

Good Friday 2005

Ms Joanne Towner
C/- Legal & Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Joanne,

Thank you for sending me the background paper on the Committee's Enquiry into harmonisation with New Zealand.

SUBMISSION

I can't help thinking that the bureaucrats in Attorney-Generals Dept are using the Committee, in getting the Committee to do much of the work that they should be doing themselves. For example, all you really need for your enquiry is a list of the areas where there has been difficulty with Trade and a set of suggested solutions. I am not sure that whoever wrote the Background Paper knows the difference between Trade and Commerce.

Part of the problem could be that the Committee is using Professor George Williams as a Constitutional Consultant. I do not regard him as a Constitutional expert at all. For example he does not understand the role of the Crown in our Constitution. I think he attended the Constitutional Convention, where he had plenty of company - which is why I wrote my "Companion to the Australian Constitution on Understanding the Constitution". There are copies in the Parliamentary Library.

Australian Constitutional context.

The Constitution divides us into State and Commonwealth areas of responsibility and makes both areas Sovereign. State and Commonwealth Parliaments pass Commonwealth and State Crown Laws respectively, and these are signed into Commonwealth and State Crown Law by our various Governors, and the Governors-General.

If an inconsistency is found between Commonwealth and State Laws then, to the extent of the inconsistency, the Commonwealth Law shall prevail. The Labor and Liberal Parties interpret this High Court Decision aggressively, and considers that should the Commonwealth disagree with any State Law, then it can Legislate to annul the State Law - as happened with the Northern Territory's Mandatory Sentencing Laws.

When the Queen planned a Royal Visit in 1954 it was realised that she did not possess any **Australian Crown Powers** to perform any of the tasks we had requested of her. These Powers were returned to her with the passage of the Royal Styles and Titles Act 1953, and the Royal Powers Act 1953. These Acts were strictly unconstitutional, but nobody minded and the Powers have never been abused. That is the Parliament gave the Queen these Powers, but the Governor-General derives his Powers from the Constitution.

Harry Evans thinks that the Australian Crown I am talking about is metaphysical, but in my opinion he is wrong, and this is holding up the recognition of Australia's Constitutional evolution and development, because many regard him as a Constitutional expert.

The business of good Government is good business. There is no indication for State or Commonwealth Governments to be holding up any legitimate business anywhere. You can never make laws that will control all chicanery - that would be like attempting to codify the Reserve Powers of the Crown. You don't know what sort of chicanery people are going to get up to next.

I remember Lionel Murphy bringing in the **Australian Law Reform Commission Bill**. The Bill was never meant to work the way its grandiose title sounds. It only came into operation on the say-so of the A-G, and it was to recommend whatever changes to Laws that Lionel wanted, in order to give him control of things. Naturally it was taken up by Lionel's disciples like Gareth Evans, Alan Missen, Michael Kirby etc.

I see that the ALRC has been ten years reviewing the uniform Evidence Acts of the Commonwealth, but actually only of two States and one Territory, and it is to report this December. **I recommend that its members only get paid on results.** Incidentally, Lionel Murphy also brought in the Trade Practices Act, and I remember having a beer with him one night when he said: "the Lawyers ought to put up a statue to me, because nobody can understand the **Trade Practices Act**".

The Commonwealth Government was not given Powers in all these areas (eg a general commerce power), for very good reasons. If Business has a problem and takes it to Government, Business will very soon have a crisis. It was not that the Federating Fathers knew nothing about Human Rights for example, that the Commonwealth Government was given so little to do with Human Rights. Human Rights were left right near the People where they belong, with the States. And so it is with the Commerce Power.

The Federating Fathers were fearful and took great care not to give the Central Government they were creating too much power. This was because they were aware of the huge problems a powerful Federal Government could create. Their reasoning was that: should the Federal Government make a mistake then everybody in the whole Country was affected. But, if only one State makes a mistake, then only that State was in trouble and it could be bailed out.

The Commonwealth Government feels that it is only common sense that it short circuit the maze of many regulators, save money and time for Business, and move on to a land of milk and honey. It does not work that way. Business moves at breakneck speed and has huge and detailed communication links that Government cannot keep up with, particularly as Government does not know where Business is going next. A successful business has several failures in its attempts to succeed, where Government need not and should not be involved - except for allowing legitimate business deductions.

It has been the laxness of Commonwealth Government regulating that inevitably led to the obscene Directors emoluments that stand in the way of any successful wage negotiations with the Unions and workforce. Directors were raking off gargantuan retirement benefits that nobody could justify - all the fault of lax Commonwealth Government administration. If this

is the way the Commonwealth Government assists Business, then further Commonwealth Government intrusion does not bode well.

Directors emoluments are also upsetting in the community generally, and create many false expectations. First of all it creates expectations in the Civil Service so that the hierarchy of the Service feels it should be remunerated at the same rate as business heads. Bureaucrats feel if they are running a big Department they should be remunerated at an equivalent rate to the Private Sector. This is false reasoning because businessmen get fired for silly mistakes and bureaucrats get promoted for them. That is, the security of tenure of the two is not the same at all.

Similarly, the pace of decision making is far from similar. Bureaucrats are not in competition in the same way as the Private Sector operates. Bureaucrats used to work for the Crown, but now they are under contract. They travel first class and go overseas on Diplomatic Passports and use all the perks of the Embassies for airport pickup and transport. They wrangle the best seats at sports, expositions and theatres etc.

The main reason why the States prove inadequate in regulating business is because of disuse atrophy. Ever since the Commonwealth Government was given the States taxing rights as a wartime emergency measure the Commonwealth has been assuming a larger and larger role in their administration, even though it does not have the Constitutional Power. It has persisted denigrating the States ability until we have reached the present imbroglio, with the Commonwealth bureaucrats slaving because they cannot wait to take over Commerce.

In referendum after referendum the People have voted not to give more power to Canberra, yet the High Court in decision after decision favours the Commonwealth over the States, as does the Commonwealth Public Service. In other words the High Court and the Commonwealth are going against the Constitution and the Will of the People. I wonder how much further up the garden path we want to go?

Business always claims it wants certainty with its arrangements, and usually thinks it would be better to have one Government to deal with rather than seven or eight. The Federal bureaucrats slaver when they hear this. I think it would be better if Business made a submission to Government on what it wants to do, and Government assesses whether what Business wants to do **will hurt the People or not**. If it looks satisfactory, then Government should give Business a list of the known pitfalls and problems and then let Business go. If business does something stupid, then come down on it like a ton of bricks. Harmonising is for quartets, not bureaucrats.

I notice under your heading 'Co-operative or complimentary schemes' you include "Vocational Training". The Health Insurance Commission has been attempting to control General Practitioners throughout Australia by this mechanism, and it has proved to be the most divisive mechanism of all. It has created a two tier system of General Practitioners, which it was not supposed to do, and has not led to an improvement in patient care, quite the reverse. **However the HIC has persisted with it despite the chaos it is causing.** Bureaucrats don't seem to mind chaos because it takes more bureaucrats to run.

I also notice your paper claims that "**Amendments to the Constitution are difficult to achieve...**". This is not so. Only 4 of 48 referendum proposals have been passed because nearly all of them were power grabs by the Commonwealth Government. Machinery

provisions pass easily. The decision to "count the Aborigines" has led to nothing but trouble for the Aborigines, and relations are worse now than ever - all because we implemented Gough Whitlam's definition of who is an Aborigine rather than **the proper definition of an Aborigine under Customary Tribal Law** (See my 'Companion p 42 ...').

The High Court in Decision after Decision passes more Power to the Commonwealth, which flies in the face of all the referenda which refuse more Power to the Commonwealth. This would appear to be acting against the wishes of the People and the Constitution, and means that the People think that not all wisdom lies with the Commonwealth Government.

Thus the Committee is wrestling with a Laocoon of nebulous concepts and nebulous Acts of Parliament. I think Lionel Murphy derived his inspiration from gazing at the ceiling. Men are seldom so innocently employed as when they are busy making money. All the bureaucrats have to do is see that what they are doing is not hurting anybody or breaking the law, and assist them where possible.

Yours sincerely

Glenister Sheil.