

3rd December 2010

Committee Secretary,
Senate Standing Committee on Rural Affairs and Transport,
PO Box 6100,
Parliament House,
Canberra ACT 2600,
Australia.

Thank you for the opportunity to make this submission to the inquiry into **The management of the Murray-Darling Basin**. I note the terms of reference.

Studying these terms of reference I believe there is an overlap with the terms of reference for the **Senate Select Committee on the Reform of the Australian Federation**. (see attachment)

This reform inquiry exposed the powers of the **Australian Constitution** and the contravention of this constitution by the Commonwealth Government development of **Regional Development Committees** to introduce regionalism.

In submission No 28 to this reform inquiry I documented through Minutes of Wangaratta Rural City Council, Victoria, the Hume Regional Management Forum activity to introduce the Hume Region Sustainable Communities research program in the Murray Darling Basin.

I refer you to the social research of Neil Barr formerly of Department Primary Industry Victoria who published with Land & Water Australia (Halstead Press) a social history of rural land use. **The House on the Hill**, The transformation of Australia's Farming Communities, records the battle to survive on the land through generations with response to drought, flood, war, depression, with two major influences government promoted settlement schemes and the introduction of the contraceptive pill restricting unpaid family labor. This research based on experience and understanding is a contrast to large volumes of computer modeling and analysis.

Bryan Pape QC based at University of New England has connections to the Committee of the Australian Centre for Agriculture and Law; he has conducted research in America into the USA Constitution and has experience in taxation and corporate law. He has presented opinion for increasing the number of States in Australia. His submission No 20 to the inquiry into the Reform of the Australian Federation includes copy of an Oration he gave to the Samuel Griffith Society on 27th August 2010 which gives legal opinion on the relationships of the Australian Constitution (trade, commerce, financial, social) between the Commonwealth and States governments. He explains Local Government is not recognized in the Australian Constitution. Transcript attached. 2/

2/

The Samuel Griffith Society was formed in 1992 to ensure proposals to change the Australian Constitution will be subject to intense scrutiny. Reference attached information.

Submission 7 from the Centre for Public Law, University of New South Wales explains to the Inquiry into the Reform of the Australian Federation

“Currently, COAG has no formal status under Australian Law. It was established by agreement between the Prime Minister, Premiers and Chief Ministers in 1992 but enjoys legal recognition neither in the constitution nor the statute”

On 25th January 2010 Paul Kildea and Professor George Williams from the Centre for Public Law UNSW presented a paper **“THE CONSTITUTION AND THE MANAGEMENT OF WATER IN AUSTRALIA’S RIVERS”**

to the Supreme and Federal Court Judges’ Conference. The opening statement reads **“The management of water in Australia’s rivers has become, within little more than a decade, one of the most urgent public policy problems facing governments at every tier of the Australian Federation.”**

Page 10 of the paper in the section Coercive Powers there is this statement

“However, the status of local councils under s 51(xx) has recently been called into question,³⁶ and it seems that certainty in this area can only follow a definitive statement by the High Court.”

For your information I have attached copy recent letters to Doug Sharp CEO Rural City of Wangaratta 26th November 2010, The Editor Wangaratta Chronicle 29th November 2010 and a paid advertisement Wangaratta Chronicle published 12th November 2010. Also attached is copy of a letter 13th May 2008 to Hon Richard Wynne MP, Minister for Local Government, Parliament House, Melbourne referring to the Hume Region Sustainable Communities Strategy.

As owner of land under Victorian Government Freehold Land Title in the Murray – Darling Basin I have concern at the centralist, unauthorized interference of the Federal Government in State Rights. I have concern as to the legal status of the Murray-Darling Basin Authority and the affect of its actions on the value of my land. I do not understand what legal power there is to enforce the Murray Darling Basin Authority recommendations. I consider there is urgent need for the status of Local Government under the Australian Constitution to be clarified.

I am committed to support the objective of the Samuel Griffith Society to protect citizens from the arbitrary abuse of power, including executive power.

Alison G Walpole.
Rural, resident ratepayer,
Rural City of Wangaratta, Victoria.



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The management of the Murray-Darling Basin

Information about the Inquiry

On 28 October 2010 the Senate referred the following matter to the Senate Standing Committee on Rural Affairs and Transport for inquiry and report.

The management of the Murray-Darling Basin, and the development and implementation of the Basin Plan, with particular reference to:

- (a) the implications for agriculture and food production and the environment;
- (b) the social and economic impacts of changes proposed in the Basin;
- (c) the impact on sustainable productivity and on the viability of the Basin;
- (d) the opportunities for a national reconfiguration of rural and regional Australia and its agricultural resources against the background of the Basin Plan and the science of the future;
- (e) the extent to which options for more efficient water use can be found and the implications of more efficient water use, mining and gas extraction on the aquifer and its contribution to run off and water flow;
- (f) the opportunities for producing more food by using less water with smarter farming and plant technology;
- (g) the national implications of foreign ownership, including:
 - (i) corporate and sovereign takeover of agriculture land and water, and
 - (ii) water speculators;
- (h) means to achieve sustainable diversion limits in a way that recognises production efficiency;
- (i) options for all water savings including use of alternative basins; and
- (j) any other related matters.

Submissions should be received by **15 December 2010**. The reporting date is **30 November 2011**.

The Committee is seeking written submissions from interested individuals and organisations **preferably in electronic form submitted online** or sent by email to rat.sen@aph.gov.au as an attached Adobe PDF or MS Word format document. The email must include full postal address and contact details.

Alternatively, written submissions may be sent to:

Committee Secretary

Senate Standing Committee on Rural Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Notes to help you prepare your submission are available from the website at http://www.aph.gov.au/senate/committee/wit_sub/index.htm. Alternatively, the Committee Secretariat will be able to help you with your inquiries and can be contacted on telephone +61 2 6277 3511 or facsimile +61 2 6277 5811 or by email to rat.sen@aph.gov.au.

Inquiries from hearing and speech impaired people should be directed to Parliament House TTY number 02 6277 7799. Adobe also provides tools at <http://access.adobe.com/> for the blind and visually impaired to access PDF documents. If you require any special arrangements to enable you to participate in the Committee's inquiry, please contact the Committee Secretariat.

Once the Committee accepts your submission, it becomes a confidential Committee document and is protected by Parliamentary Privilege. You must **not** release your submission without the Committee's permission. If you do, it will not be protected by Parliamentary Privilege. At some stage during the inquiry, the Committee normally makes submissions public and places them on its website. **Please indicate if you want your submission to be kept confidential.**

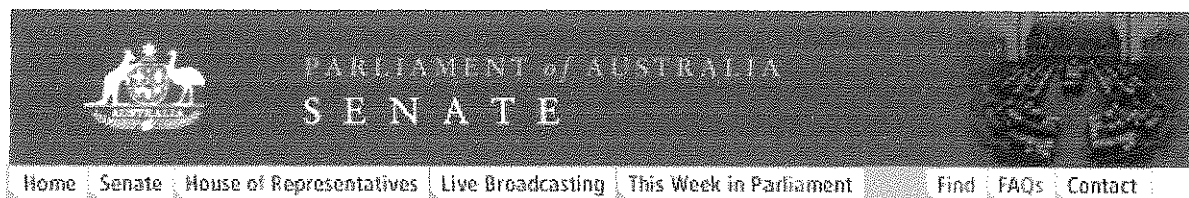
For further information, contact:

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Select Committee on the Reform of the Australian Federation

Information about the Inquiry

On 17 June 2010 the Senate referred the following matter to the Select Committee on the Reform of the Australian Federation for inquiry and report.

On 17 June 2010 the Senate established a Select Committee on the Reform of the Australian Federation. On 29 September 2010, the committee was re-established by the Senate, to:

- (a) inquire into and report by 17 November 2010 on key issues and priorities for the reform of relations between the three levels of government within the Australian federation; and
- (b) explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters:
 - (i) the distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),
 - (ii) financial relations between federal, state and local governments,
 - (iii) possible constitutional amendment, including the recognition of local government,
 - (iv) processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and
 - (v) strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs.

The report will be tabled on **the last sitting day of May 2011**.

Submissions should be received by **20 August 2010**.

The Committee is seeking written submissions from interested individuals and organisations **preferably in electronic form submitted online** or sent by email to reffed_sen@aph.gov.au as an attached Adobe PDF or MS Word format document. The email must include full postal address and contact details.

Alternatively, written submissions may be sent to:

Committee Secretary
Select Committee on the Reform of the Australian Federation
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Notes to help you prepare your submission are available from the website at http://www.aph.gov.au/senate/committee/wit_sub/index.htm. Alternatively, the Committee Secretariat will be able to help you with your inquiries and can be contacted on telephone +61 2 6277 3583 or facsimile +61 2 6277 5719 or by email to reffed.sen@aph.gov.au.

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Select Committee on the Reform of the Australian Federation

Submissions received by the Committee

Sub No.

- 1 Mr Andrew Oliver ([PDF 152KB](#))
- 2 Regional Development Australia Peel Inc ([PDF 587KB](#))
- 3 Mr Don Auchterlonie ([PDF 12KB](#))
- 4 Regional Development Australia Barwon South West Committee ([PDF 5164KB](#))
- 5 Naracoorte Lucindale Council ([PDF 17KB](#))
- 6 Mr Terence Holmes ([PDF 36KB](#))
- 7 Gilbert + Tobin Centre of Public Law and UNSW Faculty of Law ([PDF 206KB](#))
- 8 FamilyVoice Australia ([PDF 88KB](#))
- 9 Rethink Australia ([PDF 140KB](#))
- 10 Australian Chamber of Commerce and Industry ([PDF 114KB](#))
- 11 Glenelg Hopkins CMA ([PDF 432KB](#))
- 12 Northern Territory Statehood Steering Committee ([PDF 106KB](#))
- 13 Regional Development Australia Wide Bay Burnett Inc. ([PDF 879KB](#))
- 14 Pearce Division Liberal Party of Australia ([PDF 133KB](#))
- 15 Regional Development Australia Sunshine Coast ([PDF 410KB](#))
- 16 Dr Gabriel Donleavy ([PDF 25KB](#))
- 17 Dr Augusto Zimmermann and Mrs Lorraine Finlay ([PDF 454KB](#))
- 18 Miss Fiona Smith ([PDF 11KB](#))
- 19 Regional Development Australia (RDA) Brisbane Inc ([PDF 43KB](#))
- 20 Mr Bryan Pape ([PDF 206KB](#)) Attachment 1([PDF 732KB](#)) Attachment 2([PDF 190KB](#))
- 21 Deakin University ([PDF 803KB](#))
- 22 Civil Liberties Australia ([PDF 135KB](#))
- 23 Mr Doug Holmes ([PDF 14KB](#))
- 24 Australian Local Government Association ([PDF 319KB](#))
- 25 Mr Anthony Dowling ([PDF 195KB](#))
- 26 Regional Development Australia Wheatbelt Inc ([PDF 255KB](#))
- 27 Australian Monarchist league ([PDF 327KB](#))
- 28 Mrs Alison Walpole ([PDF 1077KB](#))
Supplementary Submission ([PDF 869KB](#))
- 29 National NRM Regions' Working Group ([PDF 95KB](#)) Attachment 1([PDF 718KB](#))
- 30 NSW Business Chamber ([PDF 844KB](#))
- 31 Local Government Association of SA ([PDF 21KB](#)) Attachment 1([PDF 365KB](#))
- 32 Dr Anne Twomey ([PDF 152KB](#))
- 33 WA Local Government Association ([PDF 42KB](#))
- 34 Law Council of Australia ([PDF 137KB](#))
- 35 City of Mandurah ([PDF 186KB](#))
- 36 Gold Coast City Council ([PDF 478KB](#))
- 37 Council for the National Interest WA Committee ([PDF 295KB](#))
- 38 Council for the Australian Federation (CAF) ([PDF 57KB](#)) Attachment 1([PDF 25KB](#)) Attachment 2([PDF 3105KB](#)) Attachment 3 ([PDF 912KB](#)) Attachment 4([PDF 754KB](#)) Attachment 5([PDF 94KB](#))
- 39 NSW Government ([PDF 429KB](#)) Attachment 1([PDF 207KB](#))
- 40 Tasmanian Government ([PDF 294KB](#))
- 41 Dr A J Brown, Griffith University ([PDF 151KB](#)) Attachment 1([PDF 773KB](#)) Attachment 2([PDF 153KB](#)) Attachment 3([PDF 142KB](#)) Attachment 4([PDF 140KB](#)) Attachment 5([PDF 239KB](#)) Attachment 6([PDF 174KB](#)) Attachment 7([PDF 2110KB](#)) Attachment 8([PDF 119KB](#)) Attachment 9(Confidential) Attachment 10(Confidential) Attachment 11([PDF 1551KB](#)) Attachment 12([PDF 331KB](#)) Attachment 13([PDF 664KB](#)) Attachment 14([PDF 484KB](#))

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**Reform of the
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Federation Select
Committee**

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Senator Trood

Members
Senator Furner (*Deputy
Chair*)
Senator Back
Senator Ludlam
Senator Moore
Senator Ryan

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http://www.aph.gov.au/senate/committee/reffed_ctte/reffed/index.htm

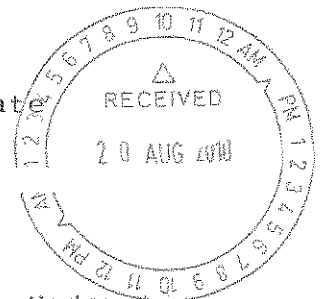
**Public Hearing
Programme**

Date Thursday, 2 December 2010
Venue Committee room 814/815,
NSW Parliament House, Sydney

10:00 am – 10:45 am	Anne Twomey, Associate Professor University of Sydney
10:45am – 11:00 am	<i>Morning Tea</i>
11:00 am – 11:45 am	Gilbert + Tobin Centre of Public Law Professor George Williams, Foundation Director Mr Paul Kildea, Director, Federalism Project
11:45 am – 12:30 pm	NSW Business Chamber Mr Paul Orton, Director of Policy and Advocacy Mr Micah Green, Economist
12:30 pm – 1:30 pm	<i>Lunch</i>
1:30 pm – 2:15 pm	COAG Reform Council Mary Ann O'Loughlin, Executive Councillor and Head of Secretariat

Parliament of Australia

Senate



Submission from Alison G Walpole

To Committee Secretary,
Select Committee on the Reform of the Australia Federation
PO Box 6100, Parliament House, Canberra ACT, 2600 Australia

This submission uses a selection of attached written information from August 2007 onward to expose the actions of elected government funded by commercial enterprise, Australian Government Departments and the Victorian State Government to introduce regionalism.

The process acknowledges development of the Council of Australian Governments and the Council for the Australian Federation to by pass control by elected government, Decisions made by appointed committees and co-opted members are not being exposed to public debate in the news media. These attachments include copy of advertisements in Wangaratta Chronicle which show how the Wangaratta Rural City Council was legally challenged and proved wanting in integrity in attempting to introduce an abattoir at Wangaratta. A situation covered by the Hume Regional Management Forum. This Forum funded by the Victorian Government is linked into a wider planning initiative undertaken across Victoria through Regional Development Victoria.

The minutes of Wangaratta Rural City Council 20th July 2010 record page 16 "The Hume Strategy for Sustainable Communities project is a major planning initiative of the Hume Regional Management Forum. It involves determining how catchments (or sub regions) can strategically plan and co-operate over such matters as land use planning, delivery of services, development of infrastructure and protection of the environment while addressing skills, lifestyle and climate change influence."

page 17 "It is anticipated the regional plans emanating from this process will form the basis for investment and interaction by State and Federal Governments under the new Regional Development Australia/Regional Development Victoria structure.

The recently released State Government blueprint for rural and regional Victoria entitled "Ready for Tomorrow" has a direct link to regional plans and is the first tangible manifestation of their importance on future government investment decisions." "Ready for Tomorrow" strategic plans are based on the assumption changes to Acts of Parliament not yet introduced to parliamentary scrutiny will be enacted.

These actions fail to acknowledge Local Government is not recognised in the Commonwealth Government constitution and lacks clarification of State and Federal Government powers and financial commitments. The Commonwealth of Australia Government is a government created by a Federation Of independent State Governments. The Victorian State Government blueprint "Ready for Tomorrow" became operational on 1st July 2010. There is an urgent need for Local Government to be recognised in the Australian Commonwealth Government constitution as recommended by the Australian Local Government Association (ALGA).

Alison G Walpole

25 OCT 2010

SUPPLEMENTARY SUBMISSION AND ATTACHMENTS 20th OCTOBER 2010

To Committee Secretary,
Select Senate Committee on the Reform of the Australian Federation,
PO Box 6100, Parliament House, Canberra ACT 2600.

On 25th August 2010 the Hume Regional Management Forum released the Hume Strategy for Sustainable Communities 2010-2020 at Wangaratta. The Hume Strategy 2010-2020 was published by the Victorian Government Department Planning and Community Development in June 2010.

This publication provides a documented example of Executive Federalism as explained by Bryan Pape QC in an attachment to his Submission No 20 to the Reform of the Australian Federation committee. The attachment is transcript of an oration to The Samuel Griffith Society dated 27th August 2010. Bryan Pape QC questions the legal status of the Council of Australian Governments, Intergovernmental and National Partnership Agreements. The Australian Local Government Association Submission No 24 questions the financial future of Local Government which is not recognized in the Australian Commonwealth Government Constitution.

Attached is information in Terra Publica Vol 10 No 1 January 2010 "Land Policy" about proposed changes to Victorian Government Law re natural resources legislation by December 2011, new biodiversity and conservation legislation by December 2012 and consolidated public land legislation by 2014. This will involve restructuring of Catchment Management Authorities which are located within the Murray-Darling Basin Authority area. The Commonwealth Government, Murray Darling Basin Authority, Guide to the proposed Basin Plan Overview released 8th October 2010 Section 7-8 (page 8) refers to the risk to rural and regional communities of the long term consequences of this plan. On 8th October 2010 the Victorian Government Department Planning and Community Development advertised in Wangaratta Chronicle 10 positions Planning and Development Opportunities in Regional Victoria. 9 of these positions required expertise in Regional Land Use Plans.

Attached is copy of an advertisement Wangaratta Chronicle 15th October 2010 for the Ovens & King Community Health Service 2nd AGM. The OKCHS is developed from merging the King Valley CHS and Ovens Valley CHS formed at the time of the Whitlam Federal Government and managed by local community committees. Now I read the OKCHS referred to as a Company and the 2nd AGM is being held at a time and place which does not encourage community attendance. The advertised Guest Speaker Hayley Cail, Commonwealth Government appointed Chair of the Regional Development Australia Committee, will present the Hume Strategy for Sustainable Communities developed by the Hume Regional Management Forum.

Attached for your information is copy of Appendix B – Ministerial Taskforce Members and Future Governance, Ready For Tomorrow, pages 64-66 published by the State Government of Victoria June 2010.

Alison G Walpole,

Dr Neil Barr

Citation

Land & Water Australia. 2009. *Dr Neil Barr*. [Online] (Updated August 11th, 2009)
Available at: <http://lwa.gov.au/node/3175> [Accessed Tuesday 20th of October 2009 05:21:01 AM].

Dr Neil Barr is the leader of the Rural, Social Research Team with the Department of Primary Industries, Victoria.

Why do some country football teams find it hard to survive? Why are *Beaut Blokes* weekends so popular? Why are some small country towns dying and others thriving? Will the corporate farm supersede the family farm? What is the 'grass change'? Where does the city end and the country begin? What are the environmental concerns of farmers? Why are wind generators so controversial? How do we shape the countryside and its environment by what we choose in the supermarket?

These are just some of the questions that researcher Neil Barr is being asked by rural communities in an effort to understand, explain and manage change in their communities.

The nature of Dr Barr's rural social research work is changing as he responds to a growing number of requests to explain his research.

'From once seeing these requests as an interruption to the work of a researcher, I am now seeing these requests as the reason for my career,' said Dr Barr.

'As a researcher, I find I am learning as much from the community as they learn from me. Their questions increasingly set my own preferred research agenda.'

The increasing need for explanations of the commercial applications and social implications of his research is changing the nature of Dr Barr's career as a researcher.

The various reports of Dr Barr and his colleagues do not fill the expansive gap that remains beyond the reach of personal involvement. These reports are not always accessible, are often written for a specialised audience and most importantly, do not offer an holistic interpretation of the present and future of farming and rural communities.

The House on the Hill Book



This book is a result of the Land & Water Australia Senior Research Fellowship award which allowed Dr Barr the breathing space to complete a manuscript based on his experiences as a rural social researcher.

On the land and in country towns, the battle to survive goes on forever. Increasingly, the world's needs food and fibre, but squeezes out the communities which provide them. Young people leave, farmers sell up, towns die, football teams amalgamate, communities keep reinventing themselves.

What's going on? What can we do? Neil Barr looks close up and he looks at the big picture. What affects real people on the land affects everybody.

Publications and Resources

Title	Product Type
The House on the Hill	General Information

None listed

The Samuel Griffith Society

The Third Sir Harry Gibbs Memorial Oration

Bryan Pape

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

*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 didn't abate, but intensified, when I found that the then recently retired Justice of the High Court, the Hon. Ian Callinan had followed him in 2008. Presumably, the reason for my invitation was that I might be more easily followed.

Up to the 1970s the Commonwealth Parliament's only 'card of entry', so described by Sir Robert Menzies,³ into state responsibilities like education was the use of the grants power with conditions attached - the so called s. 96 'tied grants' power. The Whitlam Government went a step further by relying 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. I Justice Gibbs strongly dissented reminding 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

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, 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*, where '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*⁶ 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.
(emphasis added)

The appropriation gold card of entry.

The Commonwealth has for many years abandoned the practice of using the 'tied grants' contrivance under s. 96 to supposedly authorize the funding of universities. Instead, under 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 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 C.J. 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. ⁷

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. ⁸ (emphasis added)

Last year, Banjo Paterson's line of *T'was Mulga Bill from Eaglehawk that caught the cycling craze*⁹ seemed to have infected the Hon 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).*¹⁰ The commencement date was in 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 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 s. 81 appropriation section, 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. Undaunted, the cycling craze began after the need for any further economic stimulus had ceased. For example, on 20 October 2009 the Minister 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,¹¹ (also including 10.138 km for the Town of Kwinana at a cost of \$600,000 – an average cost of \$60,000 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 km 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 that the old sorcerer's statement that powerful spirits should only be called by the master himself.¹²

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 the executive? Or does it find itself in a similar position to the sorcerer's apprentice.¹³ Of not knowing the magic word to stop the flood of money gushing into the economy. The High Court has given the executive 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 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 (i.e. the overnight rate) from 3.0 per cent to 3.25 per cent and since then there have been five successive increases culminating on 5 May 2010 in the present 4.5 per cent rate. ¹⁴

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.¹⁵ Before reading it we need to consult a short glossary of terms:

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.

<u>BER Element</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>Total</u>
	\$bn	\$bn	\$bn	\$bn
NSP	0.4	0.9	-	1.3

P21	0.6	6.6	5.2	12.4
SLC	<u>-</u>	<u>1.0</u>	<u>-</u>	<u>1.0</u>
	<u>1.0</u>	<u>8.5</u>	<u>5.2</u>	<u>14.7</u>

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 which came into being and operates indefinitely from 1 January 2009.

Intergovernmental agreements and National Partnership Agreements are political agreements. 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 Commonwealth¹⁶.

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 deal with the topic of education. It is a topic which lies within the exclusive jurisdiction of the States.

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 s 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 account¹⁷ is an account within the Consolidated Revenue Fund. 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 to financial assistance to the States and Territories*. Importantly s. 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. 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. Two questions are required to be answered. First, who is to adjudicate on the demarcation between federal and State

responsibilities and 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.*¹⁸ 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 C.J. 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. ¹⁹

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.*²⁰

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 1921²¹.

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.

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 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 in essence 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* ²² 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.

27 August 2010

[3913 Words]

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, pp. 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 (1957) 99 CLR 575 at 610.

⁷ *Pape v Commissioner of Taxation & Anor* (2009) 238 CLR 1; (2009) 83 ALJR 765; (2009) 257 ALR 1 at para [111].

⁸ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 378-9.

⁹ A. B. Paterson, 'Mulga Bill's Bicycle', in the *Collected Verse of A.B. Paterson* (1923), 147-150.

¹⁰ *Nation Building Program (National Land Transport) Amendment Act 2009* (Act No 56 of 2009), assented 26 June 2009; commenced 27 June 2009.

¹¹ National Bike Path Projects

<<http://infrastructure.gov.au/regional/files/Bikepaths5Feb10.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.

¹² <http://en.wikipedia.org/wiki/The_Sorcerer's_Apprentice> accessed 18/6/2010

¹³ Goethe, 'The Sorcerer's Apprentice', *Der Zauberlehrling*, (1797) in David Luke (ed) *Goethe*, (Penguin Books) 173-177.

¹⁴ 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.

¹⁵ 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](http://www.deewr.gov.au/Department/Documents/BERIT%20Interim%20Report%2006082010.pdf) accessed 22/8/2010.

¹⁶ See *South Australia v Commonwealth* (1962) 108 CLR 130 per McTiernan J at p. 149, per Taylor J at p.149 and Owen J at p.157. See too *P.J. Magennis Pty. Ltd v Commonwealth* (1949) 80 CLR 382 per Dixon J at p.409. Anne Twomey, *The Constitution of New South Wales* (2004) at pp 845-6.

¹⁷ As at 1 July 2010, there were 58 Special Accounts established under s 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 too Charles Lawson, "Special Accounts" Under the Constitution: Amounts Appropriated for Designated Purposes, [2006] 29(2) UNSWLawJl 114.

¹⁸ The Hon J. C. Bannon, *Supreme Federalist, The Political Life of Sir John Downer*, (2009), 188.

¹⁹ *Victoria v. Commonwealth* (1975) 134 CLR 338 at 383.

²⁰ S. 88 *Judiciary Act* 1903 (Cth). Part XII repealed by Act No 45 of 1934 by s 2(3) 4th Schedule.

²¹ *Re Judiciary Act 1903-1920 & In re Navigation Act* (1921) 29 CLR 257.

²² State Memorial Order of Service for the Rt. Hon. Sir Harry Gibbs GCMG, AC, KBE, St Stephen's Uniting Church, Sydney, 11 July 2005.

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Welcome

How much do you know about our Constitution?

If you're like most Australians your answer would probably be, "not much"!

We all know there is something called "The Constitution" and we know that the Constitution has been a good thing, yet we know very little about what's in it, or how it works in practice.

The Constitution is in fact the keystone of our parliamentary and legal system. It protects our democracy and our liberties.

From time to time, assorted prominent people suggest that Australia's Constitution is "badly in need of reform" and that we should now embark on a large scale process of "constitutional review".

These comments have set alarm bells ringing in the minds of many Australians who regard such attempts to "reform" our Constitution with great reserve, if not suspicion.

Written constitutions exist in many countries and have been established for very good reasons – maintaining law and order and protecting citizens from abuses of power and authority – including, particularly, abuses by governments.

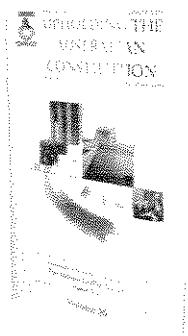
It is difficult for many Australians who, if native born, have never experienced serious domestic turbulence, or civil wars, or openly oppressive government regimes, to appreciate fully the benefits of such civil quietness. Nevertheless most of us would agree that we should always be alert against any attempt to undermine the liberties we currently enjoy.

With these thoughts in mind The Samuel Griffith Society was formed in 1992, and the fact that hundreds of Australians have since joined the Society indicates the general concern to uphold a Constitution which has served us so well for so long.

Sir Samuel Griffith was, from 1903 until 1919, the first Chief Justice of the High Court of Australia. It is widely accepted that he was primarily responsible for writing the first constitutional draft of 1891. This document became the basis for our Constitution, under which the six Australian self-governing colonies came together to form a Federation. The proper roles of federal and State governments under the Constitution are of continuing and vital importance.

The Samuel Griffith Society's prime role is to ensure that proposals to change the Australian Constitution will be subjected to the most intense scrutiny. Constitutional change may well be desirable from time to time, but it should only occur after exhaustive, community-wide debate, leading up to consideration by the Australian people under the referendum provisions of s.128 of the Constitution.

The Society now appeals to all Australians to join in upholding their Constitution – not only because it has served us well in the past, but also to ensure it continues to serve well future generations.



Sir Harry Gibbs
Founding President of the
Samuel Griffith Society
"Upholding the
Constitution"

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About the Society

The purposes of The Samuel Griffith Society are as follows

1. To found a Society named after Sir Samuel Walker Griffith, First Chief Justice of the High Court of Australia. As Premier of Queensland and subsequently Chief Justice of the Queensland Supreme Court, Griffith was one of the prime movers of Federation. During his term as Chief Justice of the High Court from 1903 until his debilitating illness in 1917, he consistently supported the rights of States against the powers of the federal Government.
2. To set out as a preamble to the specific purpose of the Society a statement of the role of constitutions and parliamentary and legal institutions in the following terms:

One important function of political constitutions, and indeed of all political institutions, should be that of maintaining civil peace and concord, and of protecting citizens from the arbitrary abuse of power, including executive power.

People who have experienced nothing but peaceful association within the society in which they have grown up, take the incalculable benefits of such civil quietness for granted. The terrors of civil war or threats of civil war, of savage government repression, seem to most native born Australians to be beyond comprehension, and certainly beyond the realms of possibility here. Nevertheless, civil unrest – ethnic, political and religious violence – has been endemic throughout recorded history. Arbitrary arrest and imprisonment has, likewise, been commonplace.

Those countries which have achieved long periods of unbroken civil peace, with societies which have lived under the rule of law, have also become prosperous. Some of these countries have written constitutions. Others do not.

Australia has an unbroken record of constitutional government and rule of law. It was one of the first nations to establish universal suffrage. It has been entirely free from any hint of civil war. Up until the Great War of 1914-18 Australia was also in per capita terms, the richest country in the world.

The strength of our parliamentary and legal institutions, of our political conventions and modes of behaviour, is, arguably, Australia's greatest asset. The Constitution which Australians drafted and accepted in the 1890s, and which established the framework of the Australian nation as a sovereign federal state, is the keystone of this structure and has served us well. It has protected our democracy, and our liberties, by providing for independent centres of political authority and the diffusion of power which flows from that.

The Australian people have voted many times against proposed amendments to our Constitution, almost all of which were directed towards providing more powers to the federal government in Canberra. We must presume that Australians regard the Constitution, on the whole, with approval. All institutions, nevertheless, require refurbishment and repair. There is growing concern at the decline in the prestige, standing and influence of Parliament, and the growing centralisation of power and authority in the Executive. There is also concern at the expansion of the power of the Commonwealth at the expense of the States, the increasing centralisation of power in Canberra, and the consequent growth of a Commonwealth bureaucracy which, in many areas, deals with matters which were originally the sole concern of the States.

As we approached the centenary of the passage of the Commonwealth of Australia Act (1900), by the British Parliament, a vigorous debate built up, focused on changes which some people wished to see made to the Constitution, to the place of the constitutional monarchy in that Constitution, and to our parliamentary institutions. The founders of The Samuel Griffith Society wished to encourage and promote the widest possible debate not only on particular constitutional issues but on the health of our political and legal institutions generally. Central to their concerns has been the need to emphasize federalist views and to reverse the Canberra-led erosion of our federal institutions.

3. In the light of the foregoing, the Society proposes the following objectives

Generally

- to promote discussion of constitutional matters through the articulation of a clear position in support of decentralisation of power through the renewal of our federal structure
- to defend the great virtues of the present Constitution against those who would undermine it in order to supplant it with a unitary state
- to restore the authority of Parliament and defend the independence of the judiciary
- to foster and support reform of Australia's constitutional system to these ends.

Specifically

- to arrange conferences, hold meetings, publish papers, and inform people and governments in accordance with the general objectives set out above
- thereby to encourage a wider understanding of Australia's Constitution and the nation's achievements under the Constitution.

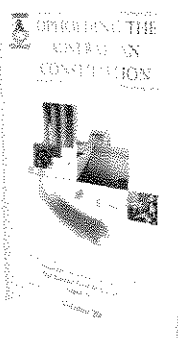
Priority Areas

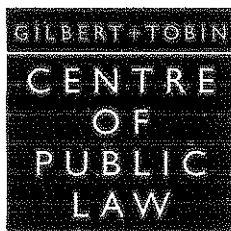
The following areas of priority have been identified in the wider debate over Australia's constitutional future

- the need to redress the federal balance in favour of the States, in view of the excessive expansion of Commonwealth power and the need to decentralise decision making
- the need to reassert the role of Parliament (including that of the Speaker and President of the Senate) vis a vis the Executive
- the need to safeguard judicial independence in light of increasing executive encroachments
- the need to review the financial arrangements between the Commonwealth and the States with a view to achieving a more equitable and efficient division of taxation power and a greater sense of financial responsibility on the part of all governments
- the need to redress the duplication of bureaucracy by clearly defining the respective spheres of Commonwealth and State interest and by eliminating Commonwealth influences in matters that should be the concern of the States
- the need to consider, and as appropriate, develop alternative methods of constitutional amendment, such as States' initiatives.

Immediate Aims:

- To promote widespread discussion of these matters
- To attract for the Society a stable membership and funding base.





THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

20 August 2010

Committee Secretary
Select Committee on the Reform of the Australian Federation
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Inquiry into Reform of the Australian Federation

Thank you for the invitation to make a submission to the Committee's inquiry into the Reform of the Australian Federation.

We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

Mr Paul Kildea
Director, Federalism Project

Dr Andrew Lynch
Centre Director

Professor George Williams
Foundation Director

Priorities for reforming the Australian Federation

The Committee's inquiry is a timely opportunity to review the functioning of the Australian Federation. The federal system, while having many strengths, is not working as well as it should be. The Committee's terms of reference canvass a wide range of areas for potential reform, including the distribution of roles and responsibilities, financial relations, and the position of local government. We support the breadth of the Committee's inquiry, and agree that several useful reforms could be made in each of the listed areas.

Our submission focuses on one particular area for reform that we believe is the highest priority in terms of improving our federal system: that is, enhancing the capacity of the Commonwealth and the States to work together cooperatively. This is the case for two reasons. First, some of the nation's most pressing problems, including health care, education and water management, are not the responsibility of any single tier of government, and so require effective collaboration between Commonwealth and State governments. If optimal policy outcomes are to be achieved in these areas, then a stronger framework for federal collaboration needs to be established. Another reason to treat cooperative federalism as a priority is that many substantial reforms can be accomplished either by agreement or through statute, and so avoid the difficulty of achieving formal constitutional change. Having said that, it should also be recognised that reforming the Australian Federation will also involve tackling more difficult change through constitutional amendment.

In what follows, we propose reforms in the following areas:

1. The enhancement of cooperative federalism, by
 - a. Formalising COAG's legal status
 - b. Improving COAG's governance arrangements
 - c. Improving COAG's democratic accountability and transparency
 - d. Removing barriers to cooperative legislative schemes
 - e. Better clarifying the operation of Commonwealth-State referrals
2. The holding of a Convention on the Federation.

1. Enhancing cooperative federalism

a. Formalise COAG's legal status

The Commonwealth, State and Territory parliaments should pass legislation to give the Council of Australian Governments (COAG) a firmer legal foundation.

Currently, COAG has no formal status under Australian law. It was established by agreement between the Prime Minister, Premiers and Chief Ministers in 1992 but enjoys legal recognition neither in the Constitution nor by statute. While this has not prevented COAG playing an influential policy role from time to time, its existence necessarily remains tenuous.

Statutory recognition would give COAG a more secure place in the Australian federal framework, delivering greater certainty and imbuing COAG with a status in keeping with its influential role in federal governance. Moreover, giving COAG a statutory basis would instil COAG with a stronger democratic legitimacy and help to improve awareness in the general community of its role in policy making.

Statutory recognition of COAG would be simple to achieve, requiring only the passage of complementary legislation by the Commonwealth, State and Territory parliaments.

THE CONSTITUTION AND THE MANAGEMENT OF WATER IN AUSTRALIA'S RIVERS

Delivered at *Supreme and Federal Courts Judges' Conference*, 25 January 2010

PAUL KILDEA* AND GEORGE WILLIAMS**

I INTRODUCTION

The management of water in Australia's rivers has become, within little more than a decade, one of the most urgent public policy problems facing governments at every tier of the Australian Federation. The legion of challenges surrounding water conservation are now familiar, and include water scarcity, increasing salinity, impairment of river wildlife and habitat, and the degradation of ecological assets.¹ The challenges facing the Murray-Darling Basin are perhaps the best known, but these problems apply to river systems across Australia.² They have also been made more urgent due to the effects of drought and climate change.³ Indeed, the Chair and CEO of the National Water Commission, Ken Matthews, remarked recently that, '[w]e have known for years that water reform in Australia was important, pressing and difficult. Now that climate change is with us, important becomes vital, pressing becomes urgent, and difficult becomes downright tough'.⁴

The challenge of managing Australia's water resources has given rise to a number of agreements and institutions, including the recent National Water Initiative and Intergovernmental Agreement on Murray-Darling Basin Reform. Like their predecessors, these initiatives were both shaped and constrained by the *Australian Constitution* and, in particular, by the federal design of the constitutional system. The constitutional framework has, for good or ill, determined the extent of State and Commonwealth influence over river management, and in doing so has had a bearing on whether management initiatives have served local or national interests, and on whether they have been cooperative or imposed by the federal government.

The challenges that the constitutional framework poses for the successful governance of Australia's inter-jurisdictional rivers is attracting increasing attention. Since the announcement of the Howard government's \$10 billion plan to address water management in the Murray-Darling Basin in 2007, the successes and failures of governments in this area have featured prominently in news coverage and commentary. In recent years, the Senate Rural and Regional Affairs and Transport Committee completed inquiries into the sustainable management and governance of both the Coorong and Lower Lakes and the Murray-Darling

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** George Williams is Foundation Director, Gilbert + Tobin Centre of Public Law and Anthony Mason Professor of Law, University of New South Wales and an Australian Research Council Laureate Fellow.

¹ William Blomquist et al, 'Institutional and Policy Analysis of River Basin Management: The Murray Darling River Basin, Australia' (Working Paper No 3527, World Bank, 2005) 5-8.

² National Water Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (2009) v.

³ *Ibid* 4.

⁴ Ken Matthews, 'Australian water reform in 2009' (Speech delivered at Committee for Economic Development in Australia, Canberra, 9 October 2009).

water use or water-related businesses. The power could be used, for example, to prevent such corporations from building dams or weirs, or from planting certain crops.⁵⁰

The Commonwealth might also be able to use this power to regulate State government water authorities on the basis that they would be classified as trading corporations (the Tasmanian Hydro-Electric Commission was so classified in the *Tasmanian Dam* case). In any event, with the implementation of the National Competition Policy in the 1990s, the activities of many State government agencies, including those involved in water supply, were privatised, corporatised or outsourced. Justice Kirby referred to this trend in his dissenting judgment in the *Work Choices* case, where he singled out land and water conservation as areas that might now fall under federal control.⁵¹ The 1990s also saw the country's largest water suppliers become corporate entities in a manner that made them prone to regulation under s 51(xx).⁵² These include, for example, the Sydney Water Board, Melbourne Water and the SA Water Corporation.

The greatest area of uncertainty surrounding s 51(xx) relates to the meaning of the term 'trading or financial corporation'.⁵³ Currently, courts decide this issue by looking at the activities in which a corporation engages. If they engage in trading or financial activities to a significant or substantial extent, the corporation will fall within the scope of the power.⁵⁴ In the past, many not-for-profit corporations have been found to qualify as trading corporations by lower courts, including universities, private schools, local councils, public hospitals and utilities, childcare centres, community service providers and benevolent or charitable bodies such as the Red Cross or the RSPCA.⁵⁵ This might suggest, for example, that the water supply activities of local councils might be regulated by the Commonwealth under the corporations power. However, the status of local councils under s 51(xx) has recently been called into question,⁵⁶ and it seems that certainty in this area can only follow a definitive statement by the High Court.

Even if such certainty is achieved, it will only mean that the power extends to bodies that are incorporated. It will remain possible for businesses and other bodies to escape the reach of this power by changing their legal status. For example, in order to escape the coverage of the federal industrial law as amended during the life of the Howard government, the Queensland Parliament removed the corporate status of local government bodies in Queensland (with the exception of the Brisbane City Council) by enacting the *Local Government and Industrial Relations Act 2008* (Qld).

Another source of Commonwealth power, the *external affairs power* (s 51(xxix)), has been used on numerous occasions to enact legislation dealing with environmental matters.⁵⁷ This head of power gives the Commonwealth authority to legislate to give effect within Australia to international obligations which it has acceded to under international treaties and other instruments. The primary constraint on the exercise of this power is that the provisions of the

⁵⁰ John Williams, in evidence given to the Rural and Regional Affairs and Transport References Committee, *Implications for Long-Term Sustainable Management of the Murray Darling Basin System*, above n 5, 48.

⁵¹ *New South Wales v Commonwealth* (2006) 229 CLR 1, 224 (Kirby J).

⁵² Moeller and McKay, above n 41, 300.

⁵³ See Nicholas Gouliaditis, 'The Meaning of "Trading and Financial Corporations": Future Directions' (2008) 19 *Public Law Review* 110.

⁵⁴ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

⁵⁵ See, for example, *Quickenden v O'Connor* (2001) 184 ALR 260; *E v Australian Red Cross* (1991) 99 ALR 601.

⁵⁶ *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 250 ALR 485.

⁵⁷ Eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Copy

26th November 2010

CEO Doug Sharp,
Wangaratta Rural City Council,
P O Box 238,
Wangaratta 3676

Dear Sir,

Thank you for the copy of the minutes of the ordinary meeting of Wangaratta Rural City Council 16th November 2010 provided from your office. I draw your attention to the anomaly they are headed Business paper.

I note Wangaratta Chronicle 24th November 2010 page 11 re Murray Darling Basin Plan "The focus for council will now turn to making a formal submission to the MDBA plan, as well as to two parliamentary enquiries into the plan."

As reference for these proposed documents I draw your attention to the Senate Committee Inquiry into Water (Crisis Powers and Floodwater Diversion) Bill 2010 submission 9 June 2010 from the Gilbert and Tobin Centre of Public Law, UNSW, Mr Paul Kildea (Director, Federalism Project), Dr Andrew Lynch (Centre Director) and Professor George Williams (Foundation Director) and the attachment paper "The Constitution and the Management of Water in Australia's Rivers" delivered at Supreme and Federal Courts Judges' Conference, 25 January 2010. Written by Paul Kildea and George Williams.

I quote from page 10 of this paper

"However the status of local councils under s 51(xx) has recently been called into question,²⁷ and it seems that certainty in this area can only follow a definitive statement by the High Court."

I trust that this paper will be consulted in making your submissions and they will be authorized and approved by the elected council.

Yours sincerely,

Alison G Walpole,
Resident rural ratepayer,
Rural City of Wangaratta.

*Copy minutes provided.
Samuel Griffith Society*

Copy

The Editor,
Wangaratta Chronicle,
PO Box 221,
Wangaratta 3677

29th November 2010

Dear Sir,

The release of water policy for the Murray Darling Basin Plan (MDBP) has not been clear and transparent. Federal Government inquiries have been announced. The House of Representatives Committee Inquiry is of a generalist nature. The Senate Committee to be chaired by Senator Bill Heffernan references a wide range of issues covering Australia's food production, global food supply, efficient water use, foreign ownership, the social, economic and sustainable impact of the MDBP on the environment and rural communities, water speculators and as a related matter the committee will give consideration to the water Act 2007.

On 25th January 2010 a paper "The Constitution and the Management of Water in Australia's Rivers" prepared by Paul Kildea and Professor George Williams of the UNSW Centre of Public Law was presented to the Supreme and Federal Court Judges' Conference. The paper began "*The management of water in Australia's rivers has become, within little more than a decade, one of the most urgent policy problems facing government at every tier of the Australian Federation*"

The paper gives an account of legislation affecting water under the Australian Constitution; Commonwealth and State Law. Beginning Constitution section 98 "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to the railways the property of any state." The Tasmanian Dam case is discussed and the question, if the scheme to buy out irrigation operators in the MDB would be upheld in the High Court, is asked. The review discusses non-coercive powers, coercive powers, trade and commerce power and acquisition of property explaining in the context "However, the status of local councils under S51(xx) has recently been called into question,^{sp} and it seems certainty in this area can only follow a definitive statement by the High Court."

In October 2009 the National Water Commission released its 2nd Biennial assessment on water reform. A number of problems related from the report include "A failure to provide irrigators with sufficient information about the buyback plans and other reform initiatives to enable them to plan for the future; uncertainty and stress among farming families and irrigation-dependent communities; and lack of clarity and transparency with respect to programs and decision making about environmental water."

The paper concludes with legal discussion of the role of the Australian Constitution and cooperation between the states, the financial relationship of State and Federal governments and the future for Local Government. Questions for the incoming Victorian Government.

Yours sincerely . . .

Alison G Walpole. /

TO THE PUBLIC.

10th November 2010

When is the Victorian Election campaign going to acknowledge the State/Commonwealth/Local Governments constitutional uncertainty increased by the dictatorial attitude of former Prime Minister Kevin Rudd ?

The Premier of West Australia Colin Barnett has frequently referred in the news media to the inefficiency of the Council of the Australian Governments (COAG) calling it bloated, expensive, lacking accountability and transparency. Legal opinion claims COAG has not been ratified by the Commonwealth Parliament and intergovernmental agreements and state/commonwealth partnership agreements are merely political agreements.

Property and mining rights are controlled by the sovereign independent states which created the Commonwealth Government. Local Government is not recognized in the Commonwealth Constitution. In Victoria Local Government is recognized in the State Constitution. By State Government control of the appointment of the Chief Executive Officer it is effectively reduced to a State Government agency. My opinion is that the present Victorian government obsession with regionalism is a prelude to another round of Local Government amalgamations.

The Australian Constitution does not recognize regionalism. Legal opinion is given that Commonwealth Government appointed Regional Development Australia Committees are not constitutionally legal. The Commonwealth Constitution provides for increasing the number of states in the Commonwealth of Australia. Independent MP Bob Katter has called for Queensland to be divided into three states. The Murray Darling Basin Authority Plan provides basis for discussion of a possible State of Murray Valley.

“On 28th October 2010 the Senate referred the following matter to the Senate Standing Committee on Rural Affairs and Transport for inquiry and report.”

The management of the Murray-Darling Basin.

Among 10 terms of reference are

- (g) the national implications of foreign ownership, including:
 - (1) corporate and sovereign takeover of agriculture land and water, and
 - (2) water speculators;
- (i) options for all water savings including use of alternative basins;

The due date for reporting is 30 November 2011, when the Greens will hold the balance of power. Submissions are due by **15th December** 2010, a brief period to contribute.

It is sensible for every landowner to ask “what is happening to my State issued freehold land title” and watch the reaction of the banks to what is happening

Written and paid for by

Alison G Walpole, 309 Whorouly South Road, Whorouly South, Victoria 3735

Published 12th November 2010 paid advertisement \$172-00

Copy

13th May 2008

Hon Richard Wynne MP,
Minister for Local Government,
Parliament House,
Melbourne 3002

Dear Sir,

On the advice from the office of Ombudsman Victoria I wrote to you on 20th April 2008 (posted 21st April 2008). This letter has not been acknowledged or returned undelivered. A copy was posted to the Ombudsman Victoria office.

I repeat this letter of 20th April 2008.

There is an apparent conflict of interest situation regarding the Hume Region Sustainable Communities Strategy Project as recorded in the Minutes of Wangaratta Rural City Council 18th March 2008 .

Applications closed 29th February 2008 for Project Manager, Hume Region, Sustainable Communities Strategy "to make a significant contribution to strategic regional direction setting and decision making within the Department of Planning and Community Development (DPCD)." Previously in December 2007 Local Government Victoria, Department of Planning and Community Development published a paper prepared by Sue West and Hayden Raysmith "Planning Together. Lessons from local government community planning in Victoria" This report, and the Ombudsman report "Conflict of interest in local government" tabled in Parliament 13th March 2008, both refer to a review of the Local Government Act.

"Planning Together" page 42 states

"It would appear to be difficult and perhaps undesirable to codify planning in legislation. Whilst the wording of the Act may be changed to more clearly mandate community planning as a necessary element of the council plan the form that community planning may take will vary from local government to local government."

"Integrating community planning with the development of the council plan is only one side of the equation. The other side is the connection with State government policy frameworks, input by State government representatives and responsiveness of State government."

2/

18th March 2008 Wangaratta Rural City Council meeting resolved "That Council endorse the Sustainable Communities Project as outlined and commit to its completion as a vital planning tool for the Central Hume sub-region". An attachment to the minutes of this meeting records Mansfield, Benalla, Alpine and Wangaratta Councils joined together as the Central Sub Region of the Hume Regional Management Forum. This study is an initiative of a CSIRO research study. A review of the Local Government Act is in progress.

The Ombudsman Victoria report "Conflict of Interest in Local Government " March 13th 2008 noted. " the policies and practices in many councils do not adequately identify conflicts of interest and do not sufficiently monitor and control conflict situations. This lack of clarity and rigour leaves councils and council staff vulnerable to issues of integrity."

To read the Attachment to the Wangaratta Rural City Council minutes 18th March 2008 Hume Region Sustainable Community Strategy is to question has the WRCC CEO Doug Sharp been placed in a position of conflict of interest by Council commitment to the Sustainable Communities Project. ?

The background states the Hume Regional Management Forum "comprises state government regional managers, CEO's of twelve local government authorities, regional managers of statutory authorities and a commonwealth government Area Consultative Committee manager". Local government is represented by the President of the Australian Local Government Association on the Council of Australian Governments.

The Hume Region Sustainable Communities Strategy attachment states

"The methodology is characterised by a multidisciplinary, multilayered, spatial approach to economic development and strategic land use, using a joined up government approach."

"Forums will be conducted at a number of stages throughout the project to engage community leaders who have a significant role in shaping the future development of the region."

How are these community leaders to be chosen ? Does this methodology reflect on the integrity of elected Local Government community leaders ? Where has provision been made for the CEO to report to the elected Council which employs him ? Is provision made for the Wangaratta Rural City Council to publicly debate and contribute to the Hume Region Sustainable Communities draft report prior to it being presented to the secretary of the Department of Premier and Cabinet ? The Wangaratta Rural City Council at its 18th March 2008 meeting adopted the Sustainable Communities Project, a major pilot study as "a vital planning tool for the Central Hume sub-region." When was the project debated in the State Parliament ? Has the funding of \$1,015,000 been approved by parliament ? Or is funding being provided from the Community Support Fund from gaming revenue ?

It appears this project is designed to by pass the authority of Local Government. In a letter to me dated 18th March 2008 Wangaratta Rural City Council CEO Doug Sharp has written that the Council is preparing an Agricultural Land Study. The study will be reported to the Council when it is complete. Will this study be debated at a public council meeting.

3/

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The State Government announced Rural Land Use Planning Project concerning Rural Land Zoning has financial implications for all rural land owners. Commissioned by the Federal Government as part of a natural resource assessment project a ten year study by Charles Stuart University land management expert Professor Alan Curtis predicts nearly half of rural properties will change hands in the next 10 years.

In October 2003 the Parliament of the Commonwealth of Australia, House of Representatives Standing Committee Economics, Finance and Public Administration report "Rates and Taxes; A Fair Share for Responsible Local Government" was released. This report made 18 recommendations which covered roles and responsibilities, cost shifting, infrastructure, capacity building in our regions, commonwealth funding for local government and the way forward. A 25th November 2003 article about the report by Josh Gordon (Melbourne Age) stated "Australia's three tiered system of government is costing taxpayers about \$20 billion a year because of duplication and cost shifting, a parliamentary inquiry has found." "The committee recommended that local councils should get their funding straight from the Federal Government using a standard formula based on need, rather than via the states on an ad hoc basis."

Almost 5 years later at its March 2008 meeting the Council of Australian Governments discussed reform of financial relationships between governments. This included review of Special Purposes Payments of importance to local government.

As a local government rural ratepayer I have a financial interest in these negotiations and have concerns about the statement made by Wangaratta Rural City Council when on the 18th March 2008 it adopted this Sustainable Communities Project a pilot study adopted by the State government.

"One of the management initiatives for delivering the project is to create leadership forums so that it will gain traction and conduit in the community. The leadership forums are to be made up of ten community leaders in each sub-region (total of forty) who will champion the cause within the community and participate in two major forums. The first of these forums is expected to be held in April/May."

To read the attachment 10.2.1.1 to Wangaratta Rural City Council minutes 18th March 2008 is to realize elected councilors are not to be part of this project. Local governments are to be represented by CEOs and community leaders are to be opted to some forums. What is the legal reference for this action? Have elected councilors of Wangaratta Rural City Council lost to bureaucracy their responsibility to represent ratepayers? This is of extreme concern when control of strategic land use is listed as one of the proposed functions of Regional Management Forums. Is it an indication of a changed role of responsibility that the Wangaratta Chronicle reported that a Planning Reconciliation meeting held at Milawa between an applicant for a planning permit for a feedlot and 70 objectors was chaired by Wangaratta Rural City Council CEO Doug Sharp? Where were the elected Mayor and Councilors?

Clearly there is conflict of interest between the three tiers of Australian government, threat of introduction of a fourth tier, regionalism, and the historic land title right of ownership and use of rural land. These matters should be debated in the Victorian parliament before any changes to the local government act are introduced.

End repeat

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As citizens of the Rural City of Wangaratta we are being used as research animals in a research project Sustainable Communities. 18 months after Wangaratta Rural City Council started the project as the regional hubs model it told ratepayers and residents about its actions by formally endorsing the Sustainable Communities Project and As citizens of the Rural City of Wangaratta we are being used as research animals in a committing "to its completion as a vital planning tool for the Central Hume sub region." at the meeting of Council 18th March 2008. Attachments to the minutes outline the research process.

The Rudd Federal Government has a Social Inclusion Agenda announced in April 2007 when in opposition. Senator Ursula Stephens is the Parliamentary Secretary for Social Inclusion and the Voluntary Sector. In a speech at Orange NSW, released 24th April 2008, she explained the development of a "national framework and a new public policy approach to control disadvantage and exclusion in all communities; in inner cities, regional centres or remote regions"---requiring "a significant change in the way we deliver policy and services to our communities." "Social Inclusion is about putting *people* at the centre of policy development, where all levels of government work in partnership with business and the not-for-profit sector to address the array of different needs."

"The National Reform Agenda has highlighted new approaches to dealing with entrenched disadvantage and to reform COAG for better outcomes."

When the Council of Australian Governments met in March 2008 it commissioned Working Groups in a number of areas from education and housing to a review of the Australian Tax System to co-ordinate national, state and local governments. The former Regional Area Consultative Committee structure is being replaced by Regional Development Australia Committees to develop strategic input into programs and ensure there is effective engagement with local communities.

An interesting part of this agenda is the emphasis it places on the role of Local Government. At present the Victorian State Government is signaling changes to the Local Government Act. The Australian Local Government Association is represented on COAG by the President. Participation in the Hume Region Sustainable Communities Strategy Research Program indicates Local Government at Wangaratta has an uncertain future.

Will the property tax of Municipal rates be reviewed? Will Local Government retain responsibility for land use planning? Two Victorian State Government reports Land and Biodiversity and Future Farming released in April 2008 propose changes to environment and planning Acts. What is the future role and responsibility of Local Government? Citizens are legally, socially and financially affected by changes to legislation. I request a response to this letter.

Yours sincerely,

Alison G Walpōle
Delivery confirmed 19th May 2008