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The Vision in Hindsight: Parliament and the Constitution: Paper No. 15

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution is a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. A number of essays have been commissioned and will be published, as IRS Research Papers, of which this paper is the fifteenth.

Eleven of these papers were selected for inclusion in the final volume, *Parliament: The Vision in Hindsight*, G. Lindell and R. Bennett, eds, Federation Press, Sydney 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assisted DPL with the management of the project.

Centenary of Federation 1901–2001

Maurice Kennedy
28 May 2002

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Enquiries

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Major Issues

This Paper looks at the relationship between the Parliament and the Executive with respect to the control and management of the Commonwealth's financial affairs. It does so by focusing on a selection of issues and events, since Federation, that became significant in shaping and reshaping the operating frameworks within which the Executive conducts its financial affairs and on which Parliament and the Executive regularly interact (or ought to).

The Paper begins by a consideration of the Founders' vision in relation to how the financial affairs of the Commonwealth would be managed under the Constitution. It notes that the Constitution must be approached not as a collection of individual rules and declarations, but as a cohesive, integrated framework of checks and balances by which the interests of the bicameral Parliament, the Executive, the States and the Judiciary are established and maintained.

It also points out that the Founders did not seek to lay down in the Constitution detailed prescriptive rules regulating the control and management of public finance. They considered that these matters should be left to the Parliament. Further, the High Court has not interpreted the constitutional provisions which deal with these matters in a way which significantly inhibits or controls the relevant powers and responsibilities of the Parliament. As a result, ultimate responsibility under the Constitution for the management of Commonwealth money is very much a matter for the Parliament.

The Paper focuses on section 94 of the Constitution, the provision which requires the Commonwealth to pay its 'surplus revenue' to the States, to demonstrate how the Constitution's financial provisions were intended to relate to each other and, in particular, how these provisions provide a framework of checks and balances between the various political institutions established by the Constitution.

Under this framework, established principally by sections 53, 54, 56, 81, 83 and 94 of the Constitution, the States were to be protected, in relation to their long-term fiscal interests, by the payment of any surplus revenue which the Commonwealth's operations might generate. The Commonwealth Parliament was to be bound by clear lines drawn around the respective powers of the two Houses, regarding their roles and capacities with respect to proposed laws of a financial nature. And the Executive was to be safeguarded, in its normal capacity to govern, against capricious interference from the Senate. However, the Executive was also to be constrained in its collection and accounting for revenue, and in its capacity to spend. It was also to be constrained by a statutory regime of accounting, banking and related operational controls that supported, and gave substance to, the basic constitutional principles.

The Paper then sets out how the Parliament has sought to give effect to the Founders' vision, and the extent to which current practice reflects that vision. It concludes that in several important respects the vision has been, or is at risk of being, subverted.

In this respect, it notes that in 1999 the Government gained Parliament's agreement to the adoption of a new, comprehensive financial management framework for the Commonwealth which is based on the principles of accrual accounting. Under this framework, traditional cash-based accounting concepts have been all but discarded despite the fact that the application of these concepts underpinned the Constitution's financial provisions. Consequently, some measures accepted by Parliament, under the accruals umbrella, may actually have profound, if unintended, constitutional implications.

In particular, the Paper looks at those legislative provisions passed by the Parliament in March 1999 which eliminated the requirement to account for the moneys of the Commonwealth in separate Funds. It considers whether it is now possible for the States to argue successfully that as a result of these accounting changes, there is now surplus revenue of the Commonwealth which must be distributed to the States, pursuant to section 94 of the Constitution.

If this were the case, one aspect of the Founders' vision would have renewed life. However, in other important respects, these recent legislative and administrative changes have the potential to undermine the Founders' vision. In particular, one of the central conclusions of this Paper is that the Parliament is at risk of relinquishing its ultimate control over Commonwealth financial matters to the Executive.

Specifically, the Paper discusses the effect which the current form of annual Appropriation Acts has on the Parliament's ability to scrutinise and control the Executive's expenditure of Commonwealth money. It notes that the annual Appropriations Bills introduced for 1999–2000, were the first to be structured to provide appropriations according to agency 'outcomes', rather than as particularised line-items. These outcomes are typically couched in such broad terms that it is possible for the Executive to accommodate, during the currency of an appropriation, totally new activities that Parliament may not have contemplated at the time it was considering and approving the Appropriation Bills.

Furthermore, it seems that the breadth of these outcomes has the potential to diminish the meaningfulness of the Senate's rights, under section 53 of the Constitution, in relation to proposed laws appropriating money.

The Paper also notes that in recognition of the need to be able to fund Commonwealth agencies' long-term commitments (e.g. provisions for asset depreciation; employee entitlements such as long service leave; etc), appropriations for the ordinary annual services of the Government no longer lapse at the end of the financial year. As a result it appears that the Executive will be entitled to utilise amounts unspent in an ever-growing number of non-lapsed appropriations of former years. Further, the development and proliferation of 'special accounts' will facilitate this development.

The Paper concludes that these tendencies may have the potential to dilute Parliament's ultimate power—the power to prevent the Executive from continuing to function when denied supply—and especially diminish the roles of the Senate.

Introduction

The founders of the Commonwealth, indeed, had a Vision for their creation; and the Constitution is the operating manual by which that Vision is turned into reality. It follows that the Constitution must be approached not simply as a collection of individual rules and declarations, but as a cohesive, integrated framework of checks and balances by which the interests of the 'players'—the bicameral Parliament, the Executive, the States and the Judiciary—are established and maintained. It is that cohesiveness which allows certain provisions' *reasons and purposes* to be discerned from, or buttressed by, other related provisions. This is especially so for the Constitution's financial provisions.

It is not for nothing that the side of the Parliamentary Chamber occupied by the Government is sometimes referred to as 'The Treasury Benches':

> almost every executive action of Government ultimately has a financial implication. And since section 56 of the Constitution provides that no law for an appropriation of money can pass unless the purpose of the appropriation has been recommended to the House by the Governor-General—who acts on the advice of the Executive—it is only the Executive which has the use of the Commonwealth's financial resources.[1]

Custodianship of the authority to raise and spend money is the core of *being* the Executive. Correspondingly, that authority carries with it certain inherent responsibilities of stewardship.

The basic tenets of Commonwealth financial governance have a long (British) genealogy, reflecting, in particular, the relationship that had evolved and matured over more than 800 years, between the Parliament and the Crown [the Executive]. That relationship is characterised by two fundamental constraints on the Executive:

- all money actually received by the Executive is to be brought to account as one pool, and
- spending by the Executive from that pool can only be as sanctioned by Parliament.

These two imperatives are the threads that run through laws expressly dealing with the Executive's custodianship, accounting and control of its financial resources. Those laws, together with parliamentary processes and conventions, compel the Executive to be audited and held accountable for its stewardship.[2]

Historically, government was once purely the Sovereign's business and the grants of Parliament to 'supply' the Crown were merely aids to assist the King in defraying his expenses, including those of his Government. In medieval government, everything depended on the King—upon his prerogative and direction. Unless, at the time, the House of Commons happened to entertain some particular jealousy of the Crown and its Ministers, the sums granted were left entirely to the Sovereign's disposal. During the time of the Stuart Kings, however, the animosity of the House of Commons towards the Crown reached such heights that, by the use of its legislative and inquisitorial powers, it imposed its will on the Crown and achieved control over the raising of revenues by taxation and the purposes on which those revenues would be spent. Eventually, parliamentary control extended to the Crown's being held accountable for its actions.

This path of governance evolved over 'generations' of Parliaments and Sovereigns, and has brought us to the substance of responsible government, such as we enjoy today. But the path wends ever on, across new and very different terrain. The ways that Parliament and the Executive operate and interact have never been static; consequently, change is both inevitable and necessary. It is a sobering thought, nevertheless, to consider whether, in responding to contemporary needs and urges to refine the financial framework of government, we might be a little too quick to dismiss, as arcane, the accumulated wisdom and meaning already reflected in the framework. To choose a visual metaphor: we can be grateful that air travel today has been refined well beyond those quaint flying machines that existed in the early part of the 20th Century. Yet compliance with the same basic laws of aerodynamics that the Wright Brothers first successfully harnessed in 1903 is what keeps the modern jetliner from falling out of the sky.

The Vision's Focus

Unlike the pioneering Wright Brothers, the architects of our system of financial governance already had 'flying hours' in the form of experience of other systems—mainly those of Britain, Canada and the United States and, of course, our own Colonial systems, including New Zealand. Our Constitution's articulation of the Commonwealth's financial arrangements is deliberately confined to the higher level principles.

This is evident from the Convention debates in relation to the clause which became section 83 of the Constitution. By the time the Constitution Bill reached the Melbourne Convention of 1898, that clause read:

> No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law and by warrant countersigned by the Chief Officer of Audit of the Commonwealth.

In moving that the requirement for a warrant countersigned by the Chief Officer of Audit should be removed, Sir George Turner (Vic.) said that the matter should be left:

> entirely to the Federal Parliament, as the exigencies of the case may, from time to time, require to pass a law providing all the necessary checks. As we have done in our respective colonies, it can pass an Audit Act. [3]

It was this view which ultimately prevailed. Under this approach Parliament would flesh out those broad constitutional principles with legislation to give them their operational substance: the rights, powers, obligations and duties of those who would be involved in the day-to-day financial dealings of government. So it was that the first Parliament passed the *Audit Act 1901* as its fourth piece of legislation.

True to his vision, Sir George Turner, as the Commonwealth's first Treasurer, was the architect of that Act. He had drawn extensively on the form and content of the Victorian Colonial Audit Acts of 1857 and 1859, which, themselves, had been groundbreaking laws, in that they were the first *composite* Audit Acts (specifying both the appointment of Audit Commissioners and the principal financial procedures of government) enacted in any jurisdiction under the British Crown—preceding even the United Kingdom's Audit and Exchequer Act by several years. In the remaining years of the 19th Century, the other Australian Colonies all came to adopt the Victorian model for themselves. Consequently, in the 1901 Commonwealth context, while the Audit Act was new, many of the concepts and procedures it set down were familiar to those who would come within its purview.

The Commonwealth Audit Act, like its Victorian antecedent, was a composite Act: it provided for the establishment of the office of Auditor-General, setting down his role and extensive powers in the audit and examination of, and reporting to Parliament on, the Executive's finances; and it set down the operating rules for the financial procedures of government, by which the Executive would be appropriately constrained and empowered.

The Auditor-General

For many years the primary function of the Auditor-General was the traditional audit function of checking and certifying financial statements. In 1976, the Royal Commission on Australian Government Administration recommended that the Auditor-General be 'empowered to conduct efficiency audits … extending to all agencies which he audits in respect of financial regularity'.[4] In accordance with this recommendation, the Audit Act was amended in 1978 to expand the Auditor-General's functions to include the conduct of 'efficiency audits'. From an early stage, the Auditor-General took the view that efficiency audits should include an evaluation of the effectiveness of administrative actions taken by officials in achieving program objectives.

In 1989, the Joint Committee of Public Accounts issued its report—*The Auditor-General: Ally of the People and Parliament* which reviewed the Office of the Auditor-General in light of changes which had occurred in Commonwealth financial administration since Federation. The decision to replace the Audit Act stems from the then Labor Government's response to that Report.

The *Auditor-General Act 1997* commenced on 1 January 1998 as part of that parcel of legislation, including the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*, which provides the framework for the financial management of the Commonwealth, its agencies and companies. (This legislation is discussed in greater detail at pages 30–32).

The Auditor-General Act emphasises the independence of the Auditor-General and the Australian National Audit Office (ANAO) from the Executive Government. The status of the Auditor-General and his relationship with Government and Parliament had always been ambiguous, but section 8(1) of the Act clarifies the matter by providing that the Auditor-General is an independent officer of the Parliament.

Significantly, section 8(4) of the Act provides that subject to any Commonwealth law, the Auditor-General has 'complete discretion in the performance or exercise of his functions and powers', and in particular is not subject to direction from anyone in relation to whether or not a particular audit is to be conducted and the priority to be given to any particular matter. So, subject to any specific statutory obligations or limitations, the Auditor-General determines the when, how and if of the ANAO's duties.

Section 10 of the Auditor-General Act imposes one such limitation by requiring the Auditor-General when performing functions to have regard to the audit priorities of the Parliament as determined by the Joint Committee of Public Accounts and Audit (JCPAA). This requirement reinforces the close links which the ANAO has traditionally had with the Public Accounts Committee. One of the central duties of that Committee is to examine all reports of the ANAO and report to both Houses of Parliament on any items or matters in those reports which it thinks should be drawn to the attention of Parliament.

Joint Committee of Public Accounts and Audit

The JCPAA (until 1998, known as the Joint Committee of Public Accounts) is one of two joint committees (the other being the Parliamentary Standing Committee on Public Works)[5] empowered by legislation of the Commonwealth Parliament in the early years of Federation to help scrutinise and report on the Commonwealth's financial management. Initially established by the *Committee of Public Accounts Act 1913*, its existence is now regulated by the *Public Accounts and Audit Committee Act 1951*. In addition to its functions with respect to the ANAO's reports, the Committee's responsibilities under section 8 and 8A of that Act include examining the financial affairs of authorities of the Commonwealth, and increasing parliamentary and public awareness of the financial operations of government. The Committee is also responsible under section 63 of the *Public Service Act 1999* for approving, on behalf of the Parliament, the guidelines which Commonwealth Departments must comply with when preparing their annual reports.

A Carrot for the Vision

At the beginning of the 21st Century, it is easy to lose sight of the fact that Federation came about largely because the Australian Colonial Governments accepted that most of their suspicions, jealousies, concerns and fears for their long-term continued fiscal survival would be accommodated through the avenues that the proposed Constitution promised.

It was for the purpose of honouring that compact that the Constitution's relevant financial provisions were framed towards the one safeguard so vital to the prospective States: that any surplus revenue of the Commonwealth must be distributed to them as required by sections 87, 89, 93 and 94. In this light, the structural cohesiveness adopted by the framers, whereby the interests of all the Constitution's 'players' are astutely balanced, can only be admired.

Connecting the Constitution's Financial Provisions

Section 94, which was intended to commence operating after the initial 'transition' periods of the Commonwealth's existence, provides:

> After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

The concept of 'surplus revenue' of the Commonwealth was envisaged to be calculable as:

> (Revenues Received)—(Payments out of Revenue)

and the Constitution contains provisions to safeguard both of these types of transactions.

Receipts

At any time, the Commonwealth could have in its possession money it had originally received from three possible sources:

(a) Revenues of the Commonwealth

(b) Loans to the Commonwealth

(c) Money over which the Commonwealth has no ownership in its own right, but holds in a trustee capacity for someone else.

Receipts of Revenue

Since the outcome would be the distribution to the States of net (i.e., surplus) revenues, it was important for the Constitution to ensure that a transparent distinction could be maintained between those receipts that were in the nature of revenues, and those that were non-revenue receipts. The better view is that the terms of section 81 of the Constitution recognise this distinction. Section 81 provides:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund (CRF), to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Viewed in isolation, it might be thought that the reference to 'revenues or moneys' in section 81 is broad enough to cover both revenue receipts and non-revenue receipts such as loan payments. However, as McHugh J noted in the *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[6] there is a 'widely held view that loan moneys do not form part of the CRF'. The main considerations supporting this view are set out by Quick and Garran, in the *Annotated Constitution of the Australian Commonwealth* who made the following observations while reviewing the drafting history of section 81:

> As originally drafted and passed in 1891, the clause read:
>
> > All duties, revenues and moneys … to be appropriated for the public service of the Commonwealth … subject to the charges provided by this Constitution.
>
> At the Adelaide session, 1897, the clause was introduced in the same form. On Sir John Downer's motion, the words 'duties' and 'moneys' were omitted, to make it clear that loan moneys do not go to the CRF. (Conv. Deb., Adel., pp. 84–5.) At the Melbourne session, there was a general debate on the report of the Finance Committee (p. 197, *supra*). A suggestion of the Legislative Council of Tasmania, to restore 'and moneys' was negatived. (Conv. Deb., Melb., pp. 774–900.) Drafting amendments were made before the first Report: The words 'or moneys' were inserted, the word 'purposes' was substituted for 'public service,' and the words 'and liabilities' were inserted, to make it clear that the payments to the States, under sections. 89 and 93, were included.
>
> In the corresponding clauses of the Constitution of the Australian colonies—and, it is believed, of all British colonies—the word 'moneys' is not used; the usual words associated with 'revenues' being 'duties', 'taxes', &c. In this Constitution the word 'moneys' was struck out in Adelaide to make it clear that loan moneys were not included, and a suggestion to restore it was negatived at Melbourne for the same reason (see His. Note, *supra*); but at a subsequent drafting stage it was reinserted for some reason that is not apparent. It cannot, however, be supposed that the Convention meant that loan moneys should be paid into the CRF. (See Conv. Deb., Melb., p. 1114.) The generic word "moneys" must be controlled by the preceding specific word 'revenues', and limited to moneys in the nature of revenue. This is a well-known and sound principle of construction. (See Maxwell, Interpr of Statutes, chap. XI., sec. V.)

> The universal constitutional practice, not only of Great Britain, but of all the British colonies, to keep loan funds distinct from revenue funds, is the strongest possible corroboration of the evidence afforded by the debates, that there was no intention whatsoever of departing from established usage in this respect.[7]

However, as McHugh J indicated in *Northern Suburbs Cemetery case*, the widely held view that loan moneys do not form part of the CRF has not gone unchallenged.[8] Further, in the *Northern Suburbs Cemetery case* itself, Brennan J said that '[A]s it stands, s. 81 appears to stamp the character of the C.R.F. on all Commonwealth revenue raised and all moneys received by the Executive Government irrespective of source'. However, Brennan J considered it unnecessary to determine the categories of money which form the CRF.[9]

Accordingly the matter does not seem to be beyond argument, but the dominant view is that loan moneys and, by parity of reasoning, trust moneys, should not reside in the CRF. The considerations referred to by Quick and Garran which support this view are reinforced by the fact that the Audit Act—reflecting contemporary insights at Federation—established the Loan Fund (s. 53 of the Act) and the Trust Fund (s. 60 of the Act) to accommodate and account for non-revenue receipts separately from, and outside of, the CRF established by section 81 of the Constitution. The following considerations are also relevant:

- any intention (or need) to hold, and account for, receipts of non-revenue money within the CRF, would have rendered section 81 a *completely superfluous provision* from the outset, since the homogeneous pool holding all manner of receipts, regardless of type, would simply be synonymous with section 83 'the Treasury of the Commonwealth'. In this respect as outlined at p. 10, it is clear that 'the Treasury of the Commonwealth' comprises *any* fund or sum of money standing to the credit of the Commonwealth including loan or trust money

- in that event, effective control over the Executive could have been established solely through a slightly modified section 83—such as: 'All moneys received by the Executive Government of the Commonwealth shall comprise the Treasury of the Commonwealth, from which no money shall be drawn except under an appropriation made by law', and

- even the fact that section 81 established a 'CRF', rather than the inherently broader concept of a 'Consolidated Fund', adopted by other jurisdictions, underscores the particular role its framers had in mind.

Section 81 establishes a CRF to be '… appropriated for the purposes of the Commonwealth …'. Successive Commonwealth Parliaments have acted on the view that the words 'for the purposes of the Commonwealth' do not limit the purposes for which appropriations may be made. In particular, the power to appropriate is not limited to purposes related to those subject matters over which the Commonwealth has specific legislative and executive power, for example interstate and overseas trade and commerce, defence.

There is no High Court decision which clearly and authoritatively establishes this principle. Indeed, in *Attorney-General (Vict); Ex rel Dale v The Commonwealth (The Pharmaceutical Benefits Case)*[10], a majority of the High Court expressed support for the view that the appropriations power is limited to the appropriation of money for purposes related to those matters over which the Commonwealth otherwise has power under the Constitution.

However, the Commonwealth can and has drawn comfort from the subsequent decision in *Victoria v The Commonwealth & Hayden (The Australian Assistance Plan Case)*[11] in which a majority of the High Court rejected a challenge to Commonwealth funding of a scheme which did not relate to any specific head of Commonwealth power. The Commonwealth also takes some comfort from the doubts which exist in relation to the justiciability of issues in relation to appropriations. In this respect, in *Davis v The Commonwealth*[12], Mason CJ, Deane and Gaudron JJ said that the *Australian Assistance Plan Case* was 'an authority for the proposition that the validity of an appropriation act is not ordinarily susceptible to legal challenge'.

Limiting the Senate's Powers over Revenues

It is consistent with the democratic pre-eminence of the House of Representatives that it should possess certain superior rights over the Senate regarding proposed laws to raise and spend money. Section 53 of the Constitution sets specific boundaries in respect of those rights.

It is interesting, however, to look beyond the notion of the Senate's 'inferior status' on money bills and to regard the limitations imposed by section 53 as being connected to the surplus revenue outcome of section 94. That is, it might be supposed that the Senate, having been established and structured as the States' House, could, occasionally, favour a maximisation of surplus revenue, in the interests of the States, rather than always following the broader national interest. It seems reasonable to assume that such a possibility would have occurred to the framers of the Constitution. To counter any folly the Senate might entertain in that direction, section 53 provides (in part), from the revenues perspective:

> Proposed laws … imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to … impose taxation, by reason only of its containing provisions for the imposition … of fines or other pecuniary penalties, or for the demand or payment … of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation …
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

While the first two paragraphs are clear enough in constraining the unwarranted generation of surplus revenue, there is an ambiguity about the third paragraph. At one level—that of preventing the Senate (through proposed laws that it *is* permitted to amend) from seeking to increase revenues to create a bigger surplus for the States—it has an obvious meaning: the Senate shall not amend any proposed law so as to increase *non-taxation* revenues, such as fees, charges, fines, penalties, etc. Yet the first paragraph of section 53 allows proposed laws addressing these types of revenues to *originate* in the Senate, which seems to defeat any safeguard afforded by the third paragraph. Quick and Garran describe that part of the first paragraph of section 53 as a 'compromise':

> This part of the section embraces a compromise, with reference to the originating power, which was recommended to the Legislative Assembly of Tasmania. The Tasmanian amendment, drafted by the Hon. Inglis Clark, Attorney-General of that colony (now Mr. Justice Clark), was founded on the practice recognised by the House of Commons, and thus explained by [Erskine] May:
>
>> The claim to exclusive legislation over charges imposed upon the people was formerly extended by the Commons to the imposition of fees and pecuniary penalties, and to provisions which touched the mode of suing for fees and penalties, and to their application when recovered; and they denied to the Lords the power of dealing with these matters. The rigid enforcement of this claim proved inconvenient; and in 1849, the Commons adopted a standing order, based on a resolution passed in 1831, which gave the Lords power to deal, by bill or amendment, with pecuniary penalties, forfeitures or fees, when the object of their legislation was to secure the execution of an Act; provided that the fees were not payable into the exchequer, or in aid of the public revenue; and when the bill shall be a private bill for a local or personal act. And the Commons also agreed to another standing order, whereby they surrendered their privileges so far as they affected private and provisional order bills sent down from the House of Lords, which refer to tolls and charges for services performed, not being in the nature of a tax, or which refer to rates assessed and levied by local authorities for local purposes. The practical result of these standing orders is a waiver by the Commons of the privileges with respect to pecuniary penalties in public and in private bills. Fees imposed in a public bill can only be dealt with by the Lords provided they are not paid into the exchequer; whilst it is competent for the Lords by a private bill to impose fees and tolls for rendered services, and to authorise the levy of rates to be assessed and levied by local authorities for local purposes. (May's Parl. Prac. 10^{th} Ed., p. 547)
>>
>> I am quite prepared to go in the direction indicated by the amendment of Mr. Inglis Clark, which will not only make things a good deal more definite, but is a step beyond the Bill of 1891, by way of making the legislative machinery work more smoothly, and securing to the Senate that degree of individuality in matters of this kind, of which it would be a scandal to deprive them through some matter of construction. (Mr. E. Barton, Conv. Deb., Syd., 1897, p. 474.).[13]

Yet the important proviso in the British model on which the 'compromise' was based, namely, that '… fees are not paid into the exchequer …' actually has no comparison in the

Australian constitutional context, given that section 81 requires **all** revenues to be brought to account in the CRF. This 'compromise' may simply be an unfortunate flaw in the Constitution's cohesiveness.

Receipts of Non-revenues

The Audit Act, in creating the Loan Fund (s. 55), required the Treasurer to keep a separate account of '… all moneys which shall be raised by way of loan upon the public credit of the Commonwealth …' and to record these receipts '… under such separate heads as are specified in the several Loan Acts under the authority whereof the moneys were raised.'

The Act's provisions in creating the Trust Fund (s. 60) had a similar thrust: a separate account was to be kept '… of all moneys which shall be placed to the credit of that Fund under such separate heads as may be directed by the Treasurer'. Sections 27 and 28 of the Act described the types of 'private moneys' that were required to be credited to the Trust Fund.

Establishing the Loan and Trust Fund as separate accounting constructs from the CRF, could only have been intended to ensure that receipts into, and payments out of, Revenue would remain transparent for the calculation of the surplus.

The Executive's Handling of Receipts

Notwithstanding the accounting distinctions applying to receipts being credited to the CRF, Loan Fund and Trust Fund, the Audit Act recognised that money per se was the medium. The Act required that officials charged with the responsibility for the care, custody and control of money from Loan Fund and Trust Fund receipts should, as far as practicable, deal with it as they would money destined for the CRF. The Act gave practical substance to the Executive's responsibilities for dealing with money received in two main respects:

- first, it imposed stewardship responsibilities on the Treasurer as the ultimate custodian of the Commonwealth's financial resources. The bank accounts to hold the Commonwealth's money would be opened by, or under the authority of, the Treasurer. To that end, the Act provided a regulation-making power for carrying out the provisions of the Act and, as well, empowered the Treasurer to give directions to any person in any department who was involved in financial operations on behalf of the Commonwealth. Aligned with this, the Act imposed obligations on the Treasurer to periodically report to Parliament on the Commonwealth's financial activities, and

- secondly, it set down the regime for the handling, banking and transmission of 'public moneys' (all money in the Commonwealth's possession—including the paradoxically described 'private money' destined for the Trust Fund). The rules ensured that money received by the Commonwealth would actually flow into the central bank accounts (the 'Commonwealth Public Account') maintained by the Department of the Treasury on the Treasurer's behalf. The rules also required that, simultaneously with these movements of the cash through the banking system, officers who, in their various departments, had collected and transmitted that money, must send the relevant data to the Department of the Treasury to enable it to bring to account, in a central ledger, the nature of the receipt—revenue, loan or trust money—properly credited to their relevant 'heads', where necessary.

Payments

Once money received had been brought to account in its appropriate Fund, the constraints and processes for making payments out of any of the funds were identical. All payments were subject to section 83 of the Constitution:

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

In *Northern Suburbs Cemetery case*, Mason CJ, Deane, Toohey and Gaudron JJ noted that section 83 'expresses the principle that parliamentary authority is required for the expenditure of any moneys by the Crown. The reference to 'the Treasury of the Commonwealth' extends to any fund or sum of money standing to the credit of the Crown in right of the Commonwealth'.[14]

The 'Treasury of the Commonwealth' does *not* refer to the Department of the Treasury, since the establishment of departments of State is an administrative power of the Governor-General, under section 64 of the Constitution. Rather, the term should be taken as a reference to the ancient concept of the 'King's Treasure'—all the money actually held by the Executive in the one pool (equating to the Funds' credit balances), that was available, at any point in time, to satisfy payments against appropriations.

Appropriations

Appropriations are customarily thought of as the 'setting aside' or 'segregation' of money.[15] To an extent, there was a semblance of that in the first two decades after Federation. Until the Department of the Treasury adopted a centralised payments system in 1919, procedures under section 33 of the Audit Act entailed the periodic physical distribution of *advances* of money to departments to meet anticipated calls against appropriations. But, essentially, an appropriation should be regarded as a law in which Parliament grants the Executive permission to access the 'Treasury of the Commonwealth', to draw money as payments for a purpose specified in the appropriation law. Any 'setting aside' does not, in fact, occur until the Executive *acts to make a payment* of the money to a payee for the purpose so specified. In other words, an appropriation empowers the Executive to utilise its money; but it does not affect the classification or status of the available money *prior* to utilisation. [It is, in fact, common for particular appropriations to specify amounts that, in the event, are underspent, or not spent at all; any money that was not spent was never 'segregated'.]

To be effective, an appropriation law *must always*:

(a) specify the purpose to which the money would be applied,[16] and

(b) allow identification of the Fund-source being appropriated.

The law *may*, depending on the nature of the appropriation, also specify:

(c) a particular amount of money as the limit applicable to the purpose [but note that, even where no amount is specified, an appropriation law must always lead to a *calculable* amount—the appropriation cannot be totally open-ended],[17]

(d) conditions attaching to the payment purpose [or calculation of amount], and

(e) a timeframe within which the appropriation remains available.

An appropriation law is the key that opens the door of 'the Treasury'—but that is all it does.[18] It does not, of itself, *authorise* the Executive to spend. For example, an Appropriation Act might include an item for the costs of a department's purchase of furniture. But the Appropriation Act is not the source of legal authority to buy furniture: this comes from the executive power of the Commonwealth under section 61 of the Constitution and the inherent powers of the department's Minister, conferred by section 64 of the Constitution (the powers to 'administer … departments of State'). The action taken to purchase the furniture is an exercise of the constitutional Minister's power; accessing the money to pay for it is merely a consequence of an available appropriation. Similarly, a Pensions Act may, itself, contain a general provision appropriating money for payments of benefits under that Act. But it will be other provisions in the Act by which a decision-maker is empowered to determine a person's eligibility and level of entitlements; spending against the appropriation will occur only as a consequence of the decision-maker's determinations.

At the time the Constitution was being framed, appropriations were considered to fall into three categories:

- appropriations to meet the costs and expenses of maintaining the 'ordinary annual services of the Government' (described by Quick and Garran as including '… the various public departments manned and equipped to carry on the general work of the Government …'),[19] for which the Executive would seek Parliament's authority each year. The appropriations have the characteristics described in sub-paragraphs (a), (b), (c) and (e) above. Their purposes were specified in detail; the CRF was identified as the source from which the money to meet them would be drawn; the amount available for each purpose was specified; and the appropriation was operative only for the duration of the financial year

- annual appropriations to meet payments for purposes that were not 'ordinary' services of the Government—such as payments to the States; capital works; etc. These, in practice, have the same four appropriation characteristics as appropriations for the ordinary annual services of the Government, but are regarded as a separate category, because they would be presented each year to Parliament in a separate annual Appropriation Bill that could be amended by the Senate, and

- permanent appropriations to meet specific obligations imposed by the Constitution or by particular Acts of Parliament. Generally, they have characteristics (a), (b) and (d). Conditions pre-requisite for payment would certainly be identifiable, but the appropriations need not be constrained by specified limits on amounts or time.

Another interesting categorisation of appropriations is whether they are 'compulsory' or 'permissive', according to the terms of the law that Parliament has passed which contains the appropriation. In the previous example of the purchase of furniture, that appropriation would be classed as 'permissive' because the annual Appropriation Act would have allowed, but not required, the Executive to spend on furniture. The Constitution's requirement for the distribution of surplus revenue to the States, however, would qualify as a 'compulsory' appropriation, as would the Audit Act's provisions for the salary of the Auditor-General and payments out of the Trust Fund in accordance with laws governing the disposition of trustee moneys. The payment of entitlements to the eligible pensioner, in the other previous example, would also be a compulsory appropriation.

For an amount of money to be 'drawn from the Treasury of the Commonwealth' in accordance with a law appropriating it, a sufficient credit balance (in accounting terms) must be available within the Fund-source to meet the payment—for just as it is impossible to continue to draw fuel from an empty tank, there can be no such thing as a negative balance in a Fund or Fund component:

- in the case of an appropriation of revenue, the CRF, being 'consolidated' in character, it is the total credit balance of that Fund that is taken to be available to meet payments against appropriations of revenue, and

- for the Loan Fund and Trust Fund, however, since they were made up of component 'heads' (according to the purposes for which money was received), there needed to be a sufficient credit balance in the particular 'head' proposed to be drawn down to meet the payment against an appropriation of that head.

Since payments could not be made from an empty Fund the Loan Fund was used extensively as the primary appropriation source to meet the Commonwealth's capital works and Defence expenditure, thereby relieving the effects of cyclical pressures that would inevitably occur in the receipts and payment patterns of the CRF, when it would otherwise have been likely to run dry. The Senate could have no quarrel with this arrangement, since anything that took the pressure off the CRF could only help to maximise the levels of surplus revenue.

A 1906 amendment to the Audit Act (section 62B) allowed money standing to the credit of the Trust Fund (and not immediately required for the purposes of that Fund) to be invested in Commonwealth securities. The 'purchase' of securities generated credits to the Loan Fund, strengthening its capacity to help keep the CRF in positive balance.[20]

Limiting the Senate's Powers over Appropriations

Section 53, constraining the Senate in relation to revenue raising, also limits its capacity to interfere with the Executive's spending plans. But whereas, for revenues, section 53 presents reasonably discernible links to the safeguard of negating any potential bias on the Senate's part towards maximising surplus revenue for the benefit of the States, those links seem tenuous in so far as spending is concerned.

Section 53 provides (in part), from the spending perspective:

> Proposed laws appropriating revenues or moneys … shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys … by reason only of its containing provisions for the … appropriation of fines or other pecuniary penalties, or for the … appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws … appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

Preventing the Senate from originating proposed laws that would lead to the Commonwealth's *spending* money, is broadly consistent with its presumed disposition towards maximising the levels of surplus revenue. However, any appropriation *origination* powers that might otherwise have been given to the Senate could hardly have delivered any unwarranted favouring of States' interests. Only the Executive may introduce proposed laws appropriating revenue or moneys (through the operation of section 56, which makes a pre–requisite, for passage of such a law, a message from the Governor-General to the originating House, recommending the purpose of the appropriation). In this light, there seems no substantive reason for prohibiting the Senate's *originating* proposed laws for appropriations, other than to enshrine the conventions relating to the respective powers of Upper and Lower Houses over the raising and spending revenues.[21]

The second paragraph of section 53 was crucial for its time:

- expenditures on the 'ordinary annual services of the Government' then comprised the bulk of appropriations. To allow the Senate the power to amend—assume downwards—proposed laws covering appropriations of this kind, could, indeed, have had a marked impact on the eventual levels of surplus revenue, and

- but more importantly, these were the appropriations that provided the wherewithal for the Executive to perform its functions. To expressly empower (invite) the Senate to intervene in the Executive's capacity to operate could seriously undermine, if not destroy, the 'balance' of the bicameral system within which the People's choice of Executive Government was translated through the House of Representatives, not the Senate.

A countering element of that 'balance', however, can be found in section 54, which prevents the Executive/House of Representatives from 'tacking' onto bills proposing appropriations for the ordinary annual services of the Government (which the Senate may not amend), provisions that do not relate to those appropriations.[22]

Much Parliamentary debate has occurred since Federation over the meaning of 'the ordinary annual services of the Government'. Discussed in more detail later in this paper.

Within the range of appropriation laws that the Parliament might enact, the third paragraph of section 53 still gave the Senate the scope to exert influence over spending. By expressly excluding *only* proposed laws for the ordinary annual services of the Government from amendment by the Senate, it meant that proposed laws for:

- annual appropriations that were not 'ordinary services' (such as for capital works; grants to the States etc.)

- appropriations of fines, penalties, fees, etc.

- permanent—also termed as 'standing' or 'special'—appropriations (such as for Ministers' salaries; payments out of the Loan Fund and Trust Fund etc).

could be amended by the Senate.[23]

The Executive's Handling of Payments

To support its obligations to uphold the integrity of section 83, the Executive established, through the *Audit Act 1901*, a framework of procedural controls over disbursements of money:

- first, it established the 'Governor-General's Warrant' system that ensured that any money proposed to be *made available to departments for spending* was supported (as to purpose, conditions, amount and timeframe) by an available appropriation. The warrant system was a control device with a very long Imperial history—the Royal Warrant, or more accurately termed, in the Exchequer context, the 'Sign Manual Warrant'. The Audit Act (s. 32) provided that the Treasurer would prepare an instrument containing the calculations of the amounts of money likely to become due and payable during the forthcoming period (of up to three months) against the various categories of appropriation. He would sign it and give it to the Auditor–General, who would check it to ensure that the amounts were in accordance with available appropriations, both as to financial limits and purposes. The Auditor–General, if he was happy with the document, would countersign it and return it to the Treasurer, who would then submit it to the Governor-General for his approval and signature. The Audit Act (subsection 32(4)) provided:

– such instrument when countersigned by the Auditor-General and approved and signed by the Governor-General but not otherwise shall be the warrant for the issue of the drafts and cheques hereinafter mentioned.

The terms of the Governor-General's Warrant provided authorisation to the Department of the Treasury to issue, on the Treasurer's behalf, amounts out of the 'Commonwealth Public Account' (the central Treasury bank accounts) for payment as advances into the various departments' bank accounts on which those departments' designated officials would then be able to draw to make payments. [As a further reflection of the Treasurer's responsibilities as the custodian of the Commonwealth's financial resources, the various departments' officials who were authorised to make payments out of those bank accounts exercised a legal authority conferred on them by the Treasurer, rather than a power from their own Minister or Department Secretary.], and

- secondly, it set down the regime (s. 34) to ensure that any money proposed to be *actually spent by departments* would not be spent by them unless the transaction had been duly approved as to purpose; authorised as to availability of uncommitted appropriated funds; and certified as to correctness of the details of the claim. [It is interesting to note that the Act allowed the Treasurer to permit payment of accounts that had not been through this usual approval, authorisation and certification process, if he was satisfied that 'undue delay' would be caused. Even more interesting, however, is the fact that the complementary enabling subsection of the Act (34(4)) that deemed such payments to have been duly authorised where they had been 'directly sanctioned by the Treasurer' was to be used, over the next 78 years, as the purported source of statutory power of the Treasurer to approve *act of grace* payments.]

A Salutary Tale of the Light-fingered Lieutenant

The true test of effectiveness of any law, rule or procedure is whether it works under conditions of extreme stress. Anyone responsible for developing important operating frameworks needs to be able to envisage a variety of possible 'worst cases', to gauge how things might work in other than the best of times.

As already explained (in connection with the Governor-General's Warrant system) the operating procedures originally set up under the Audit Act's framework included a system of advances—periodic payments by the Department of the Treasury from the Commonwealth Public Account into decentralised departmental bank accounts, out of which designated officials in each department would then make payments for claims arising over the ensuing accounting period. The conditions of extreme stress for this procedure came in the form of Defence mobilisation during the First World War.

It was, of course, not only the advances system that was tested during the War. The whole fabric of Defence's (i.e., the Army's) internal controls and the financial and accounting procedures for the administrative support of the logistics and personnel functions were found to be sub-optimal in may respects. Considering the enormity of the task that confronted Defence so suddenly and rapidly in 1914 and 1915, however, it is a credit to the skills and professionalism of many of the military and civilian employees that Defence's whole administrative structure did not collapse under the strain.

The growing instances of poor management in Defence led to the Government's setting up a Royal Commission in 1917. The Letters Patent, issued by the Governor-General on 2 July of that year, required the Commissioners—William George McBeath (Chairman); James Chalmers; and Frank A. Vercoe—to inquire and report on the following matters in connection with Departments of the Navy and Defence:

(a) Business Administration generally, including contracts and supplies

(b) Accounting and Paying Systems

(c) Industrial Establishments, and

(d) Relations with the Department of the Treasury and the Auditor-General.[24]

The Reports of the Royal Commission on Navy and Defence Administration were comprehensive and led to a number of far-reaching improvements in the way those departments functioned. [They are worthy of study, even today, as insights into the causes and consequences of management failure.]

The Second Progress Report (of 14 February, 1918) addressed 'Business Administration generally, including contracts and supplies' in relation to the Department of Defence. It contained a 'Report of the Advisory Accountants'—Thomas Brentnall, FCPA and A. E. Barton FCPA—whom the Commissioners had engaged to examine and report on Defence's accounting systems. Their report set out, in some detail, a major fraud that came to be known as the 'Howell-Price Case'.[25]

At the commencement of the war, Lieutenant D. C. W. Howell-Price was attached to the Administrative and Instructional Staff at Victoria Barracks, Sydney and was, in addition, Adjutant of a Militia Unit—the 9th Light Horse Regiment. His duties on the

Administrative and Instructional Staff meant that he was, in effect, the Deputy Assistant Adjutant-General in the 2nd Military District (covering NSW), consequently, much of the administrative work of that section came to his notice. After the outbreak of the war, various elements of the Militia within NSW were mobilised and the work of issuing orders for mobilisation was performed by the office of the Assistance Adjutant-General.

These orders set out which units, squadrons or sections were to be mobilised and the dates of mobilisation and demobilisation. Copies of these documents went to the 2nd Military District Pay Office. From time to time, such orders covered various squadrons of the 9th Light Horse, of which Howell-Price was Adjutant. While the Regimental Office was located at Victoria Barracks, the squadrons were scattered throughout country NSW, and the Commanding Officer was invariably engaged in the country. Unit administrative matters, therefore, fell to the Adjutant.

Various squadrons of the 9th Light Horse had been mobilised for the period between 25 February and 20 April 1915. Pay sheets, duly signed by the Commanding Officer and the Adjutant were submitted to the District Pay Office which drew cheques to cover the men's pays for that period. Under the Regulations, these cheques should have been drawn for payment to the Unit's Banking Account, from which, in turn, the necessary cash for payment would have been obtained by a cheque drawn on that account and signed and countersigned by the C.O. and the Adjutant. This procedure was not followed, however, and the District Pay Office cheque was drawn 'open' and handed over to Howell-Price as Adjutant. In this way, cash was obtained for the pays but without the safeguards provided by the Regulations. This breach in procedures paved the way for Howell-Price to perpetrate his later fraud.

The essence of that fraud was that he submitted a further series of pay sheets to the District Pay Office, forging the C.O's signature, and purporting to show that squadrons of the 9th Light Horse had been mobilised for some 10 months longer than they actually had been. The District Pay Office, without checking the claim against their copies of the circulated mobilisation orders, again, improperly issued 'open' cheques to Howell-Price, who then cashed them for his own use and benefit. Following the appointment of a new Paying Officer at the District Pay Office who was concerned that Howell-Price had furnished no acquitted pay sheets (those that the men sign upon being paid), he did some 'forensic' accounting—comparing the payments actually made, since the outbreak of the war, pursuant to the submitted pay sheets for the 9th Light Horse, to the payments that should have been made according to the issued mobilisation orders for the Unit. He discovered that, of the actual payments totalling about £70 000, only about £3000 were supported by mobilisation periods. This led to Howell-Price's arrest in connection with pay sheet frauds.

The Advisory Accountants wryly state in their Report: 'On two occasions, in August 1915, the Regulations were inadvertently complied with, and the amounts of the [Pay Office] cheques were lodged to the credit of the unit's account at the Commonwealth Bank.'[26] It was while Howell-Price was ill that the District Paying Officer sent the cheques for the 9th

Light Horse pay to the Commonwealth Bank. These amounts, totalling over £2061 were subsequently withdrawn by means of cheques that contained the forged signature of the C.O. It was in respect of these cheques that Howell-Price was charged and convicted of forgery and sentenced to two concurrent terms of four years imprisonment.

On the more serious charges related to the £67 000 alleged pay sheet frauds, the Government decided not to take any further action. The reasons for this decision were outlined in a statement by the Prime Minister. Partly based on legal considerations—supported by advice from the Solicitor-General—the decision also took into account, in the words of the Prime Minister Hughes:

> … circumstances not less weighty. The prisoner's parents had in all six sons. Five had served their country gallantly. Four of them were in the Australia Imperial Force, of whom three have been killed in battle—two having earned the Distinguished Service Order and the Military Cross, and one the Military Cross. A fifth is in the Navy. The Government was of the opinion, in which I myself concur, that Australia owes something to such a family—to the memory of the dead, to the valour of the living, to the feelings of the parents. Necessary punishment was inflicted on the culprit. But the object of criminal law is not revenge, but discipline and example. A long-term of imprisonment was awarded, which has broken his career and brought him life-long disgrace. I endorse the view of the Solicitor-General that further prosecution would have served no good purpose.[27]

The final irony of this affair is that, ultimately, the Australian taxpayers might well owe this 'Black Sheep in the Light Horse' a debt of gratitude, because his exploits were instrumental in convincing the Commonwealth to pioneer a new way of controlling payments, as a result of which, over the decades since, much more money has probably been saved that he is alleged to have defrauded.

A Strengthening of the Treasury of the Commonwealth

In the wake of the Howell-Price frauds, the Department of the Treasury moved (in 1919) to discontinue the system of issuing advances to departments through decentralised bank accounts (which involved hundreds of paying officers located all over Australia holding advances) and adopted a centralised payments system to be managed by the Treasury, itself.

The centralised payments system's integration of cash outflows and Fund accounting was an especially effective safeguard against departments breaching section 83 of the Constitution:

- for the Executive to spend beyond the boundaries authorised by Parliament (even by mistake) is, in a sense, the most serious financial evil a Government can do under our democratic system—because it is tantamount to rendering Parliament 'irrelevant' in the exercise of financial control over the Executive.

A key element of the payment system's appropriation control was the 'Drawing Account' mechanism. Drawing Accounts were separate bank accounts to the main Commonwealth Public Account. A designated official in a department requiring a payment to be made—say, to a supplier from whom goods had been purchased—would advise the Department of the Treasury of the amount and details of the authorised requirement. The Treasury would process the production of a cheque for the payment to the supplier against the available appropriation, the ledger account for which would be debited at that moment. The cheque would be drawn against a Drawing Account and dispatched to the payee. At the end of each day's processing the cash equal to the total value of the day's payment transactions would be transferred from the Commonwealth Public Account and credited to the Drawing Account. The balance at any time in the Drawing Account would represent the value of unpresented cheques. The integrity of the balances of the CRF, and the 'heads' of the Loan and Trust Funds would be preserved since the relevant Fund-source would have been debited at the same time the cheque was produced and the Appropriation ledger debited.

Over time, the Commonwealth's centralised payments system evolved into an extremely efficient and cost-effective operation. In the latter part of the 20th Century, utilising advances in technology, it supported millions of transactions each week in direct credits to payee's bank accounts as well as by the issue of cheques.

Moreover, the system allowed 'real-time' debiting of the central Appropriation ledger, to classify and record payments as they were made, thereby buttressing the Executive's stewardship responsibilities. It also enabled the Executive to undertake timely interrogation of the accounts during periods when the Budget was under stress—a facility that visiting officials from many other countries viewed with some envy.

A Blurring of the Vision

Thus, the balanced, cohesive, visionary framework for the Commonwealth's financial operations, as promised by the Constitution, had:

- The States:
  - protected, in relation to their long-term fiscal interests, by a system set to deliver to them any surplus revenue which the Commonwealth's operation might generate
- The Parliament:
  - bound by clear lines drawn around the respective powers of the House of Representatives and the Senate, regarding their roles and capacities with respect to proposed laws of a financial nature, and
- The Executive:

- safeguarded, in its normal capacity to govern, against capricious interference by the Senate; but, in turn
- constrained in its collection and accounting for revenue
- constrained in its capacity to spend
- constrained by a statutory regime of accounting, banking and related operational controls, that supported, and gave substance to, the Constitution.

If the surplus revenue arrangements were an important 'carrot' held out to the Australian Colonial Governments to hasten them along the path to Federation, those arrangements would soon take on an entirely different complexion for the newly extant Commonwealth.

The manner of calculating surplus revenue, as initially required by sections 87, 89 and 93 of the Constitution, was administratively cumbersome. Further, sections 87, 89 and 93 were seen as, and proved to be, transitional provisions which did not long survive the initial period fixed for them since, by their terms, they were only meant to operate 'until Parliament otherwise provide[d]'. More significantly, however, the surplus revenue concept, itself, was a millstone for the Commonwealth in striving for its own long-term fiscal health and in planning its own revenue and expenditure programs. And this loomed as a permanent problem once section 94 became operative. In this respect, although section 94 is expressed in facultative rather than mandatory terms, the accepted view appears to be that that provision imposes an obligation on the Commonwealth to pay any 'surplus revenue' to the States.

Realistically, seeking an amendment to the Constitution to overcome the Commonwealth's problem was not an option—any move to formally reduce the States' fiscal autonomy would hardly have met with popular support. The opportunity to achieve the same result, however, came about through circumstances that were, to say the least, fortunate for the Commonwealth.

Surplus? What Surplus?

A number of departmental activities (principally, within the Defence and the Postmaster–General's Departments) that were, essentially, business operations, faced the impracticability of handling their receipts and payments in conformity with the law, as it stood, which required the pooling of revenue receipts to, and annually finite appropriation of expenditure from, the CRF. For the first few years after Federation, these activities, in fact, operated unlawfully in this regard. A way needed to be found to allow the practical business realities of financing these activities as 'going concerns' to be accommodated within the law.

As mentioned previously, the Trust Fund was established by section 60 of the Audit Act to account for non-revenue receipts coming into the Commonwealth's possession that were to be held for, or on account or for the use or benefit of, another person—that is, where the Commonwealth was in either a real or apparent trustee capacity. The Trust Fund's individual components ('heads') were available for spending only in accordance with the laws applicable to the disposition of such trustee-type money, or to be carried to the CRF, if unclaimed, after certain time periods had elapsed (sections 27–30 of the Audit Act). It might be noted that the Act's provisions for the disposition or transfer of these moneys were, in effect, standing appropriations of the Trust Fund and, thus, satisfied the requirements of section 83 of the Constitution.

In 1906, to facilitate the operations of departmental business activities, the Audit Act was amended by the inclusion of section 62A, which introduced the concept of 'Trust Accounts'.

Whereas the section 60 'heads' of the Trust Fund accounted for *private* money in the Commonwealth's possession, Trust Accounts were to account for certain types of *Commonwealth* money that was intended for future spending on Commonwealth purposes. The Audit Act deemed Trust Accounts to be part of the Trust Fund; that is, they would not form part of the CRF. The *Audit Act 1906* established 17 such Trust Accounts, covering various departmental activities, and defined their purposes.[28]

Section 62A further provided that the Treasurer could establish additional Trust Accounts and '… define the purposes for which they were established …'. Subsection 62A(5) specified the sources of money that could be paid to the credit of the Trust Account to which they related. These included:

(a) All moneys appropriated by law for the purposes of that Trust Account

(b) All moneys received from the sale to any person or Commonwealth Department of any articles purchased or produced, or for work paid for, with moneys standing to the credit of that Trust Account

(c) All moneys paid by any person for the purposes of that Trust Account.

Subsection 62A(6) provided that 'Moneys standing to the credit of a Trust Account may be expended for the purposes of the account'. This was, in effect, a standing appropriation of the Trust Fund: it identified the purposes of the appropriation (the determined purposes of the particular Trust Account); the Fund-source of the appropriation (the Trust Account, itself, as a component of the Trust Fund); and a calculable amount of money available to be appropriated (the credit balance of the particular Trust Account). As a standing appropriation, it was not constrained by a timeframe and did not lapse at the end of the financial year in the same way an annual Appropriation Acts did.[29]

With time running out on the 'transitional' surplus revenue arrangements established by section 87 and 93 of the Constitution, the Commonwealth acted to circumvent the future effects of section 94 by capitalising on the mechanism constructed by section 62A of the Audit Act. It moved to establish Trust Accounts into which it could appropriate the surplus revenue of the CRF.

The *Surplus Revenue Act 1908* affirmed that moneys of the CRF appropriated by law to a Trust Account for the purposes of that Trust Account [s. 62A(5)(a) of the Audit Act] was a payment out of revenue and validly reduced the amount of surplus revenue available to the States under section 94 of the Constitution. Notwithstanding that such payments were 'intra-Treasury' transactions, they reinforced the legal and conceptual separateness of the CRF from the Trust Fund, of which Trust Accounts would now become a dominant part.

New South Wales mounted a High Court challenge on the constitutionality of the Surplus Revenue Act—hardly surprising, since the ostensible effect of the Act was a 'sleight of hand' repeal of section 94. The challenge was unsuccessful.[30]

The upshot has been that, since 1910, there have been no surplus revenues for payment to the States[31] and complex alternative arrangements governing Commonwealth financial assistance to the States have had to be developed.

The Commonwealth had made bunnies of the States with a 'disappearing carrot'.

The Senate Stirs

If the array of checks and balances in the financial provisions of the Constitution had been predicated on the fact that the Senate was established and structured to function as the States' House, then the demise of surplus revenue was the catalyst for the Senate to develop strengths and roles in directions other than primarily safeguarding States' interests. Certainly protecting the States would remain part of its mandate, but the Senate's role would gradually change, in time, for it to become, principally, a powerful 'House of Review'.

Governments (and Government officials) often seem not to really understand the Senate. And even when they understand it, they seldom have much love for it. Governments of all persuasions have been known to label it, variously, as 'obstructionist', 'unrepresentative', 'moribund', 'obstinate' etc. The Senate can, indeed, sometimes be a difficult—even capricious—obstacle to an Executive attempting to get its plans into effect. But the framers of the Constitution showed remarkable foresight in formulating the Senate's powers. In the political continuum, there is something reassuring about the existence of this formal hurdle that a Government must overcome—as opposed to simply being able to do whatever it wants, unimpeded. Correspondingly, the Senate's capacity and willingness to call the Executive to account—especially through its committee system—is an important brake on the inherent tendency to excess that *all* Governments seem to acquire (typically, commencing at some point during a Second Term of Office).

The Ordinary Annual Services of the Government

As discussed earlier in this paper, the fact that section 53 of the Constitution precluded the Senate from amending proposed laws appropriating money for the ordinary annual services of the Government, may have been due to either (or both) the perception, at the time, that expenditures for these purposes would comprise the bulk of the Commonwealth's appropriations and, hence, would have an impact on the level of any surplus revenue; or (and) because it would be inimical to the balance within the bicameral system to allow the Senate to interfere too easily with the elected Executive's normal capacity to function.

Regardless of the reasons, the question of what the term 'the ordinary annual services of the Government' actually means has, on occasion, been the subject of vigorous contest between the two Houses.

- Notwithstanding that it is always open to the Senate to 'request' the House of Representatives to make amendments to such Bills, this issue of definition should never be thought of as static, nor merely as the Parliamentary equivalent of the esoteric question of how many angels fit on the head of a pin

- To the contrary: it is, de facto, the present-day point of engagement for the struggle between the Crown (Executive) and the Parliament. It assumes that importance because the Executive almost always controls the Lower House, and

- The Executive will inevitably want to include as many types of appropriation purposes as possible into an Appropriation Bill that the Senate cannot amend. The corollary is that, for its part, the Senate needs to be constantly vigilant that any 'migration' of purposes to the unamendable Bill is not shrinking the scope of its power to amend proposed laws for other types of appropriations.

Because the term arises only in the context of 'proposed laws', its meaning remains solely a matter for the Parliament, rather than the Courts, to decide.[32] Unfortunately, the Constitution, itself, gives no guidance on the meaning, although there are some clues in the contemporary thoughts of its framers and the experiences of other jurisdictions. A most comprehensive and searching Parliamentary analysis of the issue occurred in 1965, by a Committee appointed by *Government* Senators in which those thoughts and experiences were closely examined.[33]

The 1965 Compact

The formation of the Committee was in response to the Executive's 1964 decision to change the form of the annual Appropriation Bills—to amalgamate, from 1964–65, the Appropriation Bill and the Appropriation (Works and Services) Bill:

> … subject to the separation out and inclusion in separate measures [an additional Bill] of any particular items which, as a matter of interpretation, do not fall within the description of appropriations for the ordinary services of the Government.[34]

This move by the Executive was seen as an unambiguous attempt to reduce the powers of the Senate.

The Committee's report sets out in great detail the aspects considered and the reasoning behind its ultimate recommendations. The Report states:

> The expression 'ordinary services of the Government' was written before 1900. It has the meaning which the words then had. This would not prevent that meaning from being applied from year to year to changing circumstances of Federal Government finance.[35]

This particular regard for historical context, out of which the expression had come, appears to have significantly influenced the Committee's thinking. Paragraphs 62–70 of the Report cover the dissection of the expression into its component parts, namely 'Services of the Government'; 'Annual'; and 'Ordinary' and the Committee's rationale for the conclusions it reached.

The Committee Report described 'annual' in the following terms:

> It is not considered that 'annual' should be regarded as the prime qualifying word in the expression 'ordinary annual services of Government'. However, it is difficult to imagine that the word was originally meant to have any other than its ordinary meaning of relating to or by the year, or yearly. It connotes services of an annually recurrent nature. Thus, one properly speaks of an annual subscription, an annual licence, or an annual meeting. The payment of Service or Public Service salaries, pensions and payments for the maintenance of buildings readily appear to satisfy the description. On the other hand, it seems very difficult to speak of a service which consists of the construction of a lake, such as Lake Burley Griffin, as an annual service.[36]

In hindsight, one notable gap in these conclusions was an express confirmation that 'annual appropriations', whether or not for the ordinary services of the Government, were laws whose timeframe was *limited to the duration of one financial year*.

Perhaps this omission occurred because the principle seemed so fundamental, that no one at the time could even envisage that, one day, Parliament might accept the proposition that an Annual Appropriation Act did not lapse at the end of the financial year to which it related, but could continue in force indefinitely. The principle was referred to, in passing, elsewhere in the Report such as Quick and Garran's statement that the ordinary annual services include:

> … the various public departments manned and equipped to carry on the general work of the Government departments, such as customs and excise, posts and telegraphs, light-houses, light-ships and quarantine, naval and military defence, the money to pay for which is voted by Parliament *from year to year*.[37]

In their *Annotated Constitution of the Australian Commonwealth* Quick and Garran draw attention to another significant connection to the concept of *annually lapsing* appropriations. In relation to section 6 of the Constitution which provides:

> **6.** There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

Quick and Garran state:

> The annual meeting of the Federal Parliament is secured by this section of the Constitution, in accordance with numerous colonial precedents … The guarantee of an annual session is the necessity of providing money for the public service.[38]

Although the Committee's completed Report was not tabled until May 1967, the Government had recognised, some two years earlier, in the face of the Senate's strong bipartisan adverse reaction to its 1964 move to amalgamate the Appropriation Bills, that this was a battle that it could not win. An agreement was struck between the two Houses that drew the lines on what matters would, in future, be included in the annual Appropriation Bills that the Senate could amend. This agreement is referred to as 'The 1965 Compact'. The Treasurer (Mr Holt),[39] informed the House of the Government's decision that, in future, there would be a separate annual Appropriation Bill, that would be subject to amendment by the Senate, containing appropriations for:

- the construction of public works and buildings
- the acquisition of sites and buildings
- items of plant equipment which are clearly definable as capital expenditure
- grants to the States under section 96 of the Constitution, and
- new policies not authorised by special legislation. Subsequent appropriations for such items will be included in the Appropriation Bill not subject to amendment by the Senate.

This formulation for annual appropriations was never entirely ideal, since it still leaves some scope for 'interpretation'. Consequently, it has been necessary to vary the Compact in several marginal respects since its adoption, to take practical account of the changing face of the 'business of government'. Nevertheless, it remains a significant milestone in giving substance to the sorts of rights that the framers of the Constitution envisaged for the Senate.

The Crisis of 1975

Much has been written on the interplay of the political and constitutional circumstances surrounding the dismissal of the Whitlam Government in November 1975. The comments that follow are confined to the financial circumstances.

Before the final years of the 1990s, when the Executive commenced to introduce Commonwealth Budgets in May, it was customary for the Executive to bring down its Budgets in August of each year. The Parliamentary processes for debate and passage of the two annual Appropriation Bills (one for the ordinary annual services; and one for the non–ordinary annual services), customarily took up to four months, so that the Executive was not granted its appropriations until late November/early December. In order to provide finance to allow the normal business of Government to carry on from the commencement of the financial year (on 1 July), until the main annual Appropriations Bills were finally passed, Parliament would enact interim appropriations—called Supply Acts—in May/June each year. There would be two Supply Acts: one appropriating money for the ordinary annual services of the Government; and one for the non-ordinary annual services.

It was a convention that the estimates of expenditure included as proposed appropriations in the Supply Bills would reflect the funding needs to the Executive to undertake only existing policies—sufficient to see it through the five-month period from July to November, by which point the main Appropriation Bills would normally have been passed. The rule of thumb for Supply Bill estimates was that a proposed appropriation would be included at five-twelfths of the *current* year's estimated expenditure. That is, Supply Bill (No. 1) 1975–76, introduced in May 1975, would have the majority of its estimates based on five-twelfths of the expected final expenditure on the equivalent item for 1974–5.

It may be useful, here, to point out that, contrary to popular terminology, the Commonwealth Parliament does not approve 'The Budget'. For a long time now, the Executive's revenue and spending plans that make up the great bulk of a particular year's Budget consist, largely, of laws that are in place. That is, laws for taxation and other revenue measures; and laws containing standing appropriations for payments to the States, grants, pensions, benefits etc, have already passed the Parliament (in some cases, years ago). The Executive's 'Budget Measures', each year, represent changes to existing policy settings, which may require seeking Parliament's agreement to amend or repeal these existing laws, or the introduction of new programs. But, overall, much of the annual Budget is actually 'self-executing' by virtue of those existing laws.

Not 'self-executing', however, are spending proposals included in the annual Appropriation Bills. They require Parliament's approval. Moreover, the Bill for the ordinary annual services contains the proposed appropriation provisions that will allow the Executive to function—it provides, inter alia, for the payment of officials and the costs and outgoings necessary for departments and agencies to continue operating. If these appropriations are not forthcoming, staff would have to be stood down for a lack of funds to continue paying them. And though some might volunteer to work for no pay, that situation would raise a number of legal difficulties. The reality would be that, in all probability, there would be no, or insufficient, staff to process the revenues or pay pensions, benefits etc. Suppliers would also go unpaid. For all intents, the Government would effectively lose its capacity to function.

With the Senate's resolve not to consider the annual Appropriations Bills, that was the very prospect facing the Government in 1975. The Executive was not short of *money*—revenues were still flowing in to the Treasury of the Commonwealth and being credited to the CRF. The Executive was, however, short of Parliament's authority to access that money. The appropriation limits specified in the 1975–76 Supply Act were progressively becoming exhausted by the necessary draw-downs since July. And while there were ample credits in the Loan and Trust Funds, that money could be spent only on the purposes specified for the particular component 'heads' established under those Funds. Meeting the running expenses of departments was not a purpose specified.

A possible way around the dilemma was discussed in some quarters—having the banks advance public servants' salaries, supported by a guarantee from the Commonwealth to reimburse the banks after the impasse with Senate was over and the Appropriations Bills were passed. That idea was rejected for a number of legal and practical reasons, including that the purposes specified in the Appropriation Bills were for 'Salaries and payments in the nature of salaries', which clearly did not embrace the repayment of loans to financial institutions. Any attempt to put through a further Appropriation Bill, specifying such loan repayments as a purpose, would not be a proposed law for the ordinary annual services of the Government; as such it may well be amended or rejected by a hostile Senate.

The rest, as they say, is history. Regardless of where one stands on the question of the Senate's actions in blocking supply, the Constitution's financial provisions operated, consistently with their constitutional purpose, to prevent the Executive Government from having access to Commonwealth money in the absence of an appropriation approved by the Parliament. Those provisions withstood the extreme stresses which the situation imposed on them. If this is a testimony to the framers of the Constitution, it must equally be recognised that, in Australia, we are fortunate to have Executive Governments which abide by the Rule of Law.

A Change in Prescription

In the last two decades of the 20th Century, reform of the public sector was a worldwide phenomenon. Precipitated largely by economic imperatives for increased sectoral efficiency within the context of burgeoning market globalisation, public sector reform took on something of a momentum of its own. The fact that these reforms were worldwide meant that countries could benchmark against each other and learn from each other—adopting and adapting, for their own environment, the reforms that others had developed. Organisations such as the Organisation for Economic Co-operation and Development, the International Monetary Fund and the Work Bank became focal points and clearing houses of knowledge and ideas on public sector reform. In addition, of course, links were formed and ideas (and staff) were exchanged directly between the public sectors of different countries and jurisdictions.

Australia was long overdue for a 'Reformation' in the way governments (Commonwealth, State and Local) delivered services to the public, and were held accountable for their performance. Certainly, the emerging economic imperatives for greater efficiency were real enough. There was, however, a danger: not from reform per se, for it was genuinely needed, but from risk of 'institutional collateral damage' caused by the nature and the pace of the reform momentum. The constant and prolonged international and intra-national exchange of ideas created a climate in which some practitioners developed a mindset along the lines of 'Anything you can reform, I can reform better'. As a result, within the Commonwealth's constitutional environment, some of the reform measures that were adopted or adapted from, or inspired by, other public sector jurisdictions, or the private sector, may, ultimately, prove an uneasy fit.

It is useful, at this point, to note a change that had taken place in 1976 in the Commonwealth's departmental framework, that had a direct bearing on financial administration and on the subsequent carriage of its reform. On 7 December 1976, the Governor-General issued an Administrative Arrangements Order to establish the Department of Finance to perform a range of functions that had, hitherto, been performed by the Department of the Treasury.

- In effect, the Department of the Treasury had been split into two:

- Among the functions given to the Department of Finance were the management of the Commonwealth Public Account (the Executive's central pool of money, maintained in accounts at the Reserve Bank, into and out of which all of the Executive's receipts and payments flowed); responsibility for the preparation, management, oversight and control of appropriations, and responsibility for the Commonwealth's accounting framework and procedures (including administration of the Audit Act and its subsidiary legislation), and

- this meant that 'the Treasury of the Commonwealth', referred to in section 83 of the Constitution, would, in future, be administered by a 'Minister for Finance', rather than a 'Treasurer'.

Applying the principle that 'Form should follow Function' leads to the conclusion that the name-tags for the two departments were mixed at birth. Perhaps ministerial or bureaucratic attachment to the perceived status of the titles 'Treasurer' and 'Treasury' came into play at the time to thwart the logic of the principle. But what's in a name, anyway? Surely it should be of little importance—unless, of course, such a connotational disconnection leads those who would, in future, be charged with the custodianship and protection of the 'Treasury of the Commonwealth' to cease identifying with it and its constitutional significance.

Commonwealth Reforms in Financial Management

Financial reform of the Commonwealth public sector was given an impetus with the election of the First Hawke Government, in 1983. It had a reformist agenda and Budget reform was accorded a high priority.[40] For example, the introduction and committed application of a system of three-year rolling program of forward estimates (1986) represented a quantum leap in the imposition of greater fiscal discipline by the Government on its agencies.

From the Parliament's perspective, the most noticeable change was in the adoption (1988) of the 'Running Costs' system for departments, in appropriations for ordinary annual services. Since Federation, appropriations for departmental administrative expenses had been presented in a highly dissected form, with separate line-items for each type of expense—salaries; overtime; travel; postage and telephone; office equipment; repairs and maintenance; etc. [The early years of Federation even had the salaries appropriations identifying, separately, staff position classifications.] Such line-item appropriations meant that there was no flexibility available to managers to re-arrange their resources to meet changing needs. By aggregating all of the separate departmental administrative expenses into a single line-item appropriation titled 'Running costs', managers were given greater freedom to make rational operational decisions, such as employing more staff rather than paying overtime, or purchasing computers rather than employing additional people—decisions which were formerly made difficult by the existence of line-item appropriation limits.

The Financial Management and Accountability Act

In its significant 1989 report into the operations of the Auditor-General,[41] the Joint Committee of Public Accounts recommended (as the first of its 78 recommendations) that the *Audit Act 1901* be replaced by more modern legislation. The Act had, in fact, been amended many times during its life, but, both structurally and conceptually, it still reflected much of its Victorian (in both senses of the word) origins. In particular, it was becoming increasingly incompatible with the directions of the public sector financial management and auditing reforms that were already taking place or were in prospect. The Government accepted the JCPA's recommendation and developed a package of three proposed laws to replace the Audit Act:

- an **Auditor-General Act—**to define the powers, functions and responsibilities of the Auditor-General
- a **Financial Management and Accountability Act—**to provide for the regulatory financial framework for 'agencies': bodies whose receipts and payments flow into and out of 'the Treasury of the Commonwealth' (i.e., departments and those statutory authorities which, financially, are agents of the Commonwealth in that they have no legal ownership of money or assets separately from the Commonwealth), and
- a **Commonwealth Authorities and Companies Act—**to contain standard financial provisions, together with core reporting, auditing and ethical obligations on directors, in relation to Commonwealth-controlled companies and those statutory authorities whose enabling legislation empowers them to hold money and assets in their own right.

The Bills for these Acts were originally introduced into the House of Representatives in June 1994, but had not completed their passage through both Houses before Parliament was prorogued for the 1996 Election. Upon the change in Government, the Bills were reintroduced and passed in October 1997. They became law from 1 January 1998.

The *Financial Management and Accountability Act 1997* is the 'inheritor' of the Audit Act's linkages with sections 81 and 83 of the Constitution. In his Second Reading Speech on the Bill the Minister for Finance (the Hon. John Fahey MP) said:

> One of the most visible changes to be brought about by the proposed Financial Management and Accountability Act is in relation to the accounting classifications of money in the Commonwealth's possession. The Trust Fund established by section 60 of the *Audit Act 1901* is to be abolished and replaced by two, purpose-based, Funds—the Reserved Money Fund and the Commercial Activities Fund. Apart from components of the Reserved Money Fund that may be established pursuant to other enactments, the components of these two Funds will be established or varied by Finance Minister's determinations. The effect of such determinations will be to specify the kinds of money that may be drawn from the CRF or Loan Fund and credited to the particular component and the purposes on which that money may then be spent. Since the spending of money from such a Fund is, in all respects, an appropriation, the proposed Act will require that these determinations by the Finance Minister be tabled as disallowable instruments that do not take effect until the period of disallowance has passed. This procedure is more visible and provides a greater measure of Parliamentary control than has traditionally been the case in the establishment of Trust Accounts under the *Audit Act 1901*.

> Payments of public money, including debiting a Fund against an appropriation, will be controlled by a system of 'Drawing Rights', to be issued by the Finance Minister. This system is predicated on the fact that the laws made by Parliament relating to appropriations, variously compelling or permitting the Executive Government to spend, always specify the Fund being appropriated and the purpose of the spending. Such laws may also specify an amount and a timeframe. It would be a breach of section 83 of the Constitution for spending to occur in any instance outside of those parameters, so the Act will stipulate that the Finance Minister has no capacity to issue valid Drawing Rights that are inconsistent with the terms of the relevant appropriation law; and makes it an indictable offence for an official or Minister to knowingly spend, or seek to spend, otherwise than in accordance with a valid Drawing Right.[42]

The Act took a conservative, literalist approach to section 81 of the Constitution. As noted earlier, on their face the words of that section:

> All revenues or moneys raised or received … shall form one CRF to be appropriated for the purposes of the Commonwealth

embrace the possible legal interpretation that even non-revenue receipts should, at least in the first instance, form part of the CRF and only then be *appropriated* to another Fund. Accordingly, the Act provided for this model of inter-Fund flows and standing appropriations of the CRF were included in the Act to cover such transfers.

The Act also contained provisions that categorised money that was en route to or from a Fund:

> Money, from the time it was received into the Commonwealth's possession until credited to the CRF was defined as ***Received Money.*** Such money was required to be credited to that Fund as soon as practicable.
>
> ***Drawn Money*** meant money that had been debited from a Fund (and not credited to another Fund) but was still in the Commonwealth's possession (typically, the unpresented cheque 'float' in Drawing Accounts; or advances held by agencies to meet expenses, etc.)

These categories helped facilitate the discipline of lapsing appropriations—specifically, section 29 of the Act provided that Drawn Money held by agencies as unused/uncommitted advances that had been drawn against an appropriation which lapsed at a particular time (e.g., 30 June), would lose its status as Drawn Money at lapsing time and be dealt with as Received Money [and paid promptly into the CRF]. This was to prevent the accumulation of 'hollow logs'.

The Government Adopts an Accrual Financial Management Framework

In his Media Release of 7 May 1997, the Minister for Finance (the Hon. John Fahey MP) announced that the Government had decided to implement a fully integrated financial management framework that would:

> … result in a significant improvement in the way the Commonwealth budgets and manages its finances.

The Minister went on to state:

> The decision is consistent with the recommendations of the National Commission of Audit[43] relating to the Commonwealth's financial framework and with the recommendations made in 1995 by the Joint Committee of Public Accounts.[44] This decision will move the Commonwealth into line with the States, as the majority of State Governments have either already adopted or have decided to adopt accrual financial management.

Accrual accounting allows for the recognition and recording of economic transactions and events as they occur, regardless of when (or whether) the related cash receipt or payment takes place. For example, in the books of a business which sells goods, the transaction records a sale as 'Income', even though payment from the purchaser may not yet have been received; the purchaser would be recorded under the Asset heading 'Debtors'. Subsequent payment would be recorded as an increase in the Asset 'Cash' and an offsetting reduction in 'Debtors'. Correspondingly, a purchaser's failure to pay would cause an increase in the Expense item 'Bad Debts Written Off', with an offsetting reduction in 'Debtors'.

Cash accounting, on the other hand, would record the transaction under 'Receipts' when payment was received—or nothing at all if the purchaser defaulted. Obviously, internal records would be kept of Debtors and Bad Debt Write-offs, but, under cash accounting, they do not form part of an integrated accounting framework of the kind that would allow comprehensive financial statements to be interpreted to assess the *operational performance* of the entity.

Increasingly, public sector activities are being recognised as contestable—that there can be economic and efficiency gains from opening these activities up to the market. In order to make rational judgements on whether or not to outsource (or, possibly, sell off) activities, the Executive needs the broad span of financial data about its activities that only accrual accounting can provide. Further, as the Management Advisory Board of the Australian Public Service stated in its 1997 Report *Beyond Bean Counting*.

> Accrual management has important implications for internal management practices. Moving to a total accrual framework is predicated both on the transparency it provides to external users about the costs and performance of government and its catalytic effect on line managers in terms of public sector management. Access to accrual information on a day-to-day basis enables managers to:

- meet the challenges of competition in the delivery of services previously captive to the public sector, because it provides better data for costing activities and undertaking benchmarking and market testing
- fulfil the need for consistent accountability and evaluation that facilitates the setting of financial targets/objectives, and
- monitor and assess the efficiency of output/activity delivery against those targets.[45]

There can be little argument that the Executive's adoption of an accrual accounting framework for internal budgeting, management and accountability; and for external reporting, holds the continuing prospect of considerable benefit in those areas.

Departments and other Commonwealth reporting entities have published audited accrual financial statements since 1994–95. Parliament, as the primary consumer of such reports, would appreciate the greater utility and scope for improved Executive accountability afforded by the change. For example, in its Report 374 [Appendix E], the Joint Committee of Public Accounts and Audit cites a wide range of ratios that can be used to compare performance between public sector bodies.[46]

The 1999 Time Bombs

But there is an apparent paradox. The adoption of an accruals-based system of accounting makes the Executive's financial activities more transparent to the Parliament in its role of holding the Executive accountable for those activities *after the event*. Yet the supposedly necessary complementary changes to the appropriation structures, wherein the Parliament's authority is given *before the event* for the Executive's financial activities, may actually have diminished Parliament's capacity to control the Executive in the way the Constitution envisaged.

The 1999 Amendment to the Financial Management and Accountability Act

On 10 February 1999, the Parliamentary Secretary to the Minister for Finance (the Hon. Peter Slipper MP) introduced the Financial Management Legislation Amendment Bill 1999, to amend the *Financial Management and Accountability Act 1997* (and certain other Acts). The changes proposed by the Bill were stated to be required to facilitate the introduction of a full accrual financial framework from 1 July 1999. In his Second Reading Speech, Mr Slipper outlined the principal amendments and the reasons to support them.

The main change was the abolition of the Loan Fund, the Reserved Money Fund and the Commercial Activities Fund, with their functions and purposes being merged with the CRF. The Second Reading Speech states:

> Fund accounting was introduced by the *Audit Act 1901* and is based on the notion that financial management and accountability can be supported by a simple system that requires the setting aside of separate pools of money designated for particular purposes. However, such accounting has been overtaken by more sophisticated financial management systems suited to the complexities of a modern businesslike environment.
>
> The modern systems, which are being implemented by agencies, are not designed to perform fund accounting and its continuation would therefore require dual accounting systems to be kept. Clearly this would serve no useful purpose and be wasteful of resources. Further, the complexity of such an arrangement would frustrate the efficient and effective operation of the accrual framework that will operate from 1 July 1999.
>
> The [merging of the Funds] will eliminate the need to maintain a multiple fund accounting system, including the inefficient legal requirement of daily transferring of moneys back and forth among the funds to keep them in positive balance. The current requirement does not assist financial management.
>
> The effect will be to give the CRF the central tole envisaged by the founders of the Constitution rather than the diluted role that has emerged with the creation of additional funds outside the CRF.[47]

The Government, nevertheless, recognised the continuing need to be able to account separately for certain types of receipts and reserved allocations, that would be applied to specified purposes. For example:

- money that the Commonwealth does not own—such as that received, in advance, for services that the Commonwealth is to undertake for other governments; or money in Income Equalisation Deposits; Customs Security Deposits; money paid into Federal Courts; etc, and

- money that the Commonwealth does own and has reserved for future use—such as the Federation Fund; or the Aboriginal and Torres Strait Islander Land Reserve; Borrowings; etc.

To meet this need that, hitherto, had been met through the separate components of the Funds being abolished (and, earlier, by 'heads' established under the Audit Act's original Funds), the Bill proposed the establishment, within the CRF, itself, of a mechanism to be called 'Special Accounts', which would, for all intents, operate and have their receipts and payments accounted for, in a similar manner to the former Fund components they were designed to replace.[48] These similarities include:

- the Finance Minister may make a written determination that: establishes a Special Account; allows (or requires) amounts to be credited to it; and specifies its purposes. By a further written determination, the Minister may revoke or vary a previous determination, or abolish a Special Account

- the Finance Minister's determinations in relation to Special Accounts may be disallowed by Parliament, within a disallowance period of five sitting days. A determination that has not been disallowed becomes effective only upon the expiry of the disallowance period

- Special Accounts may be established by other Acts which identify their purposes, and

- a standing appropriation is established covering expenditure for the purposes of the Special Account—up to the current balance of the Account.

The Bill was passed and the Act came into effect on 1 July 1999.

With the adoption, for the first time since Federation, of a financial framework that has *only* the CRF categorising all of the money held by the Commonwealth, it invites speculation about whether this 'reawakens' the long-dormant surplus revenue issue and injects a new relevance to section 94 of the Constitution.

On one view, the States would be wasting their time and money in attempting to pursue the issue:

- although there is no appropriation of the CRF *to* Special Accounts, there is, nevertheless, a standing appropriation *of* their credit balances. This hypothecation of Special Account balances, together with the broad array of other standing appropriations that commit the Fund to various purposes, make the prospect of any 'surplus' highly unlikely, and

- in any case, Commonwealth-State financial arrangements have developed into a highly complex structure in the 'post surplus revenue era' and any attempt by the States to disturb the foundations of that structure would, in present times, be imprudent, impracticable, and could do great harm to the national economy.

Another view might tend towards the proposition that the Constitution's reference to 'surplus revenue' meant the literal, total, unspent credit balance of the CRF, so that any purported *internal* segregation of money within that Fund—such as into Special Accounts—would afford no protection:

- first, because section 81 of the Constitution clearly declares the Fund to be 'one' and 'consolidated'—a unitary Fund upon which the transparent determination of the level of the Commonwealth's surplus revenue would be based, and which is not depleted until money is actually paid out of it. Provisions in the Financial Management and Accountability Act cannot purport to override the Constitution

- secondly, far from 'diluting' the role of the CRF, the additional Funds (first established contemporaneously with the Constitution), in fact, complemented its role and, moreover, worked to the Commonwealth's advantage—by ensuring that non-revenue receipts could be kept apart from revenues, to avoid any risk of inflating the pool of money from which the surplus was to be derived, and

- the issue of the States' constitutional rights to the Commonwealth's surplus revenue—bizarre and outdated as that might seem today—has been dormant since 1908 only because the High Court found that the multiple-Fund accounting constructs, that protected the Commonwealth's position, were legally effective. To now change the setting so radically, may actually prove to be an invitation to the States to, once again, try their luck before the High Court—or, more probably, use the *threat* of doing so as a bargaining chip against the Commonwealth.

If the matter ever found its way to the High Court, the court would, presumably, consider whether this intra-CRF 'Special Account' construct could have the same effect as the CRF/Trust Fund arrangements that were the focus of considerations in the *Surplus Revenue* case or, indeed, whether any form of Fund construct is even relevant in the characterisation of 'surplus revenue'. What indications we do have suggest that a majority of the justices in the *Surplus Revenue* case might well subscribe to the view that the mere existence of a standing appropriation of a 'Special Account' would be sufficient. For example, Griffith CJ said:

> It is entirely within the discretion of the Parliament when authorising the expenditure of the public revenue to fix the period during which it may be disbursed. It follows that, if a sum of money is lawfully appropriated out of the Consolidated Revenue for a specific purpose, that sum cannot be regarded as forming part of a surplus until the expenditure of it is no longer lawful or no longer thought necessary by the Government.[49]

And Isaacs J said:

> If Parliament has enacted that certain purposes shall be executed, and the necessary money appropriated to defray their cost, what difference can it make to the states that the particular creditor is not yet selected, or that the contract is not actually signed on behalf of the Commonwealth Government? I agree that payment to the credit of a trust fund makes no difference.

Barton J and Higgins J appear to take the same view.[50] What little other judicial authority there is also suggests that an appropriation is sufficient in itself to prevent the appropriated amount from being considered 'surplus revenue'. Specifically, in the *Northern Suburbs Cemetery case,* Brennan J said, citing the view of Isaacs J in the *Surplus Revenue case,* that it is the appropriation for the execution of the purposes prescribed by Parliament, not payment to the credit of a trust fund, that makes a difference.[51]

Regardless of views on the issue, it is still extraordinary to note from the Second Reading Speech by Mr Slipper that, apparently, the Commonwealth *may* have put its entire fiscal security at risk, even if remotely, only because the sophisticated, accounting systems, which agencies were acquiring, could not cope with 'Funds'.

Along with the abolition of Funds, the *Financial Management Legislation Amendment Act 1999*, also abolished, as redundant, the concepts of 'Received Money' and 'Drawn Money', the terms that had been established under the *Financial Management and Accountability Act 1997* to describe money that was en route to or from a Fund. Received Money applied to that which had been received, but not yet credited to the CRF; Drawn Money referred to that which had been debited from a Fund, pursuant to an appropriation, but was still in the Commonwealth's possession (typically, held by an agency as an advance, or to meet unpresented cheques).

The 'General Outline' section of the Explanatory Memorandum accompanying the Financial Management Legislation Amendment Bill 1999 states:

> Requirements for debiting and crediting all cash transactions to a fund account in a central ledger will be removed. In future, transactions of agencies will be processed and recorded in their own accounting systems. The amendments [abolition of the Funds, and Received/Drawn Money] will therefore facilitate the move to devolved accounting and banking arrangements for agencies, consistent with more businesslike approaches used in the private sector.

The Explanatory Memorandum's 'Notes on Clauses'[52], referring to the repeal of the Financial Management and Accountability Act's references to these two categories of money, stated that it was '… to reflect that the CRF is 'self-executing' under section 81 of the *Constitution* …' In other words, money is 'received' as soon as it comes into the Commonwealth's possession and, hence, is automatically part of the CRF. In the other direction, until money actually leaves 'the Treasury of the Commonwealth', it retains its character as part of the CRF.

Devolved banking for agencies was introduced from 1 July 1999. The Department of Finance and Administration has assured the JCPAA that, with agencies now physically managing their own cash, the possible risks of:

- an agency spending in excess of its appropriations, including through any 'mixing' of receipts with other money held in the account, and

- agencies accumulating 'hollow logs' of surplus cash

> are considered to be remote, because of the banking and cash management protocols that support the new arrangements.[53]

Devolving the banking and associated ledger functions to agencies represents something of a disaggregation of 'the Treasury of the Commonwealth' and, on the face of it, a significant weakening of the Finance Minister's traditional custodianship role over it. Nevertheless, in the light of the assurances given to the JCPAA, the devolution model chosen should work infinitely more effectively than the previous model, which operated until 1919, and out of which, the Commonwealth acted to *centralise* its payments system in response to the Howell-Price frauds.

The 1999 Change to the Annual Appropriation Acts

The culmination of the Executive's move to a full accrual financial management framework, from 1 July 1999, came with Parliament's acceptance and passage of the 1999–2000 Appropriation Bills[54] that were radically restructured to reflect accruals principles.

The narrative in Budget Paper No. 4,[55] circulated to Members with the introduction of the Bills, stated (in part):

> With the introduction of accrual budgeting there have been some revisions to the structure of the Appropriation Bills.
>
> first, the Senate has agreed to a change in the 1965 Compact between the Senate and the Government on the content of Appropriation Bills No. 1 and No. 2. In essence, that change will result in:
>
> – inclusion in Appropriation Bill (No. 1) of the full costs of the price of outputs for departmental expenses, including employee entitlements such as long service leave as it accrues and depreciation (or the cost of consumption of assets)
>
> – inclusion of all equity injections and loans in Appropriation Bill (No. 2), and
>
> – inclusion of all appropriations for administered expenses for new outcomes in Appropriation Bill (No. 2), mirroring the past arrangements for new appropriations
>
> second, Appropriation Bills will be focused on agency outcomes. The aim of this change is to allow a clear linkage through Portfolio Budget Statement (PBS) to agency annual reports and financial statements, and
>
> third, in recognition of the funding for long-term commitments, the Appropriation Bills, while related to activity in a specific year, will not lapse at 30 June each year.
>
> The appropriations for departmental expenses will be open ended, while the appropriations for administered expenses will be limited to expenses incurred in that year.

Using, for the purposes of illustration (because of its brevity in having only one described outcome), the appropriations for the ordinary annual services for the Department of Transport and Regional Services, the new form that the Schedule to the Appropriation Bill took was:

	Departmental Outputs $'000	Administered Expenses $'000	Total $'000
Outcome 1			
Linking Australia through transport and regional services	181 992	114 171	296 163
Total: Department of Transport and Regional Services	181 992	114 171	296 163

To use the (somewhat simplistic) analogy of a trucking company, the 'Departmental Outputs' broadly equate with the costs consumed in *maintaining the company's capacity to operate*—the expenditures incurred in staffing, equipping and meeting the overheads of the entity; whereas 'Administered Expenses' broadly refer to what the trucks *deliver to third parties*—the various Commonwealth programs that, primarily, involve transfer payments. Under the terms of an annual appropriation, an entity is allowed to switch its operating capacity resources (Departmental Outputs) between Outcomes, but not its 'deliveries' (Administered Expenses): those appropriated amounts can only go to the recipients covered by that particular Outcome. However, as noted below, the Outcomes for Administered Expenses are often expressed so broadly that they do not impose particularly strict legal limits on the purposes for which the appropriated amounts may be applied.

The activities which each entity proposes to undertake in achieving its Outcome(s), are detailed in its Portfolio Budget Statement (PBS) which provide comprehensive data about the intended financial operations of the entity. A PBS for each portfolio is tabled in Parliament as a 'Budget Related Paper' with the introduction of the Bills.

Although mention is made of them in the Appropriation Acts, the PBS are not part of the Appropriation Acts. Typically, the Appropriation Act provides that 'the PBS's are hereby declared to be relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*' (see e.g. s. 4(1) of the *Appropriation Act (No. 1) 2001–2002*). This allows the PBS to be used as extrinsic materials to interpret the Appropriation Act. More significantly, an Appropriation Act routinely prescribes that; 'If the PBS indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome' (see e.g. s. 4(2) of the *Appropriation Act (No. 1) 2001–2002*.).

The important point is that the PBSs, when read with the relevant provisions of the Appropriation Act, do not impose any additional legal restriction on the purposes to which an entity may apply amounts appropriated to it under an annual Appropriation Act so long as such a purpose is not inconsistent with the terms that describe the entity's outcome(s). Consequently, there seems to be no legal impediment to the Executive's undertaking, during the course of a financial year, *totally new or expanded activities* which had not been foreshadowed to Parliament in the PBSs. Provided the new or expanded activities were, in some way, related to the achievement of a described outcome, and their costs could be accommodated within the total appropriation provision for that outcome, Parliament may not be formally made aware of the matter until details of those activities were later revealed in the entity's annual report and financial statements.

To paint a hypothetical 'worst case':

- At a time which just happens to coincide with the lead up to a crucial rural by-election, an incumbent Government seeks to show its deep concern for the residents of this 'depressed, isolated region' by offering those with a motor vehicle over 10 years old, a subsidy to purchase a new car.

There appears to be nothing to prevent the Government from funding such a program with spare Administered Expenses capacity within the appropriation for the expansively-titled 'Linking Australian through transport and regional services' Outcome. On the face of it, Parliament would be powerless to prevent this exercise in blatant political pork-barrelling that the Government was able to fund from an existing appropriation.

Another not-so-hypothetical 'worst case':

- Assume this appropriation structure was in place in 1995.
- In the 1995–96 Budget, the Labor Government had included, in Appropriation Bill (No. 2), an item in the Attorney-General's Department's votes for the Commonwealth to pay Dr Carmen Lawrence's legal costs in connection with the Easton Royal Commission.
- The non-Labor Senators had indicated that they would amend the Bill to exclude that portion of the costs which related to Dr Lawrence's appeals to the courts.
- The Government amended its own Bill in the House of Representatives to reduce the item's provision by some $300 000 and, thereby, avoid the threatened conflict between the Houses that would have delayed passage of the whole Bill.

What would be achieved, under the current appropriation structure, if the Attorney-General's Department's appropriation provision of $58 945 000 for 'Other Administered Expenses' in Appropriation Bill (No. 2), against the Outcome 'An equitable and accessible system of federal law and justice', were reduced to $58 645 000? The Government would still be legally able to fund Dr Lawrence's court appeal costs out of that total.

By any measure, adoption of the new structure of the Appropriation Acts has significantly weakened Parliament's capacity for control over the Executive's financial activities.

The most dramatic weakening of Parliament's role, however, comes not from the *structure* of the Acts, but from what they actually do—or, rather, do <u>not</u> do.

- the annual Appropriation Acts do <u>not</u> lapse on 30 June.

Ostensibly, this is to permit the Executive to finance its accrued expenses (such as provisions for employee leave entitlements and depreciation of assets etc.) included in the amounts for a current year's appropriation, but for which no actual payment is required until some event in a future year (the employee separates from the Service and received a payment in lieu of leave; or the asset is replaced and the accumulated depreciation funds are applied to purchase the new asset etc.).

In practice, however, it will probably be recognised as impracticable for agencies to accurately reconcile these payments to a growing 'tail'—a multitude of previous years' unspent appropriations. For example, if an employee actually takes leave using some part of their long service leave entitlements that had accrued over many years, which particular previous years' appropriations should be applied, and how, to the employee's salary cost while they are on leave?

The following paragraphs develop the issue in a 'worst case' context that could well have the potential to do the greatest possible harm to that fundamental balance between the Executive and the Parliament, which the Constitution's financial provisions are intended to maintain.

Keeping track of a vast array of accrued expenses, across and within agencies, soon emerges as an administrative and accounting nightmare. It seems that the only practical way around this problem is for each agency to transfer all accrued expense provisions, *each year*, to the credit of its own Special Account established for the purpose of meeting those expenses when they eventually fall due. This solution means that, when the provision for an accrued expense had to be drawn on, at any time in the future, the Special Account will be the only source of appropriation that the agency needs to access.

Helpfully, both the Appropriation Acts contain identical enabling sections for this to occur.[56]

> **Crediting amounts to Special Accounts**
>
> If any of the purposes of a Special Account is a purpose that is covered by an item (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

The Acts define 'item' as an administered item [an amount set out in the Schedule opposite an outcome of an entity under the heading 'Administered Expenses']; or a departmental item [the total set out in the Schedule in relation to an entity under the heading 'Departmental Outputs'].

Since 'item' encompasses the *whole amount* of each appropriation described in the definition, it should be possible to credit these Special Accounts not only with accrued expenses requiring payments in future years, but also with *all of the unspent balances of each appropriation*. Since merely an intra-CRF transfer would be involved, the transaction would not be in contravention of the sections of the Act that apply certain constraints on amounts being *issued out of* the Fund. In a relatively short time, these Special Account credits amount to a very considerable sum, the expenditure of which is now no longer governed by the terms of the Appropriation Acts, but rather, by the purposes clause of the Special Account and the standing appropriation of the CRF that permits spending up to the credit balance of any Special Account for those purposes.[57]

- for this to occur, all that is required is for Parliament to not disallow a Finance Minister's determination establishing Special Accounts whose purposes are innocuously or ambiguously described as, say, '… for expenditure by [the agency] to meet accrued *and other* expenses in respect of those outcomes for which appropriations had been made in former years …'

In this way the Executive establishes what are, in effect, 'hollow logs' of 'appropriations made by law' (section 83 of the Constitution); and Parliament has unwittingly surrendered its most sacred power—the power to prevent the Executive from continuing to function when denied supply for the ordinary annual services of the Government. [It needs to be noted, however, that these accumulating Special Account 'hollow logs' would continue in existence despite changes in Government, from time to time. Consequently, Governments and Oppositions, alike, might find the concept not unattractive.]

Any future stand-off between the Senate and the House of Representatives over the passage of the annual Appropriation Bills—such as that which occurred in 1975—must now have a very different outcome. Depending on the size of the 'reserves' it had been able to accumulate in its Special Accounts, an Executive could continue functioning, not indefinitely, but for a time, notwithstanding the denial of the current year's supply to it. Moreover, it could be expected to devote its Special Account resources to continuing to do those things that would minimise political damage to itself; and not do other things so as to maximise political damage to the Opposition.

To allow any potential for such a 'worse case' pattern of events to unfold, would mean tolerating a significant shift in the political dynamics within the Parliament and between the Parliament and the Executive:

– The Senate would undoubtedly recognise the pointlessness of taking that final step in the exercise of ultimate parliamentary power—the power to deny the Executive's annual appropriations—when the Executive is protected by a reservoir of accessible funds.

– But even if the Senate did choose to pursue that path for reasons of its own, the practical consequences for the welfare of the people, where the Executive cannot secure timely supply, may be so minimal that a Head of State would not *need* (at least for a time) to contemplate taking profound action to break the impasse. This could be seen (at least in practical terms) as tantamount to narrowing the Head of State's 'reserve powers' under the Constitution.

If there is even the remotest possibility of this 'worst case' (or something like it) materialising, then a bipartisan approach by the Parliament, and a genuinely supportive commitment by the Executive, would be urgently needed to find a way to restore the constitutional balance.

Fortunately, the congruency of the sorts of circumstances that gave rise to the crisis of 1975 tend not to happen often within the span of our parliamentary history. But the fact that **it is within the power** of the Parliament to deny supply to the Executive, is the great moderating influence on the way Governments behave and, for that reason, it deserves to be seen as one of the more important protective cornerstones of our Australian democracy. Anything that could place that power at risk could be justified only by the strongest possible reasons of national interest—such as the need for the Government to assume emergency powers in time of war. Risking it merely to support the badge of accrual accounting somehow just doesn't seem to rate.

Does the Vision Need Correcting?

The changes to important elements of the Commonwealth's financial framework that were developed by the Executive and accepted by the Parliament in 1999, say something about how the original Vision embodied in the Constitution is currently seen—or, perhaps, not seen.

It is inevitable that Vision deteriorates with age. But with a combination of available aids—the telescope of history; the bifocals of our own experience; bi-partisan parliamentary good will; and political commitment from the Executive to address any problems within its purview, it should be possible to prevent the Vision from failing.

And while on the matter of visual aids, it is unfortunate that we do not have access to a periscope to the future. The framers of the Constitution might certainly have made good use of one, or perhaps, a time-tunnel. If the framers of our Constitution could have visited the year 2001, to survey the massive growth in the scope and complexity of the Commonwealth's financial activities that had occurred over the century; and the ensuing difficulties—for the Parliament and the Executive alike—of trying to work within the constitutional constraints that those framers were about to set, would they return to their own time and re-think their task? If so, which of the Constitution's financial provisions might they change to permit this startling evolution is of the 'business of government' to be better accommodated?

– It would be hoped that they might leave the surplus revenue carrot in the ground and change the thrust of the provisions on Commonwealth-State finances to create something more workable and enduring.

– As a consequence of that, section 81 could go and section 83 could be strengthened. There would then need to be changes in other sections that refer to the now discarded CRF.

– The principles reflected in section 53 might stay generally as the framers had developed them, but a clarification of what 'the ordinary annual services of the Government' actually meant would be very welcome—including, of course, a declaration confirming that 'annual' meant 'for the duration of one year'. (They might even see the parallel between the century-separated concepts of 'the ordinary annual services of the Government' and 'Departmental Outputs'.)

Or might these time-travellers assure us, with wry smiles, that the proposed Constitution's framework of financial provisions was conceptually sound, being the product of long, hard–won experience, and in no need of wholesale revision? And, in that event, would they admonish us with their prescience that any strains now arising in our time come not from inherent inadequacies in the Constitution's provisions, but rather, from our own arrogance and folly in ignoring those lessons of history and attempting to 'bend' such time-tested concepts to fit our own expedient ends?

Endnotes

1. A pedantic aside: many people, both inside and outside Parliament, frequently refer to the notion that 'Parliament appropriates money'. This can be misleading, for Parliament has neither the custody of, nor access to, money. What Parliament does is to pass laws, proposed by the Executive, that, variously, compel or permit the Executive to spend the money in its possession, but in accordance with purposes, conditions, amounts and timeframes which Parliament has specified in those laws.
2. It might be noted that an express statutory obligation of the Executive to *manage its resources properly* would not emerge until some 97 years after Federation; however, such an onus could probably be considered inherent in the Constitution's stated qualitative outcomes of 'peace, order and good government' and, of course, in the electoral reality of governing.
3. Official record of the Debates of the Australasian Federal Convention Melbourne 20 Jan–17 March 1898, Melbourne, Government Printer, 1898, p. 902.
4. Royal Commission on Australian Government Administration Report, AGPS, Canberra, 1976, p. 433.
5. Initially, the Committee was regulated by the *Commonwealth Public Works Committee Act 1913*. It is now established by the *Public Works Committee Act 1969*, and its principal function is to consider each public work referred to it, and report to both Houses concerning the expedience of carrying out the work.
6. (1993) 176 CLR 555 at 599.

7. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p. 881.
8. In particular, it was rejected by Mr Owen Dixon KC, as he then was, in evidence which he gave to the Royal Commission of the Constitution of the Commonwealth, (1927–1929), Minutes of Evidence, pp. 779–780, see also Enid Campbell 'Parliamentary Appropriations', Adelaide Law Review, vol. 4 (1971) 145, p. 149.
9. 176 CLR 555, pp. 580–581.
10. (1945) 71 CLR 237.
11. (1975) 134 CLR 338.
12. (1988) 166 CLR 79 at pp. 95–96.
13. Quick and Garran, op. cit., p. 667.
14. 176 CLR 555 at pp. 572–573.
15. In *New South Wales v. The Commonwealth* (the 'Surplus Revenue Case') (1908) 7 CLR 179, p. 200, Isaacs J. said:

    > Appropriation of money to a Commonwealth purpose' means legally segregating it from the General mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the Constitution itself had declared, or Parliament has lawfully determined shall be carried out.

16. See decision of the Full Court of the High Court in *Brown v West* (1990) 169 CLR 195 at 208; but see criticism of this view by McHugh J in *Northern Suburbs Cemetery cas*e 176 CLR 555 at pp. 600–601. McHugh J cited the annual Advance to the Treasurer as an example of an appropriation which did not specify a purpose. The Advance to the Treasurer is now an Advance to the Finance Minister under the annual Appropriation Acts. Even if one accepts the orthodox view, it is arguable that the appropriation supporting that Advance is for a purpose—the provision of money to meet unforeseen expenses or to cover omissions etc.
17. See Brennan J in *Northern Suburbs Cemetery cas*e, ibid., at p. 582: 'It is of the nature of an appropriation that it appropriates either a sum certain or a sum calculable by reference to specified criteria'.
18. An Appropriation Act is 'financial not regulative' … 'it neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that the public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction'—*The Commonwealth v Colonial Ammunition Co. Ltd* (1924) 34 CLR 198 at pp. 224–225 per Isaacs and Rich JJ, cited by Mason J in the *AAP case* 134 CLR 338 at pp. 392–393.

    However, it appears that the terms of a specific appropriation could in certain circumstances be used to override limits otherwise imposed by existing legislation. It was argued in *Brown v West* 169 CLR 195 that the relevant Supply Act evinced a parliamentary intention that the limit imposed by a Remuneration Tribunal determination on postal allowances for MPs did not prevent additional payments for postal expenses. The Court noted that 'the basic consideration must be whether the Parliament, in making the appropriation in question, intends to override existing legislation', (p. 211). The Court held that the Supply Act was not intended by Parliament to override the ordinary application of the Remuneration Tribunal Act 1973 and determinations made under it given the generality of the purpose of the appropriation in the Supply Act ie 'Running costs', (p. 212).

19. Quick and Garran, op. cit., p. 669.
20. Note: s. 62B qualified as a standing appropriation.
21. ibid., p. 667.
22. ibid., p. 675.
23. With the passage of time, appropriations for ordinary annual services would cease to be the dominant share of Executive expenditure and come to be significantly outstripped, by these other types of appropriation—so that the Senate's power has (in theory) increased, accordingly.
24. Commonwealth of Australia Gazette, 3 July 1917, no. 106.
25. Parliamentary Papers General, Session 1917–18–19, vol. iv, p. 193. Appendix to the Second Progress Report, pp. 26–31.
26. ibid., p. 27.
27. Parliamentary Papers, op. cit., Memorandum by the Prime Minister on the endnote Howell-Price cast, pp. 249–250.
28. *Audit Act 1906* (no. 8 of 1906), Fourth Schedule.
29. The Audit Act provided that every appropriation made out of the CRF '… for the service of any financial year …' (i.e., an annual appropriation) would lapse and cease to have effect for any purpose at the close of that year and that departments could not apply any money unexpended against such an appropriation. [An exception was made for Militia Forces pay: any money available for Militia pay that Members had earned in one financial year could be paid after the close of that year and charges to the appropriation for the year in which it was earned.]
30. *New South Wales v. The Commonwealth* (the 'Surplus Revenue Case') (1908) 7 CLR 179.
31. Over the years, various Trust Accounts have been used as a means of balancing the CRF. At an early stage, the Invalid and Old Age Pension Trust Account was used to receive moneys additional to those disbursed for the purposes of the Account in the year of appropriation. Later, the War Pensions Account was used for the same purpose. The last was the Loan Consolidated and Investment Reserve Trust Account.
32. In *Northern Suburbs Cemetery Case* (1993) 176 CLR 555 at 578, Mason CJ, Deane, Toohey and Gaudron JJ said, in reference to s. 54 of the Constitution, that 'a failure to comply with the dictates of a procedural provision, such as s. 54, dealing with a 'bill' or a 'proposed law' is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two Houses of the Parliament and has received the Royal Assent'. In *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 482, six justices of the Court

reached the same conclusion in relation to s. 53 holding that that provision 'is a procedural provision governing the intra-mural activities of the Parliament' and endorsing the traditional view that the High Court 'does not interfere in those activities'. The Court noted that this principle does not prevent the Court determining whether the requirements of s. 57 of the Constitution had been complied with when assessing the validity of an Act passed at a joint sitting of Parliament. In this respect, as Mason J observed in *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 184, the functions of sections 53 and 57 are 'entirely dissimilar and leave no scope for an analogous reading of s. 57 deriving solely from reference in each section to the words 'proposed laws''.

33. *Report from the Committee appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government* (Parliamentary Paper No. 55 of 1967). Parliamentary Papers 1967, vol. 2, p. 1733.
[The Committee consisted of Senators Cormack, McKellar, Wedgwood and Wright who, on this and countless other occasions, each proved to be a true 'Champion of the Parliament'.]

34 Senate, *Debates*, 5 May 1964, p. 923.

35. Report from the Committee appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government, op. cit., p. 8, para. 29(2).

36. ibid., para. 66.

37. ibid., para 47.

38. Quick and Garran, op. cit., p. 410.

39. House of Representatives, *Debates*, 11 May 1965, pp. 1485–6.

40. See *Budget Reform: A Statement of the Government's Achievements and Intentions in Reforming Australian Government Financial Administration*, AGPS, Canberra, April 1984.

41. Joint Committee of Public Accounts, 'The Auditor-General: Ally of the People and the Parliament', *Report No. 296*, AGPS, Canberra, 1989

42. House of Representatives, *Debates*, 12 December 1996, p. 8345–8346.

43. National Commission of Audit, *Report to the Commonwealth Government*, AGPS, Canberra, June 1996.

44. Joint Committee of Public Accounts, 'Accrual Accounting—A Cultural Change', *Report 38*, AGPS, Canberra, 1995.

45. Management Advisory Board, 'Beyond Bean Counting: Effective Financial Management in the APS—1998 and Beyond', *Report*, PSMPC, Canberra, 1997, p. 13.

46. Joint Committee of Public Accounts and Audit, , 'Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997', *Report 374*, AGPS, Canberra, March 2000.

47. House of Representatives, *Debates*, 10 February 1999, p. 2283.

48. Financial Management Legislation Amendment Bill 1999, Schedule 1 [Items 20–23]; and Explanatory Memorandum 'Notes on Clauses'.

49. Surplus Revenue Case op. cit., p. 191.
50. ibid., pp. 202, 194, 205–206.
51. 176 CLR at 584, footnote 83.
52. Items 19 and 23.
53. Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, op. cit., Submission Volume, pp. S277–S325, Department of Finance and Administration Submission, [Para 4.2.1, 4.3.1–2, 4.5.1–2].
54. Appropriation (Parliamentary Departments) Bill 1999–2000, Appropriation Bill (No. 1) 1999–2000; and Appropriation Bill (No. 2) 1999–2000. [Introduced, House of Representatives, 11 May 1999].
55. op. cit. pp. 1–2.
56. *Appropriation Act (No. 1) 1999–2000*, section 12; *Appropriation Act (No. 2) 1999–2000*, section 11.
57. *Financial Management and Accountability Act 1997* [s. 20].