

Select Committee on the Reform of the Australian Federation

Amended Submission by Bryan Pape*

I refer to paragraph (b) of the Terms of Reference:

(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),

Dr John B. Condliffe observed¹:

*It is possible to conceive of a double process of centralisation and devolution with increasing powers passing to the Commonwealth and a much increased number of States exercising more limited powers of local government in their respective regions.....The powers of the Commonwealth are bound to expand. **It would be logical to create new States and reduce the powers of existing States.** (emphasis added)*

External affairs, defence, diplomatic relations with other countries, trade, communications and social security are the principal responsibilities of the Commonwealth. Domestic matters such as education and health should be the responsibility of the states. The overriding consideration should be to get decision making down to the lowest possible level.

Local Government is a state responsibility. Establishing more states in accordance with Chapter VI of the Constitution should be fostered.

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

The Commonwealth should reduce its personal income tax rates to allow the states to levy income tax. Personal income tax should be administered by the Commonwealth as agent for the States. GST should be retained by the Commonwealth to allow the rate to be readily varied to assist in managing the economy.

The first priority is to reverse so called vertical fiscal imbalance between the Commonwealth and the states.

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

- Consideration could be given to giving to reversing the relationship between the Commonwealth and the states by amending the Constitution to invest the Commonwealth with the residuary power. Correspondingly the States would be granted specific powers which directly affect citizens like education, health and local government. The criterion for deciding what powers should be assigned to the states are those which get decision making down to the lowest possible level.

- Local government should not be recognized by the constitution. It is a function which affects people at the local level and should be retained as a responsibility of the states.
 - The constitution should be amended to provide for the attorneys-general of the states to bring relator proceedings in the High Court on behalf of a citizen to challenge impugned legislation on the grounds that it is beyond power. This obligation should be subject to a provision for the attorneys-general to show cause as to why they should decline to institute these proceedings. Effectively the citizen is granted an order nisi against the state attorney-general to bring the proceedings.
-

(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.

Executive federalism as administered by the Council of Australian Governments (CoAG) should be discontinued and national partnership agreements should be rescinded.

The COAG Reform Act 2008 (Cth), the Federal Financial Relations Act 2009 (Cth) which both commenced on 1 January 2009 together with the Intergovernmental Agreement on Federal Financial Relations and the suite of National Partnership Agreements ushered in a new era of Executive Federalism. They are properly characterized as domestic treaties. Most of which are incapable of being ratified by the Parliament because they involve an overreaching of power. They are not laws, but political agreements. Yet the Parliament has seen fit to appropriate monies to the COAG Reform Fund to indirectly pay monies to the States in accordance with an intergovernmental agreement or National Partnership Agreement. Here Parliament has effectively abdicated its legislative responsibility to the Executive to make agreements on topics for which the Parliament has no power to make laws. These executive agreements are tantamount to a scheme or contrivance resulting in a disregard of the Constitution.

The COAG Reform Fund is a special account under s 21 of the *Financial Management and Accountability Act 1997 (Cth) (FMA)*. This special account is an account within the consolidated revenue fund. The source of its funding is apparently from a maze of special accounts such as the Build Australia Fund. What is the authority for parliament to appropriate money from this special account called the COAG Reform Fund? The disbursement is made in accordance with a standing appropriation under s.21(1) of the FMA. For example the appropriations made with respect to payments made to service the *Building the Education Revolution Program* of \$16.2 bn. established by the *National Partnership Agreement on the Nation Building and Jobs Plan* on 5 February 2009. The sole criterion which needs to be satisfied is that there is a written agreement between the Commonwealth and the state in accordance with s. 7(2) of the *COAG Reform Fund Act 2008 (Cth)*.

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

There is no constitutional power to do this. It could be done by establishing more territories of the Commonwealth or preferably by encouraging the states to redivide themselves into more states in accordance with Chapter VI of the Constitution. For example having three states in both Queensland and New South Wales including the New England and the Riverina areas.

Exhibit 'A'

Federalism for the Second Century

*Barrister at Law

1 September 2010 (2nd edition)

¹ John B. Condliffe, *The Development of Australia*, (Australian Development Research Foundation, Ure Smith, 1964), 59