# The Samuel Griffith Society

## The Third Sir Harry Gibbs Memorial Oration

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### *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.

| 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 |

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 Commonwealth[16].

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 account[17] 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 1921[21].

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.

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[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 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.