Chapter Nine
The Use and Abuse of the Commonwealth Finance Power

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> "We have been taught by long experience that we cannot without danger suffer any breach of the constitution to pass unnoticed".[1]
> "The Commonwealth Parliament has no general power to make laws for the peace, order and good government of the people of Australia".[2]
> "Finance is government and government is finance".[3]

Introduction

Upholding the Constitution is a fundamental tenet of the legislature, the executive and the judiciary. By its use of the appropriation and grants powers the federal Parliament has expanded its authority in its quest to gain absolute power over the States. As Lord Acton wrote in his famous letter:

> "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: .....There is no worse heresy than that the office sanctifies the holder of it".[4]

This paper examines some recent and pending Acts which seek to rely upon the appropriations power (s. 81 of the Constitution) for their validity. In doing so, it raises the vexed, but independent questions of standing and justiciability. The role of the Auditor-General, as a supposed watchdog, to warn both the Parliament and the people of abuses of financial power, is also considered. Finally, whether a successful challenge could be mounted to overrule the law on the use of the grants power is canvassed.

At the outset it is helpful to remind ourselves of the nature of the federal system:

> "[I]t involves the co-existence of national and State or provincial governments, with an established division of governmental powers; legislative, executive and judicial. As in the United States, the national government was given limited, specified powers. An approach to constitutional interpretation which stressed a reservation of State powers flourished for a time after federation, but was reversed by the *Engineers' Case* in 1920. Even so, as in the United States, the federal nature of the Commonwealth has been held to limit the capacity of the federal Parliament to legislate in a manner inconsistent with the constitutional role of the States".[5]
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> As McHugh J has remarked:
>
> ".....the ultimate judicial umpire is the High Court. Its judgments ultimately define the powers and functions of the federal and State governments".[6]

However, without standing, the citizen is barred from challenging legislation which is beyond the power of the Commonwealth Parliament to enact. Where the States abdicate their responsibilities, and acquiesce in what may be an abuse of power by the Commonwealth, the citizen has at present no legal remedy. This is

of particular concern where there has been a tacit *inter se* arrangement cobbled together through political expediency:

> "The existence of consensual arrangements of this nature should not be used to justify the restriction of standing rights".[7]

The appropriation power

Chapter IV of the Constitution deals with finance and trade. For present purposes the key finance provisions of the Constitution are ss. 81 and 83. They provide as follows:

> "S. 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, *to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution*". (Emphasis added).
>
> "S. 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law....".

The effect of these provisions was first considered by the High Court in *Attorney-General for Victoria v. Commonwealth*,[8] the *Pharmaceutical Benefits Case*, in which it was held that the *Pharmaceutical Benefits Act* 1944 was beyond any purpose of the Commonwealth:[9]

> "Section 81 is not to be construed narrowly and is to be interpreted as allowing the appropriation of moneys to permit the Commonwealth to carry out the usual incidents of government such as payments for the executive and the judiciary. Nevertheless s. 81 is not to be construed as permitting something to be done which is otherwise beyond the legislative competence of the Parliament".

Dixon J in the *Pharmaceutical Benefits Case* rejected the idea that the power "to spend money is independent of the other powers of the Commonwealth".[10] That is consistent with his submissions in 1927 to the Royal Commission on the Constitution, set out in Annexure A.

> "The Commonwealth power of appropriation, however, is explicit; it is 'for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by' the Constitution. This power must be construed liberally; it is a great constitutional power, but it does not authorize the Commonwealth appropriating its revenues and moneys for any purpose whatever, without regard to whether the object of the expenditure is for the purpose of and incident to some matter which belongs to the Federal Government....
>
> "But the *Pharmaceutical Benefits Act* 1944 is beyond any purpose of the Commonwealth. No legislative, executive or judicial function or purpose of the Commonwealth can be found which supports it, and it cannot be justified because of the existence of the Commonwealth or its status as a Federal Government".[11]

The case which appears to have encouraged the Commonwealth to bypass its contrived use of the s. 96 power of tied grants to the States is *Victoria v. Commonwealth*[12] (the *Australian Assistance Plan Case* or *AAP Case*). Briefly, money appropriated for the Australian Assistance Plan under the *Appropriation Act* 1974-75 for payment of grants to 35 Regional Councils for social development was unsuccessfully challenged as beyond power. Both Barwick C J and Gibbs J strongly dissented.

The meaning of the words "for the purposes of the Commonwealth" was central to the construction to be given to s. 81. Barwick C J said:

> "[T]he Commonwealth is a polity of limited powers, its legislative power principally found in the topics granted by ss. 51 and 52. .. [T]o say that a matter or situation is of national interest or concern, does not, in my opinion attract any power to the Commonwealth".[13]

Gibbs J was of the view that these words:

> ".....do not in their ordinary sense have the same meaning as 'for any purpose whatever' or 'for such purposes as the Commonwealth may think fit' ".[14]

Five Justices effectively held the appropriation was valid by an unworkable alloy of diverse reasons. Mason J would have restrained the execution of the plan because it was outside the executive power of the Commonwealth, and in so doing reduced the result to a majority of four. The reasoning in the case is unsatisfactory as it has no predictive value. McTiernan J held that the dispute was not justiciable; it was within the field of politics not law. Stephen J held that the plaintiffs had no standing to bring the suit.

Disturbingly, Jacobs J observed that:

> "The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself".[15]

He held "that the appropriation of moneys of the Commonwealth Parliament cannot by itself be the subject of legal challenge".[16]

The following piece of doggerel encapsulates the *AAP Case*:

> "Thus for the scheme to be valid,
> It had to be firmly moored,
> In executive power. The tossed fruit salad,
> The motley smorgasboard,
> Of executive powers explored here had to yield,
> An accumulation of arguments which would afford
> Sufficient powers to 'cover the field'.
> Perhaps they did. But in the end the argument seems rather pallid".[17]

Finally, and importantly, the reasons of Murphy J go to the nub of the present topic. He remarked that:

> "If the plaintiffs' contentions were accepted, it would mean that the Parliament's use of the appropriation power had been unconstitutional since federation".[18]

In short, Murphy J held that the appropriations power was unlimited, and that Parliament is the authority to determine what are the purposes of the Commonwealth. Here he followed what Latham C J and McTiernan J said in the *Pharmaceutical Benefits Case.*

Murphy J described the background to the issue, and indeed the present problem for determination, in this way:

> "From the material supplied to the Court and an examination of the Appropriation Acts, it appears that there were many current programmes [that is, in 1974-1975], some of which had been in operation for many years and which are not clearly referable to any head of legislative power in the Constitution other than s. 81.
>
> "These include substantial appropriations in the Departments of Education, Tourism and Recreation, Science, Health, Housing and

Construction, Agriculture, Special Minister of State, Prime Minister, Media, Urban and Regional Development, Environment and Conservation, Labor and Immigration, and Social Security.

"To ascertain whether these appropriations are referable to one of the enumerated powers (other than s. 81) would involve exhaustive inquiry into the boundaries of the enumerated powers.

"The appropriation for those purposes not within the scope of the enumerated powers would, on the plaintiff's contention, be unconstitutional. Hundreds of items of appropriation since Federation and many hundreds of millions of dollars would have been unlawfully appropriated and spent.

"The chilling effect that such an interpretation would have on governmental and parliamentary initiatives is obvious. It is not a formula for operating a Constitution. It is one for stultifying government".[19]

To adopt Murphy J's approach to s. 81 would be like deleting paragraphs (i) to (xxxix) of s. 51 of the Constitution. If this were done it would then read:

"The Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth".

Unfortunately, those who advocate this position need to avail themselves of the provisions of s. 128 of the Constitution to bring about such an amendment. Its time may have arrived!

Enactments beyond power?

"My Government also employed for the first time on any scale direct money grants 'for the purposes of the Commonwealth' under s. 81. For a number of reasons the making of grants through State Governments unnecessarily complicates the machinery of government. In the case of the Australian Assistance Plan and the Australian Legal Aid Office, for example, several States had shown their unwillingness or their inability to provide urgently needed services".[20]

The *Roads to Recovery Act* 2000, consisting of 13 sections, provides for the appropriation by 30 June, 2005 of $1.2 billion to local government for roads, of which $850 million is being spent in rural and regional Australia (e.g., Wagga Wagga City Council $5.0 million) and the remainder in capital cities (e.g., Blacktown City Council $4.9 million).[21]

Section 4 simply states that "the main object of this Act is to provide $1,200,000,000 for road expenditure by local governing bodies", and s. 6(3) again simply provides "that the Consolidated Revenue Fund is appropriated for payments under this section". In short, there is no pretence by the Parliament that the appropriation of these moneys is for any purpose of the Commonwealth enumerated in s. 51 or elsewhere.

After 30 June, 2005 the Roads to Recovery programme is pending continuation under Part 8 of the *AusLink (National Land Transport) Bill* 2004, and payments as provided by s. 89 will be made in accordance with the appropriation for ordinary annual services under *Appropriation Act (No.1)*. These appropriations will be for a further $1.2 billion to be paid directly to local government in the four years to 30 June, 2009.

By putting the Nelsonian telescope to the blind eye the States have treated these payments to local government as windfall gains. It has allowed them to avoid any potential burden to provide this type of finance. A ditty attributable

to Sir Robert Garran, composed in the context of the States feigning a desire of regaining the income tax power, reveals their acquiescent approach:

"We thank you for the offer of the cow,
But we can't milk so we answer now,
We answer with a loud emphatic chorus,
You keep the cow and do the milking for us".[22]

Here the States have simply acquiesced to the Commonwealth invading the financing of local government. They are in truth *de facto* grants to the States. It is a good illustration of what has been described as "fruitcake federalism". In short, a bit of everything, where both the States and the Commonwealth are financing the same activity.

The same formula is applied by the Commonwealth under the Regional Partnerships Programme, for which the Commonwealth plans to spend $308 million over the next four years to 30 June, 2008.[23] For 2004 the estimated actual expenditure was $91 million and for 2005 it is also estimated at $91 million.[24] This expenditure purports to be authorized by ss. 6 and 15 of the *Appropriation Act (No.1) (2004-2005),*[25] which appropriated $178.628 million for Outcome 2 (greater recognition and development opportunities for local regional and territory communities) of the Department of Transport and Regional Services. Unlike the *Roads to Recovery Act* 2000, where the appropriation is a standing amount, the regional partnership expenditure is part of an appropriation for ordinary annual services and related purposes.

Appropriations under the *Roads to Recovery Act* 2000 and the Regional Partnerships Programme appear to rely upon ss. 81 and 83 of the Constitution. If this proposition is correct, then the activities which the Commonwealth can engage in are unlimited. This, of course, is tantamount to substituting a unitary system for a federal one.

What head of power did the Parliament rely upon to enact the *Australian Sports Commission Act* 1989? By s. 5 the Commission is established as a body corporate with perpetual succession, and under s. 43 (1) "there is payable to the Commission such money as is appropriated by the Parliament for the purposes of the Commission".

There is nothing in s. 51 of the Constitution which deals with sport as such. Is the Commission a trading corporation for the purposes of paragraph (xx)? Was it established under the *Commonwealth Authorities and Companies Act* 1997? How does the appropriation[26] of $128 million for 2005 to the Commission answer the description of being "for the purposes of the Commonwealth" under s. 81 of the Constitution? Of this amount, $31 million is allocated to "Outcome 1 – an effective national sports system that offers improved participation in quality sports activities by Australians", and $97 million to "Outcome 2 – excellence in sports performances by Australians".

Another topical illustration is likely to be in respect of the goal of the Commonwealth to establish 24 Australian Technical Colleges throughout Australia. It is a guessing game as to which head of power under s. 51 will be relied upon. The candidates could be the trade and commerce power under paragraph (i), or perhaps more likely, the corporations power under paragraph (xx). Yet again reliance may be sought on s. 81 to authorize the appropriation of money to fund this activity.

All of this ought to attract the same cutting criticism made by Professor Colin Howard in lamenting the High Court's decision in the *AAP Case*:

> "The most basic question posed by the litigation, however, was not squarely confronted at all. This was whether any government should be permitted to utilize an Appropriation Act for the purpose of acquiring Parliamentary sanction for a policy which could not be legislatively supported in any other way. It ought to be obvious that, federal questions apart, it borders on the scandalous in terms of governmental practice for Parliament to be presented with two lines of text, amounting to no more than brief and vague headings, as a basis for expending millions of public dollars in such a context. Those two lines concealed an important policy departure which was both new, in the sense that parliamentary sanction had not been gained by normal legislative methods, and highly contentious. The missing legislative methods include debate upon the proposed legislation which deals with the substance of the matter and not simply what it is expected to cost".[27]

Standing and justiciability[28]

If citizens wish to challenge the validity of Commonwealth legislation they are obliged to get a State Attorney-General to bring a relator action. In short, such actions are not maintainable without the fiat of the Attorney-General, which simply means that the Attorneys-General bring these actions in their own names.[29] As to the validity of an Appropriation Act, it is not ordinarily susceptible to effective legal challenge.[30] If so, then what are the extraordinary circumstances where it is capable of challenge? In determining an application to strike out a statement of claim, Gibbs C J held that it was arguable whether the plaintiffs as taxpayers had standing to challenge the validity of an Act under which public moneys were being disbursed.[31]

Professor P H Lane has suggested that the suppressed reason for not granting a citizen standing to attack unconstitutional expenditure is found in convenience. It is claimed that the Commonwealth would be an easy target because its powers are enumerated and specific.[32]

If this is so, then the decisions of the Supreme Court of Canada, starting with *Thorson v. Attorney-General of Canada*,[33] might offer the prospect of the High Court overruling its attitude to standing. In this case, Thorson, QC challenged the constitutional validity of the Appropriation Act providing money to implement the *Official Languages Act* (1968-69) (Can). Laskin J, as he then was, said:

> "I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder……The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; ... A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute.... The substantive issue raised by the plaintiff's action is a justiciable one; and prima facie, it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication".[34]

The approach of Laskin J in emphasizing the need to provide legal redress to citizens who challenge allegedly illegal expenditures of public money[35] needs to

be argued before the High Court. The Commonwealth pulls itself up by its own bootstraps by relying on the appropriations power to support activities for which no authority can be found elsewhere in the Constitution. Saying so doesn't make it so.

Surreptitiously, the Commonwealth has subverted the federal union and expanded its activities by relying on s. 81. The high water mark of the Commonwealth's expansion of powers reached through the use of s. 96 has now been well passed. Whether this higher limit is built upon a sound legal basis is doubtful because of the generally unsatisfactory spread of reasons in the *AAP Case*.

Some encouragement as to whether the High Court would grant standing to a citizen to challenge the unauthorized appropriation of moneys under s. 81 may be gained from the remarks of Gleeson C J and McHugh J, where they said "that it is not difficult to understand why, in the case of certain laws, it might be considered in the public interest to provide differently".[36] Laws which are claimed to exceed power under the Constitution would be a prime example. As Gibbs J observed:

> "It is somewhat visionary to suppose that the citizens of the State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible".[37]

A view approved of in *Bateman's Bay Local Aboriginal Land Council v. Aboriginal Community Benefit Fund Pty Ltd*.[38]

Murphy J urged the liberalisation of the requirements of standing for individuals.[39] Later he expanded upon this idea in *Attorney-General (Vic); Ex Rel Black v. The Commonwealth* (the *Defence of Government Schools Case – DOGS Case)* when he said:

> "A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and in my opinion, does not depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has standing in the courts to secure the observance of constitutional guarantees".[40]

So far as constitutional guarantees are concerned, there are none. At best there is a duty of the Parliament, the Executive and the Judiciary to uphold the Constitution. Citizens have a legitimate or reasonable expectation[41] that it will be administered according to law.

Alternatively, the Court could allow the suit to be heard, deferring its decision on the grant of standing as part of its decision whether to make an order declaring the Act invalid or to dismiss the proceedings for want of standing. Such a practice is used to determine applications for special leave to appeal in criminal matters. In short, the Court might make a grant of conditional standing.

The requirement of justiciability[42]

Standing and justiciability, whilst sometimes intertwined, are separate issues. In the present context, the asserted "matter" which falls for adjudication is the due and proper administration of the Constitution. For example, it is the registered electors who have the power to amend the Constitution in accordance with s.128. An analogy might profitably be drawn between the rights of an object of a discretionary trust to sue the trustee to require the trust estate to be

administered in accordance with the terms of the trust. Here the object has no proprietary interest but a mere expectancy.[43] Similarly, a citizen duly registered as an elector who has no proprietary rights to assert against the Commonwealth, ought to be entitled to enter the "temple of justice" to challenge the validity of appropriations for non-Commonwealth purposes.

At the very least, it would seem that "matter" should be widely and beneficially construed for the purpose of allowing notice to Attorneys-General under s. 78B of the *Judiciary Act* 1903. The Court is under a duty not to proceed in a matter arising under the Constitution, or involving its interpretation, until the Attorneys-General have considered whether they might seek to intervene in the proceedings. If an Attorney-General did so seek to intervene, and the Court refused standing to the individual citizen who initiated the s. 78B notice, then an alternative might be to allow an appearance as *amicus curiae*. Even in the *AAP Case* a majority held that the challenge to the appropriation power was justiciable.[44]

The Auditor-General – ally of the people? or, Who guards the guards?

Is the Auditor-General under a duty to report to Parliament as to whether appropriations are beyond power? *Prima facie*, the answer would seem to be "Yes". To ignore such a failure sits uncomfortably with the task with which an auditor is charged. The Auditor-General has complete discretion in the performance of his or her functions or powers.[45] "His duty is to criticize, make suggestions and to draw attention to any breach of law or regulation".[46] Where there is doubt the Auditor-General ought to obtain independent legal advice, and if equivocal, such matters ought to be disclosed. Section 25(1) of the *Auditor-General Act* 1997 allows the Auditor-General to report to the Parliament on any matter at any time.

A perusal of the reports of the Auditor-General to the Parliaments shows that so long as there are Acts which appropriate moneys from the Consolidated Revenue Fund, the Auditor-General is seemingly indifferent as to whether those appropriations are made under Acts which are contrary to the Constitution. Examining whether Parliament has the power to legislate is a matter which is apparently ignored by the Auditor-General. No mention of this issue was made in the Public Accounts Committee inquiry into reform of the Audit Office, or in the Auditor-General's response.[47]

It is submitted that the Auditor-General, in reporting to Parliament, is required to be satisfied that the Consolidated Revenue Fund is appropriated for purposes authorised by the Constitution. In short, the Auditor-General is a watch dog to warn Parliament when either it or the Executive exceeds the constitutional power to spend money. What would be useful is for the authority upon which reliance is placed to be disclosed. If s. 81 is the claimed source of the authority, then it should be recorded in the explanatory memorandum to the Bill, preferably with reasons to support such a contention. The second reading speeches and explanatory memoranda are silent on this aspect.

Overruling the law on the grants power

By way of illustration, for 2005 the Commonwealth has appropriated $1.5 billion[48] to the States for local government under the *Local Government (Financial Assistance) Act* 1995 *(LGFA Act)*. Through the Investing in Our Schools Program the Commonwealth is spending $1 billion in small capital projects of up to

$150,000 for 2005-08, in schools for library resources, computer facilities, air conditioning of class rooms, etc., under the *Schools Assistance (Learning Together–Achievement Through Choice and Opportunity) Act* 2004. The paragraphs of s. 51 of the Constitution have nothing to say on these topics.

The power to undertake these expenditures comes from the conditions attached to the grants to the States. Relevantly s. 96 provides:

> "S. 96 During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit".

A good illustration of how s. 96 works is given by s. 3(2) and (3) of the *LGFA Act*, which relevantly provides:

> "(2) The Parliament wishes to provide financial assistance to the States for the purposes of improving:
>
> a) the financial capacity of local governing bodies; .....
>
> "(3) The financial assistance is to be provided by making to the States, for local government purposes, of general grants under section 9 and additional funding under section 12".

Here the Commonwealth has the capacity to invade any field of activity it likes. University education is a first class example. As Sir Robert Menzies said:

> "The practical effect of all this, of course, has been that in the revenue field, the Commonwealth has established an *overlordship*. .....[T]his was a *major revolution* without any formal constitutional amendment at all".[49] (Emphasis added).

This development was not foreseen by the drafters of the Constitution. It was apparently assumed that the terms and conditions would be strictly relevant to the circumstances which called for financial assistance, which were expected to be rare.[50]

The key as to why the High Court should depart from its s. 96 precedent is to be found in the dissent of Starke J in declaring the *State Grants (Income Tax Reimbursement) Act* 1942 to be invalid:

> "The government of Australia is a dual system based upon a separation of organs and powers. The maintenance of the States and their powers is as much an object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. The limited grant of powers to the Commonwealth cannot be exercised for ends inconsistent with the separate existence and the self-government of the States, nor for ends inconsistent with its limited grants".[51]

What needs to be answered is whether the High Court would now overrule the precedent involved. Some of the factors which could warrant such a departure were conveniently collected in *John v. Commissioner of Taxation*.[52] However, there is no definite rule in which the Court will reconsider an earlier decision.

The first case on s. 96 was *Victoria v. Commonwealth*[53] in which the Court, in a laconic three lines, upheld the validity of the *Federal Aid Roads Act* 1926. Next came *Deputy Federal Commissioner of Taxation (NSW) v. Moran*,[54] of which Dixon C J in the *Second Uniform Tax Case*[55] expressed his dissatisfaction about its correctness when money is placed in the hands of a State with a direction to pay it over to a class of persons.

The temporary[56] nature (five years) of the 1942 Uniform Tax Legislation was driven by the extreme urgency of the threat of enemy invasion. While reliance on the defence power, other than for the *Income Tax (War-time Arrangements) Act*, was not argued to uphold the legislation, it could easily have been so.[57] (A chronology of events in 1942 is set out in annexure B).[58] Also, the limited way in which the 1957 *Uniform Tax Case* was argued calls for a review. Further, none of the parties in the *Defence of Government Schools Case*[59] asked the Court to overrule *Deputy Federal Commissioner of Taxation (NSW) v. Moran*;[60] they only sought to distinguish it.

It is submitted that the law on s. 96 suffers from there being no carefully worked out principle in the five cases mentioned above.

Conclusion

If the use of s. 96 by the Commonwealth and its tame acceptance by the States brought about a constitutional revolution, (without any formal amendment of the Constitution), then the abuse of the appropriation power to bypass the States has effectively destroyed the federal union.[61]

The torpidity of the States in failing to effectively repel the Commonwealth's invasion of their fields of activities, invites consideration as to whether there is now some undisclosed reason for this occurrence. On its face, such an invasion is against their interests. Or is it? The political ideology of the present six State and two Territory Labor governments is for a unitary system of government, despite some occasional feigned protestations that they subscribe to the masquerade of so called co-operative federalism.[62] The Commonwealth, by enthusiastically doing what the States should be doing, is being drawn into a financial vortex.

Unwittingly, the drafters of the Constitution do not seem to have provided against the States and the Commonwealth acting in a way which has brought about change from a federal union to a *de facto* unitary system. It is trite law that the Constitution does not provide for a national government with unlimited power; it provides for a federal government with specific enumerated powers. A perusal of the Acts listed in the Schedule to the *Administrative Arrangements Order*[63] signed by the Governor-General on 26 October, 2004, together with *Appropriation Acts*, shows that some of them are likely to have exceeded the power of the Parliament to enact.

If Australians desire to ratify this state of affairs, then a formal amendment of the Constitution needs to be made by a referendum. Such a move would bring on a debate for review of the federal system, including a reassignment of powers between the States and the Commonwealth.

Under the Constitution, the Parliament does not have plenary power; unlike the United Kingdom Parliament, it cannot do what it likes.[64] What is alarming, is that the citizen is denied access to the High Court to challenge appropriations which are beyond power. In short, the High Court needs to be afforded the opportunity of reconsidering the issues of standing and justiciability.

Annexure A

Extract from Minutes of Evidence by Owen Dixon, KC, on 13 December, 1927 for the Committee of Counsel (Owen Dixon, KC, Wilbur Ham, KC and Robert Menzies) of the Victorian Bar Council to the Royal Commission on the Constitution,[65] at p.780.

> "An examination of the Commonwealth Constitution supports the conclusion we have attempted to state, viz., that upon its true interpretation it restricts the power of Parliament to appropriate money to the subjects of the legislative power. The function of appropriating money seems to be treated as an exercise of the power of law making, and not as a separate power. The appropriation act is simply regarded as a law depending for its efficacy upon legislative power. If so, it follows that such an act, like any other statute, must be a law for the peace order and good government with respect to one or more of the enumerated subjects of legislation which come within that power.
>
> We have considered this matter somewhat closely, because we understand differences of opinion exist upon the subject, and in the view which we have suggested, *the Federal Parliament has upon a number of occasions and over a long period of time exceeded its powers in the expenditure of money*". (Emphasis added)

Annexure B: Chronology

3 September, 1939	War declared against Germany.
September, 1940	Japan signed mutual assistance pact with Germany and Italy.
7 December, 1941	Pearl Harbour attacked and war declared against Japan.
15 February, 1942	Fall of Singapore.
19 February, 1942	Darwin attacked.
4-8 May, 1942	Battle of the Coral Sea.
15 May, 1942	Uniform Tax Bills presented to House of Representatives.
4-6 June, 1942	Battle of Midway Island.
7 June, 1942	Uniform Tax Legislation assented to as a temporary measure [to end on 30 June, 1947].
22-26, 29-30 June, 1942	Hearing of challenge to the validity of the Uniform Tax Legislation in Melbourne.
23 July, 1942	Uniform Tax Legislation upheld; Latham C J, Rich, McTiernan, Williams J J; Latham C J dissenting on *Income Tax (War-time Arrangements) Act*; Starke J dissenting on both the *States Grants (Income Tax Reimbursement) Act* and the *Income Tax (War-time Arrangements) Act.*
2 September, 1945	Execution of surrender document by Japan.

Endnotes:

1. Lord Macaulay, *History of England*, in *The Life and Works of Lord Macaulay* (Longmans Green and Co, 1912), Vol I, p. 26.
2. Latham C J in *The Lord Mayor, Councillors and Citizens of the City of Melbourne v. Commonwealth* (1947) 74 CLR 31 at 47.
3. Sir Earle Page, *Truant Surgeon,* Ann Mozley (ed.) (Angus and Robertson, 1963), p.126.
4. Lord Acton, *Letter to Mandell Creighton, 5 April, 1887*, in *Essays on Freedom and Power,* Gertrude Himmelfarb (ed.) (World Publishing, 1948), pp. 335-336.
5. Gleeson C J in *Austin v. Commonwealth* (2003) 215 CLR 185 at 211, [17].
6. *Ibid*., at 277, [211].
7. Australian Law Reform Commission, Report No. 27, *Standing in Public Interest Litigation* (Australian Government Publishing Service, 1985), para. 174.
8. *Attorney-General for Victoria v. Commonwealth* (1945) 71 CLR 237.
9. Later paragraph (xxiiiA) of s. 51, inserted by the *Constitutional Alteration (Social Services)* referendum of 1946, authorized the payment of pharmaceutical benefits.
10. (1945) 71 CLR 237 at 269.
11. *Ibid*., per Starke J at 265-6.
12. *Victoria v. Commonwealth* (1975) 134 CLR 338.
13. *Ibid*., at 361-2.
14. *Ibid*., at 374.
15. *Ibid*., at 405.
16. *Ibid*., at 410.
17. Gertrude Gerard [Professor Tony Blackshield], *A Reply to The AAP Case* (1977-78) 2 UNSWLJ 105 at p.115.
18. *Victoria v. Commonwealth* (1975) 134 CLR 338 at 410.
19. *Ibid*., at 419.
20. E G Whitlam, *The Labor Government and the Constitution*, in Gareth Evans (ed.), *Labor and the Constitution 1972-1975* (Heinemann, 1977), p. 308.
21. *Roads to Recovery Programme, Annual Report 2002-2003* at p.15 and at p.11; www.dotars.gov.au/transprog/downloads /Road_R2R_AnnualReport-02-03.pdf , viewed 19/2/2005.
22. Sir Robert Garran, *Prosper the Commonwealth,* (Angus and Robertson, 1958), p. 208.
23. www.budget.gov.au/2004-05/ministerial/download/trans port.pdf, at p.15, viewed 19/02/2005.
24. Table 2.7: Administered programmes that contribute to Outcome 2 (operating expenses), Department of Transport and Regional Services 2005 Budget Statements, Budget Related Paper No. 1.15 at p.66; www.dotars.gov.au /dept/budget/0405/dotars_pbs0405.pdf, viewed 27/02/05.
25. *Appropriation Act (No 1) (2004-2005)* at p.135.

26. *Ibid*., at p.53.
27. Colin Howard, *Public law and common law – parliamentary appropriation*, in D J Galligan (ed.), *Essays in legal theory* (Melbourne University Press, 1984), at pp. 24-25.
28. See generally, Simon Evans and Stephen Donaghue, *Standing to Raise Constitutional Issues in Australia*, in Gabriel A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century* (Copyright Publishing Company Pty Ltd, 2002), at pp. 77- 81 and 97-103. See too, Australian Law Reform Commission, Report No. 78, *Beyond the door keeper – Standing to sue for public remedies* (Australian Government Publishing Service, 1996).
29. *Anderson v. Commonwealth* (1932) 47 CLR 50; *Pye v. Renshaw* (1951) 84 CLR 58. For example, *Attorney-General for Victoria (at the relation of the Victorian Chamber of Manufactures) v. Commonwealth* (1935) 52 CLR 533.
30. Per Mason C J, Deane and Gaudron J J in *Davis v. Commonwealth* (1988) 166 CLR 79 at 96.
31. *Davis v. Commonwealth* (1986) 61 ALJR 32 at 36-37.
32. P H Lane, *The Australian Federal System* (Law Book Co, 1972), p. 824.
33. [1975] 1 SCR 138; (1974) 43 DLR (3d) 1.
34. *Ibid*., at 145; at 6-7.
35. *Remmers v. Lipinski* (2001) 293 AR 156 at para [35].
36. *Truth About Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 599.
37. *Victoria v. Commonwealth* (1975) 134 CLR 338 at 383.
38. (1998) 194 CLR 247 at 263.
39. *Victoria v. Commonwealth, loc. cit.*, at 425.
40. (1981) 146 CLR 559 at 634.
41. Paul Finn and Kathryn J Smyth, *The Citizen, the Government and "Reasonable Expectations"*, (1992) 66 ALJ 139 at p. 146.
42. See generally, P H Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 1997), pp. 506-508.
43. Cf. Mason J in the *AAP Case* at 402.
44. C A Saunders, *The concept of non-justiciability in Australian constitutional law*, in D J Galligan (ed.), *Essays in legal theory* (Melbourne University Press, 1984), pp. 49-50.
45. Section 8(4), *Auditor-General Act* 1997. The *Audit Act* 1901 was enacted pursuant to s.97 of the Constitution and was repealed by s. 3 and Schedule 1 of the *Audit (Transitional and Miscellaneous Amendment) Act* 1997.
46. K W Knight, *Budgeting and Financial Management*, in R N Spann (ed.), *Public Administration in Australia* (Government Printer of NSW, 1973), p. 408.
47. Joint Committee of Public Accounts, Parliamentary Paper No. 40 of 1989, Report 296, *Auditor-General, Ally of the People and Parliament – Reform of the Australian Audit Office* (Australian Government Publishing Service, 1989); Parliamentary Paper No. 193 of 1989, *Accountability, independence and objectivity: a response to report 296 of the Joint Committee of Public*

Accounts (Australian Government Publishing Service, 1989).

48. Table 1.1 and 1.5 in note 24 above.
49. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth Power in the Australian Federation* (Cassell, 1967), pp. 91-92.
50. Cheryl Saunders, *The Strange Case of Section 96*, Paper 11, Intergovermental Relations in Victoria Program, Law School, University of Melbourne, 1987, pp. 11-12.
51. *South Australia v. Commonwealth* (1942) 65 CLR 373 at 442.
52. (1989) 166 CLR 417 at 438-439.
53. (1926) 38 CLR 399.
54. (1939) 61 CLR 735.
55. *Victoria v. Commonwealth* (1957) 99 CLR 575 at 607.
56. *States Grants (Income Tax Reimbursement) Act* 1942; *Income Tax (War-time Arrangements) Act* 1942. Both Acts were to continue in operation "until the last day of the first financial year to commence after the date on which His Majesty ceases to be engaged in the present war", and no longer. The formal surrender of Japan occurred on 2 September, 1945, and as such Uniform Tax Legislation was to end on 30 June, 1947. *The State Grants (Tax Reimbursement) Act* 1946 repealed and replaced its precursor with effect from 1 July, 1946. What was temporary was now permanent.
57. Cf. Fullagar J in *Victoria v. Commonwealth* (1957) 99 CLR 575 at 655.
58. It should be noted that the preamble to the *Income Tax (War-time Arrangements) Act* 1942 was in the following terms:

    > "Whereas, *with a view to the public safety and defence of the Commonwealth* and of the several States *and for the more effectual prosecution of the war* in which his Majesty is engaged, it is necessary or convenient to provide for the matters hereinafter set out". (Emphasis added).

59. (1981) 146 CLR 559.
60. *Loc. cit.*.
61. Note that the Constitutional Commission recommended that s. 81 be amended to allow the appropriation of the Consolidated Revenue Fund "for any purpose that the Parliament thinks fit"; per Sir Maurice Byers, E G Whitlam & Ors, *Final Report of the Constitutional Commission*, (Australian Government Publishing Service, 1988), para. 11.296 (i).
62. Cf. Brian Galligan and John S F Wright, *Australian Federalism: A Prospective Assessment*, in *Publius*, (2002) Vol. 32(2), p. 156.
63. http://www.pmc.gov.au/parliamentary/docs/aao.pdf, viewed 8/03/05.
64. Simon Jenkins, *Big Bang Localism–A Rescue Plan for British Democracy* (Policy Exchange, 2004), p. 133.
65. Sir John Peden & Ors., *Appropriation of Revenue*, in *Report of the Royal Commission on the Constitution* (Australian Government Printer, 1929), Ch. XIII, pp. 137-140.