Liberal Party (WA) - Pearce Division

Select Committee on the Reform of the Australian Federation
PO Box 6100
Parliament House
Canberra ACT 2600

20 August 2010

Submission regarding the Reform of the Australian Federation

The Pearce Division of the Liberal Party represents twenty Liberal Party branches in the Pearce electorate in Western Australia. This submission has been endorsed by the Pearce Divisional Executive, with each of the reform proposals contained below being policy motions that have been debated and adopted by the Pearce Division membership over the past five years.

During the first of the Convention Debates in 1891 Sir Samuel Griffith emphasised that[1]:

> "... we must not lose sight of the essential condition that this is to be a federation of States and not a single government for Australia".

It is clear, however, that the federal character of Australia has, over time, been undermined and weakened. The role and powers of the States have been gradually diminished in comparison to the continued expansion of Commonwealth powers, and the federal balance that underpins our *Constitution* has been eroded.

The *Constitution* was developed by conventions of delegates from all of the colonies during the 1880s and 1890s. It was voted into force by the residents of all of those colonies and was enacted by the British Parliament. It was the specific intention of the framers of the *Constitution* that no level of government would become overly powerful, or indeed all powerful. This was intended to be achieved by dividing power not only between two levels of the central Parliament (i.e. the House of Representatives and the Senate) and between the legislature and the judiciary, but also between the central (Commonwealth) government and the governments of the States. The colonies, in particular Western Australia, would not have agreed to the Federation had they not been promised protection from the overwhelming voting strength of the more populous States (i.e. NSW and Victoria) by each State receiving equal representation in the Senate.

It is, in our view, timely that a Committee on the Reform of the Australian Federation be established. It is our submission that the re-strengthening of the federal system is a matter of considerable importance and that there is a clear need for reform in this area. The benefits to be gained from a strengthened and well-functioning federal system are manifest. The advantages of a federal system include the protection of the individual through the formal dispersal of power; increased choice and diversity in policies and services; encouraging policy innovation; greater accountability and scrutiny by citizens having multiple access points to government; and better policy decisions by local problems being recognised and local solutions being devised.

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[1] *Official Report of the National Australasian Convention Debates* (Sydney, 1891), at p. 87. Accessed at http://setis.library.usyd.edu.au/ozlit/pdf/fed0054.pdf on 10 August 2010.

For the purposes of this submission there are four key areas that the Pearce Division wishes to focus on and that we propose as reforms with the aim of strengthening the Australian federation

1. *Amendments to the Constitution*

We support an amendment to s. 128 of the *Constitution* to allow State and Territory Parliaments to initiate amendments to the Commonwealth Constitution. Under s. 128 as it is currently written it is only the Federal Government who can initiate constitutional amendments by submitting it to the Australian people for judgment through a referendum. Given this, it is not at all surprising to find that a majority of the amendments put forward under the s. 128 procedure have been designed to expand the powers of the Federal Government. It is even less surprising to note that the vast majority of these proposals have been rejected by the Australian people. There has never been a referendum question seeking to reduce Commonwealth powers, and with the current amendment procedures it is extremely unlikely that this would ever happen. Under our *Constitution* the States are not subordinate to the Federal Government and have an equal stake in the development of our Federal Commonwealth. It is difficult to see any reason for denying States the opportunity to also propose amendments to the *Constitution* and to initiate constitutional referenda.

This submission therefore proposes that any two State Governments should be able to require the Commonwealth to institute referenda for constitutional change. To reduce the risk of there being a frivolous referendum proposal it may be prudent to require that the two State Governments proposing the referendum have passed their proposal with either an absolute majority of the members in a unicameral parliament or an absolute majority at a joint sitting in a bicameral parliament.

2. *Appointment of High Court Justices*

We propose that the process for appointing High Court Justices should be amended to provide for the Justices of the High Court to be appointed by State Governments in rotation, and only the Chief Justice to be appointed by the Commonwealth from within the ranks of the existing Justices. Section 72(i) of the *Constitution* provides that High Court Justices shall be appointed by the Governor-General in Council. The States are given some semblance of an official role under the current arrangements, with s. 6 of the *High Court of Australia Act 1979 (Cth)* requiring the Commonwealth Attorney-General to consult with the State Attorneys-General with regards to High Court appointments. This is largely, however, a symbolic gesture. There is nothing requiring the "consultation" to be anything more than a cursory discussion, and the States are not guaranteed the opportunity to have any substantive input into the ultimate appointment.

The High Court is the final arbitrator on questions of the allocation of powers between the Commonwealth and the States. Clearly, when one party to a disagreement appoints all of the umpires, that party will surely receive a majority of the favourable decisions. If all of the AFL umpires were appointed by Mick Malthouse or John Worsfold it would be very obvious which teams would generally contest the grand finals!

When we consider the general trend of High Court decisions over the years it becomes clear that this is not just an abstract concern. Over the past century there has been a gradual expansion of Commonwealth powers, which has been made possible by the expansive approach to constitutional interpretation adopted by the majority of High Court Justices. In the *Work Choices Case*[2] Justice

[2] *New South Wales v Commonwealth* [2006] HCA 52.

Kirby emphasised that "[t]his Court needs to give respect to the federal character of the Constitution, for it is a liberty-enhancing feature"[3]. We suggest that the federal character of the Constitution could only be strengthened by providing for the Justices of the High Court to be appointed by State Governments, with only the Chief Justice remaining an appointment for the Federal Government.

3. Reforming funding arrangements

It is proposed that Commonwealth/State funding arrangements should be amended to ensure that States are appropriately rewarded for their economic performance. The Australian federal system is characterized both by high levels of vertical fiscal imbalance and high levels of horizontal fiscal equalization. The revenue-raising capacity of the States has been dramatically reduced over the years, and statistics show that in 2005 the Federal Government directly collected 82% of taxes in Australia, while the States and Territories were responsible for 40% of all public spending[4]. The fact that States lack the capacity to raise the funds required to fulfill their spending responsibilities is problematic as it reduces direct government accountability, with State governments not having to make the difficult choices attached to balancing taxation and expenditure. This problem is exacerbated by the prevalence of Specific Purpose Payments, which effectively allow the Commonwealth to dictate policy to the States in policy areas that may never previously have been the domain of the Commonwealth government. As Alfred Deakin famously observed in 1902[5]:

> "The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot-wheels of the central government".

The introduction of the GST was intended to address this problem by giving the States access to a growing revenue base. Despite these good intentions, the financial dependence of the States on the Commonwealth remains. The States were required under the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* to abolish a range of State taxes, which has further reduced their available revenue sources. In addition, the Federal Government remains in full control of the amount of revenue transferred to the States and no individual State is guaranteed a particular share of the revenue.

The process by which GST revenue is transferred fails entirely to appropriately reward States for their economic performance. The present formula used by the Commonwealth Grants Commission acts as a disincentive to economic growth and efficiencies, and fails to recognize the infrastructure and associated costs that must be met by a State experiencing strong economic growth. The most recently announced changes to the funding formula for next year will mean that Western Australians will only receive 68 cents back for every dollar they pay in GST, with this being further reduced to only 57 cents within the next three years. This compares to the people in New South Wales receiving 95 cents back, Victorians receiving 93 cents, and Queenslanders receiving 91 cents[6]. In our view, there is considerable merit in 100% of GST revenues being returned to the State from which they were generated and in ensuring that the GST becomes a constitutionally entrenched State

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3 *New South Wales v Commonwealth* [2006] HCA 52, per Kirby J at [558].

4 Anne Twomey & Glenn Withers, *Federalist Paper I: Australia's Federal Future* (Council for the Australian Federation, April 2007), at p. 36.

5 Sir Alfred Deakin, *Letter to 'The Age'*, April 1902.

6 Premier of Western Australia, *Flawed system must be changed after $311 million revenue cut to WA"* (Media Release, 11 March 2009). Accessed at: http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=131488&search=State+Budget+2010-11&admin=Barnett&minister=Barnett on 10 August 2010.

tax to ensure that this situation cannot be altered in the future (absent approval by the people through a referendum).

The States of the Commonwealth cannot possibly fulfill their responsibilities unless they have financial independence. On almost every occasion that States have sought a revenue base they have been challenged by the Commonwealth Government in the High Court and the Commonwealth Government has been supported. This trend has continued right up until now. Reform of the financial relationship between the Commonwealth and the States is necessary to strengthen the federation by ensuring that the States have financial independence and the capacity to independently raise sufficient revenue to fulfill their constitutional responsibilities.

4. Ratification of international treaties

We propose the introduction of a requirement that international treaties be ratified by State Parliaments before they can be agreed to by the Commonwealth. Under s. 51(xxix) of the *Constitution* the Federal Government has been given the power to make laws with respect to "external affairs". This has been given an extremely broad interpretation by the High Court of Australia. In the *Tasmanian Dams Case*[7] it was established that a Commonwealth law implementing a *bona fide* treaty obligation that is binding on Australia will be a valid law (on the basis of the external affairs power) regardless of the particular subject matter of the obligation.

The Federal Government has signed numerous international treaties on behalf of Australia. The number of treaties being signed on behalf of Australia has increased dramatically over the past twenty years, and many of these concern areas of traditional State responsibility. The external affairs power has been a primary mechanism through which the Federal Government has expanded its powers and many treaties signed by Australia have reached into issues traditionally characterised as State issues. This continues to undermine the federal balance and to weaken the policy independence of the States. Requiring a majority of State Parliaments to consider and approve any treaty that impacts upon an area of State responsibility before they can be formally entered into by the Federal Government would be one way of restoring this balance, and ensuring that the external affairs power cannot be used by the Federal Government as a backdoor way of intruding into areas properly the domain of the State Governments.

Conclusion

It is our view that the federal nature of our constitutional structure is a valuable feature and well worth preserving. The federal balance that underpins the *Constitution* has, however, been consistently undermined in recent years, with Commonwealth powers being expanded at the expense of the States. The reform proposals that have been discussed in this submission are all designed to enhance the role played by the States in our Federation and to re-strengthen the practice of federalism in Australia. These reforms, on their own, will not entirely solve the problem, but they are a step in the right direction towards a revitalised and less centralist Federal system.

Yours sincerely,

Mr Rod Henderson
President, Pearce Division, Liberal Party of Australia (WA Division) Inc.

7 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.