The Third Sir Harry Gibbs Memorial Oration

Stopping Stimulus Spending, or Is the Sorcerer's Apprentice Controlling the Executive?

Bryan Pape

> *Those who would stay free must stand eternal watch against the excessive concentration of power in government.*[1]

It is both a privilege and an honour to have been invited by the Board of Management to give the third Sir Harry Gibbs Memorial Oration. Lord Denning, the renowned Master of the Rolls, said of Sir Harry Gibbs: "His work as Chief Justice was of the first quality and I would rank him as one of the greatest of your Chief Justices rivalling my good friend Sir Owen Dixon".[2]

When it dawned upon me that Justice Dyson Heydon of the High Court had given the inaugural Oration in 2006, I became quite daunted. It did not abate, but intensified, when I found that the then recently retired Justice of the High Court, the Honourable Ian Callinan, had followed him in 2008. Presumably, the reason for my invitation was that I might be more easily followed.

Until the 1970s the Commonwealth Parliament's only "card of entry," so described by Sir Robert Menzies, into State responsibilities like education was the use of the grants power with conditions attached – the so-called section 96 "tied grants" power.[3] The Whitlam Government went a step further and created a gold card of entry. This relied upon the use of the appropriation section which was misconceived to confer a power of spending – later corrected in the *Tax Bonus case* – to bypass the States to make grants directly to bodies such as regional councils. When that action was unsuccessfully challenged by the State of Victoria in 1975, the High Court handed down its majority decision, four to three, in the then leading, but now misleading, *Australian Assistance Plan case.*[4] It concerned the Parliament's use of a few lines in an Appropriation Act to spend about $6 million in financing 35 regional councils for social development. In separate judgments, both Chief Justice Barwick and Justice Gibbs strongly dissented. Importantly, Gibbs J (as he then was) reminded us that:

> The legislative power that is said to be incidental to the exercise by the Commonwealth of functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution.[5]

He illustrated this when considering the issue of the Commonwealth's responsibility for managing the economy. His remarks in 1975 were prescient with respect to the 2009 *Tax Bonus case* when he said:

> There is but one economy of the country, not six: it could not be denied that the economy of the nation is of national concern. But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking including the

> activities of the Reserve Bank and the budget whether it be in surplus or deficit. The national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power.[6]

A good illustration of the Commonwealth stimulating the economy was in the aftermath of the 1961 credit squeeze. There, the Menzies Government moved the Parliament to give a 5 per cent rebate of tax to all individual taxpayers from end of March 1962 until 30 June 1964 (see Annexure A). It was delivered by the employer reducing group tax deductions under the Pay As You Earn (PAYE) system. Its effect was an immediate increase in the size of the employee's weekly pay packet and it was sustained for a little over two years.

Constitutionally it was an impeccable plan to stimulate the economy. The contrast with the Rudd Government's tax bonus of $900 is extreme. The latter was upheld by the thin majority of four High Court justices to three and by resort to the combination of the executive and incidental powers in the *Tax Bonus case*.[7] This is the platinum card of entry, which is kept in a drawer and is only to be used in emergencies. The arbiter of when and how this card is to be used is vested in the Executive Government.

I propose to take you on a journey which focuses on four so-called Commonwealth cards of entry. First, the standard s. 96 grants power card; secondly, the appropriation gold card; thirdly, the executive power platinum card; and, fourthly, the new executive federalism oyster card. The latter is named after the London oyster card, which allows you to travel anywhere on the underground tube or bus.

Finally, I turn to suggest a way to discipline the sorcerer's apprentice, that is, the Executive Government, in the way it contrives both for itself and the Parliament to overreach their respective powers.

The standard card of entry

This card works through legislation which relies upon the grants power under s. 96 of the Constitution, under which "the **Parliament** may grant financial assistance to any State on such terms and conditions as the **Parliament** thinks fit'. [emphasis added]

Chief Justice Sir Owen Dixon, in the *Second Uniform Tax case*, said: "It must be borne in mind that the power conferred by s. 96 is confined to granting money to **governments. It is not a power to make laws with respect to a general subject matter**".[8] [emphasis added]

As Dixon CJ noted, the money is given to the State government, that is, the Executive of a State. The making of the grant does not provide an opportunity to make laws with respect to a general subject matter, for example, education. For good measure, too, there is no authority to make coercive or policing laws.

The appropriation gold card of entry

The Commonwealth has for many years abandoned the practice of using the "tied grants" contrivance under s. 96 supposedly to authorize the funding of universities. Instead, under s. 30-1 of the *Higher Education Support Act* 2003 (Cth), universities (as higher education providers) receive grants, through funding agreements to finance their activities. For example, the maximum grants payable under the s. 30-25 funding agreements for 2011 is $4.7 billion. If the Commonwealth has relied on what it misconceived as a spending power under s. 81 of the Constitution, then these payments would be unlawful. As French CJ said: "Substantive power to spend the public moneys of the Commonwealth is not to be found in s. 81 or s. 83, but elsewhere in the Constitution or statutes made under it".[9]

Since the *Tax Bonus case* reasons were published on 7 July 2009, the Commonwealth and the universities have continued to disregard the unanimous reasoning of the High Court in quashing the

improper use of the appropriation section.

A further example among many is provided by the *Regional and Local Community Infrastructure Program (RLCIP)*. It was initially funded in 2008 to $300 million, comprising a local council component of $250 million and $50 million for strategic projects. This last component was later further increased by $500 million to $550 million. No specific legislation, or legislation under the incidental power, was passed with respect to this program. If a s. 81 appropriation is incapable of supporting it, so, too, is the s. 61 executive power and the s. 51(xxxix) incidental power. This leads to the next card of entry.

The executive power platinum card of entry

This card is characterized by the tandem use of the s. 61 executive power and s. 51(xxxix) incidental power. As Gibbs J said in the *Australian Assistance Plan case*:

> According to s. 61 of the Constitution, the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". These words limit the power of the Executive and, in my opinion, make it clear that **the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth**.[10] [emphasis added]

In 2009, Banjo Paterson's line of *T'was Mulga Bill from Eaglehawk that caught the cycling craze*[11] seems to have infected the Honourable Anthony Albanese, MP, the Minister for Infrastructure, Transport, Regional Development and Local Government. Like "Mulga Bill", Mr Albanese took to the cycling craze and decided to stimulate the economy by making direct grants to local councils to build bicycle paths.

The *AusLink (National Land Transport) Act* 2005 (Cth) was cosmetically renamed as the *Nation Building Program (National Land Transport) Act* 2009 (Cth).[12] The commencement date for ss. 8-91 was 28 July 2005, with the remainder commencing on 6 July 2005. The Act was rebranded to give the misleading appearance of being a new initiative of the Rudd Government by an amending Act commencing on 27 June 2009. Into the renamed Act was inserted the definition of a ***Nation Building Program Roads to Recovery funding period*** to mean the period starting on 1 July 2009 and ending on 30 June 2014. Also inserted into the Act was a new definition of "road" to include "a path for the use of persons riding bicycles".

When the amending Act commenced, the reasons for decision in the *Tax Bonus case* had not been published. So it is likely that the Commonwealth was still relying upon the appropriation section, s. 81, and its misconception that it was a spending power, to authorize its planned expenditure on bicycle paths to run for the 2009-10 financial year. After 7 July 2009 it could no longer rely on s. 81. (Strictly speaking, it could never have relied on s. 81 to support making direct payments to local councils.) Undaunted, the cycling craze began after the need for any further economic stimulus had ceased. For example, on 20 October 2009, Minister Albanese announced that the Tamworth Regional Council was to receive $135,000 to construct a 13.5 km bicycle path ($10,000 per km).

In case you were unaware of this project, it is part of the $40 million National Bike Path Project,[13] (also including 10.138 km for the Town of Kwinana at a cost of $611,659 – an average cost of $60,333 per km). The great disparity in the price per km might lead one to deduce that the Commonwealth was making an inflated grant to the Town of Kwinana – some six times the price per kilometre for Tamworth.

In Goethe's poem, *The Sorcerer's Apprentice*, the old sorcerer departs his workshop leaving his apprentice with chores to do. Tired of fetching water by pail, the apprentice enchants a broom to do the work for him – using magic he is not fully trained in. The floor is soon awash with water and the

apprentice realizes that he cannot stop the broom because he does not know how.

Not knowing how to control the enchanted broom, the apprentice splits it in two with an axe, but each of the pieces becomes a new broom and takes up a pail and continues fetching water, now at twice the speed. When all seems lost, the old sorcerer returns, quickly breaks the spell and saves the day. The poem ends with the old sorcerer's statement that powerful spirits should only be called by the master himself.[14]

Having called in aid such a far reaching power, when and how is it to end? Is it merely to be exercised at the whim of Executive Government? Or does it find itself in a similar position to the sorcerer's apprentice of not knowing the magic word to stop the flood of money gushing into the economy.[15] The High Court has given Executive Government a magic genie, but no criteria as to how it is to be used, let alone stopped.

By July 2009, when the program was to start, the criteria for stimulating the economy through the use of the executive power and the incidental power simply did not exist. Yet the Commonwealth embarked on a five-year Nation Building Program of Roads to Recovery to 2014. One could be excused for thinking that the Executive's enthusiasm for the economic stimulus package was an example of Justice Heydon's observation of the great maxim of governments seeking to widen their constitutional powers: "Never allow a crisis to go to waste".

The need, if there was any need, for stimulating the economy through government spending, had passed. On 7 October 2009 the Reserve Bank lifted the cash rate (that is, the overnight rate) from 3.0 per cent to 3.25 per cent. Since then, there have been five successive increases culminating on 5 May 2010 in the present 4.5 per cent rate.[16]

The executive federalism oyster card of entry

I turn to the *Executive Federalism Revolution* (EFR) – my words, not the Rudd or Gillard governments' description. Its use is relevant to the $14.7 bn expenditure for the so-called *Building the Education Revolution* (BER) (later increased to $16.2 bn). More particularly, it comprises three elements as shown by the table below.[17]

BER Element	**2009**	**2010**	**2011**	**Total**
	$bn	$bn	$bn	$bn
NSP	0.4	0.9	-	1.3
P21	0.6	6.6	5.2	12.4
SLC	-	1.0	-	1.0
	1.0	8.5	5.2	14.7

NSP	National School Pride
P21	Primary Schools for the 21st century (multi-purpose halls, libraries and classrooms)
SLC	Science and Language Centres for 21st century schools
DEEWR	Department of Education, Employment and Workplace Relations

As can be seen, *Building the Education Revolution* had little to do with stimulating the economy at the time of its introduction, with only $1.0 bn allocated to be spent for 2009.

This program was delivered through the so-called *National Partnership Agreement on the Nation Building and Jobs Plan* agreed to by the Council of Australian Governments (COAG) on 5 February 2009. The origin of this so-called National Partnership Agreement is to be found in the *Intergovernmental Agreement on Federal Financial Relations* between the Commonwealth, the States and the territories. It came into being and operates indefinitely from 1 January 2009.

The BER is and has been delivered under this National Partnership Agreement to State educational authorities and so-called "block grant" authorities, that is, non-government authorities.

> The devolved delivery of the program by Education Authorities has been governed by the establishment of bilateral agreements with state and territory governments and funding agreements with non-government Education Authorities.[18]

Intergovernmental agreements and National Partnership Agreements are political agreements (see Annexure B). They are unenforceable domestic treaties made between the States' executives and the Commonwealth executive. They are not laws of any State, territory or of the Commonwealth[19]

Mason J, as he then was, in *R v. Duncan; Ex parte Australian Iron and Steel Pty Ltd*, said:

> The scope of the executive power is to be ascertained, as I indicated in the AAP Case (1975) 134 CLR, at pp 396-397, from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constitutent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation **joint legislative action**, **so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution**. A federal constitution which divides legislative powers between the central legislature and the constitutent legislatures necessarily contemplates that there will be joint co-operative legislative action to deal with matters that lie beyond the powers of any single legislature.[20] [emphasis added]

There, Mason J seems to be contemplating legislative action by the Parliament, for example, under s. 51 (xxxvii) where the State parliaments are able to refer their powers to the Commonwealth Parliament. This was the situation with the enactment of the *Corporations Act* 2001 (Cth) and the *Water Act* 2007 (Cth), (see ss 9, 9A for the Constitutional Basis). In the case of the BER there was no such referral of legislative power.

We have had co-operative federalism and now, through a process of metamorphosis, we have collaborative or executive federalism, which substitutes funding agreements between Commonwealth, State and non-government bodies for s. 96 parliamentary grants.

> Cooperative federalism has been described as marble-cake federalism. Like a marble cake with its two distinct flavours, cooperative federalism was based predominantly on interaction between two layers of government – the national and State governments. Like a marble cake with its four to five swirls where the two flavours are mixed together; cooperative federalism had the national and State governments sharing responsibility in only four or five major policy areas. Lyndon B. Johnson's creative federalism so modified cooperative federalism that the marble-cake metaphor gave way to one based on fruitcake. In a fruitcake, no distinct levels or flavours are distinguishable. The different spices, nuts, fruits and candies are mixed all together. Similarly, fruitcake federalism implies a mixing of governmental functions and responsibilities. Complexity is one of its main traits.[21]

It is instructive to refer to the recent Auditor-General's report on the BER at paras 3.4 and 3.5:

> **3.4** The BER is established under executive authority: it is not specifically legislated. That is, there is no law or regulation setting out which schools are to benefit, by how much and under what conditions. Rather, the fundamental program rules are set by government decisions with greater elaboration prepared by the administering agency, DEEWR, in the form of program guidelines and other supporting material.
>
> **3.5** The Commonwealth Ombudsman recently set out the advantages of this approach to managing a program:
>
> > The main advantage of executive schemes is their flexibility. Because there is no need to wait until legislation is drafted, considered and passed by Parliament, such schemes can be quickly established when the need arises, adjusted easily as circumstances change and closed down when the need for them no longer exists.

According to the Auditor-General, national partnership payments are not treated as grants as provided by r.3A(2)(h)(iv) of the *Financial Management and Accountability Regulations* 1997 (Cth).

> **3.14** However, National Partnership payments (such as payments under BER P21), as payments to a state or territory made for the purposes of the Federal Financial Relations Act 2009, are taken not to be grants for the purposes of the Financial Management and Accountability Act 1997 (FMA Act). Therefore the Commonwealth Grant Guidelines and the requirement to provide the program guidelines to ERC do not apply to the BER program.
>
> **3.15** It would have been prudent, nevertheless, for DEEWR to have consulted Finance and the Treasury on the BER guidelines. This was especially so, given that DEEWR had concerns about the adequacy of program funding from early in the program's inception.[22]

Professor Cheryl Saunders has observed:

> If there is a corresponding head of legislative power, executive power exists on any view, and may be augmented by an incidental executive power, implied to effectuate the purpose of the main grant.[P. Lane, Commentaries on the Australian Constitution, (1986) 258] If there is no parallel legislative power, the second question that arises is whether the agreement represents an exercise of the nationhood power, "deduced from the existence and character of the Commonwealth as a national government", conferring a "capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which **cannot be otherwise carried out for the benefit of the nation**" [AAP case at 397-398] . . . . The case for the nationhood power as a source of support for intergovernmental agreements is strengthened by the consensual nature of such agreements.[23] [emphasis added]

Is the BER National Partnership Agreement one which is within the power of the executive of the Commonwealth to make? Because there is no legislative power under the Constitution to make laws with respect to education, the short answer would seem to be "No". As Gibbs J said in the *Australian Assistance Plan case*, "the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth". There are forty paragraphs covering the powers of the legislature in s. 51 of the Constitution and none deals with the topic of education. It is a topic which lies within the exclusive jurisdiction of the States. What Mason J said in *R v. Duncan; Ex parte*

Australian Iron and Steel Pty Ltd does not require joint legislative action. Nor does there seem to be any warrant for the Commonwealth and State executives to enter into consensual agreements for the Commonwealth to assume obligations which are outside its legislative competence on the grounds that it supposedly falls within the nationhood power. That is an attempt to do something indirectly which is unable to be done directly.

On the other hand, if it be assumed for present purposes that the BER is a valid executive agreement, then how is the Commonwealth to draw down funds from the Consolidated Revenue Fund to make lawful payments to satisfy its obligations under the agreement?

Relevantly, s.16 of the *Federal Financial Relations Act* 2009 (Cth) which commenced on 1 April 2009 provides with respect to National partnership payments:

> (1) The Minister may determine that an amount specified in the determination is to be paid to a State specified in the determination for the purpose of making a grant of financial assistance to:
>
> (a) support the delivery by the State of specified outputs or projects; or
> (b) facilitate reforms by the State; or
> (c) reward the State for nationally significant reforms.
>
> (2) If the Minister determines an amount under subsection (1):
>
> (a) that amount must be credited to the COAG Reform Fund; and
> (b) the Minister must ensure that, as soon as practicable after the amount is credited, the COAG Reform Fund is debited for the purposes of making the grant.
>
> (3)-(4) . . . . . .
>
> (5) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the determination.

Section 5 of the *COAG Reform Fund Act* 2008 (Cth) establishes and designates the COAG Reform Fund as a special account under s. 21 of the *Financial Management and Accountability Act* 1997 (Cth) (FMA). Relevantly, section 21 (1) provides as follows:

> If another Act establishes a Special Account and identifies the purposes of the Special Account, then the CRF is hereby **appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account**. [emphasis added] [see Annexure C]

This special account is an account within the Consolidated Revenue Fund.[24] The source of its funding is apparently from a maze of special accounts including the Build Australia Fund.

Section 6 of the *COAG Reform Fund Act* 2008 (Cth) provides that the purpose of the fund *is the making of grants of financial assistance to the States and territories*. Importantly, section 7(2) *provides that the terms and conditions on which that financial assistance is granted are to be set out in a written agreement between the Commonwealth and the State or territory*.

The question here is whether ss. 81 and 83 of the Constitution are satisfied ? Relevantly they provide as follows:

> 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]
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

An amount credited to the COAG Reform Fund for the purpose of National partnership payments is done by executive determination under s. 16 of the *Federal Financial Relations Act* 2009 (Cth). It is a legislative instrument, but is not a disallowable one. In doing so, Parliament has abdicated its legislative responsibilities to the Executive Government. If the amount so credited is not "for the purposes of the Commonwealth" in accordance with s. 81 of the Constitution – and education is not such a purpose – or not "drawn from the Treasury except under appropriation by law" in accordance with s. 83 of the Constitution, then the crediting of the COAG Reform Fund with the amount would seem to be unlawful. As, indeed, would be the debiting of the COAG Reform Account for an appropriation to cover a payment with respect to Building the Education Revolution.

Policing the bright line: the problem of standing

An inherent difficulty in all federal unions is the policing of the boundaries between the functions assigned to the central government and those assigned to the sub-national governments, namely States, provinces, etc. There are two questions requiring to be answered. First, who is to adjudicate on the demarcation between federal and State responsibilities; secondly, who has the right to initiate demarcation proceedings? In Australia, the answer to the first question is to be found in s. 76 (i) of the Constitution and s. 30(a) of the *Judiciary Act* 1903 (Cth).

Sir John Downer saw *the* "High Court as the only guarantee that the Constitution could not be arbitrarily flouted by any government, however popular".[25] Such a guarantee is an arid one if there is no right to bring proceedings to have the claimed guarantee enforced. The responsibility for ensuring that there is compliance with the Constitution is vested with the Attorney-General. But, as Gibbs CJ shrewdly observed:

> (I)t 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.[26]

This difficulty was recognized as early as 1910, when Part XII *Reference of Constitutional Questions; ss 88-93* was inserted into the *Judiciary Act* 1903 (Cth). It allowed the High Court to give advisory opinions to the Governor-General. Relevantly, s. 88 provided that:

> Whenever the Governor-General refers to the High Court for hearing and determination any question of law as to the validity of any Act or enactment of the Parliament, the High Court shall have jurisdiction to hear and determine the matter.[27]

Because such opinions did not constitute a matter which affected legal rights, the High Court struck that provision down by a five to one majority on 16 May 1921.[28]

It is useful to trace the history of the reasons for the introduction of the now repealed Part XII. A century ago, on 22 November 1910, in Melbourne, the then Acting Prime Minister and Attorney-General, William Morris Hughes, a centralist, in moving the second reading of a Bill to insert Part XII, said *inter alia*:[29]

> I admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States and the Commonwealth, and **that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere**. [emphasis added][A fuller extract is set out at Annexure D]

Frankly, advisory opinions are not the answer. At first blush it is an attractive solution, but it is defective because there is no dispute. It is to ask the High Court to confirm what the legislature has done. It can only decide on the validity of a law from the evidence adduced before it by the Commonwealth. Here there would not even be a special case based on agreed facts. It smacks of the High Court condoning or rubber stamping the wishes of the legislature.

An alternative solution is to provide for the States' attorneys-general to be subject to a show cause action (an order *nisi*) as to why they should not bring a relator action in the High Court to impugn legislation if requested by a citizen or group of citizens. No longer would the States have the capacity to condone the Commonwealth Parliament's regular violation of the Constitution. Such a right would need to be granted to the citizen by the Constitution. An amendment like this would plug the gap so as to stop the Constitution from "being arbitrarily flouted by any government, however popular", to use the words of Sir John Downer.

Failing such an amendment being passed at a referendum, one can only hope that a member of the House of Representatives or, indeed, a Senator, might assume the role of a constitutional censor. An overdue task would be to carry out a constitutional audit of the statute book. From there the Parliament should be moved to repeal Acts which had exceeded its power. A defeated bill would then be the trigger to bring proceedings in the High Court to quash the impugned Acts.

Conclusion

The present dysfunctional state of the federal union is characterized by the way in which the Commonwealth has usurped many of the functions of State governments. Co-operative federalism has given way to collaborative federalism and now to executive federalism. All this has been accomplished by the Commonwealth's cards of entry – standard, gold, platinum and the oyster card.

The COAG Reform Act 2008 (Cth), the *Federal Financial Relations Act* 2009 (Cth) together with the *Intergovernmental Agreement on Federal Financial Relations* and the suite of *National Partnership Agreements* (see Annexure B) ushered in a new era of Executive Federalism. They are properly characterized as domestic treaties, most of which would be incapable of being ratified by the Parliament because they involve an overreaching of power. *They are not laws, but political agreements.* Yet the Parliament has seen fit to appropriate monies to the COAG Reform Fund to pay monies to the States in accordance with an invalid intergovernmental agreement or National Partnership Agreement. Here, Parliament has effectively abdicated its legislative responsibility to the Executive, allowing it to make agreements on topics for which the Parliament has no power to make laws. These executive agreements are tantamount to a scheme or contrivance resulting in a disregard of the Constitution. The end result is an impermissible amendment or abdication by Parliament with respect to s. 96 by substituting the word "Executive" for "Parliament" for the third last word of the section, so that it would read: "the Parliament may grant financial assistance to any State on such terms and conditions as the **Executive** (sic)(Parliament) thinks fit".

Yet again our watchdog, the Auditor-General, the so-called ally of the people, has refused to bark. We may ask: who guards the guards?

The Canberra political playpen must focus on its constitutional responsibilities and stop usurping the functions of the States. The policing of these boundaries could be achieved by altering the Constitution to require the Attorney-General of a State to bring a relator action at the request of a

citizen, unless there are good grounds to the contrary.

When Sir Harry Gibbs hung his heraldic banner as a Knight Grand Cross of the Order of St Michael and St George in St Paul's Cathedral in London, his motto of *Tenan Propositi*[30] was unfurled for all to see: "Hold to your principles". His life was spent in doing so. We, too, must live up to his example.

Annexure A
Income Tax Rebates and Surcharges

Year of Income	Rebate	Surcharge
30 Jun.	%	%
1962	5	
1963	5	
1964	5	
1965	-	
1966		2.5
1967		2.5
1968		2.5
1969		2.5
1970		2.5
1971		2.5
1972		5.0

Statutes

(i) *Income Tax and Social Services Contribution (Rebate) Act* 1962 (Cth) (Act No 14 of 1962), S 3 (5 per cent Rebate).
(ii) *Income Tax and Social Services Contribution Act* 1962 (Cth) (Act No 63 of 1962), S 8 (5 per cent Rebate).
(iii) *Income Tax and Social Services Contribution Act* 1963 (Cth) (Act No 70 of 1963), S 8 (5 per cent Rebate).
(iv) *Income Tax Act* 1965 (Cth) (Act No 104 of 1965), S 9 (2.5 per cent Surcharge).
(v) *Income Tax Act* 1966 (Cth) (Act No 51 of 1966), S 9 (2.5 per cent Surcharge).
(vi) *Income Tax Act* 1967 (Cth) (Act No 77 of 1967), S 9 (2.5 per cent Surcharge)
(vii) *Income Tax Act* 1968 (Cth) (Act No 72 of 1968), S 9 (2.5 per cent Surcharge).
(viii) *Income Tax Act* 1969 (Cth) (Act No 73 of 1969), S 8 (2.5 per cent Surcharge).
(ix) *Income Tax Act* 1970 (Cth) (Act No 80 of 1970), S 8 (2.5 per cent Surcharge).
(x) *Income Tax Act* 1971 (Cth) (Act No 92 of 1971), S 9 (5 per cent Surcharge).

Annexure B
National Health and Hospitals Network Agreement

On 20 April 2010, COAG agreed, with the exception of Western Australia, to sign the following National Health and Hospitals Network Agreement.

National Health and Hospitals Network Agreement
National Partnership Agreement
Nation Building and Jobs National Partnership Agreement

Current Intergovernmental Agreements
Intergovernmental Agreement on Federal Financial Relations

Personal Property Securities
Management of Security Risks Associated with Chemicals
Food Regulation Agreement
Food Regulation Agreement - Annex A
Food Regulation Agreement - Annex B
Gene Technology Agreement
Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
Murray-Darling Basin Intergovernmental Agreement
Agreement on Murray-Darling Basin Reform – Referral
Intergovernmental Agreement on Surface Transport Security
Research Involving Human Embryos and Prohibition of Human Cloning Agreement
Memorandum of Understanding National Response to a Foot and Mouth Disease (FMD) Outbreak
Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations
Natural Gas Pipelines
Tourism Collaboration Intergovernmental Arrangement
Corporations Agreement 2002 as Amended
National Action Plan for Salinity and Water Quality – 2000

Annexure C

Financial Management and Accountability Act 1997 (Cth)

Division 1A – Special Accounts
20 Establishment of Special Accounts by Finance Minister

(1) The Finance Minister may make a written determination that does all of the following:
  (a) establishes a Special Account;
  (b) allows or requires amounts to be credited to the Special Account;
  (c) specifies the purposes for which amounts are allowed or required to be debited from the Special Account.

(1A) A determination under subsection (1) may specify that an amount may or must be debited from a Special Account established under subsection (1) otherwise than in relation to the making of a real or notional payment.

(2) The Finance Minister may make a determination that revokes or varies a determination made under subsection (1).

(3) The Finance Minister may make a determination that abolishes a Special Account established under subsection (1).

(4) The CRF is hereby appropriated for expenditure for the purposes of a Special Account established under subsection (1), up to the balance for the time being of the Special Account.

(4A) If the Finance Minister makes a determination that allows an amount standing to the credit of a Special Account to be expended in making payments for a particular purpose, then, unless the contrary intention appears, the amount may also be applied in making notional payments for that purpose.

(5) Whenever an amount is debited against the appropriation in subsection (4), the amount is taken to be also debited from the Special Account.

[Author's note: CRF means Consolidated Revenue Fund.]

21 Special Accounts established by other Acts

(1) If another Act establishes a Special Account and identifies the purposes of the Special Account, then the CRF is hereby appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account.
Note 1: An Act that establishes a Special Account will identify the amounts that are to be credited to the Special Account.
Note 2: An Appropriation Act provides for amounts to be credited to a Special Account if any of the purposes of the Account is a purpose that is covered by an item in the Appropriation Act.
Note 3: See section 32A for when the crediting or debiting of an amount takes effect.

(1A) If an Act allows an amount standing to the credit of a Special Account to be applied, debited, paid or otherwise used for a particular purpose, then, unless the contrary intention appears, the amount may also be applied, paid or otherwise used in making a notional payment for that purpose.

(2) Whenever an amount is debited against the appropriation in subsection (1), the amount is taken to be also debited from the Special Account.

22 Disallowance of determinations relating to Special Accounts

(1) This section applies to a determination made by the Finance Minister under subsection 20(1) or (2).

(2) The Finance Minister must cause a copy of the determination to be tabled in each House of the Parliament.

(3) Either House may, following a motion upon notice, pass a resolution disallowing the determination. To be effective, the resolution must be passed within 5 sitting days of the House after the copy of the determination was tabled in the House.

(4) If neither House passes such a resolution, the determination takes effect on the day immediately after the last day upon which such a resolution could have been passed.

Annexure D

Acting Prime Minister and Attorney-General, The Hon. William Morris Hughes, MP, in moving the second reading of a Bill to insert Part XII into the *Judiciary Act* 1903 (Cth) said *inter alia*:

> I know of no measure which has received the attention of the Parliament which is more important than this. It would deserve special attention under any circumstances, and in any country, but particularly does it call for notice in a country under a form of dual government. Ten years have now elapsed since we adopted what is known as a federal form of government, and we have already found out many of its defects as other countries have done. One of these is that it sets up to an extent a domination of the law which even we, the most law abiding people in the world, find most repugnant to our ideas. I speak not in criticism of the rule of the law as generally exercised, but of its dominance in a new sphere which hitherto, under our unified form of government, has been reserved to and occupied by the legislature. Under a Federal form of government this has been regarded as inevitable. Under Federation, the Judiciary occupies as it were,

a position of lofty and **superior censorship** of our legislation. And, of course, obviously it must also exercise those functions which belong properly to the highest judicial Court in the country. It is on matters of law – and to this no possible exception can be taken – the last Court of Appeal. But in another direction it exercises functions of quite a different nature. Although **nominally inferior** to this Legislature, in reality it has shown over and over again, not merely in this country, but more particularly in the United States of America, that it is above and superior to, not only that Parliament, **but what is yet more important, the constitutionally expressed will of the people. I admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States and the Commonwealth, and that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere.** We must have clearly a Court clothed with sufficient authority, and charged with the exercise of these grave and responsible duties. But it by no means follows that we must "endure" – and I use that word advisedly – a condition of things such as has been endured for over a century in the United States of America, and is in existence here today.

Consider how absurd and unnecessary is the position that has arisen whereby a Court created principally – and I speak now not of its functions as a Court of Appeal for private litigants – to determine the constitutional authority of State or Federal Statutes is unable to move until some private individual who considers he has suffered some injustice or a State authority which is interested, brings an action under which the validity of a State [sic Statute] is incidentally determined. As a fact, the Court never directly determines the validity of any Statute; it merely deals with it in connexion with the facts of the case brought before it. . . .(T)he Court especially created to determine the validity of Commonwealth and State laws, does in fact never directly decide the constitutionality of any such laws. This is not a proper and sensible procedure for a great and growing nation like ours to continue, and it is for the purpose of the measure to substitute for this cumbrous, antiquated method of determining the validity of any Statutes one which on the face of it, will more speedily and effectively inform us as to the constitutionality of a measure, enabling the Court to give a calm, dispassionate, and impartial decision upon this one point without the complication of personal relations and personal wrongs . . . . .The Attorney-General will be able to ask the Court the plain question, "Is this measure one which it is within the power of the Parliament to pass?" and we shall get from the Court a straightforward answer. [emphasis added]

Endnotes

1. President Dwight D. Eisenhower, (1953-1961), Address to Conference of Governors, Joint-Federal State Action Committee Progress Report, No. 1, US Government Printing Office, Washington, 1957, 17-22.
2. Joan Priest, Sir Harry Gibbs – Without Fear or Favour, 1995.
3. Sir Robert Menzies, The Measure of the Years, 1970, 85.
4. Victoria v Commonwealth and Hayden (1975) 134 CLR 338.

5. Ibid., at 378.
6. Ibid., at 362.
7. Pape v Commissioner of Taxation & Anor (2009) 238 CLR 1; (2009) 83 ALJR 765; (2009) 257 ALR 1.
8. (1957) 99 CLR 575 at 610.
9. Pape v Commissioner of Taxation & Anor (2009) 238 CLR 1; (2009) 83 ALJR 765; (2009) 257 ALR 1 at para [111].
10. Victoria v Commonwealth and Hayden (1975) 134 CLR 338 at 378-9.
11. A. B. Paterson, "Mulga Bill's Bicycle", in the Collected Verse of A.B. Paterson, 1923, 147-150.
12. Nation Building Program (National Land Transport) Amendment Act 2009 (Act No 56 of 2009), assented 26 June 2009; commenced 27 June 2009.
13. National Bike Path Projects <http://infrastructure .gov.au/regional/files/Bikepaths_5Feb10.pdf>accessed 22/8/2010. See also an example of the Funding Agreement between the Council and the Commonwealth at: <http://infrastructure.gov.au/regional/files/Jobs_ Fund_Short_Form_FA_19Nov09.pdf> accessed 22/8/2010.
14. http://en.wikipedia.org/wiki/The_Sorcerer's_Apprentice accessed 18/6/2010.
15. Goethe, 'The Sorcerer's Apprentice', Der Zauberlehrling, 1797, in David Luke (ed), Goethe, Penguin Books, 173-177.
16. In a press release issued on 7 October 2009, the Governor of the Reserve Bank said:

    > The global economy is resuming growth. With economic policy settings likely to remain expansionary for some time, the recovery will likely continue during 2010 and forecasts are being revised higher. The expansion is generally expected to be modest in the major countries, due to the continuing legacy of the financial crisis. Prospects for Australia's Asian trading partners appear to be noticeably better. Growth in China has been very strong, which is having a significant impact on other economies in the region and on commodity markets. For Australia's trading partner group, growth in 2010 is likely to be close to trend.
    >
    > Sentiment in global financial markets has continued to improve. Nonetheless, the state of balance sheets in some major countries remains a potential constraint on their expansion.
    >
    > Economic conditions in Australia have been stronger than expected and measures of confidence have recovered.

17. Brad Orgill (Chairman), Building the Education Revolution Implementation Taskforce Interim Report , August 2010, 47. <http://www.deewr.gov.au/Department /Documents/BERIT_Interim_Report_06082010.pdf> accessed 22/8/2010.
18. The Auditor-General Audit Report No 33, 2009-10 Performance Audit Building the Education Revolution – Primary Schools for the 21st Century, 13. [There were 14 Block Grant Authorities (BGAs), two per State, one for Catholic Schools and one for independent schools . There was one BGA for each territory.] See also Commonwealth Ombudsman, 2009, Executive Schemes, Canberra, 3, available from: http://www.ombudsman.gov.au/files/investigation_2009_12.pdf accessed15/8/2010.

19. See South Australia v Commonwealth (1962) 108 CLR 130 per McTiernan J at 149, per Taylor J at 149 and Owen J at 157. See also P.J. Magennis Pty. Ltd v Commonwealth (1949) 80 CLR 382 per Dixon J at 409. Anne Twomey, The Constitution of New South Wales, Federation Press, 2004, 845-6, 2004, at 845-6.

20. (1983) 158 CLR 535 at 560.

21. Garry K. Ottosen, Making American Government Work – A Proposal to Reinvigorate Federalism, University Press of America, 1992, at 28.

22. See note 17.

23. Cheryl Saunders, "Intergovernmental Agreements and the Executive Power", 16 Public Law Review, 2005, 294.

24. As at 1 July 2010, there were 58 Special Accounts established under ss 21 and 166 Special Accounts established under s. 20 of the FMA. <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/docs/Chart-of-Special-Accounts.pdf > accessed 15/8/2010. <http://www.finance.gov.au/publications /fmg-series/docs/Special-Accounts-Guidelines-Final.pdf> accessed 24/8/2010. See also Charles Lawson, "Special Accounts Under the Constitution: Amounts Appropriated for Designated Purposes", 2006, 29(2) UNSWLawJl, at 114.

25. The Hon J. C. Bannon, Supreme Federalist, The Political Life of Sir John Downer, Wakefield Press, 2009, 188.

26. Victoria v. Commonwealth (1975) 134 CLR 338 at 383.

27. S. 88 Judiciary Act 1903 (Cth). Part XII repealed by Act No 45 of 1934 by s 2(3) 4th Schedule.

28. Re Judiciary Act 1903-1920 & In re Navigation Act (1921) 29 CLR 257.

29. Commonwealth of Australia Parliamentary Debates, Vol LIX (1910 1st Session of the 4th Parliament), 6489-6490. See other contributions to 6516 by Mr Deakin; Sir John Quick (particularly at 6511-6514 on whether the Parliament had power to pass such a measure).

30. State Memorial Order of Service for the Rt Hon. Sir Harry Gibbs, GCMG, AC, KBE, St Stephen's Uniting Church, Sydney, 11 July 2005.