

# Legitimacy of Councils and Rating Powers

## Local Government Victoria - Factsheet

### Key Messages

- Victorian Councils are lawfully constituted by State legislation, namely the *Local Government Act 2020*.
- Councils are recognised in the Victorian Constitution.
- Neither the Victorian nor Commonwealth Constitution conflict with the lawful status and powers of Victorian Councils.
- Councils derive the power to impose rates and charges from the *Local Government Act 1989*.
- It is unlawful to refuse or fail to pay rates or charges except in accordance with the provisions in the Act, or the determination of a Court. Significant penalties apply for non payment.

### MYTH 1

Local Government has no legal validity because it is not mentioned in the Commonwealth Constitution.

A referendum in 1988 to recognise local government in the Constitution did not succeed.

Therefore, local government has no legal existence.

### FACT

Local government is legally valid, having been constituted by an Act of the Victorian Parliament.

There is no obstacle in the Commonwealth Constitution to prevent State Parliaments from legislating to create, empower and regulate local government. All States have done so.

The Victorian Constitution includes explicit recognition of local government. Section 74 B gives Parliament the right to make laws for and in relation to local government.

### MYTH 2

The Victorian Constitution is not valid; therefore, its recognition of local government is invalid; therefore, local government itself has no lawful basis.

The *Constitution Act 1975* was not properly enacted as it did not receive the assent of the Queen.

### FACT

The Victorian Constitution is a valid Act of the Victorian Parliament.

The first Constitution was enacted in 1855 and provided for its replacement with subsequent Constitution Acts.

The current *Victorian Constitution Act 1975* received Royal Assent in October 1975.

The Constitution's provisions, including those relating to local government, are valid and have the force of law.

### MYTH 3

Council has no right to impose rates because the Commonwealth Constitution only gives the power to tax to the Federal and State Governments.

The High Court recently confirmed this in the 'Pape' case.

### FACT

The Commonwealth Constitution does not contain any obstacle to the levy of taxes by the States, including on property.

State Parliaments have the power to confer this function on other bodies through legislation.

Through the *Local Government Act 1989*, Part 8, the Victorian Parliament has conferred upon local government the power to levy and collect property tax in the form of rates.

The High Court case of *Pape v Commissioner of Taxation* (2009) did not refer to either the States' power to tax, or local government's power to levy rates and charges.

### MYTH 4

Councils are created as bodies corporate, not governments. Therefore, they cannot levy taxes.

### FACT

Councils are certainly created as statutory bodies corporate under an Act of Parliament. Such bodies can perform any function and exercise any power conferred on them by the Act which creates them.

The *Local Government Act 1989* provides Councils with a range of powers, including to levy rates (see 3 above).

The Victorian Constitution provides that Councils are a distinct and essential tier of government.

The *Local Government Act 2020* provides that Councils are constituted by Councillors democratically elected by their community for the purpose of providing 'good governance in its municipal district for the benefit and wellbeing of the municipal community'.

### MYTH 5

There is no lawful penalty for failing or refusing to pay rates because there is no power to impose rates.

### FACT

Councils have the lawful power to impose and enforce rates.

People who fail to pay their rates may be liable for penalties, including:

- Penalty interest for late payment;
- Recovery of unpaid rates and charges as debts, which may include selling the relevant land without the consent of the owner;
- Court proceedings which may result in award of costs against a defaulting owner, which means requirement to pay the Council's legal costs on top of the outstanding rates and charges.

### Appealing Rates and Charges

While the rule is that rates must be paid as charged, there are processes for appeal, including in circumstances of financial hardship.

The *Local Government Act 1989* and *Local Government Act 2020* sets out the legal requirements, and information on a Council's specific procedures will be available from the Council.

Any person seeking to challenge their rate notice is recommended to speak to their Council first. If proceeding to court, they are recommended to seek legal advice.

**DISCLAIMER: This Fact Sheet provides general guidance. It is not intended as legal advice but may be used as a reference guide to the views of Local Government Victoria.**

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