to support such a change in a referendum. While a majority is suggested in four of the six States (bolded), the necessary national majority is also only thin (52.8 per cent of eligible voters), notably because a majority is not indicated in either of the two States with largest population (NSW and Victoria).

Importantly, this bare 'success' would be unlikely to be realised in any referendum campaigns of the kind described earlier, that is, any involving any major political contestation, or even uncertainty as to the need for or nature of the change. In 1988, polling showed that the predicted 'yes' vote for the relevant question fell from 60 per cent only a month prior to the referendum, down to 50 per cent two weeks out.[49]

Moreover, there are indicators that base support is likely to be soft. On such a question, opinion leaders might be regarded as those who currently work, or have previously worked in government. Of the 532 respondents in the study who work or had ever worked in government, the support remained bare (53.9 per cent for, 41.5 per cent against). This included 112 respondents who work or had worked in local government itself, among whom support was higher (65.2 per cent), but

49 'Referendum "Yes" vote on the skids', *The Bulletin Reporter* (Sydney), 6 September 1988, 21.

among whom still about a third (32.1 per cent) did see any real benefit in the change. The lack of stronger support amongst current and former government workers is an indicator of the extent of the ambivalence regarding the need for change.

In the present day, based on these results, any referenda proposals similar to those of 1974 or 1988 – or conducted in similar conditions – would almost certainly be destined to again fail. However, this itself raises a number of important questions. There continues to be strong pressure for structural reform of Australia's federal system. As will be seen below, a majority of Australians *do* appear to support the need for such reform, of one kind or another. Given this fact, and the fact that a national strengthening of the existing institution of local government would appear to represent one of the most basic and logical of available reforms, why is the support for recognition of local government not greater? Further, past debates show that the contestation has been as much over the *type* of recognition being pursued, as over whether there should be any; thus would support be likely to change depending on the nature or effects of the recognition on offer?

The present study was designed to elicit further detail from respondents about their attitudes to local government, and the reform of local government, within the larger context of Australia's federal system. The results suggest three main reasons why general support for reform of Australian federalism does not currently translate into stronger support for constitutional recognition of local government.

A Weak Support for Purely Symbolic Recognition

The first major lesson of the survey is that the symbolic or 'token' value of recognising local government has yet to be overtaken by proposals of sufficiently substantive or practical value to convince a large majority of Australian voters. However, the results indicate that if a proposal for more substantive recognition is developed, and the right campaign conducted and given bipartisan political support, there is potential for the amassing of much more positive level of support.

The question of different forms of recognition was a crucial part of the Australian debates in 1974 and 1988, as it has been internationally. As shown by the previous experience, and argued recently by Cheryl Saunders, there is a need for as much clarity as possible about the objectives and intended effects of recognition – in particular, whether these are intended to be merely incidental or symbolic, or more substantive, including protective forms of recognition. For example, is recognition aimed at any of the following?

- Recognising local government as part of the structure of the Australian federation?
- Protection of a system of local government?
- Protection of local power and/or autonomy in its exercise?

- Protection of elected status (in a particular form)?
- Protection of local finances? Own-source revenues? Share of/access to state/national resources? Protection against unfunded mandates?
- Protection against (arbitrary) dismissal?
- Protection against unilateral amalgamation?[50]

For the purposes of consultation within local government, the ALGA has suggested 'a number of outcomes for communities' which could be achieved through constitutional recognition, being 'not mutually exclusive options':

- a broad recognition of local government's role in the Federation (often referred to as Symbolic Recognition);
- an acceptance of some principles relating to the existence and continuation of local government as an institution and local councils as democratic representative bodies (Institutional Recognition);
- a streamlined approach to local government funding resulting from a more direct financial connection between local government and the Commonwealth Government (Financial Recognition).[51]

From earlier debates, it can be seen that if politically contested, symbolic recognition is the least fruitful avenue to pursue, because the weakness of any potential substantive effects gives few citizens a reason to vote for it. In this respect, the 1988 referendum results were similar to those experienced in relation to the 1999 proposal to institute a largely symbolic form of republicanism. This was a debate since described in local government circles as one in which Australians 'worked ourselves into lather about symbols – not substance'.[52] In current consultations, the ALGA remains conscious that a 'focus on local government's status in the Federation might be achieved through symbolic recognition of local government in an amended Preamble', but has also posed the question to the local government community: 'how would this really affect local government and what could it achieve?'[53]

However, there are also different forms of substantive recognition. To better identify the views of citizens about different forms of recognition, the present study also surveyed respondents on their degree of support for five different recognition objectives or 'options', as set out in Table 4. The results are presented as means, on a scale of 1 to 4, ranked left to right, in order from the option receiving the least to the most support overall (the scale midpoint is 2.5). Table 4 also breaks down this result, showing the level of support amongst those who initially did and did not indicate support for recognition of local government in Table 3.

50 Cheryl Saunders, 'Constitutional Recognition of Local Government' (Speech delivered at the National General Assembly of Local Government, Darwin, November 2007) <http://nga.alga.asn.au/event/2007/speakers.php> at 6 August 2008.

51 Australian Local Government Association, above n 1, 1.

52 Bell, above n 39.

53 Australian Local Government Association, above n 1.

The results show that there are some forms of recognition that would reduce the overall level of support for constitutional recognition of local government, and others that would increase the likely support. Protective recognition (making 'it harder to amalgamate local governments or change their boundaries') is an option on which citizens appear very divided, and is particularly unsupported by those whose initial inclination was not to support recognition. Those disinclined to support recognition were even more likely not to do so if the proposal involved local government gaining 'more roles and responsibilities'. However, support became much stronger – even from those initially disinclined to support recognition – if the change promised to 'guarantee a reasonable level of funding' or 'set rules and standards of accountability' for local government.

Table 4: Support for Various Particular Forms of Recognition (2008)

	For the *Constitution* to...				
1=strongly against 2=somewhat against 3=somewhat in favour 4=strongly in favour Mean (SD)	**... make it harder to amalgamate local governments or change their boundaries**	**... give local government more roles and responsibilities**	**... state there must always be a system of local government in Australia**	**... set rules and standards of account-ability for local government**	**... guarantee a reasonable level of funding for local government**
The existence of local government should be officially recognised in the *Constitution* (n=7895)	2.77 (1.00)	3.10 (.93)	3.61 (.68)	3.47 (.74)	3.69 (.58)
There is no real benefit in making this change to the *Constitution* (n=6362)	2.28 (1.08)	2.03 (1.00)	2.61 (1.06)	3.02 (1.09)	2.93 (1.07)
Neither / don't know (n=694)	2.39 (.87)	2.63 (.97)	3.29 (.74)	3.45 (.74)	3.28 (.87)
Total (n=14951)	**2.54** (1.06)	**2.63** (1.09)	**3.17** (.99)	**3.28** (.93)	**3.35** (.92)

Table 5: Indicative Support for Particular Substantive* Constitutional Recognition (2008)

***Proposed form of change**: if the *Constitution* was changed so as to state there must always be a system of local government in Australia, set rules and standards of accountability for local government, and guarantee a reasonable level of funding for local government.

	NSW % ('000)	VIC % ('000)	QLD % ('000)	SA % ('000)	WA % ('000)	TAS % ('000)	ACT % ('000)	NT % ('000)	Total % ('000)
Base support for constitutional recognition (Table 3)	46.9% (2289)	46.8% (1754)	66.9% (1953)	58.8% (666)	55.9% (844)	59.5% (216)	47.4% (120)	35.4% (51)	**52.8% (7893)**
Support lost (strongly against proposed form of change)	-3.5% (-171)	-1.9% (-70)	-2.4% (-69)	-2.9% (-33)	-5.4% (-81)	-0% (-0)	-0% (-0)	-0% (-0)	**-2.8% (-424)**
Support gained (former non-supporters strongly in favour of proposed change/s)	29.8% (1452)	33.5% (1257)	19.4% (567)	27.0% (306)	25.2% (380)	24.5% (89)	33.2% (84)	37.5% (54)	**28.0% (4190)**
Total support	**73.2% (3570)**	**78.5% (2941)**	**83.9% (2451)**	**82.9% (939)**	**75.7% (1143)**	**84.0% (305)**	**80.6% (204)**	**72.9% (105)**	**78.0% (11659)**
Opposed / don't know / informal	26.8% (1308)	21.5% (806)	16.1% (469)	17.1% (194)	24.3% (367)	16.0% (58)	19.4% (49)	27.1% (39)	**22.0% (3289)**
Total	100.0% (4878)	100.0% (3747)	100.0% (2920)	100.0% (1133)	100.0% (1510)	100.0% (363)	100.0% (253)	100.0% (144)	100.0% (14948)
Ineligible to vote / missing	(247)	(174)	(147)	(61)	(37)	(0)	(0)	(1)	(667)
Total	(5125)	(3921)	(3067)	(1194)	(1547)	(363)	(253)	(145)	(15615)

As demonstrated in Table 5, if the more strongly supported options (as shown in Table 4) were proposed as the basis for changing the *Constitution*, then it can be hypothesised that the marginal base support for 'in principle' recognition would change. If the statements of respondents held true, then it could increase to very strong levels of support – 78 per cent of electors overall – with a majority in all States.

A similar level of interest in more substantive forms of recognition was reflected in another result, concerning the constitutional source of the powers and responsibilities of local government. According to the ALGA, a 'more radical idea' for recognising local government could involve shifting its legislative framework 'from State/Territory Parliaments to the Commonwealth Parliament' – an idea recognised as 'far more challenging given so much State/Territory legislation provides powers and responsibilities for local government', and indeed, possibly placing 'too much power in the hand of the Commonwealth Parliament on community-based issues'.[54]

The present study asked respondents about their preferred source of legislative power over local government. Results are shown in Table 6. Respondents were

54 Ibid.

told: 'currently, the roles and responsibilities of local government are set by State governments'; and asked whether they thought these roles and responsibilities should: (a) continue to be set by State governments, (b) be set by the federal government instead, or (c) be put into the *Constitution*, and not set by either State or federal government. Table 6 shows the results both according to respondents' first preferences, and whether they selected the option either as their first or second preference.

Table 6: Support for Local Government Recognition by Preferred Source of Legislative Power Over Local Government (2008)

Roles and responsibilities of local government should...	The existence of local government should be officially recognised in the *Constitution*		Or, there is no real benefit in making this change to the *Constitution*		Neither / don't know		Total	
	1st pref	1st or 2nd	1st pref	1st or 2nd	1st pref	1st or 2nd	1st pref	1st or 2nd
continue to be set by State governments	36.4% (2875)	59.6% (4708)	**54.3%** (3457)	**71.5%** (4546)	38.3% (266)	53.1% (368)	44.1% (6598)	64.4% (9622)
be set by the Federal government instead	15.2% (1200)	53.9% (4258)	22.3% (1419)	68.0% (4329)	14.7% (102)	31.8% (221)	**18.2%** (2721)	58.9% (8808)
be put into the *Constitution*, and not set by either State or Federal governments	**40.1%** (3168)	**61.5%** (4855)	16.5% (1048)	35.1% (2231)	29.4% (204)	58.5% (406)	**29.6%** (4420)	50.1% (7492)
None / don't know	8.3% (652)	-	6.9% (438)	-	17.6% (122)	-	8.1% (1212)	-
Total	100.0% (7895)		100.0% (6362)		100.0% (694)		100.0% (14951)	

These results show relatively high interest in changing the constitutional source of the roles and responsibilities of local government. Slightly more voters believe that its roles should be either put into the *Constitution* (29.6 per cent) or set by the federal government (18.2 per cent; total 47.8 per cent), than believe local government's roles should continue to be set by State governments (44.1 per cent). This result is an indication that many voters may perceive the weaknesses of their local government systems to be related to their current constitutional position as simply a creature of State governments. The result indicates that many people may support constitutional change if the change in status is related to structural improvement to local government's place in the system in ways that make a positive, practical difference to the quality of local democracy.

However, the results in Table 6 also confirm the challenge posed by these more substantive options for recognition. In contrast to symbolic recognition,

which is easily negatived because it serves less practical purposes, substantive recognition is likely to provoke a rather more intense debate over whether the practical effects of the changes are desirable. Table 6 shows that voters who were initially inclined and disinclined toward recognising local government (in Table 3) tend to have opposing views as to the preferred constitutional source of roles. Those initially inclined to support recognition were much more strongly in favour of placing local government's roles in the *Constitution*, and least in favour of giving this power to the federal government. However those initially disinclined were more strongly in favour of the status quo, or if not that, then giving the power to the federal government, with constitutional entrenchment of roles coming last. These results reinforce the predicament that even when more voters support change overall, the divided opinions about the nature of the change can easily defeat any outcome.

Taken together, these results suggest there is positive scope for shifting public opinion in favour of recognition of local government to a decisive extent, if a sufficiently clear, comprehensive and positive proposal for substantive recognition is put forward. However, in addition to these requirements being met, there would still need to be a high level of party–political and intergovernmental consensus, to prevent voter opinion about the positive effects of the change from becoming uncertain or unnecessarily divided. These alone are substantial challenges, but are also compounded by the two other main reasons why the base level of support appears low.

B Perceived Local Government Ineffectiveness and Incapacity

The second major reason why base support appears relatively low, already suggested by some evidence above, is that many Australians have a negative opinion of the effectiveness of local government, and therefore its capacity to function as a 'genuine' constitutional partner. This low opinion is, in large part, a substantial and inevitable by-product of the historical and institutional weakness of local government in Australia; in this respect it translates into a significant barrier to popular support for change.

In the present study, citizens' views of the effectiveness of local government were measured by asking respondents to rate the performance of each existing level of government in its own right, as well as which level they thought was most effective, less effective and least effective at doing 'its particular job' in the federal system. In response to the first question, 81.1 per cent of voters rated the performance of the federal level of government as quite good or very good; compared with 56.5 per cent for the local level, and 55.9 per cent for the State level of government. Opinions of local government nevertheless vary considerably between States, with only 47.1 per cent of NSW respondents prepared to rate the performance of the local level as good, contrasted with as many as 72.6 per cent of Queensland and Tasmanian respondents.

Overall, local government also vied closely with the State level of government for the honour of being rated as the least effective at 'its particular job'. In total 51.4 per cent of voters rated the federal level as the most effective and only 15.4 per cent rated it as the least effective. However, more voters rated local

government as the most effective level (19.2 per cent) than were prepared to rate State government as the most effective (17.8 per cent).

However, overall, more voters rated local government as the *least* effective level (35.9 per cent) than rated State government as least effective (32.2 per cent). Table 7 sets out these results, with the bold figures indicating the level rated least effective. Again there are substantial differences between States, with local government ranked as more effective than the State level in NSW, Queensland and Tasmania.

These effectiveness ratings have their greatest significance as vehicles for understanding *why* citizens rate different levels as ineffective. Table 8 provides a summary of the different reasons nominated by respondents in response to an open-ended question, as to why they thought a particular level was least effective. There are large differences in the types of reasons nominated by different respondents for the perceived ineffectiveness of the levels. Respondents who rated State governments as least effective, were twice as likely as the critics of the other levels to nominate underperformance in specific policy, functional or service areas (notably health and hospitals, education, public transport and environmental management). Respondents who rated the federal level as least effective were most likely to nominate general issues regarding distance, lack of inclusiveness, inability to understand community concerns, and being 'out of touch'.

Table 7: Current Level of Government Considered Least Effective by State and Territory (2008)

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT	Total
Federal level	8.9% (435)	14.2% (532)	27.3% (797)	23.8% (270)	12.9% (194)	8.8% (32)	4.3% (11)	17.8% (26)	15.4% (2297)
State level	**41.3%** (2015)	25.4% (953)	**31.5%** (920)	27.2% (308)	25.7% (388)	**41.9%** (152)	16.2% (41)	30.1% (44)	32.2% (4821)
Local level	30.2% (1471)	**46.0%** (1723)	27.9% (815)	**33.7%** (382)	**42.5%** (641)	34.7% (126)	**57.3%** (145)	**39.7%** (58)	**35.9%** (5361)
Don't know	19.6% (957)	14.4% (539)	13.3% (390)	15.3% (174)	19.0% (286)	14.6% (53)	22.1% (56)	12.3% (18)	16.5% (2473)
Total	100.0% (4878)	100.0% (3747)	100.0% (2922)	100.0% (1134)	100.0% (1509)	100.0% (363)	100.0% (253)	100.0% (146)	100.0% (14952)

Table 8: Summary of Reasons Given for Considering Each Level of Government to be Least Effective (2008)

	Level nominated as least effective			
Reasons given / Problems	Federal level	State level	Local level	Total
1. Specific policy/functional areas	25.4%	54.8%	25.7%	36.9%
2. Inclusion/representation	32.0%	18.2%	20.2%	21.6%
3. Governance quality/capacity	**25.3%**	**49.2%**	**57.9%**	**48.5%**
3.1 Too much party politics / political self-interest	*6.1%*	*4.1%*	*5.6%*	*5.1%*
3.2 Too much personal self-interest / corruption	*0.0%*	*9.4%*	*17.3%*	*11.1%*
3.3 Not enough accountability	*0.0%*	*6.1%*	*2.6%*	*3.5%*
3.4 Not enough strategic / long-term planning / leadership	*1.4%*	*12.2%*	*5.9%*	*7.5%*
3.5 Problems with implementation (slowness, delay, indecision, failure)	*7.4%*	*12.3%*	*9.1%*	*10.0%*
3.6 Inexperience / incompetence	*9.4%*	*10.7%*	*20.6%*	*14.7%*
3.7 Not enough resources	*0.0%*	*4.8%*	*8.6%*	*5.5%*
3.9 Too much bureaucracy	*0.0%*	*1.3%*	*1.6%*	*1.2%*
3.10 Waste	*2.7%*	*6.2%*	*4.3%*	*4.8%*
4. Structural issues	14.9%	10.3%	8.4%	10.3%
5. Cost	9.8%	3.4%	3.3%	4.5%
6. Other	19.3%	9.3%	20.2%	15.8%
7. None / don't know	10.3%	4.4%	5.4%	5.9%
Total	100.0% (2297)	100.0% (4821)	100.0% (5361)	100.0% (12479)

Most importantly for present purposes, respondents who regarded local government as the least effective level were most likely to nominate issues of governance quality and capacity as providing the reasons for their dissatisfaction. The types of issues nominated are further broken down in Table 8. The three issues on which local government stands out as most challenged relative to the other levels, are the perceived integrity of officeholders and officials (too much personal self-interest or corruption), inexperience and incompetence, and insufficiency of resources.

These results confirm that the problem of local governments' perceived ineffectiveness, relative to the issue of constitutional and political reform, is a 'chicken and egg' problem. The major problems (relative to the other levels of government) are all issues that can be fairly seen as products of local government's historical and institutional weakness. The extent of these problems is clearly working against claims for constitutional recognition – even though, when viewed logically, these very problems also reinforce the need for change. Citizens are attuned to voting 'for' governments they believe to be effective, and 'against' governments they believe to be ineffective. It is therefore electorally

counter-intuitive for citizens to vote to entrench or increase the political status of an institution they believe to be ineffective.

These results reinforce the indications in the previous section that the path to securing support for any change most probably lies in forms of substantive recognition aimed at increasing the quality and capacity of local governance. The challenge therefore probably lies in developing an agenda for recognition based on a larger program of local government renewal and development; one that can be convincingly seen by voters as addressing these substantive problems of resources, capacity, integrity and democratic standards. Indeed, these results suggest that the whole concept of change to 'recognise' local government may be disadvantageous to the prospects of securing any change, implying as it does the 'constitutionalisation' of local institutions as they presently exist. A constitutional change to 'reform' local government may be more accurate shorthand for the type of change that most voters might agree is needed.

C Competition With Other Reform Options

The third major reason why base support is not higher for federal constitutional recognition of local government is that while a majority of Australian voters would like to see structural reform of Australia's federal system, many do not see the entrenchment of local government as the most logical means of achieving their preferred idea of reform.

As discussed earlier, building a stronger system of local government has never been the only option mooted in Australian constitutional history for overcoming perceived structural deficiencies in the federal system. Since the late 1830s and early 1840s, when local government commenced in South Australia and NSW, and prior to the separation of either Victoria or Queensland as separate colonies; the development of local government has been caught up in a wide range of institutional choices. These include colonial subdivision and 'new State' movements, and alternative district, provincial and regional models for government.[55]

This history is ongoing, and is evident also within local government circles. As recently as 1999, the Constitutional Centenary Foundation's Local Constitutional Conventions detected an ongoing interest not simply in local government's position per se, but in the need for a broader review of Australian federalism to bring about 'a system based on regions or, at least, a larger number of States'.[56] In 2004, when addressing the National General Assembly of Local Government on the prospects for constitutional recognition, Professor Dean Jaensch

55 See Power, Wettenhall and Halligan, above n 8, 17, 20; Chapman and Wood, above n 3, 170; Brown, *Constitutional Schizophrenia Then and Now*, above n 9; Brown, 'One Continent, Two Federalisms', above n 9; A J Brown, *The Constitution We Were Meant to Have*, above n 9; A J Brown, 'Regional Governance and Regionalism in Australia' in Robyn Eversole and John Martin (eds), *Participation and Governance in Regional Development: Global Trends in an Australian Context* (2005) 17.

56 Constitutional Centenary Foundation, *Local Constitutional Conventions: National Forum Report* (1999) 46.

demonstrated the interlinked nature of the options for federal reform. He also did so in a manner that demonstrated how confusing this could make the debate:

> I consider local government to have the best potential to become the, if not the only democratic government in Australia. ... Australia is seriously over-governed, bedevilled with triplication, cost-shifting, buck-passing, inefficiency, ineffectiveness, and undemocratic practices. I do not absolve some elements of local government completely from these faults. But they are endemic elsewhere.
>
> The key problem is a federal structure which has lost touch with the realities of the modern Australian society. The 1897 compact which established a federal Australia is anachronistic, and must be replaced. ... Replaced by what?
>
> There is a belief that Gough Whitlam first designed and proposed a two-tier, national-regional system. ... But I claim to have designed a two-sphere system before him.
>
> I emphasise the phrase *two-sphere*. What we have at the moment is a three-sphere system, which includes two tiers. That is, one component has a subordinate role. That is where you come into the equation. You [local government] should be a third sphere: in practice you are a subordinate tier.[57]

Ever since the 1830s, such reform proposals have had a common central theme; the need to address the centralised nature of the Australian federal system, by devolving a larger measure of power, responsibilities and resources to stronger institutions of local and/or regional democracy. For reasons reviewed earlier, the case for such devolution remains relatively compelling. However, it is not a case that, until recently, has been widely recognised by a critical mass of policymakers and opinion leaders in Australian society.

The survey results show that there remains in Australia a high base level of interest in overall structural reform of the federal system. However, citizens' preferences for structural reform do not necessarily centre on strengthening present local institutions. Moreover, preferences for reform do not necessarily always reflect recognition of the case for devolution suggested above; instead, they often manifest as a desire for greater centralisation – even when, it can be surmised, better local and regional policy outcomes are intended goals of such centralising reform.

The evidence that a significant majority of citizens might support structural reform of the federal system was recently re-established in preliminary surveys undertaken in Queensland in 2001[58] and NSW in 2005.[59] Those surveys presented respondents with four scenarios for the structure of the federal system

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57 Dean Jaensch, 'Governance, recognition, status, authority: the possibilities for local government' (Speech delivered at the National General Assembly of Local Government, Canberra, 8 November 2004) <http://nga.alga.asn.au/generalAssembly/2004/01.presentations/11.deanJaensch.php> at 6 August 2008.

58 A J Brown, 'After the Party: Public Attitudes to Australian federalism, regionalism and reform in the 21st century' (2002) 13 *Public Law Review* 171; Brown, 'Subsidiarity or subterfuge?', above n 5.

59 A J Brown, Ian Gray and Dimitria Giorgas, 'Towards a more regional federalism: rural and urban attitudes to institutions, governance and reform in Australia' (2006) 16 *Rural Society* 283; Ian Gray and A J Brown, 'The political viability of federal reform: interpreting public attitudes' in Brown and Bellamy (eds), *Federalism and Regionalism in Australia*, above n 12.

in 50 or 100 years time, and asked them to choose the scenario closest to their preference and their expectation.

The present survey, using a different (more open) methodology, again asked respondents a series of questions to flush out their view of how they thought the system of government should be structured: 'in the future – say 20 years from now'. Some key results, for all respondents, have been presented elsewhere. They indicate that overall, 65.8 per cent of adult Australians believe the basic structure of the three-tiered system of government should be different in the future from that which it is today, as against 31 per cent who believe it should be left as a system with the same three levels as at present, based on the same number of States.[60]

This result holds for all respondents indicating eligibility to vote, as shown in Table 9. This level of popular interest in different forms of structural change to the basis of the federal system is clearly more than a superficial phenomenon, and can only reflect deeper, ongoing concerns about the optimality of our fundamental institutions. However, as Table 9 demonstrates, local government as it presently exists is regarded by a significant number of Australian voters as less than fundamental to an optimal system. In all, 30.8 per cent of voters would abolish State governments altogether out of the system – but an even greater number, 33.6 per cent, would simply abolish all local governments. While not shown in the table, this result again varies considerably between States. As many as 40.1 per cent of NSW voters would abolish all local government, a result that resonates with a recent Sydney editorial to that effect.[61] However, only around a quarter of Queensland or Tasmanian voters see value in abolishing local government.

60 A J Brown, 'Thinking Big: What Will Australian Federalism be like in 2020?' (Paper presented at The Future of Federalism Conference, Brisbane, 12 July 2008).

61 'Our teetering town halls', *Sydney Morning Herald* (Sydney), 30 July 2008, 12 <http://www.smh.com.au/news/editorial/our-teetering-town-halls/2008/07/29/1217097234034.html> at 6 August 2008.

Table 9: Support for Constitutional Recognition of Local Government by Broad Preferences for Federal System in 20 Years (2008)

	Desired system in the future				
	Same system as today (including local government)	Reformed system including local government	Reformed system with no local government	Other / Don't know	Total
	31.3% (4676)	32.0% (4790)	33.6% (5025)	3.1% (460)	100.0% (14951)
The existence of local government should be officially recognised in the *Constitution*.	57.8% (2703)	65.1% (3120)	36.3% (1822)	54.4% (250)	52.8% (7895)
There is no real benefit in making this change to the *Constitution*.	37.1% (1734)	29.7% (1420)	**60.8%** (3053)	33.7% (155)	42.6% (6362)
Neither / don't know.	5.1% (239)	5.2% (250)	3.0% (150)	11.9% (55)	4.6% (694)
Total	100.0% (4676)	100.0% (4790)	100.0% (5025)	100.0% (460)	100.0% (14951)

Table 9 also demonstrates the extent of correlation between those who would abolish local government altogether in the future, as it currently exists, and those who express an initial disinclination to recognise local government in the present federal *Constitution*. In all, 60.8 per cent of those who would abolish local government expressed this disinclination – around twice as many as those as who would either keep the present system or reform it but retain local government. While this result is unsurprising, it further confirms that a large per centage of those who are basically disinclined to recognise local government are not likely to be easily persuaded otherwise, since they hold a rather deep-seated view of local government's redundancy. While some of the earlier evidence indicates that some of these respondents' opinions could shift, the fact remains that there is a strong section of the voting population whose basic view is not simply ambivalent, but relatively hostile.

It is important to note that these large proportions of the community that would abolish one or both of the current lower levels of government, are not necessarily or solely interested in a constitutional future based on greater centralisation. While two-thirds of Australians describe a preferred future involving structural change, three-quarters of these (43.5 per cent of all respondents, weighted) would either keep State governments but have more, or would create a new tier of regional governments, or both. In all, 32.2 per cent of Australians would create these new regional governments, whether as part of a two-tiered, three-tiered or four-tiered system. These larger results indicate a basic overall interest in a restructuring of Australia's sub-national tiers of government, including at least some measure of structural devolution. A major thread, among

the majority of the majority who would reform the system, appears to be a desire for stronger democracy and administration at spatial levels that are closer to the people than is currently the case.

Nevertheless, the extent of local government's challenge is demonstrated not only by the fact that it is currently considered redundant by many, but also the fact that many Australians do *not* see the need for reform – if it is to occur – to take this devolutionary direction. Table 10 suggests that on balance, more Australian voters are decentralist (51.4 per cent) than centralist (41.3 per cent) in their basic constitutional values, when asked to choose between two statements, the first approximating the policy principle of 'subsidiarity'.[62] Those initially inclined to support recognition of local government tend to be somewhat more decentralist, against those disinclined to support local government recognition, who are to some extent more centralist in their outlook. Again, there is some hope here; exactly half of those who would not recognise local government, who answered the other question, did still agree with the broad principle of devolution. These are clearly the respondents in keenest need of persuasion that local government can become a fully competent level of government. Overall, these results are again unsurprising, but do confirm that the bases for support or lack of support run rather deep, rather than being simply superficial.

Table 10: Support for Local Government Recognition by Support for 'Subsidiarity' (2008)

Thinking of the federal government as being the **highest** level of government, and state and then local as being **lower** levels of government. Which **one** of the following comes closest to your view about where decisions should be made?

	It is better for decisions to be made at the **lowest** level of government **competent** to deal with the decision	It is better for as many decisions as possible to be made at the **higher** levels of government	None / don't know	Total
Total	51.4% (7683)	41.3% (6179)	7.3% (1087)	100.0% (14949)
The existence of local government should be officially recognised in the *Constitution*.	55.7% (4397)	38.4% (3033)	5.9% (464)	100.0% (7894)
There is no real benefit in making this change to the *Constitution*.	46.3% (2946)	46.2% (2941)	7.5% (475)	100.0% (6362)
Neither / don't know.	49.1% (340)	29.6% (205)	21.4% (148)	100.0% (693)

62 See generally Brown, 'Federalism, regionalism and the reshaping of Australian governance', above n 12.

IV CONCLUSIONS: HASTENING SLOWLY TOWARDS MEANINGFUL REFORM

For many of those who see Australia's federal system in comparative perspective, and the many Australians who see the present political system as lacking in the structures and qualities of local and/or regional democracy, federal constitutional reform to help build a stronger, more competent local government system is both fundamental and logical. For the many who believe that federal principles remain an appropriate source of Australian constitutional values, the challenge is 'to make constitutional recognition part of the movement to improve Australian federalism, rather than part of a process that erodes it'.[63]

For the many – federalist or otherwise – who seek structural reform of the system, the same challenge applies. Whatever the case for further centralisation of power or responsibility in some areas of public policy, there remains a compelling, parallel case for more general devolution in the political, financial and functional structures of Australia's constitutional system. One of the ideas put forth by the Governance Stream at the Australia 2020 Summit was the overall need for reform of Australian federalism by creating 'two principles of power, moving in opposite directions. Power has to be both concentrated and devolved. Think of involving people at local levels along with centralised governance.'[64]

In the present reform environment, meaningful federal constitutional recognition of local government should in many ways be a straightforward question. However, as shown by the empirical results in this article, the combination of a tortured constitutional history and current public attitudes make this far from the case.

Based on the new research discussed here, a base, bare majority level of support for the principle of federal constitutional recognition exists, but stands ready to evaporate – as it has done previously – under even mild political contestation or pressure. A high level of interest in broader reform of the federal system *could* contribute to support for constitutional recognition, but only if the proposed constitutional changes are ones seen by voters as both necessary and desirable to bring about a substantially reformed and improved system of sub-national democracy.

Moreover, an important implication of the broader state of public attitudes, is the need for a coherent national plan of federal reform, within which any constitutional change aimed at the reform of local government is seen to sit, rather than such change being posited as a 'one off' or ad hoc measure. The fact that so many Australians are interested in structural reform of the federal system, but do not value local government highly enough to see it as even having a constitutional future, provides a new guidepost to the reasons why past referenda attempts have failed. If constitutional reform on the subject of local government is pursued as an ad hoc measure, without being seen as part of a reform plan that

63 Saunders, above n 50.

64 Commonwealth, *Australia 2020 Summit: Final Report* (2008) 320.

addresses the perceptions of citizens who support reform but do not currently value local government, then any attempted alteration is clearly much more likely to fail. On the other hand, if Australians can see that a coherent plan for overall reform has emerged, and that the proposed change in favour of local government contributes to – rather than only being an endpoint – to that plan, then there is some reasonable prospect of the necessary support becoming more solid.

Australia appears to face three broad options for how it chooses to resolve the question of the federal constitutional position of local government. The first option is to abandon or postpone the question of constitutional reform, in favour of a process whereby the functional and financial position of local government is included as a more pivotal ingredient than has historically been the case, in a substantial practical overhaul of the federal system as a whole. Such an overhaul was one of the major ideas to emerge from (or more accurately, receive substantial support from) the Australia 2020 Summit. There the key recommendation recognised the need for a process of federal reform to 'enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance'.[65]

The discussion at the 2020 Summit made it plain that, of necessity, any such overhaul needs to pay careful consideration to the roles of local and regional levels of governance. Further encouragement regarding the growing recognition of the importance of these devolutionary questions can also be found in the specific mention of local government also made by the participants in the Economy stream of the Summit, when proposing structures and processes aimed at a similar overhaul.[66]

The second major option is for local government to engage with federal and State governments in a larger, national program of practical reform of local government. Without necessarily waiting for all the results of the kind of comprehensive overhaul suggested above, such a reform program could begin to attack, at their root, the structural, financial and accountability problems that currently underpin low public opinion of our lowest level of governance. Given the extent of public recognition that these problems may also be spatial, and related to regional-level deficits in democratic and administrative capacity; such a reform program would logically also embrace questions of institutions for greater regional collaboration and a more integrated approach to regional governance, across federal, State and local government activity.[67]

Part of the logic of such a reform program would be to create a nationally strengthened system of local government, of a standard that more Australians would more readily see as deserving of constitutional recognition. The focus would be on building the role of the most local levels of government as the type

65 Ibid 308.

66 Ibid 41–2.

67 A J Brown, 'Reshaping Australia's Federation: the choices for regional Australia' (2007) 13 *Australasian Journal of Regional Studies* 235; A J Brown, 'Reshaping Australia's Federation: the choices for regional Australia' (2007) 13 *Public Administration Today* 15.

of 'genuine partners' in the federal system that have been the subject of increasing political rhetoric since the 1970s, but which the structures of federalism and public finance continue to prevent in practice. In part, embarking on such a program would also recognise that most of the key problems and solutions involved in achieving a stronger, more democratic and higher-performing local government system are practical policy issues which do not themselves hinge on constitutional change. In this respect, one benchmark for the success of the reform program might well be the extent to which the perceived need for federal constitutional recognition actually dissipates.

The third major option is to proceed with the development of a proposal for federal constitutional alteration, that at least addresses the major lessons of this research – in other words, that is based on the desirability and necessity of positive, practical reform of local government (as opposed to simple recognition or entrenchment of the status quo). Such a course stands many risks of failure, even assuming there are none of the corrosive risks of destructive political partisanship evident in past debates. However, the ultimate test of whether such a proposal has been sufficiently framed in terms that resonate with the constitutional values of Australian voters lies in putting the question to plebiscite or referendum.

Of course, these three options are not mutually exclusive. The second option is a logical parallel option to the first; and both the first and second options could and should still conclude with constitutional reform to achieve those practical improvements to Australia's federal system that require constitutional underpinning or cannot be achieved in any other way. The primary lesson of this research is the need to hasten slowly before committing to a reform proposal aimed at constitutional alteration in the short- or medium-term that does not address the larger pool of longer-term issues that are clearly at play in the public mind. Contrary to many stereotypes, Australians are neither ignorant nor disinterested when it comes to basic questions of the quality and structure of their democratic institutions. Before embarking on any reform, it is well worth listening to their views – however diverse, colourful or apparently internally contradictory – especially when section 128 of the *Constitution* means that only they hold the ultimate key to the lock of Australia's federal constitutional text.