

Our Reference: N99-356

Your Reference:

Contact: Mr Vivan Mawhinney
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The Commissioners
Gambling Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Commissioners

I wish to comment on the Productivity Commission's Draft Report on Australia's Gambling Industries, in particular the references to the status of Norfolk Island.

The Government of Norfolk Island has disputed the Commonwealth's constitutional view of the Territory's status, and has petitioned the United Nations High Commission for Human Rights to address their concerns that the Commonwealth has infringed Norfolk Island's "sovereign" rights.

The Commonwealth position, agreed by a 1976 ruling of the High Court of Australia, is that Norfolk Island is a part of the Commonwealth. It enjoys a form of self-government broadly similar to that enjoyed by the Northern Territory and Australian Capital Territory. The Commonwealth position is spelt out in more detail in the attached letter from the Minister for Regional Services, Territories and Local Government, Senator the Hon Ian Macdonald, to the Norfolk Island Chief Minister dated 9 August 1999. You will note that the content of the letter was endorsed by the Prime Minister.

Against that background, I suggest that the Commission avoids references, such as that found on page 17.53, to Norfolk Island's "idiosyncratic sovereign character", and on page 17.43, to the "special place which Norfolk has within the Commonwealth". Rather, references within the Report to Norfolk Island should be framed within the context that Norfolk Island is an integral part of the Commonwealth of Australia.

I note the Commission's initial consideration that there are major benefits for the States and Territories from pursuing a national approach to online gambling. However I question whether the Committee's finding that "The case of Norfolk Island may lie outside this general principle", should be re-examined.

Norfolk Island is a small jurisdiction. It has approximately 1,500 permanent residents, and an annual budget of approximately \$18 million. It would not be unreasonable to question whether Norfolk Island's relatively limited resources are a consideration in relation to its capacity to regulate internet gaming operations with turnovers of potentially many times this amount.

It may also be that Norfolk Island would be an attractive jurisdiction for operators of questionable integrity, affording them the benefits attached to Australia's good reputation, without being subject to the rigorous legal regime from which that reputation is born. In this context it is worthy of note that some Commonwealth legislation such as the *Corporations Law* and the *Trade Practices Act 1974*, does not extend to Norfolk Island. Although the current Island proposals are for online services which would not be sold to Australians, this may change in the future.

Similarly, the issues you identify in the Draft Report, namely revenue effects, protection of Australia's international reputation, and taxation arrangements, all suggest that the benefits for both Norfolk Island and Australia as a whole being involved in any national regulatory approach should be more closely examined by the Commission.

Thank you for the opportunity to comment on the Commission's Draft Report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R Kava', written in a cursive style.

Rosanne Kava
First Assistant Secretary
Territories and Regional Support Division

13 October 1999



Senator the Hon. Ian Macdonald

Minister for Regional Services, Territories and Local Government

The Hon George Smith MLA
Chief Minister
NORFOLK ISLAND 2899

- 9 AUG 1999

Dear Chief Minister

I refer to your letter of 5 February 1999 concerning the transfer of powers between the Federal and Norfolk Island Governments and to my interim reply of 18 March 1999.

You will recall that we have earlier exchanged correspondence and discussed machinery of government and transfer of powers issues. Our officials have done likewise and towards the end of last year they prepared a draft template against which possible transfers of powers might be addressed. I sent you a copy of the draft template with my letter of 22 December 1998.

As I have indicated, the Federal Government is willing to discuss constructive and realistic proposals for advancing self-government on Norfolk Island. However, your letter of 5 February essentially invites me, on behalf of the Federal Government, to enunciate the Commonwealth position on the form of self-government that is envisaged for Norfolk Island.

There appears to have been a degree of disparity over the years in the views of the Commonwealth and the Territory Government on what is intended and I believe that it is timely to provide definitive advice on the Commonwealth's position. The issue of Norfolk Island's constitutional status has been the subject of considerable correspondence by my predecessors over past years. This has largely been in response to representations from the Territory suggesting that Norfolk Island is a dependent territory under the authority of the Commonwealth, not a part of the Commonwealth and that it has never been ceded to or annexed by the Commonwealth.

The first point I need to reiterate is that Norfolk Island is a Territory of, and will remain an integral part of, the Commonwealth of Australia. The Island has no international status separate from Australia. The words in the *Norfolk Island Act 1979* referring to Norfolk Island as a "Territory under the authority of the Commonwealth" afford no special status. This wording is taken from section 122 of the Constitution. The same wording appears in the legislation dealing with other territories that have become part of the Commonwealth since Federation. Nor is there any special significance for Norfolk Island's status of the provision at subsection 19(2) of the *Norfolk Island Act 1979* concerning the restrictions on the exercise of powers over unjust acquisition of property, defence, coinage and euthanasia. It has been suggested in some quarters on the Island that this amounts to a commitment to eventually transfer all but

these powers. This was not the intention when internal self-government was granted in 1979 and nor is it the intention now. This exclusion of powers provision, in so far as it relates to the acquisition of property, establishing a military force and coining money, is based on sections 51 (xxxii), 114 and 115 of the Constitution, which impose similar constraints upon the Commonwealth (in relation to acquisition of property) and the States (in relation to the other matters). The *Australian Capital Territory (Self-Government) Act 1988* also provides at section 23 that the Australian Capital Territory Legislative Assembly has no power to make laws over similar matters to those addressed in the Norfolk Island legislation.

The Commonwealth has always maintained the position that Norfolk Island is an integral part of Australia. In the words of the preamble to the *Norfolk Island Act 1979* "Norfolk Island was, by the *Norfolk Island Act 1913*, declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth." When the then Minister, the Hon Robert Ellicott MP, announced the Commonwealth's policy for Norfolk Island at the time the *Norfolk Island Act 1979* was made he reaffirmed that "Norfolk Island is part of Australia and will remain so".

On a related matter the Commonwealth also holds that Norfolk Island does not have an indigenous population and has no right to an act of self-determination in any international sense. The Island was uninhabited when claimed under the British Crown and the United Nations Decolonisation Committee does not regard Norfolk as a colonised territory. The traditions and culture of the Pitcairn descendants are highly valued as part of a multicultural Australia. However, these differences are no more pronounced than those of other communities within Australia. This was reinforced by the findings of the 1975 Senate Committee report on United Nations Involvement with Australia's Territories which found that "the population of about 1900 is ethnically and culturally akin to that of the mainland".

This brings me to the issue of the status of the Territory within the Australian Federation. Norfolk Island has been granted a measure of internal self-government by the Federal Parliament under the *Norfolk Island Act 1979*. In essence the Federal Parliament has created the Norfolk Island Legislative Assembly and delegated a range of powers to it. The legal framework put in place is consistent with that put in place in the other Assemblies created by the Federal Parliament in the Australian Capital Territory and the Northern Territory. Those Assemblies exercise powers generally comparable to the States. The Commonwealth sees this broad model as appropriate for Norfolk Island. An important determinant for the Commonwealth in addressing further transfer of powers between the Federal Parliament and the Norfolk Island Legislative Assembly will be whether, within Australia's Federal arrangement, they are powers normally exercised by the States and other self-governing Territories.

There are of course additional matters in which the Federal Government has an obligation to govern in the best interests of all Australians and to protect and enhance the national interest. As you are aware discussions on issues of

national importance are regularly held with the States and self-governing Territories. Often these discussions take place at meetings of the wide range of Commonwealth/State/Territory Ministerial Councils and similar consultative forums. The Norfolk Island Government already has access to some of these forums but there is substantial scope for a greater level of participation. I urge you to consider seeking greater involvement in these important Federal consultation processes. I would be happy to help in sponsoring with my Ministerial colleagues a higher level of Norfolk Island participation in these forums.

Clearly aspirations for additional powers which go beyond the current Federal arrangements, for example the one occasionally expressed on Norfolk Island for control of the 200 mile Exclusive Economic Zone, will simply not be countenanced as they would not be if sought by a State or other Territory. Greater local control over the local fishery, on the other hand, is consistent with State activities within our Federal system and I believe that this is an issue we should agree to pursue.

Within the framework I have outlined above, another major consideration is the capacity of the Norfolk Island Government to effectively discharge any new responsibilities. Here the Commonwealth Grants Commission's 1997 report on the Island's economy and its financial and administrative capacity represents the most authoritative and independent advice available. As you know the Commission found that the Territory Government is experiencing difficulty both financially and administratively in coping with the existing range of functions. The Commission also found in its examination of functions that a number of Norfolk Island services provided on the Island fall well below mainland standards. Among other things, the Commission suggests (page 215 paragraphs 26 – 28) the "...re-arrangement of functions for each government so that they better suited the unique circumstances of Norfolk Island...". The Commission goes on to suggest that the Commonwealth might provide health insurance and social security more easily and cheaply than the Norfolk Island Government. I believe we will need to factor all the Commission's findings into our deliberations about the appropriate level of government for the discharge of powers and functions in the best interests of Island residents.

Obviously, in considering the assumption of additional functions, the Territory Government would need to demonstrate its capacity to effectively discharge them. Overall I believe the template, which I mentioned earlier, represents a sensible way for us to progress the further transfer of powers between the Commonwealth and Norfolk Island Governments. Besides the issue of the local fishery, there appear to be two other broad subject areas that warrant our early attention. One is the matter of greater local control over heritage listing in the Territory. The other is the finalisation of the upgrading of the land administration machinery which was considered by the Joint Government Land Working Group in 1994/1995.

In relation to heritage issues, I understand you have held discussions with Commonwealth officials, notably from the Australian Heritage Commission, in

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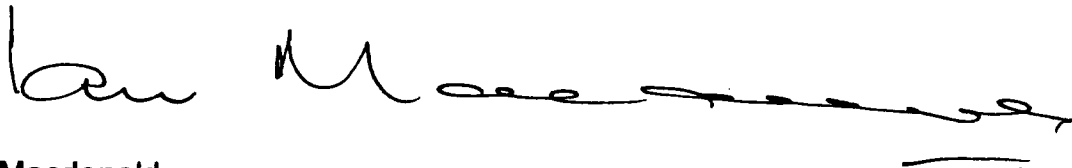
which they have offered help to the Territory Government in setting up appropriate local machinery and an adequate legal regime so that the Island Government can assume greater responsibility in this area. I urge your Government to give priority to this issue.

On the matter of land administration I understand that the Administrator has already referred to you a paper that my Department considers identifies the outstanding tasks and likely costs of completing the land administration machinery upgrade. I would welcome your Government's indication of the planned action over the next financial year in regard to putting in place the administrative framework for the remaining land legislation to become fully operative.

In terms of advancing all these issues, I suggest that our officials could continue their dialogue with a view to bringing forward a progress report and proposals about future action at our Inter-governmental Meetings later this month.

The Prime Minister has endorsed the contents of this letter and I am sending a copy to him.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Macdonald', with a horizontal line underneath the name.

Ian Macdonald