Australian Monarchists League Conference

The Swissôtel, 68 Market Street, Sydney.

Saturday 17 August 2013.

Part I: 1030-1050. – The Use and Abuse of the Commonwealth Finance Power and the External Affairs Power

Part II: 1120-1140 – Competitive Federalism

Part III: 1140-1200 – Questions.

The Use and Abuse of the Commonwealth Finance Power and the External Affairs Power

"We have been taught by long experience that we cannot without danger suffer any breach of the constitution to pass unnoticed."[1]

1. The object of this talk this morning is first to draw your attention to the use and abuse of the legislative powers of the Commonwealth to spend money on functions for which it has no constitutional authority. Secondly, to mention the consequences of the High Court's interpretation of the power which the Parliament has to make laws with respect to external affairs, particularly the 1983 *Tasmanian Dam*

[1] Lord Macaulay, 'History of England', in the Life and Works of Lord Macaulay, (Longmans Green and Co., 1912), Vol I at p. 26.

Case [2] and the 1996 *Industrial Relations Case*.[3] These matters could be enlivened again if there is a challenge to the validity of *the Australian Sports Anti-Doping Authority Act 2006* (Cth) arising from the policing of anti-doping rules concerning the Australian Rules Football Club, Essendon and The Rugby League Club, the Cronulla Sharks. Thirdly, I raise the inherent contradictions between the idea of responsible government and the separation of powers in a federal system, especially the demarcation of legislative power. Finally, I suggest some possible courses of action and a solution.

2. The Commonwealth Government's power to spend money on any activity it chooses has been curtailed by two recent decisions of the High Court. The first was an unsuccessful challenge to the validity of the 2009 Tax Bonus Act, but successful as to the impugning of the Commonwealth's use of s. 81 of the Constitution to spend money on whatever it liked. The second was in 2011 with the successful challenge to the validity of the funding of School Chaplains by a Mr Williams. There the High Court required legislation to support the payment. Because there was none, the chaplaincy program was held to be invalid.

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2 *Commonwealth v Tasmania* (1983) 158 CLR 1.
3 *Victoria v Commonwealth* (1996) 187 CLR 416.

3. Like Banjo Patterson's "Mulga Bill from Eaglehawk who caught the cycling craze", the Government in 2009 decided to yet again stimulate the economy by spending $40 million on a 'National Bike Path Project'. Grants of $611,659 to Kwinana for 10.138km at $60,333 per km and $135,000 to Tamworth for 13.5km at $10,000 per km are good examples. The total cost to Kwinana was reported as $1.2 million ($120,000 per km) of which half was gifted by the Commonwealth. Could the six times $ per km disparity between Kwinana and Tamworth and twelve times in the comparative cost per km show that some 'padding' occurred?

4. As 'Tip' O' Neill, the legendary speaker of the U.S. House of Representatives was wont to say; "all politics is local." Illustrations of 'vote buying' abound. As a start let us not forget the Commonwealth take-over of the Mersey Hospital near Devenport in Tasmania a few months before the November 2007 election for the princely price of $1. In the 2010 election campaign Prime Minister Gillard promised to set up a fund of $225 million to pay $15 million to a selected group of 15 Councils to build houses. This was trumped by the Government's Regional Development Australia Fund of $1,000,000,000 to give largesse to 55 Regional Development Committees across Australia. Round 4 recipients were to be announced from 12 July 2013. No doubt

as part of the election campaign. Prime Minister Gillard's stay in Rooty Hill earlier this year resulted in the map being redrawn to include Greater Western Sydney as an eligible region. $175 million for 'prizes' is available for projects ranging from $500,000 to $15 million. Such grants are beyond Commonwealth power. They are responsibilities of the States.

5. In the run up to the present election campaign the Government pressed Surf Clubs to make applications for grants. In the 2014 Budget, $2.2 million was allocated for building work at the Crescent Head Surf Club in Mr Rob Oakeshott's former electorate of Lyne. Tony Windsor's former electorate of New England is to receive $540,000 for community sporting, automotive and youth association in Armidale, where I live, Inverell and Werris Creek. Recently the Nationals Leader, Mr Truss promised to spend $150,000 on a soccer field in a Northern NSW Electorate. Prime Minister Rudd promised to spend $5 million on upgrading the Hobart Show Ground. It goes on and on – all oblivious to the financial proprieties.

6. The Commonwealth's response to the use of the appropriation section 81 and the executive power was to amend the *Financial Management and Accountabilty Act 1997* (Cth) (the FMA Act) by the *Financial*

Framework Legislation Amendment Act No. 3 (2012)(Cth) to supposedly give it a supplementary power to spend money when it did not otherwise have the Constitutional power to do so. This Act commenced on 28 June 2012. Relevantly s.32B provides:

(1) If:

(a) apart from this subsection, ***the Commonwealth does not have power to make, vary or administer:***

(i) an arrangement under which public money is, or may become, payable by the Commonwealth; or

(ii) a grant of financial assistance to a State or Territory; or

(iii) a grant of financial assistance to a person other than a State or Territory; and

(b) the arrangement or grant, as the case may be:

(i) ***is specified in the regulations; or***

(ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or

(iii) is for the purposes of a program specified in the regulations;

the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

7. In response to this amendment, the Executive made Regulations under the *Financial Management and Accountability Regulations 1997* (Cth) (the FMA Regulations). Specifically Part 3 of Schedule 1AA purports to authorise more than 400 items of expenditure. For example Item 421.002 supposedly authorizes spending *'to build capacity in local government and provides local community and infrastructure.'* The very issue which the abandoned referendum to amend the Constitution on the recognition of local government was supposed to achieve. Other items include Item 406.007 the Home Insulation Program. It appears 'the Pink Batts' Scheme had no authority whatsoever if it relied on s. 81 of the Constitution or the Executive Power under s 61and presumably aided by the incidental power under s. 51(xxxix)..

8. So far as the Commonwealth is concerned all it has done is put the 'telescope to the blind eye.' As was said by Fullagar J in the Communist Party case 'a stream cannot rise higher than its source.' In

other words the Commonwealth is seeking 'to lift itself up by its own boot laces.'

9. On 8 August 2013 Mr Ronald Williams now for the second time, commenced proceedings in the High Court *(the Second Chaplains case)* for a declaratory order that Division 3B of Part 4 which includes s.32B of the FMA Act and Part 5AA of the FMA Regulations including Item 407.013 of Schedule 1AA dealing with Chaplaincy programs were invalid as beyond power. Watch this space.

10. Let me turn to the External Affairs power and the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (the ASADA Act). There is no head of legislative power in the Constitution which deals with sport. Yet on the basis of the High Court's interpretation of the external affairs power in the *Tasmanian Dam case* (the *National Parks and Wildlife Conservation Act 1975* picking up the Convention for the Protection of the World Cultural and Natural Heritage) and the *Industrial Relations case* which considered the *Industrial Relations Act 1988* (Cth) and amendments made in accordance with the International Labour Organization Treaty.

11. The ASADA Act works through its regulations by purporting to establish a National Anti-Doping Scheme founded upon the 2005 *International Convention Against Doping in Sport, adopted by the United Nations Economic Scientific and Cultural Organization's (UNESCO) General Conference at Paris on 19 October 2005, i.e.* - the UNESCO Anti-Doping Convention including Annex 1 which picks up the World Anti-Doping Authority (WADA) Prohibited List of Substances as amended from time to time. National sporting organizations like the AFL and the NRL as a condition of receiving grants from the Australian Sports Commission (ASC) have incorporated a modified WADA Code as their own Anti-Doping Rules. The ASC operates under the name of the Australian Institute of Sport. What was the legislative power to enact the *Australian Sports Commission Act 1989* (Cth)? This is the topic for this morning's guessing competition. It certainly isn't the appropriation section 81.

12. Time does not permit nor would I weary you with the reasons in the *Tasmanian Dam case*. However it is worth noting what Justice Dawson said in the *Industrial Relations case*

> *(T)he fact that an agreement is made internationally will not determine whether its subject matter is international or domestic in character. The view that legislation*

implementing a treaty is necessarily legislation with respect to a subject matter falling within the description of external affairs is a view which confuses the implementation of the treaty with the subject matter of the treaty. [4]

……

(A) law actually implementing a treaty is a law with respect to the subject matter of the treaty and the nature of the subject matter is to be found by "reference to the nature of the rights, duties, powers and privileges which it changes regulates or abolishes." [5] *It may or may not be with respect to matters external to Australia. And, of course, such a law may deal with matters both internal and external to Australia, and be a law with respect to external affairs. The view of the external affairs power which I favour is not based on the incorrect assumption that "affairs are either internal or external in the sense that the two categories are mutually exclusive." Indeed, in my opinion, it is the prevailing view which involves a characterisation fallacy.* ***That fallacy is to characterize a law which implements a treaty as a law with respect to treaties even though such a***

4 *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations case) at p.566.
5 Kitto J. in *Fairfax v Commissioner of Taxation* (1965) 114 CLR 1 at p.7.

law does not operate upon treaties as a subject matter.[6] [Emphasis added].

.....

(A) law which has an entirely domestic operation cannot in my view be an entirely a law with respect to external affairs merely because it implements a treaty or is upon a subject matter of international concern.[7]

The touchstone of the external affairs power should be externality, not international concern. And if a law does exhibit the characteristic of externality, it should not matter whether the law implements a treaty of not.[8]

.....

Where the terms of a treaty are little more than exhortation or aspiration, as is not uncommon nowadays, the requirement that a law give effect to a treaty is hardly confining. And, no doubt, as this case shows, the law may give effect to the treaty partially or as a whole. But the real reason why the requirement presents no real limit upon the

6 *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations case) at p.567.
7 Ibid. at p.569.
8 Ibid. at p.571.

external affairs power is that the matters which may be the subject of a treaty are virtually unlimited.[9]

……

It is not possible to ask whether a law is for the purpose of external affairs. Either it falls within the description or it does not and whether it does or does not is to be determined by reference to the acts, facts, matters or things upon which it operates. The question to be asked is not, as in the case of a purposive power, what the law is ***for,*** *but what it operates* ***upon.*** *The concept of proportionality has no useful part to play in answering that question.* [10] [Emphasis added].

13. Whether there will be a challenge to the constitutional validity of the ASADA Act only time will tell. It would need the High Court to overrule two previous decisions. It would be hard but not in my view hopeless.

14. As you can see the decisions of the High Court on constitutional matters have a far reaching effect on the political, economic and cultural life of Australia. The cancellation of the planned referendum

9 Ibid. at pp. 571-2.
10 Ibid. at p. 572.

on whether the Constitution should be amended to give the Commonwealth to make grants to local government on conditions should give us time to think about how our Constitution is actually working. As Sir Harry Gibbs said in his 1992 inaugural address to the Samuel Griffith Society, *although the Constitution would benefit from amendment in some respects, it is not an out dated instrument that requires radical change, in spite of the vast changes in society that have taken place since 1901*.

15. The first solution was that of the then Attorney-General and then Acting Prime Minister, the Rt Hon. William Morris Hughes. It was said of 'Billy' Hughes, that "he was too small to hit, too deaf to argue with and too tough to chew." President Woodrow Wilson when negotiating the Treaty of Versailles described him as a 'pestiferous varmint'

[Wilson: " You only speak for five million people"

Hughes: "I speak for 60,000 dead Australians, how many do you speak for?"]

He died in 1952 aged 90 while still a Member of Parliament as Member for Bradfield. He was one of our great Prime Ministers, if not the greatest.

16. This difficulty was recognized as early as 1910, when Part XII *Reference of Constitutional Questions;* ss 88-93 was inserted into the *Judiciary Act 1903* (Cth**). It allowed the High Court to give advisory opinions to the Governor–General. (Underscored)** Relevantly s. 88 provided that:

> *Whenever the Governor-General refers to the High Court for hearing and determination any question of law as to the validity of any Act or enactment of the Parliament, the High Court shall have jurisdiction to hear and determine the matter.*[11]

Because such opinions did not constitute a matter which affected legal rights, the High Court struck that provision down by a five to one majority on 16 May 1921 in *Re Judiciary Act 1903-1920 and In Re Navigation Act* (1921) 29 CLR 257.

17. In his second reading speech[12] Hughes, then Acting Prime Minister and Attorney-General foreshadowed what has occurred:

> *I admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States*

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11 S. 88 *Judiciary Act* 1903 (Cth). Part XII repealed by Act No 45 of 1934 by s 2(3) 4th Schedule.

12 See Annexure 'A'

and the Commonwealth, and that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere.

18. The problem which Hughes had seen and tried to fix and undone by the High Court remains unsolved. Our Federal system has been described as the Washminster system. An unworkable alloy of responsible government of Westminster and the separation of power of republican government in Washington. Where the waters of the Thames and the Potomac flow into the Molongo. Responsible Government has been made to prevail over the Federal Constitution's separation of powers and limitation of legislative power. The Governor-General has only one source of formal advice, namely the Prime Minister, under the Westminster System.

19. Section 61 of the Constitution provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and

maintenance of the Constitution, and of the laws of the Commonwealth.

By way of contrast Section 1 of Article II of the United States Constitution provides:

The executive Power shall be vested in the President of the United States of America.

It is to the form of Oath which the President takes that reference is made to the Constitution.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The Australian Constitution is at least as strong as the United States Constitution as the executive power extends *to* ***the execution and maintenance of the Constitution.***

20. There seem to be at least four possible courses of action:

(i) an application to the High Court to overrule the *In re Judiciary and Re Navigation case*; unlikely to succeed because of its longevity of nearly 100 years;

(ii) an amendment to the Constitution to authorise the High Court to give advisory opinions on the application of the Attorney-General. C.f. Canada.

(iii) an amendment to the *Judiciary Act 1903* (Cth) to require the Attorneys-General of the States to give their fiat or consent to a citizen to commence proceedings in the High Court to impugn the legislation;

(iv) an amendment to the Constitution to re-establish the Office of Auditor-General, with rights and privileges similar to those held by Justices, under the Constitution and to authorise the Auditor-General to seek a declaration from the High Court as to whether the Parliament had exceeded its legislative power in passing an Act. Here the Auditor-General would have the role of a constitutional censor.

21. I will conclude by saying that I prefer the fourth course because first, it does not disturb the present arrangement of the Prime Minister giving exclusive advice to the Governor-General. And, secondly, because the Auditor-General would be filing the Writ of Summons in

the High Court as Plaintiff with the Commonwealth responding as the Defendant and the States' Attorneys' – General exercising their rights to intervene. In other words there would be a contest.

22. If such an Office had been in existence last year it could be reasonably expected that the Auditor-General would have sought to impugn the the *Financial Framework Legislation Amendment Act No. 3 (2012)*(Cth).

17 August 2013 Bryan Pape

Annexure 'A'

Acting Prime Minister and Attorney-General, The Hon. William Morris Hughes MP in moving the second reading of a Bill to insert Part XII into the Judiciary Act 1903 (Cth) said inter alia:

I know of no measure which has received the attention of the Parliament which is more important than this. It would deserve special attention under any circumstances, and in any country, but particularly does it call for notice in a country under a form of dual government. Ten years have now elapsed since we adopted what is known as a federal form of government, and we have already found out many of its defects as other countries have done. One of these is that it sets up to an extent a domination of the law which even we, the most law abiding people in the world, find most repugnant to our ideas. I speak not in criticism of the rule of the law as generally exercised, but of its dominance in a new sphere which hitherto, under our unified form of government, has been reserved to and occupied by the legislature. Under a Federal form of government this has been regarded as inevitable. Under Federation, the Judiciary occupies as it were, a position of lofty and **superior censorship** of our legislation. And, of course, obviously it must also exercise those functions which belong properly to the highest judicial Court in the country. It is on matters of law - and to this no possible exception can be taken - the last Court of Appeal. But in another direction it exercises functions of quite a different nature. Although **nominally inferior** to this Legislature, in reality it has shown over and over again, not merely in this country, but more particularly in the United States of America, that it is above and superior to, not only that Parliament, **but what is yet more important, the constitutionally expressed will of the people. I**

admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States and the Commonwealth, and that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere. We must have clearly a Court clothed with sufficient authority, and charged with the exercise of these grave and responsible duties. But it by no means follows that we must "endure" - and I use that word advisedly - a condition of things such as has been endured for over a century in the United States of America, and is in existence here today.

Consider how absurd and unnecessary is the position that has arisen whereby a Court created principally – and I speak now not of its functions as a Court of Appeal for private litigants – to determine the constitutional authority of State or Federal Statutes is unable to move until some private individual who considers he has suffered some injustice or a State authority which is interested, brings an action under which the validity of a State [sic Statute] is incidentally determined. As a fact, the Court never directly determines the validity of any Statute; it merely deals with it in connexion with the facts of the case brought before it. .....(T)he Court especially created to determine the validity of Commonwealth and State laws, does in fact never directly decide the constitutionality of any such laws. This is not a proper and sensible procedure for a great and growing nation like ours to continue, and it is for the purpose of the measure to substitute for this cumbrous, antiquated method of determining the validity of any Statutes one which on the face of it, will more speedily and effectively inform us as to the constitutionality of a measure, enabling the Court to give a calm, dispassionate, and impartial decision upon this one point without the

complication of personal relations and personal wrongs.....The Attorney-General will be able to ask the Court the plain question, “ Is this measure one which it is within the power of the Parliament to pass? ” and we shall get from the Court a straightforward answer. [emphasis added]