Submission

on the

Reform of the Australian Federation

to the

Senate Select Committee on the Reform of the Australian Federation

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18 August 2010

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1. Introduction

On 17 June 2010, with the conclusion of the work of the Senate Select Committee on the National Broadband, a Senate resolution passed on 17 March 2010 came into effect. This resolution created a Senate Select Committee on the Reform of the Australian federation and referred to the new select committee the following matters for inquiry:

(a) *… key issues and priorities for the reform of relations between the three levels of government within the Australian federation; and*

(b) *explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters:*

(i) *the distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),*

(ii) *financial relations between federal, state and local governments,*

(iii) *possible constitutional amendment, including the recognition of local government,*

(iv) *processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and*

(v) *strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs.*

Submissions on these have been invited and are due by 20 August 2010.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Distribution of powers

An important element of the Judaeo-Christian perspective on human society is an understanding of the frailty of mankind. This notion is captured in Lord Acton's famous dictum: "Power tends to corrupt and absolute power corrupts absolutely."[1]

The founding of Australia as a nation, following the enactment of the Constitution of Australia Act 1901, was possible only because the constitution so enacted was fundamentally federalist in character, in order to win the support of the voters in the several Australian colonies.

Federalism is one of several aspects of the Australian polity that avoids the concentration of power because of the inherent tendency of power to corrupt. Other aspects of the polity giving effect to this notion include the separation of the executive, legislative and judicial powers; bicameral legislatures and regular elections.

The Constitution of Australia created a federalist polity in which the States have an independent existence – they are not creatures of the Commonwealth – and the Commonwealth has an important, but nonetheless limited role.

Section 51 of the Constitution enumerates 40 matters on which the Commonwealth may make laws. These powers (unlike the customs and excise power granted exclusively to the Commonwealth) co-exist with the inherent and continuing power of the States to make laws on any matter.

However, section 109 of the Constitution provides that:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

The Commonwealth by passing comprehensive legislation on a particular matter that falls within one of the enumerated heads of power in section 51 can effectively "cover the field" in such a way that there is no room left for any State law on that matter.

The interpretation of the Constitution is a matter for the judiciary and ultimately for the High Court of Australia.

Decisions by the High Court on the interpretation of section 51 therefore have affected the actual distribution of powers between the Commonwealth and the States.

The two heads of power that have attracted the most controversy are:

- 51 (xxix) External affairs, and
- 51 (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

2.1 External affairs

A series of decisions by the High Court, notably in the cases *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania* (1983) 158 CLR 1, have resulted in the situation where the external affairs power can now effectively be used as a peg for the Commonwealth to legislate on matters for which it would otherwise not have any power to legislate.

Whether or not this interpretation of the term "External Affairs" is consistent with the meaning it would have had in 1900 is the subject of heated dispute.[2] In any case the question is moot as there is no appeal from decisions of the High Court, and no certainty that the court is likely to reverse its approach to this interpretation any time soon.

Consequently, the Commonwealth could consider that it is able to legislate selectively on any matter covered by the 1828 treaties signed by Australia and which were in force as at 12 August 2010, according to a search of the Australian Treaties Database.[3] This situation undermines the original distribution of powers between the Commonwealth and the States.

One example of the practical effect of the expanded reading of the external affairs power is the inability of the States to restrict access to reproductive technology on the basis of marital status.

In the case of *McBain v State of Victoria [2000] FCA 1009*[4] it was held by the Federal Court of Australia that provisions of the Commonwealth's *Sex Discrimination Act 1984* effectively overrode the Victorian law which restricted access to assisted reproductive technology to married couples. An attempt by the Commonwealth Attorney General to persuade the High Court of Australia to review this decision was dismissed on procedural grounds.[5]

The *Sex Discrimination Act 1984* states as its first object in Section 3(a):

> *to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women.*

Although the Convention has three references to marital status (Articles 1, 11.2 and 16.1), none of these seems to require access to reproductive technology to be given to women regardless of marital status.

In the absence of the broad interpretation of the external affairs power, the matter of access to reproductive technology would be one primarily for each State to determine as there is no other Commonwealth head of power that gives the Commonwealth direct responsibility for this.

Dr Colin Howard, Emeritus Professor of Law at the University of Melbourne, has proposed a constitutional amendment to restore a better balance in the distribution of powers by limiting the scope of the external affairs power.

His amendment would add to Section 51 (xxix) the words:

> *provided that no such law shall apply within the territory of a State unless*
>
> > *(a) the Parliament has power to make that law otherwise than under this sub-section; or*
> >
> > *(b) the law is made at the request or with the consent of the State; or*
> >
> > *(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia.*[6]

Without such an amendment the application of the external affairs power could eventually lead to the absurd situation of an empty federalism, where the States could only legislate on matters that are so trivial that they have not attracted the attention of the Commonwealth.

The passage of an amendment along these lines would be a significant step in the restoration of a genuine federalism in which significant areas of legislation remained the responsibility of the States and there was less room for a centralising Commonwealth government to trespass on these areas of responsibility.

> ***Recommendation 1:***
>
> ***That a constitutional amendment be put to referendum to amend Section 51 (xxix) in such a way that the Commonwealth Parliament may only make laws with respect to external affairs provided that no such law shall apply within the territory of a State unless***
>
> ***(a) the Parliament has power to make that law otherwise than under this sub-section; or***
>
> ***(b) the law is made at the request or with the consent of the State; or***
>
> ***(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia.***

2.2 Corporations

Section 51 (xx) of the Constitution empowers the Commonwealth Parliament to make laws with respect to "*Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.*"

The 5-2 decision of the High Court in the *Work Choices* case[7] established a new, broad reading of the corporations power which enabled the Commonwealth to legislate comprehensively on industrial relations.

The two judges in the minority, Justices Callinan and Kirby, each refer to the majority decision as further contributing to eroding the federal balance.

Professor George Williams has commented that:

> *"For the States, the* Work Choices Case *was lost as far back as 1920. In that year the High Court in the* Engineers' Case[8] *swept aside the earlier decisions and discarded any idea of a balance between federal and State power. This idea of federal balance, like States' rights, became a constitutional heresy. Today, they are nothing more than political slogans. Applied over decades, the* Engineers' Case *has led to a steady increase in Commonwealth power".*[9]

Professor James Allan proposes that in future cases touching on the constitutional distribution of powers, the States should instruct counsel to argue that the 1920 *Engineers' Case:*

> *went too far in propounding that each federal legislative head of power should be read not only literally, but in isolation from the other heads of power, and without any regard to the history and federal structure underlying the distribution of powers between the Commonwealth and the States.*[10]

This case needs to be re-examined to create the possibility for a restoration of federalism. The High Court is unlikely to do this unless the States vigorously press this point.

Professor Allan also calls for more appointments of High Court Judges from the less populous States (i.e. other than New South Wales and Victoria) and for a general promotion of originalism as the proper approach to constitutional interpretation.[11]

2.3 Territories

Under Section 122 of the Constitution the territories are, unlike the States, creatures of the Commonwealth. Section 121 of the Constitution provides a means for territories to become new States. However, in the absence of this occurring, it is not constitutional to treat the territories as if they were States.

The territories which have been given some form of self-government – the Northern Territory, the Australian Capital Territory and Norfolk Island – derive their legislative, executive and judicial powers from the Commonwealth Acts establishing self-government. The Commonwealth properly retains the power to directly legislate for the territories.

3. Financial relations

The former Treasurer of Queensland, Dr David Hammill provides a useful survey of the tendency of the Commonwealth to dominate the States by controlling revenue raising and treating all grants to the

States, including those grants which distribute revenue raised by the GST, as conditional or tied grants. He notes the role of the Howard Government in accelerating this trend.

> *Whilst centralisation has occurred under both Labor and non-Labor governments, the Howard Government has become increasingly interventionist, and has used its fiscal dominance and s. 96 to aggressively pursue its policy priorities in areas such as water, health, education and industrial relations. The Howard Government's embrace of this "coercive federalism" is also reflected in its increasing tendency to view the States and Territories as agencies for the delivery of services, and in competition with private service providers.*[12]

Any solution to this problem requires a Commonwealth Government sufficiently committed to federalism to willingly forego the use of coercive fiscal arrangements to advance its policy objectives and increase its level of control.

There is no sign at present of such a government.

4. Local government

Two attempts have been made by means of a constitutional referendum to introduce some reference to local government into the Constitution.

In 1974 voters were asked whether they approved a provision "*to give the Commonwealth powers to borrow money for, and to make financial assistance grants directly to, any local government body*". This proposition attracted the support of 46.85% of voters but only gained majority support in one State, New South Wales. Opponents of the measure pointed out that, if passed, it would allow the Commonwealth to bypass and perhaps eventually marginalise the States by funding local or regional bodies in preference to the States.

In 1988 voters were asked whether they approved a provision "*to recognise local government in the Constitution*". This measure attracted just 33.62% of the vote and failed to pass in even one State.

A Local Government Constitutional Summit - A Special National General Assembly was held from 8 - 11 December 2008 in Melbourne. Delegates unanimously supported a declaration which called for a referendum on an amendment to the Constitution which would 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.[13]

The Constitution does not give the Commonwealth any power in relation to local government.

However, all six State constitutions already recognise local government and guarantee its continued existence.

For example, in New South Wales the *Constitution Act 1902* provides for local government in Part 8:

> *There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for*

the better government of those parts of the State that are from time to time subject to that system of local government.[14]

In Victoria the *Constitution Act 1975* provides that:

> *There is to continue to be a system of local government for Victoria consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.*[15]

There are similar provisions in Western Australia,[16] South Australia,[17] Queensland[18] and Tasmania.[19]

It is appropriate that if local government is to be constitutionally recognised it should be in the constitutions of the various States, as it is the States that have responsibility for local government. There is no obvious reason for recognition of local government in the Constitution of Australia.

The outcome of the *Pape Case*[20] suggests that direct funding of local government (among other such one-line items in the Appropriations Act) by the Commonwealth is unconstitutional. However, as Professor David Flint has observed, this could be dealt with (as it used to be previously) by the use of tied grants to the States under section 96 of the Constitution.[21]

> ***Recommendation 2:***
>
> ***There is no persuasive case for amending the Constitution either to include recognition of local government or a specific provision authorising direct Commonwealth funding of local government.***

5. Council of Australian Governments

The Council of Australian Governments (COAG) and the various ministerial standing committees have an important role to play in co-operative federalism.

COAG can usefully discuss many matters between the Commonwealth and the States.

At the same time, the recent tendency for COAG to assume coercive powers, as distinct from cooperative ones, poses dangers of the kind referred to by Lord Acton.[22]

One concern is in regard to freedom of information (FOI).

There is an increasing tendency for both the Commonwealth and State governments to deny access to documents on the grounds that the documents are part of a process of discussion through COAG or one of the ministerial standing committees.

The Senate has on some occasions successfully demanded the tabling of such papers.

All participating governments have freedom of information laws that would usually require the release of similar papers. There is no obvious reason why such papers should suddenly become out of reach to a FOI request merely because they are not the sole possession of one of these governments.

The Commonwealth should take the lead by amending FOI legislation or procedures as needed to ensure that the normal FOI rules apply to documents which are produced as part of the COAG or ministerial standing committee process.

Recommendation 3:

Freedom of information legislation and rules should be amended to ensure accessibility to documents produced as part of the processes of the Council of Australian Governments or ministerial standing committees.

6. Regional development

Any proposals for strengthening regions should recognise the primary role of the States.

The Commonwealth should not attempt to engage in setting up regional bodies with which it would have direct dealings as a way of bypassing the States.

7. Endnotes

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5. Re McBain [2002] HCA 16, http://www.austlii.edu.au/au/cases/cth/HCA/2002/16.html

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12. Hammill, D, "W(h)ither federalism?", *Upholding the Australian Constitution*, Vol 19, 2007, http://samuelgriffith.org.au/docs/vol19/v19chap5.pdf

13. http://www.alga.asn.au/constitutionalrecognition/Final_Declaration.pdf

14. *Constitution Act 1902* [NSW] Section 51 (1).

15. *Constitution Act 1975* [Vic] Section 74A (1).

16. *Constitution Act 1889* [WA] Section 52 (1).

17. *Constitution Act 1934* [SA] Section 64A (1).

18. *Constitution of Queensland 2001*, Section 70 (1).

19. *Constitution Act 1934* [Tas] Section 45A (1).

20. *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009).

21. Flint, D, "Understanding how we are governed", 13 July 2009; http://www.norepublic.com.au/index.php?option=com_content&task=view&id=1978&Itemid=4&date=2010-08-01

22. Dalberg-Acton, John Emerich Edward, *loc cit.*