20 February 2020

Senator Anthony Chisholm
Chair
Select Committee on Administration of Sports Grants
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Senator Chisholm and Committee Members

Submission to Select Committee on Administration of Sports Grants

I am a retired lawyer with a keen interest in the rule of law and in the Australian Constitution. The Sports Grants Saga, the matter under consideration by your Committee, raises serious Program Funding design issues which go to the heart of the rule of law and Federal powers under the Australian Constitution.

In designing a Federal spending program, it should be incumbent on the Federal Government as a first step to consider and decide whether the proposed Funding Program falls within the constitutional powers of the Federal Parliament under the Australian Constitution. This does not seem to have happened in the case of the Sports Grants Program.

The Federal Parliament and, therefore, the Federal Government have quite limited powers under the Australian Constitution. Generally, those powers are found in section 51 of the Australian Constitution with a few other limited powers spread around other sections of the Australian Constitution. The Federal Parliament and, therefore, the Federal Government, do **not** have full plenary powers to make laws and spend whatever money they please on whatever things they like.

This is in contrast to the States which under their Constitutions have full plenary powers, subject to a small number of exceptions like the imposition of excise and customs duty for example, to make laws and spend whatever money they please so long as it is related to their State.

The Australian Parliament's website itself states that the Federal Parliament has limited powers:

> *"Under Australia's Constitution the federal Parliament can make laws only on certain matters. These include: international and interstate trade; foreign affairs; defence; immigration; taxation; banking; insurance; marriage and divorce; currency and weights and measures; post and telecommunications; and invalid and old age pensions. The Australian states retain legislative powers over many areas such as local government, roads, hospitals and schools."*

Unfortunately, the Federal Parliament and the Federal Government have, for a long time, operated, de facto, on the basis that they have full plenary powers to spend money just like the States do on whatever things they please and they **ignore** the **limitations** on their powers.

This attitude by the Federal Parliament and the Federal Government through its Ministers can be seen in the design of the Sports Grants Program.

The High Court of Australia has **definitively** decided in a series of three cases that the Federal Parliament and the Federal Government have quite limited powers to spend money.

Those three High Court cases are:

- Pape v Commissioner of Taxation (2009) 238 CLR 1
- Williams v Commonwealth (2012) 248 CLR 156
- Williams v Commonwealth (No.2) (2014) 252 CLR 416

The reasoning in those three cases makes it clear that, for Federal expenditure to be constitutional and therefore lawful, there must be:

- An Appropriation Act authorising the expenditure, **AND**
- The proposed expenditure must fall within at least one of the **limited** powers granted to the Federal Parliament under the Australian Constitution.

It is the second dot point limb above that Federal Governments have chosen **quite wrongly** to ignore. It is this requirement that has been **ignored** by the Federal Government in the design of the Sports Grants Program.

There is simply no Constitutional power under the Australian Constitution for many of the payments under the Sports Grants Program made directly to organisations in a State. There is, for example, no Constitutional Power to make a payment directly to a Gun Club in a State. There is no constitutional power to make payments directly to a club in a State for changing rooms at a sports club. The list of invalid payments goes on. These two examples are **NOT** exhaustive of all invalid payments under the Sports Grants program.

Payments such as these, and many others, are simply unconstitutional and unlawful!

For the sake of completeness, I do not comment on payments to an organisation in a Territory as the power for such payments probably exists under the Territories power in section 122 of the Australian Constitution.

It is imperative that, going forward, procedures are put in place whereby, in the case of proposed future Federal Grants to be made directly to organisations or individuals in States, consideration is given to the constitutional power underpinning the program and the reasons given for deciding the constitutional validity are made public and the reasons are available to find easily.

This is particularly so in the context of the Sports Grants as the Prime Minister has foreshadowed possibly making grants in the future directly to Sports Clubs that have missed out. This would simply compound the Constitutional invalidity and constitute further illegal payments.

Federal Governments exhort their citizens to obey the law (a sentiment with which I agree) but then Federal Governments ignore and do not obey the most fundamental law of all, the Australian Constitution in relation to the Australian Constitution's expenditure power.

If consideration had been given to the Federal Constitutional powers in the design of the Sports Grants Program, then many of the grants that were made would not have been made at all. Of course, if consideration was given to the Federal Constitutional powers and it was realized that there was no constitutional power, yet the payments were still made, that would be a shameful matter.

Of course, Sports Grants that were paid that were not within constitutional power when made to an organisation in a State could, of course, have been made directly to a State, rather than the sporting organisation, under the Grants power contained in section 96 of the Australian Constitution with strings attached to direct the expenditure by the State. This is not mere administrative detail. It goes to the heart of the division of powers as between the Commonwealth and the States as set out in the Australian Constitution. A State is free to accept or reject a Grant under Section 96 of the Australian Constitution.

Dare I be so bold as to say that the section 96 route was not used because:

- The Federal Government would not have received kudos from the expenditure, **AND**
- The Federal Government, its Ministers and prospective Parliamentary candidates would not have had a photo opportunity in handing over the cheque.

If Federal Governments obey the Australian Constitution and follow the reasoning of the High Court of Australia in those three cases referred to above, duplication of expenditure in matters rightfully belonging to a State and duplication of bureaucracy would most likely be reduced.

Recommendations for Consideration by the Select Committee

- That, when designing Federal expenditure programs, Federal Governments:
  - obey the Australian Constitution,
  - recognise the limits of their constitutionally limited powers,
  - follow the reasoning of the High Court of Australia in the three cases mentioned above in relation to **all** Federal expenditure (always but particularly around election time when the temptation to pork barrel is high), and
  - make their reasons for asserting the constitutional validity of the Act or of the Subordinate Legislation, which purportedly authorises the proposed expenditure, publicly known well before the expenditure is made, so that proper public scrutiny can be had about the constitutional validity of the proposed expenditure.

Yours faithfully

Frank Brody