Treasurer; Attorney General

Our ref: 35-13317

Senator Chris Back
PO Box 143
NORTHBRIDGE WA 6865

By email: (...)

Dear Senator (...)

Thank you for your invitation for me to attend the 9 March 2011 hearing before the Senate Select Committee on the reform of the Australian Federation. Unfortunately, as my Appointment Secretary your Office Manager, Ms Victoria Jackson, I was unable to accept your kind invitation due to my Ministerial and Parliamentary commitments.

I appreciate that the date for formal submissions to your committee closed on 20 August 2010, but in view of my inability to attend the above hearing, the following brief comments are provided.

I understand that the committee's terms of reference are to:

(a) inquire and report by the last sitting day of May 2011 on 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.

In relation to paragraph (a), my comments in relation to the "three levels of government" are set out below, under my response to (b)(iii).

Level 21, Governor Stirling Tower, 197 St Georges Terrace, Perth Western Australia 6000
Telephone: +61 8 9222 8800 Facsimile: +61 8 9222 8801 Email: Minister.Porter@dpc.wa.gov.au

I note that paragraph (b)(i) refers to the federal "distribution of constitutional powers and responsibilities". Of course, most of the commentary in this area concerns the expansion of Commonwealth legislative powers (especially the corporations power and external affairs power) in s 51 of the Commonwealth Constitution. In my view, this expansion, which has principally been occasioned by High Court decisions such as the Engineers Case, Tasmanian Dams Case and the Work Choices Case, has inappropriately widened the scope and reach of Commonwealth legislative powers and, in conjunction with s 109, curtailed State legislative powers. This is inappropriate, firstly because this centralisation of power is not warranted by the Constitution's text and structure. Secondly, it is inappropriate because it destroys the benefits of federalism. These benefits, in stark contrast to centralised power, include diversity, limitations on power and dispersal of power. It is important to note that in a country as geographically large as Australia, this latter benefit enables both localised exercise of power by political decision-makers and the corresponding direct responsibility and accountability to the people who elected them.

Of course, the Commonwealth Constitution also effects a federal division of executive and judicial powers. Again, the distribution of these powers between the Commonwealth and the States has increasingly moved away from a balanced federal division towards greater Commonwealth power. In the executive sphere, this is obvious from the control (both *de jure* and *de facto*) which the Prime Minister and Commonwealth Ministers exercise in Ministerial meetings, as well as resulting intergovernmental arrangements. Even the expansion of Commonwealth executive power in the field of foreign relations has had adverse effects on domestic federalism, for example by the use of Commonwealth executive power to sign and ratify treaties and conventions which are then translated into Commonwealth legislation via the external affairs power. A recent example is the Optional Protocol to the United Nations Convention on Torture.

In the judicial field, the same tendency is obvious, especially since the creation in 1976 of the federal court, of increased federal jurisdiction, which combined with accrued or associated jurisdiction, has meant that the role and importance of State courts exercising State (and federal) jurisdiction has correspondingly diminished.

In my view, all of these aspects (legislative, executive and judicial) of federalism ought to be reassessed and brought back into line with the text, structure and federal spirit of the Commonwealth Constitution. This cannot occur via a constitutional amendment, but is a matter to be accomplished via the ongoing workings and relationships of the Commonwealth and States. The risk of exacerbating the current undesirable trends might well be accelerated if, as explained below, there are constitutional amendments which could have (even the unintended) consequence of further eroding our federal system.

Paragraph (b)(ii) deals with the "financial relations between federal, state and local governments". A great deal has been written about the continuing and increasing fiscal imbalance between the Commonwealth and the States. To some extent, this is the result of High Court decisions, particularly in relation to the Commonwealth taxation powers, the expanding scope of the s 90 prohibition on State excise duties and the s 96 grants power. However, from a more pragmatic and political perspective, this imbalance is result of successive Commonwealth governments seeking to use money and fiscal powers to coerce the States and control and regulate, often in considerable detail, areas which would

otherwise be beyond Commonwealth powers and responsibilities. This can only be remedied by a new, more cooperative framework which accurately reflects and enhances the Constitution's federal division of powers. I do not envisage a constitutional amendment. Rather, arrangements, perhaps on a more permanent footing, such as the GST arrangements (whereby the Commonwealth imposes the tax and the money is returned to the States), which were entered into as a result of a High Court decision expanding s 90's scope and invalidating a range of State taxes.

In my view, the need for such a new federal fiscal framework is the most important and pressing element of "the reform of relations" between the Commonwealth and States.

In relation to paragraph (b)(iii) I note that the Commonwealth Government has indicated that it proposes to hold a s 128 referendum to give constitutional recognition of local government. There are several reasons why elevating local government into a constitutionally entrenched position in the Commonwealth Constitution would adversely affect the nature of Australia's federal system of government, which axiomatically is a relationship between two, not three, levels of government. Indeed, not only would it have this effect, but such a constitutional amendment is unnecessary.

Attached, for your information, is a copy of my letter of 19 August 2010 to the President of the Shire of Dalwallinu, which explains the reasons supporting this position.

Paragraph (b)(iv) of your terms of reference includes several matters, such as the Council of Australian Governments (COAG) and referral of powers. Although I have not directly participated in COAG meetings, my observations as a parliamentarian and State Minister are that the COAG agenda, COAG papers and officials associated with COAG are overwhelmingly directed towards achieving and implementing Commonwealth (not State) objectives and policies. It is, especially in conjunction with Commonwealth fiscal dominance, an unbalance process.

Similarly, the referral of State legislative powers to the Commonwealth Parliament has significantly contributed to the continuing growth and centralisation of Commonwealth power. There has been in recent years a profusion of referrals in areas, such as crime, family law, corporations law and personal property securities, traditionally and constitutionally well regulated by State laws. Indeed, successive Commonwealth governments have pressed States to refer powers in other areas, including education. Western Australia has, on a number of occasions, not referred powers. This has not prevented uniformity and national legislative schemes from being achieved. For example, this State has adopted (under s 51(37) of the Constitution) Commonwealth laws in areas such as mutual recognition and child support rather than, like other States, referring power to the Commonwealth. Another example is the Family Court of Western Australia, where a State court exercises both federal and State jurisdiction. This has been, both in practical and jurisdictional terms, a very successful arrangement and markedly contrasts with the situation where other States referred powers to the Commonwealth and the Family Court of Australia exercises only federal jurisdiction, which encompasses State referred matters. A final example is the use of State legislation (without Commonwealth legislation) to achieve uniform Australia-wide legislation, for instance the defamation legislation of each State. Of course, the achievement of such uniform legislation (by whatever legislation mechanism) must always be balanced

against the benefits that flow from diversity, experimentation and localisation that are the hallmark of a robust federal system.

The final term of reference in paragraph (b)(v) includes "the delivery of services through regional development committees and regional grants programs". This proposition seems very similar to the policies unsuccessfully pressed and pursued by the Whitlam Labor government in the 1970s, including the Australian Assistance Plan (AAP) which was the subject of High Court litigation in the AAP case involving the scope of the Commonwealth appropriation and spending powers. I appreciate that there has been more recent litigation in the Pape Case, on which I comment in my paper which is attached to the letter to the Shire of Dalwallinu.

The obvious element of centralisation and control by the Commonwealth Government which appears to be the objective of this term of reference is the use of Commonwealth money to be spent directly on persons, activities or organisations which might be otherwise be outside Commonwealth powers and which would also bypass the use of s 96, which requires Commonwealth funds to be provided only to the States before going to third parties. Again, this has the opposite effect to reinforcing and strengthening our federal system.

In conclusion, I suspect that, like most other Senate Committee inquiries, your committee has, from a numerical perspective, received numerous submissions advocating further centralisation of governmental powers and criticising federalism. Even so, my experience leads me to believe that there are many Australians who would be opposed to such a concentration of power in one level of government. This opposition not only emanates from those who can articulate the benefits of a federal system, but also, and perhaps more importantly, from those who value their close geographical and regional proximity to their elected members, their Ministers and their Parliament House. I trite example, is the ability of Western Australians or Tasmanians to protest on the steps of their Parliament House about issues being dealt with by the State Government or Parliament. Conversely, it is also of great benefit within representative democratic for elected decision-makers to be readily accessible to, and directly converse with, their constituents.

For all of these reasons I would urge you and your committee to make and support recommendations that strengthen our federal system and affirm the federal nature of the Commonwealth Constitution.

Yours sincerely

(...)

HON C. CHRISTIAN PORTER MLA
TREASURER; ATTORNEY GENERAL

Attach:

Cc – Hon Colin Barnett MLA, WA Premier

10 MAR 2011

Attorney General; Minister for Corrective Services

Our ref: 35-09616/1
Your ref: O-COR-3528

Cr Robert Nixon
President
Shire of Dalwallinu
P.O. Box 141
DALWALLINU WA 6609

By email: shire@dalwallinu.wa.gov.au

Dear Councillor

Thank you for your letter dated 4 August 2010, following our 1 August 2010 meeting, which raises three issues. In relation to those issues, the following comments are provided.

Firstly, you ask for my view "on the wisdom or otherwise of enshrining Local Government in the constitution?" I presume from the context of your letter and our discussions, as well as the fact that Part IIIB – Local Government – is in the *Constitution Act 1889* (WA), that you are referring to the Commonwealth Constitution. I understand that for several decades, local governments have been advocating an amendment to the Commonwealth Constitution to recognise in the Constitution local governments. There is no express or implied recognition of the existence or powers of local government in the Commonwealth Constitution. That Constitution does recognise three levels of government, namely the Commonwealth, the States and the Territories.

In my view there are several arguments against amending the Commonwealth Constitution to recognise or provide a Commonwealth constitutional basis for local government. These include:

- Electors in a section 128 referendum in 1974 (initiated by the Whitlam Government) overwhelmingly rejected a proposal to insert two new provision into the Constitution which would have stated:

  51(ivA.) "[the Commonwealth Parliament has power to make laws with respect to] The borrowing of money by the Commonwealth for local government bodies."

  96A. "The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit."

  This proposition was passed in only one of the states (NSW) with a very slim majority of 50.79%. The overall vote in favour of the proposition was only 46.85%.

  This was the detail of the result:

Level 29, Allendale Square, 77 St Georges Terrace, Perth Western Australia 6000
Telephone: +61 8 9220 5050 Facsimile: +61 8 9221 4665 Email: Minister.Porter@dpc.wa.gov.au

Result

State	*Number on rolls*	*Ballot papers issued*	*For*		*Against*		*Informal*
				%		%	
New South Wales	2 834 558	2 702 903	1 350 274	50.79	1 308 039	49.21	44 590
Victoria	2 161 474	2 070 893	961 664	47.38	1 068 120	52.62	41 109
Queensland	1 154 762	1 098 401	473 465	43.68	610 537	56.32	14 399
South Australia	750 308	722 434	298 489	42.52	403 479	57.48	20 466
Western Australia	612 016	577 989	229 337	40.67	334 529	59.33	14 123
Tasmania	246 596	237 891	93 495	40.03	140 073	59.97	4 323
Total for Commonwealth	**7 759 714**	**7 410 511**	**3 406 724**	**46.85**	**3 864 777**	**53.15**	**139 010**

Obtained majority in one State and an overall minority of 458 053 votes. *Not carried*

- Electors in a section 128 referendum in 1988 (initiated by the Hawke Government) again, and even in larger numbers, overwhelmingly rejected a proposal to amend the Commonwealth Constitution to add a new section 119A which would have stated:

  "Each State shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State."

  This proposition did even worse than in 1974 as it was not supported in any of the states and the overall vote in favour of the proposition was only 33.61.

  This was the detail of the result:

Result

State	*Number on rolls*	*Ballot papers issued*	*For*		*Against*		*Informal*
				%		%	
New South Wales	3 564 856	3 297 246	1 033 364	31.70	2 226 529	68.30	37 353
Victoria	2 697 096	2 491 183	882 020	36.06	1 563 957	63.94	45 206
Queensland	1 693 247	1 542 293	586 942	38.31	945 333	61.69	10 018
South Australia	937 974	873 511	256 421	29.85	602 499	70.15	14 591
Western Australia	926 636	845 209	247 830	29.76	584 863	70.24	12 516
Tasmania	302 324	282 785	76 707	27.50	202 214	72.50	3 864
Australian Capital Territory	166 131	149 128	58 755	39.78	88 945	60.22	1 428
Northern Territory	74 695	56 370	21 449	38.80	33 826	61.20	1 095
Total for Commonwealth	**10 362 959**	**9 537 725**	**3 163 488**	**33.61**	**6 248 166**	**66.39**	**126 071**

Obtained majority in no State and an overall minority of 3 084 678 votes. *Not carried*

- The recognition by the Commonwealth Constitution of local governments would weaken or detract from the federal structure of the Constitution and federalism generally. In my view, that would be regrettable especially because the federal structure of the Commonwealth Constitution is one of the means of limiting an expansion of centralism.

As mentioned above, the WA Constitution, as well as some other State Constitutions, formally recognise the existence of local government. For ease of your reference, sections 52 and 53 state:

"52. Elected local governing bodies

(1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.

(2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted."

"53. Certain laws not affected

Section 52 does not affect the operation of any law —

(a) prescribing circumstances in which the offices of members of a local governing body shall become and remain vacant; or

(b) providing for the administration of any area of the State —

(i) to which the system maintained under that section does not for the time being extend; or

(ii) when the offices of all the members of the local governing body for that area are vacant; or

(c) limiting or otherwise affecting the operation of a law relating to local government; or

(d) conferring any power relating to local government on a person other than a duly constituted local governing body."

In my view, the legal existence of, and the conferral of, powers and functions on local government is catered for by the *Local Government Act 1995* (WA).

Secondly, your letter asks for my view on the High Court's decision in the Pape case, including "whether or not the likely outcome substantially affects Local Government so as to require such an amendment?" Again, I presume that you are referring to the need for an amendment to the Commonwealth Constitution to overcome any adverse consequences of the Pape case for Local Government funding.

I have had an opportunity to look at the Pape case. Attached for your information is a copy of a paper delivered by Mr Bryan Pape at the 2009 Annual Meeting of the Samuel Griffith

Society. As you may be aware, Mr Pape was a party to the Pape case and presented his arguments to the High Court. In my view, the Pape case does not have obvious detrimental implications for the funding of Local Government. For example, although the High Court indicated that direct Commonwealth expenditure from the Consolidated Revenue Fund is limited to matters falling within the scope of Commonwealth legislative and executive powers (which, as you may know, have been expansively interpreted by the High Court) that decision does not limit other sources of funding such as section 96 grants of financial assistance. Of course, the Pape decision, like other High Court cases, especially in the field of constitutional law, is open to varying and different interpretations. In the normal course of events, government funding practices and further High Court elucidation may provide clearer guidance as to the implications of Pape for Commonwealth funding generally.

Your third question asks for my view as to whether your Council's "functions and services" might "make [your Council] a trading entity in regard to Commonwealth corporation powers?" I assume that you are referring to section 51(20) of the Commonwealth Constitution which grants to the Commonwealth Parliament legislative power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". That is, you are asking whether your Council is a trading corporation and consequently subject to this Commonwealth legislative power and Commonwealth statutes which are based on that power and which provisions encompass local government Councils. The answer to these questions involves constitutional law and legal advice. Neither I, as Attorney General, nor my office provides legal advice to private person or organisations, including local government Councils. Such advice may be available, for example, from private lawyers. If you are seeking such advice you may wish to refer to High Court cases such as *Ex parte St George County Council* (1973) vol. 130 Commonwealth Law Reports (CLR), page 533; *Commonwealth v Tasmania* (1983) 158 CLR 1 which have considered the interpretation of the words "trading corporation".

Thank you for informing me of your interest in these matters and I trust that the above is of assistance to you.

Yours sincerely

(...)

C. Christian Porter MLA
ATTORNEY GENERAL; MINISTER FOR CORRECTIVE SERVICES

19 AUG 2010