Frequently Asked Questions
on the Local Government Referendum

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1) **What is a referendum?**

The Constitution is the fundamental document which provides the legal framework under which our federal system of government operates. It establishes the Commonwealth Parliament and Executive Government, and it distributes powers between the Commonwealth and the States.

The Constitution was drafted in the late 19th century. It consists of 128 sections. From time to time, there are proposals to change the wording of one or other of these sections, either to fix perceived problems or to improve its operation.

A referendum is the process which must be undertaken in order for the Constitution to be amended. It involves a vote by the entire Australian electorate on whether or not a change should be made to the Constitution. This process is required by section 128 of the Constitution. If the referendum is passed, the Governor-General gives assent to it and it becomes part of the Constitution. It can then only be changed by a future referendum.

2) **What is necessary for a successful referendum?**

For a referendum to be successful, a ‘double majority’ of the votes cast must be achieved. This means that the majority of the Australian electorate must vote ‘yes’, and a majority of the electors in a majority of the States (being four out of six States) must also vote ‘yes’. (Votes in the Northern Territory and the ACT are included in the first count, but not in the second.)

For example, if 51% of the electorate voted ‘yes’ and a majority of people in New South Wales, Queensland, Victoria and Western Australia voted ‘yes’, then the referendum would succeed. However, if a majority of the electorate across Australia voted ‘yes’ but majorities in only three States voted ‘yes’, then the referendum would fail. Equally, if majorities in four States voted ‘yes’, but an overall majority of the Australian electorate did not, then the referendum would also fail.

3) **When will the referendum on local government be held?**

The referendum was originally proposed to be held on 14 September 2013 with a general election. The change in the election date to 7 September has meant that the referendum can no longer be held at the same time as the election, because not enough time has elapsed since the referendum Bill was passed by both Houses of Parliament.

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* This is not an official government document. The views expressed are not those of the University of Sydney. This document only takes account of events up until 24 May 2013.
If the Rudd Government is re-elected, it has stated that it will give consideration as to whether to run the referendum. The Opposition has made no commitments as to whether to run it or not. The maximum period for holding the referendum based upon the existing Bill is 6 months, so it could be held as a stand-alone referendum up until December 2013. Alternatively, a new referendum Bill could be passed by whoever gains office at the 7 September election.

4) **What will the question be and how do I express my vote?**

At the polling booth, electors will be given a separate ballot paper that deals only with the referendum. The way it is traditionally set out is to declare that there is a proposed law, giving the long title of this Bill. This is the Bill to amend the Constitution. On the basis of the June 2013 Bill, it would say:

A PROPOSED LAW: A Bill for an Act to alter the Constitution to recognise local government by stating that the Commonwealth can grant financial assistance to local government, including assistance for community and other services.

The ballot paper would then ask whether you approve of this change to the Constitution by saying:

**DO YOU APPROVE THIS PROPOSED ALTERATION? WRITE “YES” OR “NO”**

Voters would then have to write ‘Yes’ or ‘No’ in the box provided, indicating whether or not they approve of changing the Constitution in this way.

5) **Is voting compulsory?**

Yes, voting is compulsory in the referendum.

6) **What is the local government referendum about?**

The local government referendum is about changing the Constitution to permit the Commonwealth Government to give funds directly to local government, rather than passing those funds to local government via the States.

7) **What is the proposed change?**

The proposal is to add certain words to section 96 of the Constitution. Section 96 is known as the ‘grants power’. It currently says:

‘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’.
This means that the Commonwealth government can give money to the States on terms and conditions. For example, it permits the Commonwealth to make grants to the States on the condition that they pass all the money on to local government. This is the method by which local government has received Commonwealth funds since the 1920s. However, section 96 does not permit the Commonwealth to give that money directly to local government, by-passing the States. This amendment would allow the Commonwealth to fund local government directly without the consent of the States.

The referendum, if successful, would change section 96 to read (amendment in bold italics):

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, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit.

This would enable the Commonwealth government to fund State and local governments directly on such terms and conditions as the Commonwealth Parliament determines.

8) **Is there a threat to Commonwealth funding of local government?**

No. The Commonwealth can always fund local government bodies by making grants to the States on the condition that they pass the money on to local government. This is how 80% of the Commonwealth’s funding is provided to local government. About 20% of Commonwealth funding is paid directly to local government.

It is possible that some of the Commonwealth’s direct funding is unconstitutional. The High Court decided in the *Pape* case in 2009 that the Commonwealth cannot just spend money for any purpose at all – it can only do so if it falls within the powers allocated to the Commonwealth by the Constitution. While some grants to local government might fall within existing Commonwealth powers, others may not. However, if this is the case, then the same money can simply be given to local government by the existing valid means, through conditional grants to the States.

9) **So is this just about creating an alternative way to fund local government?**

Yes. The Commonwealth wants to be allowed to fund local government directly in addition to the current valid way of funding local government through conditional grants to the States.

10) **Haven’t we voted on this before?**

Yes. The Whitlam Government put a very similar referendum in 1974. If it had succeeded, it would have allowed the Commonwealth to ‘grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit’. The referendum failed nationally by approximately half a million votes and failed in all States except for New South Wales.
In 1988 there was another referendum on local government. This time it didn’t concern funding. Instead it was more symbolic in nature, requiring that 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’. This referendum failed nationally by approximately 3 million votes (with around two-thirds of voters opposing it) and in all States.

11) Where did this referendum proposal come from?

Local government has been campaigning for constitutional recognition for many years. It held a Local Government Constitutional Summit in 2008 which recommended that any constitutional change include the following principles:

- the Australian people should be represented in the community by democratically elected and accountable local government representatives;
- the power of the Commonwealth to provide direct funding to local government should be explicitly recognised; and
- if a new preamble is proposed, it should ensure that local government is recognised as one of the components making up the modern Australian Federation.

After the 2010 federal election, the Gillard Government promised the Australian Greens and the independents that it would hold a referendum upon the ‘recognition of local government in the Constitution’. It established an Expert Panel, chaired by the Hon James Spigelman, to make recommendations regarding the options for constitutional recognition.

The Expert Panel handed down its report in 2011 which concluded:

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

It recommended the amendment of section 96 of the Constitution to permit the Commonwealth to make grants to ‘any local government body formed by State or Territory Legislation’ on such terms and conditions as the Parliament thinks fit. The referendum proposed by the Commonwealth is in similar terms, although the Commonwealth thought it was not necessary to include a reference to the territories as the Commonwealth can already directly fund local government in the territories under a different constitutional power.
12) What does the Constitution currently say about local government?

There is no current mention of local government in the Constitution. This is because local government is created by the States under State legislation. It is not an independent level of government. Where the Constitution gives express protection to the States (such as section 114, which prohibits the Commonwealth from taxing the property of the States), this also extends to protect local government as part of the States.

The proposed constitutional amendment is not intended to change this position. While the words ‘local government’ will be included in the Constitution, this will not give local government any greater powers or legal status. Its position in the system of government will remain the same.

13) Will this take local government out of State control and put it under Commonwealth power?

No. The proposed amendment refers to ‘any local government body formed by a law of a State’. This means that it only deals with local government bodies established under State laws, passed by State Parliaments. It would not permit the Commonwealth to establish its own system of local government. Local government bodies will remain the creations of the States, established by State laws.

What it will do, however, if successful, is permit the Commonwealth to impose conditions on its funding to local government. This means that the Commonwealth could not only direct how local government spends the grant, but it could require local government bodies to agree to conditions on anything else within their power in order to receive the grant. So the Commonwealth would potentially have a degree of control over local government bodies, as long as they accept the Commonwealth grants with the conditions attached.

While the Commonwealth can already impose conditions on State grants, the States are at least big enough to be able to negotiate in relation to those terms and conditions. It is unlikely that individual local government bodies would have any capacity to do so.

14) How is local government funded at the moment?

Overall, local government is pretty self-sufficient. Most of its funding (about 84%) comes from its own sources of revenue, including rates, fees for services, sale of goods, commercial dealings and investments. Of the rest, about 8% is provided by the Commonwealth and about 8% is provided by the States.

Amongst local government bodies, however, there are variations. Some are more reliant on grants from the Commonwealth and States than others. In 2008 the Productivity Commission found that 10 percent of councils were highly dependent on grants, which accounted for more than 58% of their total revenue. These councils covered about 0.4% of the population.
In 2012-13 the Commonwealth provided $2,204 million to local government through grants to the States under section 96 of the Constitution. The Commonwealth also provided $440 million directly to local government without going through the States. This includes $335 million for the Roads to Recovery program.

Accordingly, about 80% of Commonwealth funding to local government now goes through the States and about 20% is paid directly to local government. So when it is argued that we need this referendum to avoid a legal threat to the validity of direct Commonwealth payments to local government, what we are really talking about is approximately 1.6% of local government’s funding, which could instead be channelled back into grants to local government through the States in any case.

15) Wouldn’t it be cheaper and more efficient to cut out the ‘middle-man’ and let the Commonwealth fund local government directly?

Probably not. Sometimes it is suggested that States ‘take their cut’ of Commonwealth funding to local government or that they ‘cream-off’ part of it. The Expert Panel inquired into this and found no evidence of it occurring. This is because the Commonwealth places conditions on its grants that require that every cent goes to local government. All grant expenditure has to be audited. There is no opportunity for the States to take any of the money for themselves.

Sometimes it is also said that the States deduct from the Commonwealth grants their costs of administering the grant system through the Local Government Grants Commissions. It is argued that it would therefore be cheaper, saving $18 million per annum, to cut the States out of the system. Again, it is clear that the States are not permitted to deduct the cost of running the Local Government Grants Commissions. The full amount of Commonwealth grants must go to local government and the States have to fund the Local Government Grants Commissions out of their own money. So to the extent that there are any costs to having a ‘middle-man’, they are borne by the States, not local government.

If, however, the Commonwealth took over the role of working out how to distribute grants to local government according to need, not only would it be more costly for the Commonwealth to collect all this information from each local government body in the country, but the Commonwealth would be likely to deduct its costs from its grants (as this is what it does to the States when the Commonwealth deducts its costs in collecting the GST before providing GST revenue to the States). A more likely consequence of this proposed amendment, if the Commonwealth proposed to give all its funding direct to local government, is that the administration of the grants by the Commonwealth would be more expensive and that less money would flow to local government as a result.

16) What impact will this referendum have on my rates?

It is impossible to tell. If the Commonwealth were to fund all local government bodies directly on an equalisation basis, then it is likely that rural and remote local government areas, which are likely to suffer greater disadvantages, would receive more Commonwealth funding and that city local government areas would receive less funding. This might affect rates. Alternatively, the Commonwealth could choose not
to change the funding model and to continue to distribute its funds amongst the States on a population basis. The financial consequences for local government bodies are therefore unpredictable.

17) **Will this amendment result in local government getting more funding?**

We do not know. Some people think that the Commonwealth will give more funding to local government if it can do so directly, because it gets greater political credit for doing so, allowing it to influence voters in its favour. Others think that what the Commonwealth is prepared to give local government is really dependent on its budgetary position and that it won’t make any difference whether it has two ways of providing the funding or only one. It is even possible that local government could end up with less money, if the administrative burden on the Commonwealth of administering direct funding is high and if it deducts this cost from its payment. The answer is that no one can know for sure what will happen in the future. Even if the current Commonwealth government makes commitments as to future funding, this will not bind future governments.

18) **Will this amendment prevent local council amalgamations or the dismissal of councils?**

No. Local government bodies will still be subject to State laws, including laws concerning amalgamations and dismissals. It would be possible, of course, for the Commonwealth to place a condition on its funding to local government – eg that all local government areas have a minimum number of residents. In this way it could pressure local government bodies to agree to amalgamations in order to get Commonwealth grants. This would make it easier for the Commonwealth to administer direct funding as it would only have to deal with fewer local government bodies. No one knows whether the Commonwealth would do this in the future.

19) **Might there be unintended consequences of changing the Constitution in this way?**

There is always the possibility of unintended consequences, although this is a fairly limited change, so the possibilities are relatively few.

In recent years, in interpreting the Constitution, the High Court has identified ‘essential’ characteristics for institutions mentioned in the Constitution such as courts and juries. One possibility is that it would attribute essential characteristics to ‘local government’ once it was mentioned in the Constitution.

The Expert Panel was concerned about this, so it attempted to avoid any problems by ensuring that the provision does not require there to be a system of local government. The proposal only concerns Commonwealth funding to local government. So if the High Court attributes essential characteristics to ‘local government’ (for example, if it held that the term ‘local government body’ means a body that is elected and can’t be dismissed or replaced by administrators), then the only consequence would be that the Commonwealth could not fund such bodies directly – not that they would be constitutionally invalid.
Nonetheless, if that happened a State would be under considerable pressure to change its system of local government so that it could receive Commonwealth funding on the same basis as other local government bodies. Although the Commonwealth could continue to fund these bodies through conditional grants to the States, it would be unlikely to do so if the High Court said that they did not meet the minimum standards or essential characteristics of ‘local government bodies’.

Another question is whether the conditions placed on Commonwealth grants to local government, if included in Commonwealth legislation, would override State legislation or simply be regarded as conditions upon acceptance of the grant which have no further legal effect. We would have to wait for a High Court decision to know for sure.