

## THE COMMONWEALTH/STATE CO-OPERATIVE BASIS FOR THE AUSTRALIAN WHEAT BOARD AND THE NATIONAL COMPANIES AND SECURITIES COMMISSION: SOME CONSTITUTIONAL ISSUES

It is the purpose of this article to examine some of the constitutional questions arising from the typical framework of joint Commonwealth-State statutory authorities with particular attention being paid to the constitutional basis for the Commonwealth's involvement. The discussion will be illustrated by reference to the co-operative Commonwealth State arrangements for the Australian Wheat Board (AWB) and the National Companies and Securities Commission (NCSC).

Authorities are set up under co-operative Commonwealth and State Schemes for a variety of reasons.<sup>1</sup> Commonly there is a desire to achieve uniformity of law, and, perhaps, uniformity of administration, in some area of national concern.<sup>2</sup> The fact that the Commonwealth chooses to involve the States may be dictated by one or more of the following reasons. There may be doubts about the sufficiency of the Commonwealth's power to give its law national application.<sup>3</sup> There may be a desire to accord to the State Parliaments, and perhaps more importantly, bureaucracies, an "appropriate" share in the governing of the federation. When the Commonwealth arrives late, it may wish to utilise the existing State expertise and framework.

We might ask why do the States choose to involve the Commonwealth? The States have power to set up co-operative complementary legislation on a nationwide basis without calling on the Commonwealth. They have, for example, managed the Uniform Companies Acts.

There are, of course, some significant gaps in their powers. Commonwealth Territories are outside their reach. The States' ability to make laws having an extraterritorial operation is limited by the requirement of sufficiency of connection with the government of their respective geographical territories<sup>4</sup> and there are, of course, difficulties in six equals speaking with one voice. These problems are particularly relevant to marketing schemes.

Even if the States would not be moved by these factors alone to "choose" to involve the Commonwealth, the Commonwealth can "butt in" for two simple reasons. First, the Commonwealth's revenue-raising position is stronger than the States'. Secondly, if the Commonwealth and States both legislate for the same activities, in case of inconsistency the Commonwealth law prevails by virtue of s.109 of the Constitution.

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1. *E.g.*, the preamble to the Petroleum (Submerged Lands) Act, 1967 (Cth.).  
2. *E.g.*, the recitals introducing the agreement scheduled to the National Companies and Securities Commission Act, 1979 (Cth.).  
3. *E.g.*, the soldiers settlement scheme considered in *Pye v. Renshaw* (1951) 84 C.L.R. 58. There the Commonwealth co-operated with the States to avoid the limitation on the Commonwealth's power to acquire property compulsorily.

4. *Johnson v. Commissioner of Stamp Duties (N.S.W.)* [1956] A.C. 331.

One of the earliest joint bodies was the River Murray Commission set up by 1915 legislation.<sup>5</sup> Since that time many different kinds of joint bodies have been set up. As already noted our discussion will concentrate on the framework followed by the Australian Wheat Board<sup>6</sup> and the National Companies and Securities Commission.<sup>7</sup> This framework has precedents in, for example, the hide and leather marketing arrangements set up after World War II to take over the system established by the Commonwealth during the war in reliance on an expanded defence power.<sup>8</sup>

The essential features of these joint bodies are as follows. On the Commonwealth side:

1. A Commonwealth Act establishes a national authority.<sup>9</sup>
2. The Commonwealth Act empowers the national authority to engage in activities within Territories and/or to engage in activities connected with overseas or interstate trade. Such provisions draw on clear heads of Commonwealth power under s.122 and s.51(i) respectively.<sup>10</sup> The variation in the National Companies and Securities Commission Act, 1979 (Cth.) should be noted. Section 6(1) provides that "The Commission has such functions and powers as are conferred upon it by any Act that is a law of a kind referred to in section 122 of the Constitution". In effect the Act sets up a "shelf" statutory authority, a mere shell with no direct grant of powers (beyond the power to make recommendations for the enactment of other laws).<sup>11</sup> Although, as this section and the agreement scheduled to the Act indicate,<sup>12</sup> further Commonwealth legislation is contemplated,<sup>13</sup> the Commission can be kicked into life by an executive direction under s.7 which is discussed below.<sup>14</sup>
3. The Commonwealth Act submits the national authority to State laws by directing it to fulfil duties imposed on it by State law and by authorising it to exercise powers vested in it by State laws. For example, s.56(2) of the Wheat Marketing Act, 1979 (Cth.) provides

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5. River Murray Waters Act, 1915 (Cth.). For an example of the complementary State legislation, River Murray Waters Act, 1915 (N.S.W.).
  6. Wheat Marketing Act, 1979 (Cth.) and complementary State legislation. As an example of complementary State legislation reference will be made to the Wheat Marketing Act, 1979 (N.S.W.).
  7. National Companies and Securities Commission Act, 1979 (Cth.). At the time of writing this article there was no complementary State legislation. Reference will be made to the kind of complementary legislation contemplated by the Agreement made between Commonwealth and State governments and scheduled to the Commonwealth Act.
  8. Hide and Leather Industries Act, 1948 (Cth.); Hide and Leather Industries Act, 1948 (N.S.W.).
  9. Wheat Marketing Act, 1979 (Cth.), s.6 continuing in existence the Australian Wheat Board set up by the earlier Commonwealth Wheat Industry Stabilization Act of 1968. Cf. National Companies and Securities Commission Act, 1979 (Cth.), s.5.
  10. Wheat Marketing Act, 1979 (Cth.), s.12(1) also empowers the participation in activities "incidental to an international agreement to which Australia is a party ..." in reliance on s.51(xxix).
  11. Section 6(3). In *Colonial Sugar Refining Co Ltd v. Attorney-General (Commonwealth)* the High Court (1912) 15 C.L.R. 182 and the Privy Council (1914) 17 C.L.R. 644 considered the scope of the executive power to inquire into subjects of possible legislation and the scope of the legislative power derived from the interaction of s.51(xxxix) with this executive power.
  12. The agreement with which the Act purports to comply, provides, under the heading "Part IV — Initial Legislation", that the Commonwealth will submit to the Commonwealth Parliament legislation unanimously approved by a Council of State and Commonwealth ministers "to form the basis of the scheme" (s.8(1)(a)).
  13. Since this article was written some legislation has been enacted — Companies (Acquisition of Shares) Act, 1980 (Cth.), Securities Industry Act, 1980 (Cth.) — and more is to follow.
  14. *Infra*, n. 16.

"It is also declared to be the intention of the Parliament that, except as otherwise directed by the Minister, the Board shall have and be subject to powers, rights, functions, liabilities and duties conferred or imposed on it by a State Act that are additional to those conferred or imposed by this Act."<sup>15</sup>

4. The Commonwealth Act may delegate or allow the national authority to delegate the exercise of some of its powers to co-operating State authorities.<sup>16</sup>
5. The national body receives some or all of its funding from an appropriation from Commonwealth Consolidated Revenue.<sup>17</sup>

The complementary State legislation has these features.

1. A State Act vests power in the national authority to engage in activities which would otherwise be beyond or arguably beyond Commonwealth power. For example s.7 of the New South Wales Wheat Marketing Act, 1979 empowers the national authority to engage in intra-state trade in wheat.<sup>18</sup>

The National Companies and Securities Commission Act, 1979 (Cth.), s.6(2), also contemplates that the Commission established by the Commonwealth Act may be vested with power by State legislation. There is a possibility of more remote involvement of the NCSC in "State" activities. In cl.37 of the Agreement scheduled to the Act it is agreed that State (and Territory) entities administering State (and Territory) laws made in fulfilment of the Agreement, "shall in the performance of those functions be subject to direction by the National Commission".

2. The State Act authorises its own State authority to act as delegate for the national body.<sup>19</sup>

3. The State funds its own State authority and, in the case of the NCSC, contributes to the funds of the national authority.<sup>20</sup>

15. Cf. National Companies and Securities Commission Act, 1979 (Cth.) s.6(2) "The Commission shall perform any functions and may exercise any powers that are conferred or expressed to be conferred upon it by any State Act". Section 3(1) defines "functions" as including "duties" unless a contrary intention appears. It is unlikely that the use of the word "conferred" rather than "imposed" would be a sufficient contrary intention even though it is unusual to speak of duties being "conferred". Otherwise this attempt at drafting brevity would be completely subverted.

16. Wheat Marketing Act, 1979 (Cth.), ss.13, 16. National Companies and Securities Act 1979, (Cth.), cl. 35 of the Agreement scheduled to the Act. In a recent article, "From Co-operative to Coercive Federalism and Back?" *F.L. Rev.* 121, especially 137-141, Dr Cranston discussed the propriety and constitutionality of the delegation by the Commonwealth of administrative functions to State bodies not required to answer to the Commonwealth Parliament. Attention is given in that article to the effect of s.61 of the Constitution and to the conflict between such delegation and the maintenance of responsible government.

Section 7 of the National Companies and Securities Commission Act, 1979 (Cth.) provides that the Commission must comply with any direction given by the Commonwealth Minister or a State Minister or a Ministerial Council of Commonwealth and State Ministers in accordance with the Agreement scheduled to the Act or pursuant to any power conferred by a Commonwealth or State Act complying with the Agreement.

Dr Cranston addressed himself to the affront to the doctrine of ministerial responsibility caused by delegation by the Commonwealth to State bodies. Section 7 of the National Companies and Securities Commission Act, 1979 (Cth.) cuts across the doctrine in two different ways. First, the section subordinates a Commonwealth statutory authority to control by a State Minister. Secondly, the Agreement subordinates the Commission (and Commonwealth and State Ministers) to majority decisions of the Ministerial Council.

17. Wheat Marketing Act, 1979 (Cth.), s.41; National Companies and Securities Commission Act, 1979 (Cth.), s.26.

18. As to the Commonwealth's power to engage in intra-state trade, *Airlines Case [No. 2] (1965)* 113 C.L.R. 54 and *Port Hedland Case (1976)* 138 C.L.R. 492.

19. Wheat Marketing Act, 1979 (N.S.W.) ss.8, 9.

20. National Companies and Securities Commission Act, 1979 (Cth.), s.17.

Before we enter upon a discussion of the constitutional issues concerning the Commonwealth's role in these arrangements two simpler matters — intergovernmental immunity and the basis for State participation — can be dealt with.

*Intergovernmental Immunity and Co-operative Schemes*<sup>21</sup>

We noted above that the Commonwealth submits the AWB and NCSC to State laws. The Commonwealth directs these bodies to fulfil duties imposed on them by State law and empowers them to exercise powers vested in them by State laws. Without such express provision in a Commonwealth enactment, any attempt by a State Parliament to expand the powers or duties of a body set up by Commonwealth law could fail at three levels.

First, there would be a strong presumption that the Commonwealth's legislative statement of the powers and functions of the body was intended to be exhaustive. Any attempt by a State law to alter or increase those powers and functions would be inconsistent with that implied Commonwealth legislative intention and be rendered inoperative by s.109 of the Constitution.<sup>22</sup>

Secondly any such State attempt might be met by implications drawn from the nature of the Constitution.<sup>23</sup>

There is a third level of possible Commonwealth immunity depending on the theory that no State law can bind the Crown in right of the Commonwealth without the consent of that Crown.<sup>24</sup> Dixon J., as he then was, first set out the theory in *Uther v. Federal Commissioner of Taxation*.<sup>25</sup> Although his Honour was dissenting in *Uther*, the High Court reconsidered the question in *Commonwealth v. Cigamic Pty Ltd (In Liquidation)*<sup>26</sup> and a majority adopted the reasoning and conclusions of that earlier dissenting judgment. The statements of Dixon J. in *Uther* were quite general but can be confined to the specific question involved in that case of "fiscal" or "prerogative" rights of the Crown in right of the Commonwealth. In between the *Uther* and *Cigamic* decisions came the decision of *Commonwealth v. Bogle*.<sup>27</sup> In this case Fullagar J., with the agreement of Dixon C.J., Webb and Kitto JJ., stated quite unequivocally a general principle that a State statute could not bind the Crown in right of the Commonwealth without the assent of the Crown in right of the Commonwealth.<sup>28</sup> The examples given by Fullagar J. were not confined to fiscal or prerogative rights.

This third level of immunity has only a limited operation. It only protects bodies which are part of the Crown in right of the Commonwealth.<sup>29</sup> Further-

21. Generally Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 *F.L. Rev.* 221; Evans "Rethinking Commonwealth Immunity" (1972) 8 *Melbourne University Law Review* 521; Zines, "The Australian Constitution 1951-1976" (1976) 7 *F.L. Rev.* 89; and Rumble, "A Test for Inconsistency" (1980) 11 *F.L. Rev.* (forthcoming).
22. *Williams v. Hursey* (1959) C.L.R. 30, 68-69 per Fullagar J. His Honour did say earlier in his judgment much more generally "it is constitutionally impossible for a State statute to prescribe what shall or shall not be the powers of a corporation which is created and empowered by a law of the Commonwealth" (emphasis added). That statement seems, however, to look ahead to the discussion of s.109. Similar approach taken in *A.B.C. v. Industrial Court (South Australia)* (1977) 138 C.L.R. 399, 402 per Gibbs J., 407-408 per Stephen J. and 418 per Murphy J. Also *Maguire v. Simpson* (1977) 139 C.L.R. 362, 407 per Murphy J.
23. Generally Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 *F.L. Rev.* 221; *Payroll Tax Case, Victoria v. Commonwealth* (1971) 122 C.L.R. 353.
24. The High Court was asked to reconsider this doctrine in *Maguire v. Simpson* (1977) 139 C.L.R. but found it unnecessary to do so.
25. (1947) 74 C.L.R. 508, 530-531.
26. (1962) 108 C.L.R. 372.
27. (1953) 89 C.L.R. 229.
28. *Id.*, 259.
29. Discussed *infra*, 366-368.

more, it only applies to stop State laws "binding" the Commonwealth. It does not prevent State laws from "affecting" the Commonwealth.<sup>30</sup> In any event, this doctrine, like the two preceding levels of Commonwealth immunity is mollified by an express Commonwealth legislative consent.

On the other side, if a Commonwealth law attempted to vest administrative functions in a State body without express State legislative consent to such vesting, it might offend an implication in the Constitution protecting the status of the State governments.

Gibbs J., in *R. v. Humby; Ex p. Rooney*<sup>31</sup> when upholding the validity of a Commonwealth law vesting executive functions in a State magistrate commented that the State instrumentality was willing to exercise the functions. One might have thought that it was more relevant to the preservation of the status of the States to ask, not whether the particular State body consented, but rather, whether the State itself consented to its body having its capacities increased by Commonwealth law. This may have just been a slip by Gibbs J. The argument before the Court had been that the vesting of the State officer was an impermissible delegation of the Commonwealth's executive power which s.61 of the Constitution vests in the Governor-General.<sup>32</sup> The Court was not directly concerned with problems of intergovernmental immunity.

In another cryptic statement from Gibbs J. in *Pearce v. Cocchiaro*,<sup>33</sup> his Honour commented that it was within the Commonwealth power in s.51(xvii) with respect to bankruptcy to confer on a State magistrate certain non-judicial powers.<sup>34</sup> His Honour inserted the qualification that the powers were "of the same sort of power that he already exercises" under State law.<sup>35</sup> This suggests that his Honour may consider it acceptable for a Commonwealth law to vest functions in a State body, without any express statutory State consent, so long as the functions vested did not alter the general character of the State body. The typical co-operative scheme takes no chances. The States give their instrumentalities express legislative authority to exercise powers granted by Commonwealth enactment.

In summary, doctrines of intergovernmental immunity present few obstacles to the erection of co-operative schemes. All difficulties seem to be resolved by the kind of express legislative consents present in the AWB and NCSC frameworks. Once the Commonwealth and the States consent to being bound and affected by the laws of the other, there is no room for arguments based on sovereign immunity or assumptions of non-interference.

#### *State power to participate in co-operative schemes*

We have already noted the main kinds of State action in co-operative schemes. The States pass laws vesting powers in the national authority, they pass laws authorising their own authorities to act as delegates of the national authority, and they pass laws appropriating money for these purposes. The State executives and instrumentalities engage in activities associated with implementing such legislation and expending appropriated money.

Where do the States get the power for these legislative, executive and spending activities? The States are authorised to make laws for the peace, order

30. *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, 260.

31. (1974) 129 C.L.R. 231, 240.

32. Discussed in footnote 16.

33. (1977) 137 C.L.R. 600.

34. The Commonwealth's power to vest *judicial* functions in State courts is contained in Chapter III of the Constitution.

35. (1977) 137 C.L.R. 600, 609.

and good government of their respective geographical territories. These words are "traditional words used in many constitutions to confer plenary powers over named territories".<sup>35</sup> There is at first sight no difficulty in concluding that the State enactments, including appropriation acts, involved in co-operative schemes would be held to be laws for the peace, order and good government of the respective State territories. And, if the States can make the laws, then the associated executive powers follow. There have, however, been some statements made by Latham C.J. and Dixon C.J., which cast some doubt on that inviting conclusion of adequate State lawmaking power.

In *Uther's Case*, Dixon J. (as he then was) stated that a State law could not bind the Commonwealth because such a law would not be a law with respect to the "peace order and good government" of the State.<sup>36</sup> It is a familiar exercise for that formula to be referred to as the criterion for testing whether or not a State law having an extraterritorial operation is sufficiently connected with the government of the State's geographical territory. Dixon J. seemed to be suggesting not only that the formula makes that familiar territorial division, but also that it effects a division of government into stratas.

Latham C.J. had taken a similar approach in *West v. Commissioner of Taxation*.<sup>37</sup> His Honour suggested that a State law singling out Commonwealth officers might be regarded "as not being within the power of a State Parliament to make laws for the peace, welfare and good government of the State. It would be legislation specifically dealing with matters relating to the government of the Commonwealth, with which the State Parliament has no concern".<sup>38</sup>

If this theory were accepted, then it should apply even if the Commonwealth consented to the State law. The fact of Commonwealth consent would not change the nature of the subject matter. The subject matter would seem still to be out of the area of State power. The same words also introduce the Commonwealth's lawmaking powers in s.61 and a parallel argument should, as Latham C.J. also suggested,<sup>39</sup> prevent the Commonwealth from singling out States or their officers. That is to say, this subject matter theory would create reciprocal intergovernmental immunities which could not be waived, and which would thus present an insuperable obstacle to co-operative schemes.

Is such a doctrine part of Australian constitutional law? It would seem not. The introduction of the concept by Dixon J. in *Uther* can be dismissed fairly confidently as a mere rhetorical flourish to embellish his theory of immunity for the Crown in right of the Commonwealth based on lack of assent. The statements of Latham C.J. in *West* were limited by their context to situations of a State law singling out Commonwealth servants (and Commonwealth law singling out State servants) for *adverse* treatment. Even in relation to that narrow question, the analysis of Latham C.J. has received only limited support.

In the *Payroll Tax Case*<sup>40</sup> when the High Court considered how best to deal with situations when one level of lawmaking authority in the Federation singles out the other for *adverse* treatment, only a minority supported the

35a *R. v. Sharkey* (1949) 79 C.L.R. 121, 152 *per* Dixon J. discussing the function of the formula in s.51 of the Commonwealth Constitution. His Honour's emphasis in this discussion on the territorial aspect of the formula supports the conclusions suggested in the text but is qualified by its context. Dixon J. was rejecting the submission that the formula adds a separate head of power to those enumerated in s.51.

36. (1947) 74 C.L.R. 508, 530-531.

37. (1937) 56 C.L.R. 657.

38. *Id.*, 669.

39. *Ibid.*

40. (1971) 122 C.L.R. 353.

analysis of Latham C.J. Barwick C.J.,<sup>41</sup> (with Owen J. concurring) agreed with Latham C.J. that such difficulties could and should be resolved by ascertaining what was in "substance" the subject matter of the suspect law. Menzies, Windeyer (a trifle ambiguously), Walsh and Gibbs JJ.<sup>42</sup> preferred to use the theory developed by Dixon C.J.<sup>43</sup> According to Dixon C.J. the way to bring down laws of one level in the Federation discriminating against the other level is by implying into the Constitution a prohibition against the different levels of government using their lawmaking powers to single out the other level for adverse treatment.

We can conclude therefore, that it is extremely unlikely that *any* of the basic kinds of State (or Commonwealth) laws necessary for co-operative frameworks would be held invalid by resort to the mysticism of the phrase "peace order and good government". There is indeed direct authority upholding a State law authorising a State instrumentality to act as a delegate administrator of Commonwealth law. In *Conroy v. Carter*<sup>44</sup> it was submitted that it was beyond the legislative power of a State to authorise a body set up under State law to act as agent for the Commonwealth in the collection of Commonwealth taxes. The argument was rejected by the Court without even bothering to hear contrary arguments.

#### *The Commonwealth's involvement*

We can now turn to the more difficult questions surrounding the Commonwealth's involvement in co-operative schemes. The fundamental questions are:

- the source of Commonwealth *legislative power* to set up statutory authorities which are to engage in functions vested in them by State law,
- the source of the Commonwealth *executive power* to engage in activities connected with such bodies,
- the source of Commonwealth *legislative power to appropriate*, and *executive power to expend*, funds for the carrying on of the activities of such bodies.

The analogous questions surrounding State involvement in co-operative schemes were readily answered by the basic principle that a State's powers are, within its own territory, unlimited. On the Commonwealth side, there are no bases for constitutionality to be readily inferred from existing case law or basic principle. On the contrary the High Court's decision in the *Australian Assistance Plan Case*, (*AAP Case*)<sup>45</sup> throws doubt on the Commonwealth involvement in co-operative schemes.

The *AAP Case* contains discussions of the general principles relating to the interaction of Commonwealth legislative, executive and spending powers. To explain the doubt that the *AAP Case* throws on the Commonwealth's legislative, executive and spending activities associated with co-operative national authorities, it is necessary to pursue the somewhat unwieldy course of

41. *Id.*, 40. McTiernan J. also indicated some support for this approach. *Id.*, 385-386.

42. *Id.*, 386, 403, 405 and 417 respectively.

43. Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 *F.L. Rev.* 221.

44. (1968) 118 C.L.R. 90.

45. *Victoria v. The Commonwealth* (1975) 134 C.L.R. 338.

summarising that complex decision.<sup>46</sup> The key to the *AAP Case* and the reason it throws doubt on co-operative schemes, lies in its reassertion of a basic principle of the Australian Federation. The Commonwealth's powers are limited.

### *The AAP Case*

In the *AAP Case* the State of Victoria and its Attorney-General sought a declaration that an item in a Commonwealth Appropriation Act<sup>47</sup> appropriating money to the Australian Assistance Plan was beyond the legislative power of the Commonwealth. The plaintiffs also sought an injunction directed to the Commonwealth and its appropriate Minister to prevent expenditure on the Plan.<sup>48</sup>

The case was argued and decided on the basis that the purposes of the Plan should be taken to be those set out in various Commonwealth Discussion Papers.<sup>49</sup> The stated general aim of the Plan was to

"assist in the development, at a regional level within a nationally co-ordinated framework, of integrated patterns of welfare services, complementary to income support programmes and the welfare-related aspects of health, education, housing, employment, migration and other social policies, having regard [to certain listed matters]".<sup>50</sup>

Under the Papers it was proposed to pay most of the money appropriated to Regional Councils for Social Development. These bodies were "intended to be independent, bipartisan, community based bodies, free of political control ...".<sup>51</sup> The Councils were authorised to allocate funds for the provision of a range of community services.<sup>52</sup>

Section 81 of the Constitution provides that

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

Section 83 prescribes that appropriation be "by law". The extent of *Parliament's power to appropriate* depends on the interpretation of the phrase "purposes of the Commonwealth" in s.81. Some thirty years earlier in the *Pharmaceutical Benefits Case (PB Case)*<sup>53</sup> the High Court had considered the meaning of that phrase. It was unnecessary for that Court to base its decision on this issue as the majority decided the provisions under challenge were not appropriations but were regulatory and unsupported by any head of Commonwealth power. Their Honours did, however, offer some *dicta* on the meaning of "purposes of the Commonwealth" in s.81. Rich, Starke, Dixon,

46. This is not virgin territory. "Gerard" has already memorialised the *AAP Case* by making an epic poem of it. "A Reply to the *AAP Case*" (1977) 2 *U.N.S.W.L.J.* 105. The other main discussions of the case are contained in Crommelin and Evans — "Explorations and Adventures with Commonwealth Powers" in *Labor and the Constitution 1972-1975* (Evans ed), pp. 41 ff.; Gurry, "Implementation of Policy through Executive Action" (1977) 11 *Melbourne University Law Review* 189; and Saunders, "The Development of Commonwealth Spending Power" (1978) 11 *Melbourne University Law Review* 369.

47. Appropriation Act (No. 1), 1974-1975 (Cth.), Second Schedule Div. 530.

48. (1975) 134 C.L.R. 338, 339.

49. Barwick C.J. quotes at length from these papers and reference should be made to his Honour's judgment for a fuller description of the Plan. *Id.*, 343 ff.

50. *Id.*, 347 as quoted by Barwick C.J.

51. *Id.*, 349.

52. *Id.*, 350-351.

53. (1945) 71 C.L.R. 237 discussed in Enid Campbell, "The Federal Spending Power — Constitutional Limitations" (1968) 8 *West. Aust. L.R.* 443.



and Williams JJ.<sup>54</sup> considered that the words limited Parliament's power to appropriate to purposes corresponding to the limited areas of Commonwealth power. Latham C.J.<sup>55</sup> and McTiernan J.<sup>56</sup> took the purposes referred by s.81 to be any purposes that the people of the Commonwealth through their elected Parliament decided to pursue. The *PB Case* effectively stated the options for the Court in the *AAP Case*.

It will be easier to understand the *AAP Case* itself, if we first follow through the course of the judgments of the individual judges and then bring together a summary of the views on different points.

*Barwick C.J. and Gibbs J.*

Barwick C.J. and Gibbs J. agreed with the majority in the *PB Case* that the phrase "purposes of the Commonwealth" means the specific and limited powers of government which are entrusted to and definitive of the body politic created by the Constitution.<sup>57</sup>

The Commonwealth is entrusted with legislative, executive and judicial powers. Most executive power is derived from legislative power in the sense that activities that the executive may engage in correspond to the subject matters for which the Commonwealth may legislate.<sup>58</sup> The executive power which is not derived<sup>59</sup> from legislative power "generates" legislative power through s.51(xxxix) which gives Parliament power to make laws with respect to

"Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

(Judicial power was not relevant to the *AAP* discussion but it also generates legislative power through s.51(xxxix).)

Against this background of the interaction of executive (and judicial) power with legislative power, Barwick C.J. was able to reduce the interpretation which he and Gibbs J. put on s.81 to the following proposition. A Commonwealth purpose means "a purpose for or in relation to which the Parliament may make a valid law...".<sup>60</sup> Their Honours concluded that some of the purposes subsumed in the challenged item in the Appropriations Act could not be referred either to any express heads of power or to any implied power based on concepts of nationhood. Therefore, the item in the Appropriation Act exceeded the *legislature's* power to appropriate and was wholly invalid.

Gibbs J. adverted to the inscrutable brevity of the item in the Act. His Honour accepted that s.81 did not require Appropriation Acts to give a full description of each expenditure being authorised.<sup>61</sup> (If it did Parliament would be unworkable.) Gibbs J. was willing to presume the complete validity of a generally expressed item. Jacobs and Murphy JJ. also expressly endorsed "one-line" appropriations.<sup>62</sup>

54. *Id.*, 264, 266, 269 and 282 respectively.

55. *Id.*, 254, 256.

56. *Id.*, 273.

57. (1975) 134 C.L.R. 338, 360-363 and 371-373 respectively.

58. *Id.*, 362, 379 respectively.

59. Generally Zines, "Nationhood and the Powers of the Commonwealth" and Richardson, "Executive Power of the Commonwealth" both of which are chapters in *Commentaries on the Australian Constitution* (Zines ed). Also Gurry, "Implementation of Policy through Executive Action" (1977) 1 *Melbourne University Law Review* 189.

60. (1975) 134 C.L.R. 338, 363. Similarly 373-374 *per* Gibbs J.

61. *Id.*, 375.

62. *Id.*, 404, 422 respectively.

Gurry argues that the recognition of brief uninformative appropriation items (expressly by Gibbs, Jacobs and Murphy JJ. and tacitly by other members of the Court) has the practical effect of "enlarging the scope of executive action" because the Court has thus excused Parliament from scrutinising all the executive's proposed expenditures to ensure that Commonwealth power is not exceeded.<sup>63</sup> It should, however, be pointed out that the approach of Barwick C.J. and Gibbs J. contains a significant weapon for restraining the executive. It would seem that both Barwick C.J. and Gibbs J. would, as they did in the *AAP Case* itself, invalidate a whole appropriation item if it covers any *ultra vires* expenditure. Gibbs J. is willing to presume validity, but it seems that both he and Barwick C.J. were willing to take the actions of the executive, even actions of the executive *after* the Appropriation Act is passed, as evidence of the "purposes" subsumed by an item in the Act. That is to say, particular *ultra vires* executive actions may reflect back on the validity of a whole item in the Appropriation Act itself.

From the approach Barwick C.J. and Gibbs J. took in this case it seems they would accept the following interrelated propositions relevant to our problem of joint authorities. If the Commonwealth does not have power to legislate with respect to an activity, then the Parliament cannot appropriate money to be spent on that activity and the executive cannot engage in that activity.

#### *McTiernan and Murphy JJ.*

McTiernan and Murphy JJ. took quite a different view of s.81 and s.83. Their Honours adopted<sup>64</sup> the approach of Latham C.J. in the *PB Case*<sup>65</sup> which was very similar to the position McTiernan J. himself had taken in that case.<sup>66</sup> For these judges the sections were to be construed in the light of British constitutional practice. "Commonwealth" in s.81 meant people of the Commonwealth who indicated their purposes through their Parliament.<sup>67</sup> An appropriation could be for any purpose chosen by the people through their Parliament.<sup>68</sup>

McTiernan J. went on to comment that even though Parliament did not have power to make laws with respect to the subject matter of the appropriation involved in the *AAP Case*, it was within executive power to expend the money appropriated and to set up Councils to provide services for which the money was appropriated.<sup>69</sup> Murphy J.<sup>70</sup> went further and explained that if it was within executive power to administer the spending of money, it would be within the incidental power of s.51(xxxix) (set out above) for the Parliament to make laws setting up bodies to see that funds would be applied for the purpose

63. *Op. cit.* 201.

64. (1975) 134 C.L.R. 338, 367-369 *per* McTiernan J., 417 *per* Murphy J.

65. (1945) 71 C.L.R. 237 especially pp. 253-256.

66. *Id.*, 273-274.

67. Barwick C.J. sniffed at this approach as being "but an example of 'words meaning what I says they mean', a notion more likely to be found in fantasy than in constitutional law" (1975) 134 C.L.R. 338, 360. One is reminded of the leading case on constitutional fact, the *Communist Party Case* (1951) 83 C.L.R. 1 when Latham C.J. in dissent *id.*, 154 would have accepted the arguments of Sir Garfield Barwick Q.C. *id.*, 23 to the effect that in the exercise of Commonwealth powers to suppress enemies of the State, it was for Parliament and the executive not the courts to make the political decision of who were the enemies of the State.

68. Murphy J. qualified this by saying that the spending power was limited by constitutional prohibitions such as those contained in ss.92, 116 and 117, (1975) 134 C.L.R. 338, 421.

69. *Id.*, 369-370.

70. Murphy J. thought if necessary he could refer the purposes of the Plan to specific heads of Commonwealth legislative power *id.*, 419. At this stage, however, his discussion is conducted on the assumption that some of the purposes would, but for the Appropriation Act, be beyond Commonwealth legislative and executive power.

of the appropriation.<sup>71</sup> (No such legislation was in issue.) Murphy J. added the proviso that this derivative legislative power could not ordinarily support laws imposing obligations other than obligations relevant to the prevention of misappropriation.<sup>72</sup>

The relevance of the approach of McTiernan and Murphy JJ. to our inquiry is that their Honours held not only that Parliament's power of appropriation is a wide power to authorise expenditure for *any* purpose (including "non-Commonwealth" purposes), but also that that wide power of appropriation generates an executive power to engage in activities of ensuring the money is spent in the manner authorised. As Murphy J. points out, the derivative executive power would in turn generate a power under s.51( xxxix) to make laws controlling and assisting the executive in administering the expenditure.

The great difficulty with the approach of McTiernan and Murphy JJ. is that it fails to indicate what are the limits on this bootstraps technique. Could the Commonwealth Parliament give its executive the power to engage in intra-state trade by appropriating funds to cover the expense of doing so? Or would their Honours consider a distinction between administrative arrangements set up to supervise payment of funds and payments of funds made to support executive activities?

*Mason J.*

Mason J. agreed with McTiernan and Murphy JJ, that an appropriation under s.81 could be for any purpose.<sup>73</sup> Mason J., however, disagreed with those judges on the *effect* of a valid appropriation. His Honour analysed the appropriation as being merely the "necessary parliamentary sanction for the withdrawal of money from Consolidated Revenue". The appropriation did not of itself

"supply legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent. Whether the Commonwealth can engage in any specific activities depends upon the extent of the Commonwealth's legislative, executive and judicial powers."<sup>74</sup>

On this view, Parliament may appropriate money for any purpose it desires but appropriations do not generate any executive or legislative power in relation to the purpose of the appropriation.

Mason J. added one significant qualification. His Honour considered that the Commonwealth had power to make payments "for purposes thought to be deserving of financial support by government, yet standing outside the area of Commonwealth power, and not involving any exercise of the Commonwealth's executive power."<sup>75</sup> His Honour did not attempt to explain how money could be withdrawn from Consolidated Revenue without an exercise of executive power. Nevertheless His Honour's reason for saying that the Commonwealth must have such power is very convincing. Unless the Commonwealth does have such a power, the many payments made over the years to

71. *Id.*, 424. Similarly Jacobs J. explained that Parliament can legislate under s.51( xxxix) with respect to matters within the executive power *id.*, 406. In the *PB Case* Latham C.J. having concluded that money could be appropriated for any purpose saw no difficulty in the enactment of laws setting up organizations to "spend the money": (1945) 71 C.L.R. 237, 254.

72. (1975) 134 C.L.R. 338, 406. In the *PB Case* only McTiernan J. would have held that the provisions of the legislation in question vesting rights and imposing duties were either severable or incidental to what he and Latham C.J. considered an otherwise valid appropriation.

73. (1975) 134 C.L.R. 338, 396.

74. *Id.*, 396.

75. *Id.*, 394.

"worthy causes" not having any apparent link with Commonwealth power would be invalid.<sup>76</sup> (The qualification did not apply as the Plan proposed significant executive activity.) The concept of a bare power to expend money on worthy causes seems to be derived from the analogy suggested by Latham C.J. in the *P.B. Case*: "A company may have power to subscribe to a hospital or a football club without having power to conduct a hospital or to organize and control a football club".<sup>77</sup>

Mason J. went on to find that as some of the executive activities proposed by the Plan could not, in his opinion, be supported either by reference to specific heads of power or by reference to the implied national power,<sup>78</sup> the executive should be restrained from giving effect to the Plan and, consequentially from spending the money appropriated for the purpose of giving effect to the Plan.<sup>79</sup> The approach of Mason J. to the question of remedies to restrain *ultra vires* expenditure is discussed below in contrast to the approach of Jacobs J.

#### *Jacobs J.*

The judgment of Jacobs J. is quite complex. His Honour indicated many points on which he would have rejected the challenge. His Honour commented first that s.81 did not require any greater degree of particularity than the Appropriation Act's reference to Regional Councils for Social Development and the Australian Assistance Plan. So long as a purpose was stated, the degree of particularity was a matter for Parliament.<sup>80</sup> Jacobs J. would have been willing to dismiss the actions, as the statement of claim, by merely referring to these general purposes, did not indicate that they were beyond Commonwealth power.<sup>81</sup> (This seems to imply that he, like Gibbs J., was willing to presume validity.) The defendants preferred, however, to provide the Court with details of the purposes of the Councils and the Plans and to get a decision on the validity of an appropriation for these purposes.

The next crucial stage in his Honour's judgment is open to more than one interpretation. One commentator<sup>82</sup> has interpreted Jacobs J. as joining Barwick C.J. and Gibbs J. in adopting the view of the majority in the *PB Case* to the effect that the power of the Commonwealth Parliament to pass Acts of Appropriation is limited by the words "purposes of the Commonwealth" in s.81 to the appropriation of funds for purposes corresponding to subject matters of legislative power. It seems to this writer that when Jacobs J.<sup>83</sup> referred to the majority view in the *PB Case*, he was not accepting the majority view as correct. His Honour seemed rather to have been merely accepting that view for the purposes of argument. Jacobs J. went on to find that the proposed activities of the Regional Councils were within or reasonably incidental to areas of Commonwealth power<sup>84</sup> and could, therefore, be funded even on the narrow view of the appropriations power.

Even if Jacobs J. was accepting as "correct" the narrow interpretation of "purposes of the Commonwealth", earlier in his judgment he had said the

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76. *Id.*, 394-395.

77. (1945) 71 C.L.R. 237, 256-257.

78. (1975) 134 C.L.R. 338, 400-401.

79. *Id.*, 402.

80. *Id.*, 404.

81. *Id.*, 406.

82. Saunders, "The Development of the Commonwealth Spending Power" (1978) 11 *Melbourne University Law Review* 369, 406.

83. (1975) 134 C.L.R. 338, 412.

84. *Id.*, 412-415.

validity of an Appropriation Act was non-justiciable<sup>85</sup> because an Appropriation Act has no effect other than to indicate that Parliament assented to the Crown spending money on the purposes stated in the appropriation.<sup>86</sup>

However one interprets his view of the *legislature's* power to appropriate money, it seems that Jacobs J. did not agree with the view of McTiernan and Murphy JJ. that an appropriation by Parliament generates *executive* power. Jacobs J. emphasised that the appropriation "may not make valid anything which cannot be validated."<sup>87</sup> The actual expenditure by the executive of funds must be within the powers of the executive.<sup>88</sup>

The final point which should be noted about the judgment of Jacobs J. and in which he and Mason J. were in direct disagreement was on the question of remedies to restrain threatened *ultra vires* expenditure. Jacobs J. distinguished unconstitutional legislation and unconstitutional expenditure by pointing out that the enactment of a law is a unity. If a law exceeds power, then, (subject to the possibility of severance), the whole law is invalid.<sup>89</sup> On the other hand, "spending" is a series of executive acts. When the executive proposes to engage in a series of acts of spending some of which are within power and some of which are not, the Court cannot prohibit all those acts. *Ex hypothesi* some of the acts are within power and the Court has no jurisdiction to restrain executive activities within power. Jacobs J. did not see how the Court could list and restrain all possible *particular ultra vires* expenditures<sup>90</sup> nor how the Court could frame any general order directed to the executive only to spend on matters within power.<sup>91</sup>

Mason J. while acknowledging that some of the expenditure for the purposes of the Australian Assistance Plan would be within Commonwealth power,<sup>92</sup> held some of the proposed expenditure to be beyond Commonwealth power<sup>93</sup> and supported the granting of an injunction<sup>94</sup> restraining *all* expenditure. Mason J. did not address himself directly to the point which Jacobs J. took about the inappropriateness of notions based on "partially" *ultra vires* legislation.

One must support, with respect, the willingness of Mason J. to prevent *ultra vires* expenditure by the executive even if it means preventing all expenditure. If there were no adequate remedy to restrain *ultra vires* expenditure, an executive could, in the absence of legislative control such as that set out in the

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85. *Id.*, 410. "... the appropriation by the Commonwealth Parliament of moneys of the Commonwealth to the purposes stated in the Appropriation Act cannot by itself be the subject of legal challenge."

86. *Id.*, 410-411.

87. *Id.*, 410.

88. *Id.*, 411.

89. The operation of that principle is exemplified by the attitude of Barwick C.J. and Gibbs J. to the challenged item in the Appropriation Act. It did not matter to their Honours that the Parliament could validly have enacted an appropriation for *some* of the purposes subsumed by the general description in the item. The Parliament, according to Barwick C.J. and Gibbs J., lacked legislative power to authorise some of the other purposes subsumed by the item. As the item exceeded legislative power, the whole item was an invalid piece of legislation. Especially at 378 *per* Gibbs J.

90. *Id.*, 411-412.

91. *Id.*, 412.

92. *Id.*, 400.

93. *Id.*, 400-401.

94. *Id.*, 402.

Audit Act, make a mockery<sup>95</sup> of the constitutional principle contained in s.81 by expending for one purpose funds appropriated for another purpose.<sup>96</sup>

*Stephen J. and the Question of Standing*

The judgment of Stephen J. turned on the question of standing. The plaintiffs were the State of Victoria and its Attorney-General. It was not necessary for the reasoning of McTiernan, Jacobs and Murphy JJ. to decide the standing question though Murphy J. expressed some sympathy for the approach of Stephen J.<sup>97</sup> Gibbs and Mason JJ. found the interest giving standing in the State's interest in seeing that the Constitution is observed<sup>98</sup> and Barwick C.J. indicated some sympathy for that view.<sup>99</sup> Gibbs J. thought both the State and its Attorney-General had standing but that the State was the more appropriate plaintiff.<sup>100</sup> Mason J. "would draw no distinction between a State and its Attorney General".<sup>101</sup> Gibbs and Mason JJ. were willing, if necessary,<sup>102</sup> to rest standing on the narrow basis that Barwick C.J. did. This was the potential, albeit practically meaningless, entitlement of States to share Commonwealth surplus revenue under s.94.<sup>103</sup>

Stephen J. held that neither the State nor its Attorney-General had standing to challenge the validity of a Commonwealth Appropriation Act as such an Act

"is not in any way directed to the citizens of the Commonwealth; it does not speak in the language of regulation, it neither confers rights or privileges nor imposes duties or obligations. It only permits of moneys held in the Treasury being paid out ... Its importance is essentially confined to the polity in question, here the federal polity; ..."104

Nor did the State or its Attorney-General have standing to seek a declaration that the actual expenditure was *ultra vires*.<sup>104a</sup> His Honour reserved the question of whether or not citizens of the Commonwealth "as federal taxpayers" would have standing for such a challenge.<sup>105</sup> Stephen J. also reserved the question of justiciability.<sup>106</sup>

Because of his central finding of a lack of standing, Stephen J. did not have to comment on the phrase "purposes of the Commonwealth" in s.81. Nevertheless part of his reasoning was that the making of an Appropriation Act was "an example of the exercise of fiscal control over the executive by the legislature".<sup>107</sup> This indicates that Stephen J. may take a view of s.81 similar to

95. Gurry, *op. cit.* 197-199 describes and explains the ineffectiveness of the theoretically possible control by the legislature of the executive. The legislature is in no position to supervise every payment, whether threatened or in fact made by the executive.

96. Mason J. could have met the point taken by Jacobs J. by arguing that the Appropriation Act only intended to authorise expenditure for the purposes of the Australian Assistance Plan if the whole Plan could be pursued. If part of the proposed expenditure was beyond power, then the legislature's conditional permission in the Appropriation Act lapsed and no money could be spent.

97. (1975) 134 C.L.R. 338, 424.

98. *Id.*, 381, 401 respectively.

99. *Id.*, 366.

100. *Id.*, 383.

101. *Id.*, 402.

102. *Id.*, 382, 402 respectively.

103. *Id.*, 365.

104. *Id.*, 386-387 in relation to the State. Similarly at 390 in relation to the State Attorney-General.

104a. *Id.*, 391.

105. Stephen J. stated that this was not an action by a taxpayer. *Id.*, 388. No mention was made of the *Payroll Tax Case* in which it was held that the Commonwealth can validly submit States to tax liability. *Victoria v. The Commonwealth* (1971) 122 C.L.R. 353.

106. (1975) 134 C.L.R. 338, 391.

107. *Id.*, 390.

that taken by McTiernan, Mason and Murphy JJ. in relation to the question of the legislature's power to appropriate. It does not, however, give us any indication of the attitude of Stephen J. to the question of the limits on the executive power to engage in activities and to spend money validly appropriated.

Stephen J., although denying to the State and its Attorney-General standing to challenge proposed expenditure, may be willing to hear a challenge by a citizen whose trading interests<sup>108</sup> were being affected by the executive funding of an activity. If his Honour were to accept such a trading interest as providing standing to challenge an appropriation, then he would, *a fortiori*, recognize it as providing standing to challenge Commonwealth engagement in the activity.

### Summary of AAP Case

#### *The Legislature's power to appropriate under s.81*

McTiernan, Mason and Murphy JJ. held that the words "for the purposes of the Commonwealth" in s.81 meant such purposes as Parliament determines. It tends to follow and McTiernan J. expressly added that the question of whether an appropriation is "for the purposes of the Commonwealth" is non-justiciable. Jacobs J. seems at one stage to say that the validity of an Appropriation Act was a non-justiciable question whatever the meaning of the key phrase in s.81, because the Act's effect was merely internal to the government of the Commonwealth. It is arguable, therefore, that these four judges constituted a majority holding non-justiciable the question of whether an Appropriation Act is "for the purposes of the Commonwealth". Even if the judgment of Jacobs J. can be interpreted this way, the decision provides a rather fragile precedent as Stephen J. expressly reserved the question because "we heard no argument on justiciability".<sup>109</sup>

It is also arguable that these four judges constituted a majority holding that "purposes of the Commonwealth" "are such as the Parliament determines".<sup>110</sup> On this view the decision is still rather vulnerable as there is no reasoning common to the majority. Paradoxically, Jacobs J. may have weakened the force of the decision by offering so many alternative grounds for refusing the orders sought.

It may be argued that Jacobs J. was aligning himself with Barwick C.J. and Gibbs J. and holding that Parliament could only appropriate funds for purposes corresponding to areas of Commonwealth power. With Stephen J. inclining to the view that the question was non-justiciable but expressly reserving that question, this would leave a three-three split on this issue. That is to say, the case would provide no authority on this point.

#### *The Executive's Power to Spend Moneys Appropriated*

Apart from questions about certain specific sections of the Constitution which might be said to authorise expenditure,<sup>111</sup> the executive cannot spend money without the authority of Parliament given in an Act of Appropriation.<sup>112</sup> The initial question of how to restrain expenditure lacking the authority of Parliament is analogous to the question of how to restrain an expenditure which is authorised by Parliament but beyond the constitutional power of the executive. Only the reasoning of Mason and Jacobs JJ. required a consideration of this question and, as we have seen, they disagreed on the

108 *Id.*, 390 per Stephen J.

109. *Id.*, 391.

110. *Cf.* Gurry, *op. cit.* 200.

111. (1975) 134 C.L.R. 338, 353 per Barwick C.J., 371 per Gibbs J.

112. Constitution ss.81, 83.

question of remedies. Their Honours were considering the problem of devising a remedy to satisfy a State and its Attorney-General seeking to prevent a threatened *ultra vires* expenditure. There would be no doubt that the provisions of the Commonwealth Audit Act would be within power.

If there is a valid appropriation, then McTiernan, Mason and Murphy JJ. would allow the money to be actually paid out, *for any purpose* authorised by the appropriation. For McTiernan and Murphy JJ. this spending would be pursuant to an executive power generated by the authority in the Appropriation Act. For Mason J. on the other hand, mere payments out would only be valid because they did *not* involve any exercise of executive power. It is not possible to find any "majority" position on the question of the executive's power to spend.

The position of Barwick C.J. and Gibbs J. in relation to executive spending is dictated by their approach to the legislature's power of appropriation. As the legislature could only authorise spending for purposes referable to subject matters of legislative power, the executive, which cannot exceed its legislative authority, would be similarly constrained in its spending.

Apart from this limitation on executive spending derived indirectly from s.81's limitation on the legislature's power to appropriate, Barwick C.J. and Gibbs J. may well agree with Jacobs J. that there is a more direct limit on the power of spending. Jacobs J. took the view that the executive activity of spending is like any other executive activity and can only be engaged in within areas corresponding to heads of Commonwealth power.<sup>113</sup> This brings us to the final important topic.

#### *Legislative Power and The Executive's Power to Engage in Activities*

Barwick C.J., Gibbs, Mason and Jacobs JJ. all said expressly that the Commonwealth executive cannot engage in activities which are not referable to subject matters of Commonwealth power.<sup>114</sup> I have put this proposition in the negative as a necessary but not necessarily sufficient condition as Gibbs J. did when pointing out "We are in no way concerned in the present case to consider ... the circumstances in which the Executive may act without statutory sanction".<sup>115</sup>

Gibbs J. also noted that the Court was not considering "the scope of the prerogative".<sup>116</sup> By this his Honour presumably means that certain prerogative rights accrue to the Crown under s.61 which empower the executive to act without reference to a head of legislative power. In this context the prerogative's interaction with s.51(xxxix) could, as we have noted, generate a legislative power.

McTiernan and Murphy JJ. held that the Commonwealth executive's power to engage in activities could be increased by an Appropriation Act. They allowed the executive to engage in activities associated with the spending of money for any purpose authorised by an Appropriation Act.

113. "the appropriation cannot make lawful that which is unlawful ..." *Id.*, 411.

114. *Id.*, 362-363, 379, 396-397, 405-406 respectively. Gibbs and Mason JJ. cite the *Wooltops Case* (1922) 31 C.L.R. 421 and *Commonwealth v. Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1.

115. (1975) 134 C.L.R. 338, 379. Also, Richardson "Executive Power of the Commonwealth" in Zines (ed.) *Commentaries on the Australian Constitution*, 50, 72-76 where the exercise of executive powers without statutory authority is discussed. Particular attention is paid to the power to enter contracts. Also Gurry *op. cit.*, 195-201.

116. (1975) 134 C.L.R. 338, 379.



### *The Outlook*

Gurry may have accurately stated the matter when he said that there was in the *AAP Case* a majority (McTiernan, Mason, Jacobs and Murphy JJ.) taking the position "that Parliament may authorize the Executive to expend moneys for any purposes which Parliament deems fit, thereby practically enlarging the scope of executive action" beyond "purposes inside the scope of Commonwealth power".<sup>117</sup>

Since the *AAP Case* was decided, however, McTiernan and Jacobs JJ. have retired from the Court. Their Honours in general, and in the *AAP Case* in particular, took an expansive approach to Commonwealth powers. They have been replaced by Aickin and Wilson JJ. Before his appointment to the High Court, Wilson J. as Solicitor-General representing the State of Western Australia appeared frequently before the Court arguing for a restrictive view of Commonwealth powers. He appeared in the *AAP Case* itself when Western Australia intervened to support the Victorian challenge.<sup>118</sup> In his career at the bar, Aickin J. appeared much more frequently to challenge than to support Commonwealth action. It is unlikely that Aickin and Wilson JJ. (or any other member of the High Court) would feel obliged to identify out of the diverse "majority" approaches in the *AAP Case* any proposition of general principle to constitute a binding precedent at the expense of his own doctrines. Commonwealth advisers and draftsmen should therefore take into account the very strong possibility that the High Court as presently constituted would take a restrictive view of the powers considered in the *AAP Case*.

### *The application of the general principles to the AWB and NCSC*

Against the necessary background of the *AAP Case* discussion of the general principles relating to the limits and interaction of Commonwealth legislative, executive and spending powers, we can now indicate the specific doubts surrounding the Commonwealth's legislative, executive and spending activities associated with co-operative national authorities.

### *Commonwealth Power to set up and administer National Authorities*

The Commonwealth has no general power to set up corporations. Murphy J. has suggested that the corporations power in s.51(xx) includes a power to form corporations<sup>118a</sup> but there are considerable difficulties with such a suggestion. Obviously the grant of a power with respect to foreign corporations contains no power to form corporations. The rest of the placitum, which grants power with respect to financial and trading corporations, is limited to corporations "formed within the limits of the Commonwealth". Those words seem to indicate that the Commonwealth's power is limited to the regulation of existing corporations. Consistent with that interpretation, a majority of the High Court in *Adamson's Case*<sup>119</sup> considered that the characterisation of a corporation as a trading corporation depended on its *current activities*. Until formed a corporation can have no current activities.

If the High Court were to find, despite those difficulties, that 51(xx) carries a power to incorporate, the troubling words would have to be regarded, not as words of limitation, but rather as words inserted *ex abundanti cautela* to indicate that the Commonwealth's power is not limited to foreign corporations. In any event, although the Australian Wheat Board might be held to be a

117. *Op. cit.*, 200-201.

118. (1975) 134 C.L.R. 338, 379.

118a *Kathleen Investments (Aust.) Ltd v. Australian Atomic Energy Commission* (1977) 139 C.L.R. 117, 159.

119. (1979) 23 A.L.R. 439.

trading corporation the National Companies and Securities Commission does not seem to answer that or any other description relevant to s.51(xx).

Although the Commonwealth has no *general* power to set up corporations it can and does set up corporations. It would seem that a corporation can even be set up by Commonwealth *executive action* utilising a State Companies Act. It follows, however, from the principles stated by Barwick C.J., Gibbs, Mason and Jacobs JJ. that the Commonwealth executive activity associated with such an incorporation would, like any other Commonwealth executive activity, have to be linked to a Commonwealth head of power. For example Commonwealth Hostels Ltd., the "Commonwealth" corporation involved in *Commonwealth v. Bogle*<sup>120</sup>, had been incorporated under the Victorian Companies Act by Commonwealth *executive action* to provide accommodation for immigrants. The executive activity involved in setting up that corporation would seem to be justified as corresponding to the legislative subject matter of "immigration" vested in the Commonwealth by s.51(xxvii).

It is more usual for Commonwealth corporations to be set up by Commonwealth *legislation*. The typical example is provided by the statutory corporation set up to administer laws "on behalf" of the Commonwealth. If the Commonwealth enacts laws, coercive or otherwise, it need not leave their administration to the ordinary exercise of executive power through government departments. It can, pursuant to s.51(xxxix)'s legislative power with respect to the execution of executive power, set up a statutory corporation to carry out those activities.

It is possible that a Commonwealth law setting up a corporation to engage in an activity can be supported without it being a necessary step in the reasoning to establish that the Commonwealth itself could engage in the activity. For example it has been held that under s.51(xxxv) the Commonwealth has power to give unions of employees and associations of employers, corporate status. The link with the conciliation and arbitration power is provided by the reasoning that to give corporate capacity to such bodies facilitates the representation of parties in proceedings of conciliation and arbitration to settle industrial disputes.<sup>121</sup> Such bodies are not in any sense acting "on behalf of the Commonwealth". Their *raison d'être* is that they act on behalf of employees and employers.

The point is that *any* Commonwealth legislative or executive power to set up a corporation, is necessarily derivative. Ultimately the corporation must be linked to a Commonwealth head of power and inevitably the link will be found, if at all, in the activities that the corporation is empowered to engage in.<sup>121a</sup>

The bodies we are considering, the Australian Wheat Board and the National Companies and Securities Commission, are set up by Commonwealth *legislation* to engage, *inter alia*, in functions vested in them by State legislation. It is not the purpose of this article to discuss the exact kinds of functions

120. (1953) 89 C.L.R. 229.

121. *Jumbunna Coal Mine Case* (1908) 6 C.L.R. 309.

121a The decision of the majority, Gibbs J., Stephen, Mason, Jacobs and Murphy JJ., in *Kathleen Investments (Aust.) Ltd v. Australian Atomic Energy Commission* (1977) 139 C.L.R. 117 indicates that the Commonwealth and its instrumentalities may constitutionally acquire shares in an *existing* company even if that company has the capacity to engage in some activities irrelevant to Commonwealth heads of power. *Id.*, 138, 142-143, 153-154, 157 and 158 respectively. Any such acquisition would, however, have to be relevant to a head of power. Murphy J. added the comment we have referred to *supra*, 364 to the effect that s.51(xx) gives a power to set up corporations. Apart from that *dictum*, the case has nothing to say to the question of Commonwealth power to *set up* corporations and to vest corporations with capacities.

vested in the AWB and the NCSC by State legislation. As was noted earlier, a common reason for relying on a State law is that there are doubts about the sufficiency of Commonwealth power to act alone. It might eventually be discovered that the Commonwealth could have directly enacted such provisions. We would then have to confront the question of whether a Commonwealth law with respect to such functions as may be vested by a State law is a law "with respect" to any Commonwealth head of power to which the functions vested may turn out to be related.<sup>122</sup>

Let us assume that the Commonwealth could not directly vest the AWB and NCSC with the functions vested in them by State legislation. Where is the Commonwealth power to set up the AWB and NCSC corporations to engage in functions (otherwise beyond Commonwealth power) vested in them by State law? It might be answered that so long as the Commonwealth sets up a corporation to engage in an activity which can undoubtedly be referred to a Commonwealth head of power, such as s.122 or s.51(i), the States, as another source of law,<sup>123</sup> can vest other capacities in the corporation.<sup>124</sup>

The difficulty with that analysis is that the AWB and the NCSC are Commonwealth bodies not only in the sense that they have been set up under Commonwealth law, but also in their links with the Commonwealth executive. Not all bodies set up to engage in activities "on behalf" of the Commonwealth in the sense discussed above, "represent" the Crown in right of the Commonwealth. For example TAA, although supported by the theory that it is carrying on activities "on behalf" of the Commonwealth,<sup>125</sup> would not represent the Crown in right of the Commonwealth, so as to be part of the Crown in right of the Commonwealth for the purposes of privileges and immunities. It seems that this latter status can be established by an express indication of Parliamentary intention, or, in the absence of such declaration, by an examination of factors such as the degree to which the body is subject to ministerial control.<sup>126</sup>

Of the joint bodies we are considering, there is no express declaration that the AWB represents the Crown in right of the Commonwealth but the AWB

122. A similar problem was considered by the High Court in the *Australian Communist Party Case* (1951) 83 C.L.R. 1. In this case the High Court had to consider the validity of a Commonwealth enactment which purported, *inter alia*, to declare the Communist Party unlawful and then attached certain consequences to that declaration. This law was not operating by reference to any activities or category of legal persons in respect of which the Commonwealth has legislative power. The majority (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ., Latham C.J. dissenting) held therefore the proscription was *ultra vires* despite the legislature's opinion, recited in the preamble, to the effect that the Communists were engaging in activities that the Commonwealth could have regulated. Only one member of the majority was willing to take a wait and see approach. Webb J. *id.*, 242 would have been willing to hold the proscription valid if it turned out on a trial of fact that the Communists were engaging in the activities that the legislature suspected them of.

123. Subject to questions of intergovernmental immunity, *supra*, 351-352.

124. If that answer is accepted as sufficient, then delegates of the State Parliaments, such as local government authorities, could similarly increase the capacities of the body set up by Commonwealth law. This might suggest a different device for implementing a philosophy of regionalization of the kind underlying the Australian Assistance Plan. The States could ultimately frustrate any such device by withdrawing authority from local government bodies. Such a course might constitute an unattractive option for a State Government reluctant to appear the monolithic centralist.

125. *Airways Case* (1945) 71 C.L.R. 29 relying on s.51(i). This reasoning is not inconsistent with a more general proposition finding support in the case. This is that a law with respect to the incorporation of bodies set up to engage in interstate trade is sufficiently connected with s.51(j). The relevance of the narrower ground for our discussion is that it concentrates on the link between the corporation and the Commonwealth.

126. The principles are set out in Whitmore, *Principles of Australian Administrative Law* (5th ed.) 224 ff. For examples of application, *Commonwealth v. Bogle* (1953) 89 C.L.R. 229; *Bradken Consolidated Ltd v. Broken Hill Pty Co Ltd* (1979) 24 A.L.J.R. 9, 15-16 per Gibbs A.—C.J.

must act on directions of the Commonwealth Minister in relation both to its functions vested by Commonwealth law and in relation to its functions vested by State law.<sup>127</sup> On this test the AWB represents the Crown in right of the Commonwealth in relation to all its activities whether empowered by Commonwealth or State law.

The situation under the NCSC Act is more complicated. The Act attempts to settle the matter by declaring in s.5 that in performing functions or exercising a power under a Commonwealth Act, the Commission represents the Crown in right of the Commonwealth.<sup>128</sup> The Act also contemplates that State Acts may declare that the Commission represents the Crown in right of a State when performing a function or exercising a power under an Act of that State.<sup>129</sup> The purport of these express statutory declarations is worth emphasising. The character of the Commission is to change from time to time from Crown in right of the Commonwealth to Crown in right of one State or another according to which law it relies on. (If such statutory declarations do settle the matter in the way proposed, then the schizophrenic/chameleon Commission, its officers and anyone dealing with it may have some difficulty in deciding to which Crown to attribute particular actions of the Commission).<sup>130</sup> There may be situations when an action could be attributed both to the Commonwealth and to a State enactment. It might be implied that when Commonwealth power is adequate, the Commonwealth provision is intended to cover the field. (It should be borne in mind, however, that one of the basic reasons for setting up co-operative frameworks is to avoid having to confront the problem of defining the limits of Commonwealth power and the "field covered" could not be determined without determining the limits of Commonwealth power.)

If we apply the degree of ministerial control test, rather than rely on the legislative declaration of intention, the Commission takes on a different character. Section 7 requires the Commission to comply with directions, from a Ministerial Council, the Commonwealth Minister or a State Minister. An examination of the Agreement indicates that a wide range of activities is subject to direction and that most powers of direction are vested in the Council which consists of the appropriate Commonwealth and State Ministers.<sup>131</sup> The Council can proceed by majority decision.<sup>132</sup> The legislation attempts to declare a chameleon character for this body. It would seem more accurate to describe a Commission subject to this kind of direction as a hybrid representing the Crown in right of the "Federation".<sup>133</sup> It might be argued as a third alternative that as the Council itself is not answerable to any one Parliament, the NCSC does not represent the Crown in right of any level of government notwithstanding any legislative declaration that it does.

Rather than discuss these interesting questions fully, it is sufficient for our purposes to make the following observations about the status of the AWB and the NCSC as "Commonwealth" bodies. The activities of the AWB are activities which would probably be attributed to the Crown in right of the Commonwealth. It might be argued that most of the activities of the NCSC can also be attributed to the Crown in right of the Commonwealth as that Crown is

127. Wheat Marketing Act, 1979 (Cth.) s.11; Wheat Marketing Act, 1979 (N.S.W.) s.9.

128. Section 5(2).

129. Section 5(3).

130. There would, for example, be some difficulty in applying to it those provisions of Chapter III of the Constitution and the Judiciary Act, 1903 which distinguish between cases where the Commonwealth is a party to an action and those where a State is a party.

131. Cl. 19 of the Agreement.

132. Cl. 29 of the Agreement.

133. There are still difficulties in fitting this hybrid Crown into the Federal division presumed by Chapter III of the Constitution and the Judiciary Act.

part of the Council which directs, albeit by majority decision, the NCSC. This analysis reveals bodies representing the Crown in right of the Commonwealth engaging in activities depending on State legislation.

Even if we leave aside this analysis of the character of the bodies themselves we still have a problem. How is it that a Commonwealth *Minister* can engage in the *executive* activity of directing the corporation in relation to its activities depending on *State* law?<sup>134</sup> As we have already noted, in the *AAP Case*, Barwick C.J., Gibbs, Mason and Jacobs JJ. emphasised the limitations on the capacity of the Commonwealth executive to engage in activities and the need to refer executive activity to *Commonwealth* heads of power.

#### *Commonwealth Power to Fund National Authorities*

A question which we will mention only to reserve is the question of the principles governing disposal of funds generated by a Commonwealth statutory authority's activities. This is relevant to marketing authorities such as the AWB. In *Maguire v. Simpson* Mason J. referred to the opening words of s.81 which require "All revenues or moneys raised or received by the Executive Government of the Commonwealth" to go into Consolidated Revenue. His Honour commented that s.81 is not directed to statutory corporations which represent the Commonwealth and through which the Commonwealth carries on an activity.<sup>135</sup> His Honour explained that if bodies such as the Commonwealth Bank had to pay their moneys into Consolidated Revenue they would have great difficulty conducting their business.<sup>136</sup> This argument would apply equally to the AWB's income from its wheat sales. This argument does not go to the question of payments *from* Consolidated Revenue to Statutory Authorities.

There is a strong possibility that the current High Court would hold that the Commonwealth can only spend its money on purposes referable to specific heads of Commonwealth power either because of a limitation found in s.81 on the legislature's power to appropriate and/or because of the limitations on the executive's power to engage in activities (including spending).

There is provision under both the Wheat Marketing Act, 1979 (Cth.)<sup>137</sup> and the National Companies and Securities Commission Act, 1979 (Cth.)<sup>138</sup> for appropriations from Consolidated Revenue to make payments to the respective bodies. These payments may be applied for the purposes of the respective bodies<sup>139</sup> and some of those purposes are "State" purposes.

It may be answered that these bodies have other sources of revenue<sup>140</sup> and that it is impossible to say that particular activities depending on State legislation are funded by money from Commonwealth Consolidated Revenue. This defence is insufficient. If there is found to be a limitation on the Commonwealth's power to spend *via* a limitation on the *legislature* in s.81, then an authority in an Act of Appropriation would, if *exceeding* legislative power, be invalid.<sup>141</sup> If there is found to be a limitation on the Commonwealth's power

134. Section 24(1) of the NCSC Act also authorises the Commission (*inter alia*) to "arrange with the Permanent Head of any Department of the Australian Public Service ... for the services of officers or employees of the Department ... to be made available to the Commission". (1977) 139 C.L.R. 362, 398.

135. *Ibid.*

136. Section 51.

137. Section 26.

138. Section 26.

139. Wheat Marketing Act, 1979 s.52; National Companies and Securities Commission Act, 1979 s.29.

140. The Wheat Board earns revenue from trading and the States contribute to the NCSC.

141. Subject to the possibility of severance which is not particularly relevant in this context. *AAP Case* (1975) 134 C.L.R. 338, 378 *per* Gibbs J.

to spend depending on a limitation in the *executive's* power to engage in activities, then we must ask where does the Commonwealth executive get the power to pay money to a body which is empowered to pursue non-Commonwealth purposes and to expend any part or all of its funds on pursuing non-Commonwealth purposes?

One might look for an answer to this question of the validity of these appropriations by analysing the application of Commonwealth moneys to State purposes as being a grant to the States under s.96. This revives our earlier discussion of the notion that these joint bodies change from time to time from being Commonwealth to State bodies according to whether they are acting under Commonwealth or State law. It does not seem, however, that the source of power to spend can be found in treating so much of an appropriation as is for State purposes as being a grant to the States under s.96. It is difficult to analyse payments to the joint authorities as being "grants" to the States (and, distributively, appropriations and expenditures for Commonwealth purposes). As we noted above, the AWB is under the control of the Commonwealth executive and the NCSC is under the control, in some of its activities, of a Ministerial Council consisting of Commonwealth and State Ministers who can proceed by majority decision. In short, the judgments of Barwick C.J., Gibbs and Jacobs JJ. in the *AAP Case* throw considerable doubts on the validity of the Commonwealth's *funding* of the AWB and the NCSC.

Even for McTiernan, Mason and Murphy JJ., who would allow the Commonwealth to appropriate and expend money for any purpose, there are still limits on the Commonwealth's *legislative* and *executive* powers. Mason J. would require any Commonwealth legislative or executive action to be referable to a head of power. McTiernan J. would allow the executive to engage in the non-coercive activity of setting up an administrative framework to supervise the expenditure of appropriated funds. Murphy J. who went the step further than McTiernan J. (not that McTiernan J. would necessarily disagree) would allow Parliament to pass laws relating to those non-coercive activities.

It would be little consolation to the Commonwealth to be told by these judges that it can fund activities of the AWB and the NCSC but that it cannot set up these bodies to engage in their activities unless specific heads of power can be pointed out. A key reason for setting up joint schemes is to overcome doubts about the adequacy of Commonwealth heads of power. In this context s.81 adds little if anything to the power in s.96.

At best, Murphy J. would allow the Commonwealth executive to engage in, and the Parliament to pass laws relating to, non-coercive activities. The line between Commonwealth laws which are coercive and those which are non-coercive is not easy to draw. Some of the AWB's functions, for example, consist of exercising a discretion, vested by State legislation, to *relax* a prohibition imposed by State legislation. It would be absurd if those activities would be classified non-coercive, and therefore sufficiently supported by s.81, whereas the exercise of a discretion to *impose* a prohibition would be held to be coercive.<sup>142</sup> Furthermore His Honour might take the distinction suggested before:<sup>143</sup> between administrative arrangements set up as the means of ensuring the application of funds to the purpose authorised by the Appropriation Act and appropriations made to support administrative arrangements set up as ends in themselves. In summary it seems probable that not even Murphy J.

142. *Cf. Giris Pty Ltd v. Commissioner of Taxation* (1969) 119 C.L.R. 365. Especially 372 *per* Barwick C.J. and 379 *per* Kitto J.

143. *Supra*, 368.

would allow the Commonwealth to acquire the *legislative* and *executive* power necessary to support Commonwealth activities associated with the AWB and NCSC merely by appropriating money to cover their expenses.

### *The Central Issue*

All questions come back to the one. Does the Commonwealth have power to pass laws authorising and requiring its executive to engage in activities which would be beyond the executive's capacity but for a vesting of capacity by State legislation? If the answer to this question is yes, then the executive will have power to engage in such activities, and the Commonwealth will have power to fund these activities on any view taken in the *AAP Case*. If the executive can engage in such activities then s.51(xxxix) would give the legislature power to set up an instrumentality to engage in such activities on behalf of the Commonwealth. There is obviously no express legislative power sufficient to cut through these problems. Can any such power be implied?

### *Is there an Implied Power to support Co-operative National Authorities?*

As Murphy J. pointed out in *McGraw-Hinds (Aust.) Pty Ltd v. Smith*<sup>144</sup> the brevity of constitutions invites and necessitates implications to meet changing circumstances. One of the key features of our constitutional law has been the development by Dixon C.J. of a doctrine of implied *prohibitions* to enforce the federal spirit of our Constitution.<sup>145</sup> Of particular relevance to our inquiry has been the development by the High Court of a notion of an implied national power.

The theory of a national power perhaps has its first manifestations in the judgment of Isaacs J. in *Ex parte Walsh and Johnson*.<sup>146</sup> There His Honour had to consider whether the Commonwealth had power to deport immigrants.

"The nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare. We have only to imagine, as I suggested during the argument, some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor. It matters not, as I conceive, whether he is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia, the national danger is the same ... Needless to say, I speak only of national power, that is, the right of the community as a whole to preserve its own existence."<sup>147</sup>

These statements are weakened and qualified by their association with the notions that Isaacs J. had about the width of the immigration power. In that matter Isaacs J. was out of step with his contemporary brother judges.<sup>148</sup> Nevertheless, the theory of a national power based on the general needs of the

144. (1978) 24 A.L.R. 175, 198.

145. *Supra*, 354.

146. (1925) 37 C.L.R. 36.

147. *Id.*, 94.

148. Isaacs J. argued that anyone who immigrated to Australia was always liable to deportation even by retrospective legislation. His Honour was willing to reduce the proposition to "Once an immigrant always an immigrant". Rich J. agreed with Isaacs J. (*id.*, 125), but a majority of the Court in *Ex parte Walsh and Johnson*, Knox C.J., Higgins and Starke JJ. (*id.*, 61-62, 109-110 and 137 respectively) emphasised that s.51(xxvii) refers to immigration not immigrants. Once an immigrant had become part of the Australian community he was no longer engaging in immigration and therefore no longer subject to a power of deportation derived from the immigration power.

national community and on the necessity of self preservation in particular was to have a lasting place in Australian constitutional doctrine.

The *existence* of a power of self preservation was acknowledged by the High Court in *R. v. Hush; Ex parte Devanny*.<sup>149</sup> The *source* of this power received consideration in *Burns v. Ransley*,<sup>150</sup> *R. v. Sharkey*<sup>151</sup> and the *Australian Communist Party Case*,<sup>152</sup> when the High Court had to pass on the validity and operation of laws concerned to prevent people exciting disaffection against the Commonwealth. Through these cases Latham C.J. on one side attributed the self preservation power to s.61, s.51(xxxix) and s.51(vi) (the defence power). Latham C.J. drew attention to s.61's reference to the execution and maintenance of the Constitution and laws made thereunder and to s.51(xxxix)'s grant of a legislative power with respect to matters incidental to the execution of any power. Surely, Latham C.J. argued, it is incidental to the execution of executive power by government departments to prevent hostility being aroused against them.<sup>153</sup> Dixon J. (as he then was) was more representative of the Court in confining s.51(vi) to "defence" against external enemies. Dixon J. preferred to attribute the Commonwealth's self preservation power to the "very nature and existence of the Commonwealth as a political institution ..."<sup>154</sup> (Dixon J. was at pains to emphasise that the power was a power to preserve the polity, not the current government.) The relevance of the polity preservation power to our problem is that it provides a precedent of an implied Commonwealth power based on national necessity.

More directly in point are the discussions in the *PB Case* and the *AAP Case*. In the *PB Case*, Starke J. referred to "matter arising from the existence of the Commonwealth and its status as a Federal Government".<sup>155</sup> Dixon J. spoke of Commonwealth power over "whatever is incidental to the existence of the Commonwealth as a State and to the exercise of the functions of a national government".<sup>156</sup>

In the *AAP Case*<sup>157</sup> the discussion was more thorough. Mason J. pointed out that there were two not incompatible theories on which national power could be vested. One theory depends on the interaction of s.61 and s.51(xxxix). Mason J. argued that the national powers derived from s.61 and s.51(xxxix) are not confined to protecting the Commonwealth from subversion.<sup>158</sup> His Honour argued further that the presence of ss.61 and 51(xxxix) supports a second line of reasoning. This second line depends on an implication of "national power" which is "to be deduced from the existence and character of the Commonwealth as a national government ...".<sup>159</sup> Whether or not we attribute the "national" power to the rather bare framework of s.61 or to the latter ground nominated by Mason J., is unlikely to make much difference to our problem.<sup>160</sup>

149. (1933) 48 C.L.R. 487.

150. (1949) 79 C.L.R. 101.

151. (1949) 79 C.L.R. 101.

152. (1950) 83 C.L.R. 1.

153. *Burns v. Ransley* (1949) 79 C.L.R. 101, 109-110; *King v. Sharkey* (1949) 79 C.L.R. 121, 135; *ACP Case* (1950) 83 C.L.R. 1, 141-142, 150-151, 156.

154. *R. v. Sharkey* (1949) 79 C.L.R. 121, 148; similarly *Burns v. Ransley* (1949) 79 C.L.R. 101, 116; *ACP Case* (1950) 83 C.L.R. 1, 188.

155. (1945) 71 C.L.R. 237, 266.

156. *Id.*, 269.

157. (1975) 134 C.L.R. 338.

158. *Id.*, 397.

159. *Ibid.*

160. The original reasoning which hung the Commonwealth's power to suppress subversion and exciting disaffection on the words "maintenance of the Constitution" in s.61 is a lot more convincing than the suggestion of Mason J. that CSIRO owes its existence to the interaction of s.61 and s.51(xxxix). *Ibid.* It should be borne in mind, however, that s.61 vests *all* the



No judge in the *AAP Case* was willing to give any precise statement of the content of the national implied power. There were significantly different conceptions of the general principles which affect the content of the power.

Jacobs J. set out a very wide doctrine of national power.<sup>161</sup> According to Jacobs J. the Commonwealth has attained sovereignty as a nation not only externally but also internally. Matters of internal sovereignty with an Australian (rather than a local) flavour "adhere" to the Commonwealth in the same way that matters of external sovereignty do.<sup>162</sup> (The proposition that matters of national sovereignty adhere to the Commonwealth presumably looks to s.61). Disregard the content of this power is large and expanding. Growth of "national identity" can expand the area of matters with an "Australian flavour". The "complexity and values" of modern society can result in national needs calling for national action.<sup>163</sup>

This theory of constitutional power which emphasises the current condition and desires of the Australian people (rather than the express terms of the document which is the Constitution) suggests a future line of argument. It might be argued that above all else the Constitution was intended to provide a framework for the emergence of a nation and that in fact a nation has emerged. (Windeyer J. once spoke of the Constitution as being the birth certificate of a nation.)<sup>164</sup> This basic assumption underlying the Constitution and the basic fact of nationhood could be invoked to support specific Commonwealth activities which the people of the nation (through their national Parliament) say the nation needs.

I have described that line of argument as a "future" line of argument. If we compare it to current constitutional doctrines it might be more accurate to describe it as "futuristic". Mason J., for example, who took the next most liberal approach to the national implied power emphasised that it was "limited in scope".<sup>165</sup> Mason J. stated a fairly rigorous test. The national implied power supports Commonwealth involvement in activities if these activities are activities "peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".<sup>166</sup> The mere fact that it was convenient for the Australian Assistance Plan to be administered by the national government did not bring the Plan within national power.

The following aspects of the discussion by Mason J. should also be noted. First, Mason J. stated that the activities within the reach of the national power will vary from time to time.<sup>167</sup> This allows for the acceptance of "futuristic" arguments at a future time. "Necessity" is a fairly flexible test in the hands of lawyers as Mason J. himself demonstrated in his joint judgment with Jacobs J. in the *Clark King* case.<sup>168</sup> Secondly, Mason J. cited the activities of CSIRO

160. *Contd.*

Commonwealth's executive power. Section 61 expressly refers to the execution and maintenance of the Commonwealth Constitution and laws made thereunder but these matters are said to "included in" not "exhaustive of" Commonwealth executive power.

161. This doctrine was not central to the actual decision of Jacobs J. that the Commonwealth did have power to implement the Australian Assistance Plan. That conclusion depended more on his wide view of s.51(xxxix) and its interaction with specific *express* heads of power: (1975) 134 C.L.R. 338, 413-414.

162. *Id.*, 412. His Honour made similarly strong statements on the external status of the Commonwealth in the *Seabeds Case, New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 498.

163. *Id.*, 412-413.

164. *Western Australia v. Chamberlain Industries Pty Limited* (1970) 121 C.L.R. 1, 26.

165. *Id.*, 398.

166. *Id.*, 397; also 398.

167. *Id.*, 397.

168. *Clark King & Co Pty Ltd v. Australian Wheat Board* (1978) 140 C.L.R. 120, 185-193 especially 192-193.

under the Science and Research Act, 1951 (Cth.) as an example of something undoubtedly within the national power.<sup>169</sup> While it can be accepted that the validity of CSIRO's activities must be upheld,<sup>170</sup> it is stretching the test that Mason J. offered to say that these activities could not otherwise have been carried on for the benefit of the nation. It is submitted, with respect, that the distinction between the activities of CSIRO and those proposed under the Australian Assistance Plan must be sought in some other criterion. A relevant criterion is suggested by the comments of Barwick C.J. and Gibbs J. on the national power.

Barwick C.J. and Gibbs J. emphasised that the Constitution established a Federation. As Barwick C.J. put it

"However desirable the exercise by the Commonwealth of power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained".<sup>171</sup>

Gibbs J. was even more niggardly

"The legislative power *that is said to be incidental* to the exercise by the Commonwealth of the functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; *the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution*".<sup>172</sup>

This is rhetoric rather than logic. Any implication of a power not expressly granted affronts the fact that it was "carefully" omitted. The power to engage in scientific research was just as clearly omitted from the express powers of the Constitution as was the power to provide the services of the Australian Assistance Plan.<sup>173</sup> Yet it is unlikely that Barwick C.J. and Gibbs J. would hold the Science and Research Act, 1951 (Cth.) invalid. Barwick C.J. in fact gives scientific research as an example of something clearly within the national power.<sup>174</sup> Their Honours' approach highlights the fundamental conflict between the fact of a nation with national needs, and a Constitution which set out to establish a Federal Commonwealth.<sup>175</sup>

The distinction between scientific research and the activities of the kind under the Australian Assistance Plan lies in federal assumptions. It should not be forgotten that the main set of implications made into the Constitution are Dixon's implied prohibitions against intergovernmental interference. These implications are justified by reference to the Federal nature of the Constitution. The *AAP Case* emphasised that the power to determine who gets money is just as much an element in the federal distribution of powers as is the ability to pass coercive laws. The thrust of the Australian Assistance Plan was to shift the balance of power in a very significant manner. The Plan involved the Commonwealth directly in making basic social value judgments. The State governments, Parliaments and bureaucracies were by-passed.<sup>176</sup>

169. Gurry, *op. cit.* 216 ff. discusses the relationship between Commonwealth powers, especially national implied power, and statutory corporations.

170. (1975) 134 C.L.R. 338, 362 *per* Barwick C.J. Also 413 *per* Jacobs J.

171. *Id.*, 364.

172. *Id.*, 378. Emphasis added.

173. Indeed the presence of the power in s.51(viii) with respect to "Astronomical and meteorological observations" could be treated as an indication that thought had been given to the question of scientific research, and an exhaustive provision made.

174. *Id.*, 362.

175. Commonwealth of Australia Constitution Act, s.3.

176. This is not to say that decisions as to which areas of scientific research should be preferred in funding contests are not political decisions. These decisions will if anything become more highly politicised. Nevertheless the discovery of new knowledge does not *per se* change society. Society is affected only by the use made of the new knowledge.

How does all this relate to the questions of the co-operative arrangements for the AWB and the NCSC? The point of the preceding discussion is to show that there is usually tension between the theory that Australia is a nation and the theory that it is a Federation. The tension is neatly illustrated by contrasting the comments made by Byers, Solicitor-General of the Commonwealth, and Dawson, Solicitor-General of Victoria, on a Conference Paper<sup>177</sup> which included a discussion of the *AAP Case*. Solicitor-General Byers asserted: "Nationhood is not only an aid to the construction of explicit powers. It is also itself a source of power".<sup>178</sup> Solicitor-General Dawson preferred to emphasise "... the Federal structure imposed by the Constitution."<sup>179</sup> In relation to the question of making an implication of power in the Constitution to support the AWB and NCSC frameworks, the usually conflicting theories *both* tend in the direction of validity.

First, consider the question with the assumption that the Commonwealth has implied power to undertake activities appropriate to a national government. There is no difficulty in finding that it is appropriate for the national government to co-operate with the States to set up a uniform system of law and administration. The national flavour of wheat marketing and companies and securities regulation would be demonstrated not merely by judicial notice of the nature of these social problems but also by the fact that the Commonwealth and State governments are concerned enough to set up co-operative schemes to deal with these matters.

Now consider the matter with the emphasis on maintaining a balance between the States and the Commonwealth. Again there should be no difficulty with the AWB and NCSC device making a Commonwealth body the repository of State powers. Depending, as the device does, on the co-operation of States, the "balance" of power is not shifted. As Gibbs J. said in a slightly different context, the Constitution was not intended to prevent co-operation.<sup>180</sup>

There is one further kind of basic approach to the Constitution that might be mentioned. Some might see the distribution of powers made by the Constitution as having the advantage of weakening the capacity of all levels of government to interfere with individuals. Sections 51(xxxi), 80, 92 and 116 could be cited as evidence of the incorporation of this philosophy into the Constitution. (Or, *contra*, as exhaustive provision for protection of the individual.) Adherents to this philosophy might argue that it is absurd to think that two delegate levels of government, the Commonwealth and the States, may connive for the lower level to increase the carefully drawn list of powers of the higher other than in the ways expressly provided for in the Constitution. Section 51(xxxvii) allows the reference of State powers to the Commonwealth and s.96 empowers the Commonwealth to grant funds to States on conditions. It might be argued that the presence of these express powers indicates that the draftsmen of the Constitution addressed themselves to the question of co-operative schemes and exhaustively provided for them. (The presence of s.51(xxxvi) and s.96 could, on the other hand, be taken rather as indicating that co-operative schemes were consistent with the spirit of the Constitution.)

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177. The paper was Crommelin and Evans "Explorations and Adventures with Commonwealth Powers" in *Labor and the Constitution 1972-1975* (ed. Evans), p. 24.

178. *Id.*, 67.

179. *Id.*, 72.

180. *R. v. Humby; ex parte Rooney* (1973) 129 C.L.R. 231, 240.

### Conclusion

We might ask why there has been no (public) discussion of the fundamental questions raised in this article about the validity of the Commonwealth's involvement in the setting up, administering and funding of a vast range of co-operative joint authorities. Part of the answer must lie in the question of standing. When such bodies are engaged in non-coercive activities there will be few individuals with any desire or technical standing to challenge such activities. In the *AAP Case* non-coercive activities were challenged by the States. In co-operative schemes the States will have no desire to challenge the Commonwealth's role in a scheme which, *ex hypothesi*, depends on State co-operation. Even when the scheme involves coercive laws, the national authority can be shielded from constitutional attack by individuals by a simple device. The States can enact a wide prohibition or imperative and then give the national authority discretion to relax the State law. To prove that the national authority is "unconstitutional" does not relieve those caught by the State law (unless the prohibition is construed to be conditional on the existence of a discretion to relax the prohibition). On the contrary it makes the State law absolute.<sup>181</sup>

When and if the High Court ever comes to consider the questions discussed in this article what is the outcome likely to be? The likely outcome is that the Court will make an implication, along the lines suggested in the article, of a Commonwealth power to co-operate with the States. One could call such power federal implied power or national implied power. The Court may even decide that both a national and a federal power can be implied into the Constitution and that either would suffice to support co-operation.

There are respectable traditional legal arguments based on the text of the Constitution for denying the existence of the power required to answer the queries raised in this article. It is unlikely, however, that the High Court would allow traditional legal arguments alone to bring down a time honoured pragmatic device when there are similarly respectable legal implications available to support it based on the spirit or, rather, spirits of the Constitution.

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181. Query whether this device is always effective. *Giris Pty Ltd v. Commissioner of Taxation* (1969) 119 C.L.R. 365, 371-372 *per* Barwick C.J. Contrast 377-378 *per* Kitto J.