

19 March 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

Supplementary Submission to Select Committee on Administration of Sports Grants

I refer to my primary submission lodged with the Select Committee. It is submission number 12.

I attended the Select Committee's sitting in Melbourne on 12 March 2020. The constitutional point about the illegality of many of the Sports Grants, and indeed many other Government Grants, was discussed by the Select Committee with the aid of Professors Twomey, Saunders and Crommelin.

How to prevent Ministers in the future making constitutionally invalid payments.

The question was raised by the Select Committee about what sanctions might exist to prevent Ministers in the future from authorising unconstitutional illegal payments contrary to the principles enunciated in the Pape and two Williams High Court cases.

One sanction that was not mentioned in open discussion was the possibility that a Minister commits a criminal offence under the Schedule to the Commonwealth Criminal Code Act 1995 if that Minister dishonestly authorises payment of Commonwealth money not constitutionally allowed. In particular, the offences of dishonestly causing loss to the Commonwealth mentioned in section 135.1(3) and section 135.1(5) of the Schedule to that Act carry a maximum penalty of 10 years in jail – see below. The loss to the Commonwealth would be the funds unconstitutionally disbursed.

On its face, that section could be quite apt for behaviour where a Minister knows of the reasoning in the Pape and Williams cases and ignores that reasoning in making or authorizing Grants payments. **There is nothing quite like the prospect of jail to focus one's interest on what one is doing.**

If Ministers choose to ignore the reasoning of the High Court and snub their noses at the High Court, then the prospect of jail might be the only way to bring them to account.

Recovery of unconstitutional payments from Recipients

The question was raised as to what to do in respect of any constitutionally invalid payments. Could they be clawed back by the Commonwealth from recipients?

Reference was made in discussion before the Select Committee to the case of the School Chaplaincy grants that had been made and were held in the Williams cases to be constitutionally invalid. Apparently, the Finance Minister exercised a power under Federal legislation to waive the debt owed by the recipients.

There is a serious argument that the waiver process is constitutionally flawed as well. In the 1950's, certain State Transport fees that had been levied on certain transport operators were held to be unconstitutional as infringing section 92 of the Australian Constitution. The State of New South Wales in response passed a law that barred the transport operators from suing to recover from the State of New South Wales the fees paid that were held to be unconstitutional.

The Privy Council held in the case of *The Commissioner for Motor Transport v Antill Ranger & Company Pty Ltd* [1956] AC 527 ("Antill Ranger case") that the legislation barring the right to recover the unconstitutional fees was itself unconstitutional on the basis that one cannot do by the back door what one cannot constitutionally do by the front door, i.e. if the legislation barring recovery had been held to be constitutionally valid, then, in substance, the State would have imposed a constitutionally invalid fee.

By analogy to the reasoning in the Antill Ranger case, legislation allowing a Federal Minister to waive a debt due to the Commonwealth where the debt arose in unconstitutional circumstances, namely the receipt of unconstitutional payments by grant recipients, could mean the Commonwealth is trying to do by the back door what it cannot constitutionally do by the front door, namely make the grants in the first place. The exercise of the waiver power could be unconstitutional to that extent.

Yours faithfully

Frank Brody

Section 135.1 of the Commonwealth Criminal Code Act 1995

135.1 General dishonesty

Obtaining a gain

- (1) A person commits an offence if:
 - (a) the person does anything with the intention of dishonestly obtaining a gain from another person; and
 - (b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

Causing a loss

- (3) A person commits an offence if:
 - (a) the person does anything with the intention of dishonestly causing a loss to another person; and
 - (b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

- (5) A person commits an offence if:
 - (a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and
 - (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
 - (c) the other person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (6) Absolute liability applies to the paragraph (5)(c) element of the offence.