Supplementary Submission No. 15.1
Inquiry into National Funding Agreements

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Inquiry into National Funding Agreements

Supplementary Submission

by Bryan Pape *

Finance is government; government is finance.[1]

Is the drawing down of funds from the COAG Reform Fund account an abdication by Parliament of the powers conferred on it by s. 96 of the Constitution?

Relevantly s 96 of the Constitution provides that:

.....(T)he Parliament may grant financial assistance to any State ***on such terms and conditions as the Parliament thinks fit.*** (emphasis added).

With the enactment of the *COAG Reform Act* 2008 (Cth) and the *Federal Financial Relations Act* 2009 (Cth), Parliament has sanctioned Executive Federalism. It is the product of Intergovernmental agreements between the Commonwealth and the States and the Commonwealth's financing of these agreements. This scheme is founded on the 2009 *Intergovernmental Agreement on Federal Financial Relations* and a purported delegation of Parliamentary power under s 96 to the Executive.

Its working is usefully shown by the $16.2bn, *Building the Education Revolution* program (the BER) in making grants to the States for multi-purpose halls, libraries and class rooms for Primary Schools ($14.1bn), science and language centres for secondary schools ($0.8bn) and minor capital items in the national school pride program ($1.3bn). All for non–Commonwealth purposes.

This program was established by Schedule D of the so-called *National Partnership Agreement on the Nation Building and Jobs Plan* [2] made by the Commonwealth, States and Territories on 5 February 2009. The origin of this so-called National Partnership Agreement is to be found in the *Intergovernmental Agreement on Federal Financial Relations* between the Commonwealth, the States and the Territories which began on 1 January 2009.

Intergovernmental agreements and National Partnership Agreements are political agreements. They are unenforceable domestic treaties made between the States' Executives and the Commonwealth Executive. They are not laws of any State, Territory or of the Commonwealth.[3]

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

> *The scope of the executive power is to be ascertained, as I indicated in the AAP Case (1975) 134 CLR, at pp 396-397, from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constitutent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation* ***joint legislative action****,* ***so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution.*** *A federal constitution which divides legislative powers between the central legislature and the constituent legislatures necessarily contemplates that there will be joint co-operative legislative action to deal with matters that lie beyond the powers of any single legislature.* [4] (emphasis added)

There Mason J. seemed to be contemplating legislative action by the Parliament, for example under s.51 (xxxvii) where the State Parliaments are able to refer their powers to the Commonwealth Parliament. This was the situation with the enactment of the *Corporations Act* 2001 (Cth) and the *Water Act* 2007 (Cth), (see ss 9, 9A for the Constitutional Basis. Sometimes the States, the Territories and the Commonwealth pass uniform legislation like the *Uniform Evidence Acts* 1995. In each case the legislation was within the constitutional power of either the Commonwealth or the State.

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

> ***3.4*** *The BER is established under executive authority: it is not specifically legislated. That is, there is no law or regulation setting out which schools are to benefit, by how much and under what conditions. Rather,* ***the fundamental program rules*** *are set by government decisions with greater elaboration prepared by the administering agency, DEEWR,* (sic. the Commonwealth Department of Education#, Employment and Workplace Relations) *in the form of program guidelines and other supporting material.* (emphasis added)

Quaere. If Education is a subject not within the constitutional legislative power of the Commonwealth then on what grounds can the Department of Education be lawfully funded ?

> ***3.5*** *The Commonwealth Ombudsman recently set out the advantages of this approach to managing a program:*
>
> > *The main advantage of executive* ***schemes*** *is their* ***flexibility****,* (I interpolate by substituting the word 'expediency' for 'flexibility'). *Because there is no need to wait until legislation is drafted, considered and passed by Parliament, such schemes can be quickly established when the need arises, adjusted easily as circumstances change and closed down when the need for them no longer exists.* (emphasis added)

In other words an arrangement, scheme, contrivance or artifice which can easily avoid Parliamentary scrutiny.

National partnership payments are not treated as grants as provided by Reg. 3A(2)(h)(iv) of the *Financial Management and Accountability Regulations* 1997 (Cth).

> ***3.14*** *However, National Partnership payments (such as payments under BER P21), as payments to a state or territory made for the purposes of the Federal Financial Relations Act 2009, are taken not to be grants for the purposes of the Financial Management and Accountability Act 1997 (FMA Act).* ***Therefore the Commonwealth Grant Guidelines and the requirement to provide the program guidelines to ERC,*** (sic. Expenditure Review Committee), ***do not apply to the BER program.***[5] (emphasis added).

It is worth noting that paragraph (1) of Reg. 3A defines ***grant*** *as an arrangement for the provision of financial assistance by the Commonwealth:*

> *(a) under which public money is to be paid to a recipient other than the Commonwealth; and*
> *(b) which is intended to assist the recipient achieve its goals; and*
> *(c) which is intended to promote 1 or more of the Australian Government's policy objectives; and*
> ***(d) under which the recipient is required to act in accordance with any terms or conditions specified in the arrangement.*** (emphasis added)

If the exclusion of national partnership payments had not been made then subparagraph (d) would by the definition of ***grant*** classified the BER program as coercive. What is required is a review of its actual terms and conditions.

Professor Cheryl Saunders has observed:

> *If there is a corresponding head of legislative power, executive power exists on any view, and may be augmented by an incidental executive power, implied to effectuate the purpose of the main grant.[P. Lane, Commentaries on the Australian Constitution, (1986) 258] If there is no parallel legislative power, the second question that arises is whether the agreement represents an exercise of the nationhood power, "deduced from the existence and character of the Commonwealth as a national government", conferring a "capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which* ***cannot be otherwise carried out for the benefit of the nation****" [AAP case at 397-398]……The case for the nationhood power as a source of support for intergovernmental agreements is strengthened by the consensual nature of such agreements.* [6] (my emphasis)

[Quaere now the status of the nationhood power as considered by the High Court *in Pape v. Commissioner of Taxation*[7]]

Is the BER National Partnership Agreement one which is within the power of the Executive of the Commonwealth to make? Because there is no legislative power under the *Constitution* to make laws with respect to education, the short answer would seem to be "No". As Gibbs J. said in the *Australian Assistance Plan Case, the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.*[8] There are forty paragraphs covering the powers of the legislature in s. 51 of the *Constitution* and none deal with the topic of education. It is a topic which lies within the exclusive jurisdiction of the States. What Mason J said in *R v. Duncan; Ex parte Australian Iron and Steel Pty. Ltd.* does not require joint legislative action. Nor does there seem to be any warrant for the Commonwealth and State Executives to enter into agreements for the Commonwealth to assume obligations which are outside its legislative competence on the grounds that it supposedly falls within the nationhood power. That is an attempt to do something indirectly which is unable to be done directly.

Then how is the Commonwealth to lawfully draw down funds to make the payments to satisfy its obligations under these intergovernmental agreements?

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

> *(1) The Minister may determine that an amount specified in the determination is to be paid to a State specified in the determination for the purpose of making a grant of financial assistance to:*
>
> *(a) support the delivery by the State of specified outputs or projects; or*

(b) facilitate reforms by the State; or
(c) reward the State for nationally significant reforms.

(2) If the Minister determines an amount under subsection (1):
(a) that amount must be credited to the COAG Reform Fund; and
(b) the Minister must ensure that, as soon as practicable after the amount is credited, the COAG Reform Fund is debited for the purposes of making the grant.

(3) - (4) ……

(5) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the determination.

Noticeably, s. 20 provides that if a State does not fulfil a condition on which the financial assistance is made then, if the Minister so determines, it is to be ***repaid*** to the Commonwealth.

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

Relevantly s 21 (1) provides as follows:

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

This special account [9] is an account within the Consolidated Revenue Fund. The source of its funding is apparently from a maze of special accounts including the *Building Australia Fund*, the *Education Investment Fund* and the *Health and Hospitals Fund*. Having been created for non-Commonwealth purposes under the guise of some notion of nation building by the *Nation-building Funds Act* 2008 (Cth).

Section 6 of the *COAG Reform Fund Act* 2008 (Cth) provides that the purpose of the fund *is the making of grants to financial assistance to the States and Territories.* An amount credited to the COAG Reform Fund for the purpose of National partnership payments is done by executive determination under s. 16 of the *Federal Financial Relations Act* 2009 (Cth). It is a legislative instrument, but is not disallowable by the Parliament.

Relevantly s.7(2) *COAG Reform Fund Act* 2008 (Cth) *provides* ***that the terms and conditions on which that financial assistance is granted are to be set out in a written agreement between the Commonwealth and the State or Territory***. Sub-section (3) provides that an agreement under subsection (2) may be entered into by a Minister on behalf of the Commonwealth. (emphasis added).

What is the effect of the delegation to the Minister under s. 7(3)?

Here the written agreement is effectively a bargain reached between the Commonwealth and the States by which the Commonwealth has invaded the exclusive responsibilities of the States. The flavour of what is being done can be gained from the words *'reward the State for nationally significant reforms'* to be found in s.16(1)(c) of the *Federal Financial Relations Act 2009* (Cth).

In *Victorian Stevedoring and General Contracting Company Proprietary Limited v. Dignan*, Dixon J. (as he then was) said.

> *It should also be noticed that, in the opinion of the Judicial Committee, a general power of legislation belonging to a legislature constituted under a rigid constitution does not enable it by any form of enactment to create and arm with general legislative authority a new legislative power not created or authorized by the instrument by which it is established. (R. v Burah;* [10] *see also In re Initiative and Referendum Act* [11]*).*[12]

He went on to say:

> *Roche v Kronheimer* [13] *did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be,* ***if it does not fall outside the boundaries of Federal power.*** *There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.* [14]
> (emphasis added).

Evatt J. listed seven matters "which would appear to be material in examining the questioning the validity of an Act which purports to give power to the Executive or some

other agency to make regulations or by laws." For present purposes the most relevant would appear to be his second matter.

> *The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject matter assigned to the Commonwealth Parliament.*[15]

His Honour concluded by saying.

> *On final analysis therefore,* ***the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation****. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every Statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution.* ***A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.***[16]

This review of the relevant principles to be applied when Parliament delegates it legislative power to the Executive or some other body needs to be adapted to the special case of s. 96. First, it should be noticed that with respect to s.96 grants, in the *Second Uniform Tax Case*, Dixon C.J. said.

> *But s. 96 does not deal with a legislative subject matter;……* ***It confers a bare power*** *of appropriating money to a purpose and of imposing conditions. ……But in s.96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.* [17]

> *In any case it must be borne in mind that the power conferred by s. 96 is confined to granting money and moreover granting money to governments.* ***It is not a power to make laws with respect to a general subject matter…….***
> *…****……The very matter to which s. 96 is concerned relates to State finance. Further there is nothing which would enable the making of a coercive law. By coercive law is meant one that demands obedience.***[18] (emphasis added)

Conclusion

1. In the case of an intergovernmental agreement between the Commonwealth and a State which is beyond the executive power of the Commonwealth to make then the agreement is unlawful. Here the executive power must mirror the Commonwealth's legislative power in ss. 51 and 52 of the Constitution.

2. In the case of an intergovernmental agreement which provides for the Commonwealth to grant financial assistance to the State(s) under the bare power in s. 96, the terms and conditions on which the grant is made need not mirror Commonwealth legislative power.
3. There is an unlawful abdication of power to the Commonwealth Executive if the impugned written agreement is:
   (a) too vague or uncertain; or
   (b) coerces the State(s) to comply with its terms and conditions; e.g. requiring repayment or the possibility of repayment should a condition not be fulfilled.

By entering into the *National Partnership Agreement on the Nation Building and Jobs Plan* and in particular Schedule D dealing with the BER, the Commonwealth Executive on its face overreached its power. Sanctions are imposed if a State fails to have met the bench mark expenditure. For example; "***by requiring the State to return the shortfall of expenditure to the Commonwealth,*** *noting the Commonwealth will reallocate the amount to other States and/or use it for Commonwealth own purpose programs."* [19] The BER program is an illustration of the coercive way in which the Commonwealth has sought to invade the States exclusive functions over education; see the Auditor-General's Report into the BER and see also the BER Guidelines.[20] Its very name as a *National Partnership Agreement* carries with it the legal relationship of principal and agent. In short the idea that the States are acting as agent for the Commonwealth. Doing so was an abdication of Parliament's power under s. 96 to the Executive. It was a step too far.

In my opinion the drawing down of funds from the COAG Reform Fund account to pay to the States for the BER program was contrary to s. 96 of the Constitution and hence unlawful.

The answer to the general question is no, <u>*unless*</u> the terms and conditions on which the grant was made are either (a) vague or uncertain or (b) coercive. This requires an examination of the terms and conditions for each s. 96 grant.

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Annexure 'A'

Financial Management and Accountability Act 1997 (Cth)

Division 1A—Special Accounts

20 Establishment of Special Accounts by Finance Minister

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

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

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

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

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

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

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

[Note: CRF means Consolidated Revenue Fund.]

21 Special Accounts established by other Acts

(1) If another Act establishes a Special Account and identifies the purposes of the Special Account, then the CRF is hereby appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account.

Note 1: An Act that establishes a Special Account will identify the amounts that are to be credited to the Special Account.
Note 2: An Appropriation Act provides for amounts to be credited to a Special Account if any of the purposes of the Account is a purpose that is covered by an item in the Appropriation Act.
Note 3: See section 32A for when the crediting or debiting of an amount takes effect.

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

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

22 Disallowance of determinations relating to Special Accounts

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

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

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

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

[1] Sir Earle Page, *Truant Surgeon*, Ann Mozley (ed), (1963), at p.126.

[2] http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/infrastructure/nation_building_jobs/agreement/national_building_and_jobs_plan_np.pdf > accessed 5/8/2011.

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

[4] (1983) 158 CLR 535 at 560.

[5] <http://www.anao.gov.au/uploads/documents/2009-10_Audit_Report_33.pdf > accessed 1/8/2011.

[6] Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power', 16 *Public Law Review*, (2005) 294.

[7] (2009) 238 CLR 1.

[8] *Victoria v. Commonwealth* (1975) 134 CLR 338 at p.379.

[9] COAG Reform Fund Special Account.

<http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/docs/Chart-of-Special-Accounts.pdf > accessed 1/8/2011

<http://www.finance.gov.au/publications/fmg-series/docs/Special-Accounts-Guidelines-Final.pdf> accessed 1/8/2011.

See too Charles Lawson, "Special Accounts" Under the Constitution: Amounts Appropriated for Designated Purposes, [2006] 29(2) UNSW LawJl 114.

[10] (1878) 3 App Cas, at p.905.

[11] [1919] AC 935 at 945.

[12] (1931) 46 CLR 73 at pp. 95-96.

[13] (1921) 29 CLR 329.

[14] (1931) 46 CLR 73 at p.101.

[15] Ibid at p.120.

[16] Ibid at p.121.

[17] *Victoria v. Commonwealth* (1957) 99 CLR 575 at pp. 604-605.

[18] Ibid at pp. 609-610.

[19] Schedule B.8(b) to the *National Partnership Agreement on the Nation Building and Jobs Plan.*

[20] E.g. *The school **must** agree to provide access at no, or low cost to the community to libraries and multi-purpose halls.*

<http://www.deewr.gov.au/Schooling/BuildingTheEducationRevolution/Documents/BER_Guidelines.pdf > accessed 6/8/2011 at p. 7.