

29 August 2006

Mr Alistair Sands,
Secretary,
Senate Finance and Public Administration Committee,
Department of the Senate,
PO Box 6100,
Parliament House,
Canberra, ACT 2600.

Dear Mr Sands,

***Submission to the Inquiry into Transparency and Accountability to Parliament
of Commonwealth Public Funding and Expenditure.***

I refer to our telephone conversation this morning in which you advised that the committee might be minded to extend the time to allow me to file a submission.

My primary submission relates to the role of the Auditor-General in advising the Parliament as to whether appropriations or expenditure are beyond the power of the Parliament to authorise. In short, the Auditor-General should be required to identify the constitutional power supposedly relied upon by the Parliament to authorise the appropriation and whether in his opinion there are compelling legal reasons to support the use of such power.

Examples of what, in my view appear to be abuses of s.81 of the *Australian Constitution* have occurred and continue to occur in respect of payments by the Commonwealth under the Roads to Recovery Programme and the Regional Partnerships Programme.

In the Auditor-General's report to Parliament on the Roads to Recovery Programme, the highest criticism – if it be a criticism, which he could make about payments to local councils was that 'it was ***unusual***, in that the funds are provided direct to local government rather than through the States and Territories'.¹

¹ Australian National Audit Office, 'Summary of Recommendations 2006, para 6' in 'Roads to Recovery', *Audit Report No. 31 2005-06 Performance Audit*,

Secondly, I also adopt what was said by Professor Colin Howard with respect the *Australian Assistance Plan* case², when he said:

*The most basic question posed by the litigation, however, was not squarely confronted at all. This was whether any government should be permitted to utilize an appropriation Act for the purpose of acquiring Parliamentary sanction for a policy which could not be legislatively supported in any other way. It ought to be obvious that, federal questions apart, it borders on the scandalous in terms of governmental practice for Parliament to be presented with two lines of text, amounting to no more than brief and vague headings, as a basis for expending millions of public dollars in such a context. Those two lines concealed an important policy departure which was both new, in the sense that parliamentary sanction had not been gained by normal legislative methods, and highly contentious. The missing legislative methods include debate upon the proposed legislation which deals with the substance of the matter and not simply what it is expected to cost.*³

Finally, another illustration is the ‘Investing in Our Schools Program’ by which the Commonwealth is apparently spending \$1 billion in small capital projects of up to \$150,000 for 2005-8, in schools for library resources, computer facilities, air conditioning of class rooms etc., under the *Schools Assistance (Learning Together–Achievement Through Choice and Opportunity) Act 2004* (Cth). The paragraphs of s. 51 of the *Constitution* have nothing to say on these topics. The power to do so supposedly comes from the conditions attached to s 96 grants to the States. This begs the question of how wide is s 96 of the *Constitution* to be interpreted. Here reference could also be made to appropriations under the *Australian Technical Colleges (Flexibility in Achieving Australia’s Skills Needs) Act 2005* (Cth)

I also refer the committee to my paper entitled ‘*The Use and Abuse of the Commonwealth Finance Power*’ which I also seek to rely upon in elaboration of the above submissions. A copy of which has been previously sent to you by email.

If the Committee feels that it might be so assisted, I would be pleased to appear before it.

Yours sincerely,

Bryan Pape
Senior Lecturer

<http://www.anao.gov.au/WebSite.nsf/Publications/32110625262CFB72CA25712200789C25>, viewed 29 August 2006.

² *Victoria v. Commonwealth* (1975) 134 CLR 338.

³ Colin Howard, ‘Public law and common law – parliamentary appropriation’, in D. J. Galligan (ed.), *Essays in legal theory*, (1984), 24-25.