

# Working Paper Series

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01-2011

April 2011

## Principles of Local Government Autonomy in the United States and the Implications for Australian Local Government

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*Abstract:* Australian local governments have always operated under the threat of state government intervention and prescriptive regulation. While these interventions are often discussed in terms of the tensions they generate between 'efficiency' and 'democracy' policy objectives (Aulich 1999; 2005), this paper examines Australian local government in terms of local government autonomy set against the oversight exercised by state governments. In particular, we investigate 'home rule' for local government in the United States and its potential relevance to the Australian milieu. We argue that *prima facie* the operation of home rule is problematic due to its litigious nature. However, viewed as an organising principle for state-local government relations, the home rule offers useful guidelines by which Australian local governments could achieve a measure of autonomy and independence from their respective state governments.

*Keywords:* Autonomy; Dillon's rule; home rule; local government; oversight.

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## 1 Introduction

Local government occupies an uneasy role in Australian federalism. On the one hand, despite the basic structure of Federal Assistance Grants (FAGs) being in place since 1974–75 (DTIRDLG 2010, 24) local government bodies have recently been the subject of bipartisan largesse from the Commonwealth. First, under the Howard Government's *Roads to Recovery* (R2R) funding, an additional \$4 billion in road infrastructure funding was placed directly in the hands of local governments between 2001 and 2007 (Kelly, Dollery and Grant 2009, 184). Second, the subsequent Rudd Labor Government continued the R2R Program and added further monies under the Nation Building Economic Stimulus Plan (Australian Government 2010). Moreover, support for constitutional recognition of local government has recently been endorsed by federal Coalition parties (Robb 2010; Truss 2010) and is now bipartisan.

On the other hand, reform processes conducted by state and territory governments over the past 20 years reveal a very different portrait of intergovernmental relationships. Amalgamation programs across all states and territories, except Western Australia, have seen the number of municipal bodies reduced from 840 in 1982 to 530 in 2008 (Grant, Dollery and Crase 2009: 853; ALGA 2011). Further, whereas Aulich (2009) has noted the insertion of community participation clauses into most local government acts across jurisdictions, he nevertheless expressed scepticism about how enthusiastically these legislative changes have been taken up by local communities. Moreover, despite what we have described as acts of largesse toward local government on the part of federal government, the local government sector still operates in conditions of extreme financial austerity, with a burgeoning infrastructure backlog casting doubt on the sector's capacity for future financial sustainability without significant reform (see, for example, PWC 2006).

The overall consequences of reforms directed from state and territory governments (for a synoptic account, see Marshall 2008) have served to highlight the tensions between what Aulich (2005) described as 'instrumental' reforms directed at achieving economic

efficiencies, and those designed to enhance the operation of local governments as democratic entities (Aulich 2009). This perspective has been used to explore the applicability of different models of democracy to the Australian local government context (Dollery and Grant 2011a) as well as examining the potential of, and ambiguities associated with, the adoption of different types of institutional leadership arrangements (Grant, Dollery and Gow 2011). Nevertheless, with some notable exceptions (McNeill 1997; Dollery, O’Keefe and Crase 2009), Australian local government has rarely been examined from the perspective of its autonomy set against the regimes of oversight imposed by state and territory governments.

This seems surprising. In other comparative polities, like Britain and the United States, the relationship between local government autonomy and oversight has been the subject of rigorous scrutiny, debate and policy development. Recently this has been the case in local government in reform in England, where, arguably, the *Localism Bill (2010)* has sought to simplify centralised monitoring regimes and place greater powers with local government (HM Government 2010; for an alternative perspective, see Frug 2011). Further, in the United States the relationship between state and local governments, in particular local government autonomy encapsulated in the concept of ‘home rule’, has an intricate history and is the subject of considerable theoretical and legal scholarship (for an overview, see Krane, Rigos and Hill 2001, ix–22). The debate over local government autonomy has occurred despite the legal fact that in both jurisdictions, as in Australia, local governments remain creatures of state statute. Against this international comparative background, this paper examines the concept of home rule in the United States, and explores implications of adopting a similar approach in Australian local government jurisdictions.

This paper adopts what has been labelled an ‘institutional approach’ to this question, wherein legal/authority-based definitions of institutions assume the primary focus of inquiry. In other words, while it is recognised that ‘political institutions do not determine the behaviour of political actors’, they nevertheless ‘shape political behaviour by

providing a relatively systematic and stable set of opportunities and constraints' or 'enforced prescriptions' of behaviour (Lowndes and Leach 2004, 560). In essence, we investigate the potential of increased autonomy in Australian local government by way of the contemporary, comparative example of home rule in the United States.

Nevertheless, two points can be derived from the theoretical literature discussing local government autonomy that provide a backdrop to our discussion. The first is the distinction made by Lawrence Pratchett (2004) between the freedom to act on the one hand and freedom from interference from other tiers of government on the other. This distinction was also made by Gordon L. Clark in the U.S. context. Drawing on the work of Jeremy Bentham, Clark (1984, 195) delineated between 'immunity' and 'initiative', where 'the former refers ... to the power of localities to function free from the oversight of higher tiers of the state', and the latter describes 'the power of localities to legislate and regulate the behaviour or residents'. This distinction plays some role in our ensuing discussion. However, the second notable area of debate, namely the complex relationship between local autonomy on the one hand and local democracy on the other, is not explicitly discussed in this context. Nevertheless, we concur with Pratchett (2004), who has cautioned against unreflectively correlating local autonomy with local democracy.

The paper is divided into five main parts. Section 2 examines the oversight of Australian local government by state governments. It is argued that, despite the granting of general competence powers (or what Gibbons (2011) referred to as 'permissive' and 'enabling' powers), Australian local governments are subject to exacting regimes of oversight by state governments, as discussed by Dollery, O'Keefe and Crase (2009), to the extent that McNeill (1997, 22) stated: '[i]n some ways local governments could still be regarded as an extension of a state's administrative apparatus, in the same way as government departments and authorities'. Section 3 examines the operation of home rule in the United States, arguing that home rule ought to be seen not as 'a delegation of broad authority to local governments over matters of local concern' (Bluestein 2006,

15) but rather, following Barron (2003) and Briffault (2004), as a principle by which to view state-local relations in specific institutional contexts. We provide an account of home rule as a normative theory derived from Briffault's (2004) seven 'axioms' (our phrase) of home rule. Section 4 takes these axioms and examines how the introduction of home rule would potentially alter state-local relations in Australia. The paper ends with some concluding remarks in Section 5.

## **2. AUSTRALIAN LOCAL GOVERNMENT: AUTONOMY AND OVERSIGHT**

Several observers of Australian local government have claimed that the redrafting of the Local Government Acts since 1989 all provide 'general competency powers' which can be set against the specifically designated areas of responsibility as determined by the previous acts. Further, Wensing (1997, 96) argued that one of the main principles underlying legislative reform in the redrafting of the acts was to 'provide scope for councils to have a strong capacity for decision-making by increasing their *autonomy* and granting them with general competence powers to "provide for the peace, order and good government of the municipal area"' (emphasis added; see also Marshall 2008, 36–7).

This generalisation is misleading for two reasons. First, all local governments in Australia remain creatures of state statute such that, while general competence powers may have been granted, these can nevertheless be significantly and arbitrarily mitigated by legislation of state governments. Second, the general competence powers exhibit important degrees of variability across jurisdictions. For example, the contemporary Victorian, Tasmanian and Queensland Local Government Acts do contain unambiguous statements of general competence<sup>1</sup>. Additionally, the *Local Government Act 1995*

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<sup>1</sup>The *Local Government Act 1989* (Victoria) Part 1A (3F) states:

**3F            What are the powers of Councils?**

- (1) Subject to any limitations or restrictions imposed by or under this Act or any other Act, a Council has the power to do all things necessary or convenient to be done in connection with the achievement of its objectives and the performance of its functions.

(Western Australia) §3.1 states that ‘a liberal approach is to be taken to the construction of the scope of the general function of a local government’. Yet under the recent ‘State Local Government Agreement’ it is explicitly recognised that ‘underpinning the Agreement is the understanding that the relationship it is not one of a sharing of powers but, rather, a *delegation of powers* by the State to local government’ (DLG [WA] 2010; emphasis added). Further, §8 of the *Local Government Act 1993* (NSW), ‘The Council’s Charter’, includes 14 principles describing the broad roles for local government, to which councils may add their own. Yet the extent to which this allocation of responsibilities can be portrayed as granting ‘autonomy’ (Wensing 1997, 96), as opposed to simply cost-shifting, is debatable (Dollery, Wallis and Allan 2006).

Similarly, §6 (a)-(e) of the *Local Government Act 1999* (South Australia) describes five ‘principal roles’ of local government, one of which is to carry out ‘*duties* of local government under this Act and other acts’ (emphasis added). Finally, some elements of the *Local Government Act 2008* (Northern Territory) may be interpreted as granting broad powers. For example, §11(d) states: ‘To encourage and develop initiatives for improving [the] quality of life’. However, this generosity is contradicted by §10 ‘Consequential adjustment of rights and liabilities’, which reinforced the Territory administration’s sweeping powers, particularly in the area of structural reform, that saw

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- (2) The generality of this section is not limited by the conferring of specific powers by or under this or any other Act.

Similarly, with the consolidation of the *Local Government Act 1993* (Tasmania) in May of 2005, § 20 ‘Functions and powers of councils’ now contains the statement ‘to provide for the peace, order and good government of the municipal area’.

The recently reformed *Local Government Act 2009*(Queensland) Part 1 (9) states:

**9 Powers of local governments generally**

- (1) A local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.

*Note—*

Also, see section 262 (Powers in support of responsibilities) for more information about powers.

- (2) However, a local government can only do something that the State can validly do.

the number of local government bodies reduced from 61 to 16 in 2008 (DITRDLG 2010, 8). As such the general impetus toward 'autonomy' (Wensing 1997, 96) is considerably curtailed in some contemporary Local Government Acts.

This lack of autonomy is given further weight by a consideration of the regulatory framework provided by various state government departments for local government operations. For example, the Local Government Association of Tasmania (LGAT) (2011) listed 17 major pieces of legislation regulating elements of local government activity. Moreover, the activities of all local governments are overseen by their respective state government departments, or in the cases of NSW and Tasmania, divisions of their respective Premier's Departments (see DLG [NSW] 2010; LGD [TAS] 2011).

Notwithstanding the complexities of different situations between jurisdictions, two attempts have been made to conceptualise the general Australian local government experience of regulation in terms of broad models, or typologies of autonomy and oversight. First, McNeill (1997, 22–3) identified three 'examples' of types of state-local relations 'ranging from complete autonomy... through to local government acting as an agent of the state (or federal) government':

Local government being fully responsible for policy formulation and funding, but the requirement to do so is mandatory and minimum standards of service are set by the state (or federal) government;

Another sphere of government develops the policy guidelines. Local government undertakes the responsibility and funding of the service but performance is subject to oversight by the state government;

As above, but in addition to developing the policy guidelines the state or federal government also provides funds in the form of specific purpose grants (SPGs).

McNeill (1997, 23–4) focussed on the degree to which these ‘governance systems’ were ‘appropriate’ for the provision of different types of services, arguing that ‘in theory, those sorts of services over which local government has complete autonomy should satisfy an ideal set of characteristics’, namely that the effects of the decision ought to be contained within the local government area, that local residents can exercise preferences over these decisions and that the effects of such decisions are able to be readily monitored. However, while tentatively advancing this normative position with respect to local control, McNeill (1997, 23) nevertheless argued that ‘there are in fact very few activities where the effects are purely local ... [especially] given the heightened awareness of environmental effects’.

This exploration of principles upon which to base the provision of a (narrow) range of goods and services at the local level was expanded upon by Dollery, O’Keefe and Crase (2009). Drawing on the work of Berman (2003) and Zimmerman (1995), they proposed a ‘quadrilateral typology’ of state government oversight of local government, which they argued ‘could have practical application in contemporary Australian local government’ (Dollery, O’Keefe and Crase 2009, 286). In situations where local government is prone to ‘failure’ – defined as ‘the inability of a public institution to achieve its intended economic efficiency and equity objectives’ – oversight can be thought of as taking one of four types. First, the ‘Control Model’, where a state department and ancillary agencies specify both the range of services and the standards of service provision to be provided by local government, thereby largely determining the composition of council expenditure. Further, the state government also regulates the income sources of councils by (for example) rate-pegging and proscribing other fees and charges. Under the ‘Control Model’ strategic financial direction is also imposed, including specifying investments, asset depreciation and asset management. Additionally, state government retains control of planning and can also manipulate the shape of elected positions by, for instance, introducing stringent conflict of interest provisions. Dollery, O’Keefe and Crase (2009, 287) also argued that ‘the whole edifice of regulatory control can be enforced through a host of administrative techniques’ such



as various reporting and inspection regimes, and that both managers and elected officials can be made legally liable for their decisions, thus curtailing 'place-shaping' activity. Dollery, O'Keefe and Crase (2009) argued that the 'Control Model' closely approximated the system of oversight in NSW.

In the second type, designated as the 'Prevention Model' (Dollery, O'Keefe and Crase 2009, 287), the relevant state department or division is still able to pursue highly interventionist prescriptions, but at least some room for 'local choice' is allowed. Financial controls are relaxed (rates are not subject to pegging; other charges are allowed), planning laws fall largely under the ambit of local authorities and, in particular, state governments can foster collaborative partnerships with local government associations. Essentially, under the 'Prevention Model', while state governments are poised to act in the event of 'local government failure', the regime of regulation is of a less interventionist nature.

In the third type, described by Dollery, O'Keefe and Crase (2009, 288) as the 'Rescue Model', the 'hands off' approach of the Prevention Model is taken further (although it does not preclude monitoring techniques). Intervention by the state government occurs only in the case of evidence indicating that a local government is in danger of 'failing' *and* with the assent of the local government. Under this regime, Dollery, O'Keefe and Crase (2009, 288) observed that 'local autonomy and local decision-making would thus be maximised'.

The fourth type, described as 'the 'Autonomy Model' (Dollery, O'Keefe and Crase 2009, 288), represents a 'hypothetical translation of Berman's (2003) home rule approach to Australian local government milieu'. Discussing Berman's (2003) account of home rule, Dollery, O'Keefe and Crase (2009, 285) claimed that home rule had a 'libertarian appeal'. They also stated that 'this model does not have practical application' (Dollery, O'Keefe and Crase 2009, 288). However, to contend that home rule 'does not have any

practical application' ignores the fact that home rule operates in the 'real world' context of state-local relations in the United States. It is to this that we now turn.

### **3. LOCAL GOVERNMENT IN THE UNITED STATES: HOME RULE AND DILLON'S RULE**

#### **3.1. Operation of home rule**

Local governments in the United States share with their Australian counterparts the fact that they are 'creatures of statute' of sovereign state governments. However, this fact belies the complexities of state-local relations as mediated by individual state constitutions, state legislation and processes of judicial review. Bluestein (2006) provided a summary of these intricacies. Most immediately, they are marked by the distinction between Home Rule and Dillon's Rule. In common with Dollery, O'Keefe and Crase (2009), Bluestein (2006, 15) initially presented home rule as an overall description of state-local relations, juxtaposing it with Dillon's rule:

Home rule refers to a state delegation of broad authority to local governments over matters of local concern. Dillon's rule, developed in the late 1800s by Judge John F. Dillon, is a rule governing judicial review of local government actions. The rule requires that the scope of authority delegated to local governments be narrowly constructed.

Bluestein (2006, 16) noted that 'all but a few states have some form of home rule authority' and that they are heterogeneous in type, being derived from both constitutional and statute sources, with some specific to particular local government functions (for example police; sanitation) while others 'grant authority ... "not inconsistent with the laws of the General Assembly"'. It should be stressed that Dillon's rule can intervene, even in some so-called 'home rule' states. Bluestein (2006, 16) noted that 'most of the litigation in home rule states involves the issue of what constitutes a statewide versus local concern'.

Herein lays the contestable dilemma of home rule. According to Bluestein (2006, 16), it is dealt with by the courts in a variety of ways. For example, the idea of territory is sometimes invoked (i.e., if a matter can be shown to literally not be of concern outside the geographic entity of a local government, a court can use this as a principle for determining the valid application of home rule). Bluestein (2006, 16) observed that this justification is commonly used in cases of the reform to internal council structure and it has been used in cases of police powers and local employment compensation laws. Bluestein (2006, 17) also observed the role of 'convention', stating that home rule 'may be more influenced by the political, economic, historical and other social factors present in a particular state than by the governing legal structures'.

Alternatively, determination of home rule can be achieved with the application of a further principle, whereby 'a conflict exists [only] if the local provision allows what state law prohibits, or prohibits what state law allows' (Bluestein 2006, 16). Yet the application of this principle does not result in any overall intra-state consistency. On the contrary, the complex interplay of laws in each jurisdiction ensures heterogeneity of interpretation. For instance, in many jurisdictions home rule charters are limited by 'statewide general laws'; in some states, constitutions nominate areas in which state law will dominate; in other jurisdictions courts have determined that a state can rule only for statewide concerns, while in Colorado, for example, the Constitution determines that local ordinances override state laws.

The heterogeneous nature of home rule led Bluestein (2006, 20) to propose that 'home rule as it exists in most states simply *does not* place significant limitations on state pre-emption of local authority' (emphasis added). This is dissimilar to her original description of home rule – (i.e., that it refers to a state delegation of broad authority to local governments over matters of local concern). The question thus arises of how, precisely, home rule ought to be conceptualised.

One interpretation is that put forward by Barron (2004), who suggested that home rule ought to be viewed as it operated in the 19<sup>th</sup> century, namely as the negotiation of both '*grants to and limits on local power...* to enable cities to promote visions of urban governance that the prior legal regime had foreclosed' (emphasis added). This interpretation is reflected in the multifaceted way that the concept is currently used in the United States, that is, as a principle of non-interference which is invoked by a lower tier of government in specific contexts. Further, it can act as an organising principle around which other influences upon state-local relations (constitutional, statutory, judicial) can be viewed.

### **3.2 Home rule as normative theory**

Understood in this sense, home rule has had its champions in recent times, in particular Richard Briffault (2004). In his attempt to set out a justification of home rule and adapt it to the contemporary United States' milieu, Briffault (2004, 254) initially noted that 'home rule issues continue to roil the courts', but that it is nevertheless 'important' within the context of U.S. federalism because it gives some legal status to local government, thereby providing it some 'measure of protection' from the states. According to Briffault (2004, 258), home rule is 'valuable' for several reasons. First, it promotes democracy in broader society. More than this, Briffault (2004, 258) *equates* home rule with 'local autonomy', which, he argues, is necessary for local democracy:

[L]ocal democracy requires some measure of local autonomy, of home rule. People will bother to participate in local government decision making only if local governments have real power over matters important to local people. Local democracy thus requires local autonomy, much as local autonomy advances the prospects of local democracy.

This account of autonomy is not just normative, it also has operational status, in that home rule in its multifarious forms is both enacted judicially and invoked in diverse contexts across the vast majority of U.S. state jurisdictions.

Second, home rule promotes diversity in that it allows for adaption to 'local needs, circumstances and preferences'. Third, according to Briffault (2004, 258) it takes into account the idea of community; that is, society is not composed of discrete individuals, but rather of groups of people who share values and outlooks, and that this ought to be valued politically. Finally, home rule is valuable because it fosters innovation in Justice Brandeis's (1932) sense of providing the opportunity for the implementation of different ways of organisation (Briffault (2004, 259).

In itself, this reiteration of several arguments for sub-national government is unremarkable. However, in the context of discussions of Australian local government, this reiteration occurs noticeably infrequently (for an exception, see Brown 2002). However, Briffault (2004, 260) also recognised that a primary assumption of home rule, namely that the consequences of decision-making are borne largely within local boundaries, is constrained by what he referred to as 'two principal limits'. First, externalities are most salient in cross-border effects on adjacent areas. Second, home rule is limited by a lack of fiscal capacity on the part of some local governments. Briffault (2004, 262) argued that this lack of capacity involves both state-local and local-local relationships, principally in the issue of intergovernmental transfers.

Further, Briffault (2004) was aware of the need to remould a concept of late nineteenth century state-local relations to contemporary circumstances. In particular, municipalities are no longer nearly as discrete as they once were, and far greater spatially segmented land use patterns lead to high variability in fiscal capacities (Briffault 2004, 262–3). Consequently, in his attempt to contemporise home rule, Briffault (2004, 263) decomposes the concept into seven elements, or axioms.

First, a *presumption of local power* ought to exist, more specifically, a 'broad presumption of local power to act on matters that affect the locality or the people within it'. While this may sound like a well-worn cliché, Briffault (2004, 264) is more specific, stating that courts ought to avoid narrow interpretations of 'local affairs' or 'municipal

affairs' toward a more expansive 'granting of power'. In particular, Briffault (2004, 264) argued that 'Local action should be rejected if the regulation has *cross border* consequences, burdens inter-local activity, or interferes with state policies that must apply statewide. But local action should not be rejected simply because the action addresses an issue that could arise in multiple localities'.

Second, Briffault (2004, 264) argued that there should be a general axiom *limiting state pre-emption*, such that 'only [in] instances where a [local] ordinance would attempt to allow what the state would forbid' should there be any recourse to litigation. Further, Briffault (2004, 265) argued that legislation ought to trump any judicial interpretation, to the extent that 'courts should require legislatures to make pre-emption express'. This is a notably different from the portrait of home rule presented by Bluestein (2006).

Third, Briffault (2004, 265–6) provided guidelines for *when local laws should prevail over inconsistent state laws*, that is, when the two come into direct conflict. More specifically, 'the question is whether there are some matters where the local interest is so strong, the implications for local self-governance so significant, the extraterritorial effects so limited, and the burdens of inter-local variation on commerce so mild, that local control can be tolerated'. Briffault (2004, 266) argued that there are two clear examples of this: (a) 'the structure of local governance' and (b) 'local control of the employment relationship'. With respect to the former, Briffault (2004, 266) noted that 'these matters go to the heart of local capacity for local democracy and self governance', and that advocating this principle does not proscribe states making laws that provide 'default or background norms'. It is innovation in local politics that Briffault (2004) is keen to foster.

Fourth, Briffault (2004, 267–8) observed that 'unfunded mandates' (or what, in the Australian context, is commonly referred to as cost-shifting responsibilities to local government) constitute a major infringement of local fiscal autonomy and distort accountability, as state governments are immune from paying a political price for

shifting costs to the municipal sphere. Yet Briffault (2004, 269) was not opposed to mandates *per se*, arguing that they 'should be permitted when justified in terms of the dynamics of inter-local relations'. Nevertheless, he argued that 'true home rule would benefit from a mandate relief measure focused on state legislation that drives up local costs in areas of limited extra-local effects'.

Fifth, Briffault (2004, 269–70) noted that local governments' revenue-raising capacities in the United States are limited and argued that they should be increased, noting that 'local government taxing decisions are constrained not just by their voters but by an often intense inter-local competition for businesses, jobs and taxpayers'. The concept of *fiscal home rule* is of great importance.

Sixth, Briffault (2004, 270) argued that, while fiscal home rule is necessary for home rule generally, *local fiscal capacity* is also a requirement to the extent that equalisation across local government areas is necessary: 'In effect, the state should be obligated to determine a basic level of local public services for all communities; to determine the cost at that basic level; and to determine whether each locality has the tax base to provide that basic level'.

Finally, with respect to state and local roles in land use and regulation, Briffault (2004, 271) argued that state governments need to take a far more active role in the determination of land use issues such as housing densities, zoning and regulation:

Localities need to be required to keep regional concerns in mind when they make land use decisions that have regional implications...

To assure that this is done, the state needs not only to articulate more land use regulatory criteria, but also to create new institutions with the authority to review local land use actions and set aside those with undue regional harms.

This may appear to be at odds with Briffault's (2004) advocacy of home rule to contemporary local government. We will return to this point in discussing the application of home rule to Australian local government.

#### **4. HOME RULE AND AUSTRALIAN LOCAL GOVERNMENT REFORM**

To assist with the examination of the possibilities for home rule in the Australian context, we deploy Briffault's (2004) seven-fold typology of home rule axioms. First, with respect to the suggestion that there be a 'presumption of local power' to the extent that the courts avoid narrow interpretations of local affairs toward a more expansive 'granting of power', Briffault (2004) pointed to the litigious nature of home rule in the United States. This surely is the most unappealing feature of the operation of home rule.

However, it is possible to conceive that a presumption of local authority does not inevitably have to be designed or interpreted this way. Home rule could operate with underlying legal authority but in much the same way that important conventions in other tiers of Australia's federal system – for example, those surrounding the operation of governors general – operate in all Australian jurisdictions. Alternatively, home rule could also operate without underlying legal authority, but according to convention – akin to the conventions that surround the operation of Prime Minister and Cabinet and those attendant to the convention of responsible opposition (see, for instance, Maddox 2006). In this interpretation, wherein home rule becomes part of what Bluestein (2006, 17) described as 'the political, economic, historical and other social factors present in a particular state than by the governing legal structures', home rule could form a pre-litigious convention invoked in the course of reform processes initiated by state legislation or, importantly, by local governments and their communities in pursuing reforms of their own design. Further, conventions would be allowed to develop around specific types of issues. In terms of the Dollery, O'Keefe and Crase (2009) typology, this would give *particular* actions of local government the characteristics of the 'Autonomy



Model', without characterising to state-local relations generally, which we have argued is a misplaced interpretation of home rule.

The second point draws on Briffault's (2004, 265–6) argument that home rule ought to limit the pre-emptive power of state legislatures. This is notably different from the granting of powers of general competence in the Australian context; rather, it implies freedom from external interference by state governments on the basis of a principle of home rule (again, invoked in specific contexts). Arguably, however, the introduction of such a principle would serve to galvanise these powers<sup>2</sup>, thereby moving a jurisdiction such as NSW from the 'Control Model' to one where elements of state-local relations would be more accurately characterised by the 'Autonomy Model'.

Similarly with respect to Briffault's (2004, 265–6) third axiom, in which local laws ought to prevail over state laws, Briffault (2006) expressed a particular interest in reforms to governance arrangements. The British Coalition Government has introduced the option of local referendums and directly elected mayors (HM Government 2010) and similar reforms – such as citizens' referenda – can be envisioned in Australian jurisdictions. However, the operation of a principle of home rule becomes far more controversial where it is claimed to insulate municipalities against state and federal legislation, such as that governing industrial relations. Nevertheless, it would be with the introduction of home rule that the boundaries of its operation would be established. In terms of the Dollery, O'Keefe and Crase (2009) taxonomy, ground is opened up for a move toward the 'Autonomy Model', again albeit with respect to specific issues.

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<sup>2</sup>John Mant, one of the drafters of the *Local Government Act 1993* (NSW) recently commented that 'All we did was to get rid of the legislative junk from the 19<sup>th</sup> century and provide a framework in which modernisation and reform could take place'.

Further:

Unfortunately although the stage was set for reform, only a very few of the players appeared. Major reform has not been forthcoming. Nobody has really wanted it – not the unions or the Ministers, nor, at least, until recently, the Local Government Associations and the Department of Local Government.

With a couple of exceptions, most councils took the same [view] and operate essentially in the same way as they did 100 years ago (Mant, 2009, 3).

With respect to cost-shifting, Briffault's (2004) argument is very similar to that put forward recently by past president of the Australian Local Government Association, Geoff Lake. Noting that Australian local governments may struggle with unfunded mandates, Lake nevertheless identified a danger in the cost-shifting argument:

We don't look to simply put a fence around what local government does today and say 'no more cost shifting'. If we did this we would be closing our minds to future possibilities. That's not local government at all. Local government is fluid, it's responsive to communities and it will always be different five years from now from what it is today because that's the nature of communities (Lake, cited by Dollery and Grant, 2011b).

Moreover, Briffault (2004, 268–9) argued for compensation for both cross-border cost-shifting and that devolved to local government from higher tiers of government without appropriate *ex ante* funding arrangements being in place.

In concert with this, it is with respect to his fifth principle (i.e., fiscal home rule) that Briffault (2004, 269–70) is at his most strident and it is here that the implementation of home rule would have the most impact in an Australian jurisdiction, most notably with respect to rate pegging. Fiscal home rule would also open up the possibility of broader local income gathering, such as more frequent property revaluations and the introduction of local taxes. There is nothing to suggest that Briffault's (2004, 270) faith in local 'voice' and 'exit' would be significantly undermined in the Australian context. However, in the Australian context it is highly unlikely that local government would be free of all fiscal oversight: fiscal home rule would most likely result in a package accurately described by the 'Prevention Model' of Dollery, O'Keefe and Crase (2009).

With respect to the applicability of local fiscal capacity, Briffault (2004, 270) advocated a degree of equalisation alongside fiscal home rule. This is compatible with the regime of intergovernmental transfers received by local governments from both federal and state

governments. Nevertheless, home rule would focus attention on the surety of direct federal funding and the extent to which they were hypothecated or otherwise. Moreover, Briffault (2004, 271) argued that, while decisions concerning a minimum standard of resources would be a 'complex and difficult undertaking', the game seems worth the candle. This stance appears to be decidedly different, for instance, from the Cameron Coalition Government's approach to standards in its *Localism Bill (2010)*, wherein the Standards Board will be abolished, 'allowing councils to devise their own regimes to govern propriety and behaviour' (HM Government 2010, 6), albeit as creatures of statute.

Finally, in his recognition of the 'urban sprawl problem', where 'local policies have the effect of driving up the cost of housing, pushing housing to the metropolitan periphery, making it prohibitively difficult to build regionally necessary infrastructure', (Briffault 2004, 271–2) argued that 'the state needs not only to articulate more land use regulatory criteria, but also to create new institutions to review local land use actions and set aside those with undue regional harms'. At first glance this may appear to be advocacy for state legislation akin to Part 3A of the *Environment Planning and Assessment Act 1979* (NSW), wherein controversial decisions are subject to Ministerial approval (and for which Premier O'Farrell has received high praise for swiftly rescinding (LGSA 2011)). On the contrary, Briffault (2004, 272) suggested that 'bottom-up' regional institutions, authorised to foster arrangements between local governments, as well as 'block local decisions and set aside local rules as appropriate', ought to be created to fulfil these roles.

In the Australian context, pre-existing institutions that could fulfil this role include both Regional Organisations' of Council (ROCs) and the network of Regional Development Australia (RDA) Committees which have been given new impetus by the current federal government under Minister Crean (Crean 2010). While the 55 individual committees have been given some leeway with respect to constructing their own ambits, under the current program 'Informed Regional Planning' is listed as the second of five 'Roles and

Responsibilities' of the Committees (RDA 2009). Further, while key personnel of individual committees, such as chairpersons, may come from the private sector, equally they may come from backgrounds in local government (see, for instance, RDA NR 2011). Nor would the relevance of RDAs be confined to rural and regional areas. Commenting on planning in the Sydney Basin, Mant (2009, 12) stated:

The problem with planning decisions is that they pretend to be a matter for expert opinion when they are really about conflict resolution. This misconception leads to poor decisions and guerrilla tactics. We would all do better if we recognized the reality of what we are dealing with instead of pretending that there are philosopher kings or queens out there who know what is best for everyone.

This points to not merely to the procedural-political stance that ought to be adopted with respect to achieving planning decisions but, more importantly in this context, the idea that home rule – even when mediated by an institution, such as a ROC or an RDA Committee – is nevertheless a principle by which state-local relations are organised.

## **5. CONCLUDING REMARKS**

This paper has argued that Australian local governments are faced with multi-layered oversight exercised by their respective state governments, such that any idea of 'autonomy' (Wensing 1997, 96) attributed to them is misleading. Furthermore, after an examination of the operation of home rule, we have argued that it ought not be viewed as depicting an ideal type of autonomous local government, but rather as a principle by which to view state-government relations in specific settings, that is, relating to specific conflicts over the relative ambits of state-local authority. We have also suggested that in the Australian context this could be useful for precisely the same reason that it is in the U.S. context, namely that 'it takes a step toward bringing the legal status of [local governments] into closer alignment with their critical place in our government structure' (Briffault 2004, 257). As a normative concept it embodies many of the principles that are often put forward in the theoretical defence of local government and it can reflect these principles in a heterogeneity of particular settings. Yet it is not a 'one-way street':

Briffault (2004) has demonstrated that the concept also recognises the limits of 'localism' in accounting for the realities of both externalities and varying fiscal capacity and the need to bolster this capacity where necessary. Briffault (2004, 271–2) has also provided a suggestion as to the institutional design for planning which would overcome problems of coordination, an institutional design for which Australia is in a position to explore more fully.

The question of how an instrument of home rule could be fashioned and introduced in an Australian context is not in the ambit of this exploratory paper, although we note the examples available from the United States which could be drawn upon (see, for example, Krane, Rigos and Hill 2001). Nevertheless, it is possible to envisage a home rule amendment to a Local Government Act in Australia. Such an amendment would allow local government to mount legal challenges to acts of parliament or to decisions of a department or of a regulatory agency in addition to the avenues already available. However, the design of the amendment would ideally be aimed at discouraging litigation and encouraging a culture where home rule is recognised and gains standing over time. In such an event, local government would not only enjoy the power to pursue aims of its own design ('initiative'), it would also enjoy a greater measure of 'immunity' from intervention by higher tiers of government and, as such, a greater measure of autonomy, as discussed by Clark (1984) and Pratchett (2004), an autonomy which, as we have seen, Briffault (2004, 258) argues is necessary for the operation of local democracy.

Finally, our consideration of the applicability of home rule to the Australian local government milieu has, somewhat ironically, suggested how recent reforms in England under the *Localism Bill (2010)* are distinctly not local. By contrast, they comprise a policy program of compulsory devolution that is accompanied by a state-sponsored ideology of 'localism' (see, for instance, Grant and Dollery 2011). This has to be assessed as qualitatively distinct from anything that is desirable in the Australian

context, and as qualitatively distinct from home rule, as has been discussed in this paper.

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