A REPLY TO THE A.A.P. CASE

BY GERTRUDE GERARD

Those who are familiar with the poem The Wreck of the Deutschland *by Gerard Manley Hopkins (and with its principal character Gertrude, the nun) will recognise that this comment on the* A.A.P. Case *follows the stanza form of that poem.*

Hopkins' early editors found it necessary to apologise for the difficult form of The Wreck of the Deutschland. *Robert Bridges, for instance, referring to the poem's placement at the beginning of the poet's collected works, said that it was "like a great dragon folded in the gate to forbid all entrance"* (Poems of Gerard Manley Hopkins *(2nd ed., 1918) 104); and Hopkins himself wrote in a letter in 1878 that, in his original manuscript, "I had to mark the stresses . . . and a great many more oddnesses could not but dismay an editor's eye, so that when I offered it to our magazine . . . they dared not print it". (Quoted in* Poems of Gerard Manley Hopkins *(3rd ed., 1948) 220.)*

The present editors, though resolved to be more daring and less dismayed by "oddnesses" than their predecessors a century earlier, point out for the assistance of readers that each stanza is organised around two main principles: the rhyming scheme a, b, a, b, c, b, c, a; *and a distribution of the number of* stresses *in each line (not always necessarily corresponding to conventional metrical "feet") in the pattern 3, 3, 4, 3, 5, 5, 4, 6.*

It is for the reader to judge whether the present poet memorialises the A.A.P. Case *as did Hopkins* The Deutschland.

Section 81[1]
Is not itself the *source*
From which appropriations run.
The Parliament has, of course,
Express powers—including *placitum* (xxxix),
Which embraces within its incidental force
Laws to assist or support or define
Executive or judicial acts or matters made or done.

But the Parliament's power to make
Its Appropriations Acts
Is *implied* in these powers: to reach it we take
For granted, self-evident facts.

[1] Section 81 of the Commonwealth Constitution provides that Commonwealth revenues "shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth". In the *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237, and more recently in the *A.A.P. Case* (1975) 50 A.L.J.R. 157, 7 A.L.R. 277, an argument emerged that these words are the "source" of the Commonwealth's power to pass an appropriations law, and that "the purposes of the Commonwealth" means whatever purposes the Parliament determines; so that any appropriation law whatsoever will be valid. From this, some judges seek to derive a consequential validity for certain aspects of the actual *spending* which such laws authorize.

It *inheres* in, is *incident* to, each lawmaking head.
Hence validity must be a mantle that spending attracts
From its subject-matter. One cannot, instead,
By appropriations enlarge the powers comprised in the Commonwealth cake.

Thus, but on different grounds,
I follow those who hold
That, wide though "Commonwealth purposes" sounds,
The words can only enfold
A scope confined to the constitutional text.
But my reasoning seems (to me at least) less bold
Than finding a limitation annexed
To a grant of power, all *implied* in a single section's bounds.

There seems to be much more room
For reading the relevant section
(81) as meant to *assume*,
By an obvious back-reflection,
Appropriation powers found elsewhere,
With each head of power making its own projection
Of an earmarking power inherent there:
Like a hundred flowers, a hundred appropriation powers bloom!

The scheme these sections devise
(81 and 83)
Requires a law to authorize
Any spending, before it can be
Proceeded with. Clearly *presupposed* by this scheme
Is a notion of "Commonwealth purposes", I agree;
And a *power* to authorize. But, it would seem,
From the scheme itself neither powers, nor limits on "purposes", can arise.

For all other statutes, validity
Determined by judges must stand on
Laborious legalistic lucidity.
Why, then, should judges abandon
Such standards for laws by which Parliament sets the sums
It will let the executive government get its hand on?
The source from which Parliament's power comes
Must include incidental power, and be read without too much rigidity;

But it must be clearly decreed
By a firm constitutional grant.
It is not as if there is any *need*
To interpolate or transplant
The source of the earmarking power by sleight-of-hand
Into section 81, where the words are so scant.
The earmarking power can clearly stand
As an aspect of all the lawmaking powers specific provisions concede.

Take *placita* (xxxii),
(xxxiii) and (xxxiv),
All dealing with railways. On any view,
The power of making "law"
On the various aspects of railways must surely embrace
The power to allocate Commonwealth funds therefor.
So lawmaking power in *every* case
Must include the power to allocate funds out of Commonwealth revenue.

We therefore have to read
Each Appropriations Act
On the basis, in principle, of a need
For items to be attacked
If they specify spending outside the Commonwealth's ambit,
Or are just so wide and vague that they might in fact
Include such spending. But no such gambit
Would ever, as a practical matter, be likely to succeed.

For, first, the information
Available to the Court
In a case of bare appropriation
Is simply not the sort
That enables courts to determine issues clearly.
This does not mean that a challenge cannot be brought,
Or involves "nonjusticiability"—merely
That presumptions of constitutionality have their full operation.

For if the doubts that arise
On the issues such cases entail
Are unresolved in judicial eyes,
The attempted challenge must fail.
The plaintiffs are simply unable to make out their case;
The presumption of valid enactment must therefore prevail.
There is no hard evidence to displace
The initial presumption, and thus to discharge the onus of proof that applies.

Second, the Act alone
Can *only* allot an amount.
It does no spending on its own;
Nor can it be the fount
Of validity for an act of spending. Hence,
The mere earmarking—accounting—does not count:
Invades no rights, incurs no expense.
And with no practical interests affected, no standing to sue can be shown.

But I see no way of extending
This denial of standing to sue
To any actual granting or lending
The Commonwealth chooses to do.

Expenditure in excess of power creates
A real imbalance. It is no longer true
That no practical issue arises. The States
(And Attorneys-General) *must* be able to challenge Commonwealth *spending.*

Yet although the standing of claimants
May have to be differently seen
For appropriations and actual payments,
This certainly does not mean
A division of earmarking *power* (of absolute range)
From a (limited) power to spend. There is no line between.
The scope of the *power* cannot change
As we move from Appropriations Acts to disbursements and debts and defrayments.

Thus, if we could really swallow
Section 81 as the *source*
Of the power to earmark, then it would follow
(Assuming also, of course,
That the power thus given admitted of no limitation)
That the power of spending had also unlimited force.
A power of bare appropriation
Without a power to *use* the money thus earmarked, would surely be hollow.

"My son, this dollar fifty
Is your movie money this week.
But you may not spend it." Would this be thrifty,
Or just a fatherly freak?
So, too, if the son were permitted to pay the cashier,
But not to sit in the theatre, nor even to sneak
A look at the screen, he would surely sneer
At his father as rather an Indian giver; deceitful; illogical; shifty.

In short, a paper transaction
Without the power to spend
Or without the right to concomitant action
Leads to no logical end.
What is wrong with such views is their effort at *downwards* thinking:
From earmarking to action. We should rather ascend:
Beginning with substantive power, and linking
Equivalent powers to spend and to earmark to that. All else is distraction.

The spending power, then: where
Does it come from? What section creates it?
The answer must be stated with care.
Mr Justice Jacobs locates it
Within the executive power (including the Crown
Prerogative: though His Honour perhaps overstates it,
This immanent power, not written down,
Gives crucial support to what might otherwise seem to be plucked from midair).

What powers to spend does the clause
On executive power embrace?
"The execution of Commonwealth laws"
Clearly takes pride of place.
Whenever the Parliament passes legislation
For which clear lawmaking power provides a base,
Then executive spending in implementation
Of the Parliament's schemes, institutions and policies is a legitimate cause.

Such spending will be done
Within the *executive* sphere.
No *incidental* power is spun
Into the reasoning here.
(But of course incidental power, express and implied,
May support the *law*; and some *limited* spending, *near*
To the purpose in hand, may be justified
By implied incidental executive power in section 61.)

Secondly, no one can doubt
That where the Constitution
Provides for or simply talks about
Some office or institution,
"The maintenance of the Constitution" must run
To that body's staffing, facilities, work distribution.
The source is section 61—
With its own implied incidental power (if need be) to eke it out.

Third, it is sometimes said
That (stretched to the uttermost)
Each specified Commonwealth lawmaking head
Has a *Doppelgänger*, or ghost,
Within the executive power, which therefore embraces
The full range of powers the legislature can boast,
Whether or not any law in such cases
Is extant. Executive power thus mirrors the maximum lawmaking spread.

The executive therefore enjoys
(On this view of the law), for example,
Over lighthouses, lightships, beacons and buoys,
A power that is equally ample
Regardless of what has been done on the Parliament's side.
But this implication of "parallel" powers would trample
The true distribution. No index or guide
To executive power can really be found in such vague impressionist ploys.

Fourth, the prerogative power:
Law's mistiest mixture with lore
Among all that our British traditions embower.
Clear enough at its core

Are *activities* to which all sovereign powers extend:
Making treaties, for instance, or waging war.
For these the power to act—and to spend—
Requires no stress. But what of largesse, compensation, donation and dower?

In short, apart from the stock
Of prerogative powers of *action*,
And the payments with which these interlock,
Is there some inherent attraction
By which modern prerogatives draw to themselves, or inherit,
A power of payment *as such*—by grace, benefaction,
Relief of hardship, reward of merit,
Or simply gratuitous gift to a group or a person selected *ad hoc*?

There is; and perhaps every pension
Is at heart an example of this.
But these payments' limited *ad hoc* dimension
Demands more emphasis.
To speak simply of a prerogative power that spends
Without limit, for any purpose, would lead us amiss.
There is *only* a power of making amends
(Or according rewards) to specific recipients deemed to deserve such attention.

This strict definition should chasten
Any larger prerogative claim.
The payments are only *ad hoc*, and (I hasten
To add) have a limited aim.
Presumably judges mean only *ad hoc* dispensations
Such as these, when they say—in the section 81 frame
Of parliamentary authorizations—
That appropriation may "sanction" a payment. (Thus Mr Justice Mason.)

Moreover, such *obiter dicta*
Have never averred or implied
That in any challenge to spending, the victor
Must be on the Commonwealth side.
Mr Justice Mason treats earmarking laws as extending
A *necessary* condition. They cannot provide
A *sufficient* condition for valid spending.
The language he uses perhaps confuses. His actual view seems much stricter.

Fifth, the very logistics
Of government as an art
Entail a power to gather statistics,
Inform oneself, impart
And acquire information by governmental inquiries.
This factfinding power lies at the government's heart;
It cannot ever be *ultra vires*.
Policies need to be based on knowledge, not on the visions of mystics.

Suppose, however, we say
That this power of probing and scanning,
Of surveying and weighing, has to stay
In the limits of policy planning,
And hence of the Parliament's power of legislation.
This limited power would still end up by spanning
Unlimited access to *all* information,
Since the *territorial* lawmaking power is plenary anyway.

Moreover, the so-called "strings"
Which the Commonwealth may affix
To the States-grants Greek-gifts power that springs
From section 96
May include "such terms and conditions as [it] thinks fit":
Any purpose or policy that the Parliament picks.
The subject-matter is infinite.
Factfinding for policy reasons must therefore extend to all manner of things.

This factfinding power inheres
In *all* governments, not just a "nation".
But, sixth, a further power appears
In the framework of federation.
In such a framework, all levels of government *must*
Have powers of planning and mutual orchestration:
And the Commonwealth carries a special trust
To integrate and coordinate the activities of its peers.

But consultation with States
Is here a *sine qua non.*
A Commonwealth which "coordinates"
Cannot strike out on its own.
A power of "federal" planning, by definition,
Excludes any Commonwealth power of acting alone.
This power can only be used on condition
That "genuine", "adequate" consultation controls how it operates.

"Genuine." "Adequate." "Real."
The issue such words suggest
Seems hardly one with which courts can deal.
Yet when the issue was pressed
Mr Justice Mason dealt with it on the spot:
The Australian Assistance Plan had failed the test.
The Commonwealth had been "acting not
Through the States and their agencies", but in an independent excess of zeal.

Lastly, our long evolution
Into sovereign nationhood
And "identity" under the Constitution
Has to be understood

(Whenever the facts make Australian identity focal)
As creating new Commonwealth power, holding good
For issues whose "flavour" is not "local",
But "Australian", uniquely appropriate to a national contribution.

This so-called "national" quality,
And the power it prompts, may inhere
In our very existence as a polity;
Or in the textual sphere
Of the Constitution's "maintenance and execution";
Or in prerogative power; or in a mere
Implication. Whatever the chosen solution,
It is clearly a genuine power, not a mere public relations frivolity.

But it needs the qualifications
Mr Justice Mason imposed.
The list of factors attracting the nation's
Response (though the list is not closed)
Must show substantially more than the fact that a scheme
Can "conveniently" be applied, or a need diagnosed,
By the Commonwealth. Nor can there be an extreme
(Or a "radical") transformation of federal powers and limitations.

This last point should be restated.
The "national" power in play,
However we see it as being created,
Has mainly *executive* sway.
But this means that by *placitum* (xxxix) there is vested
A power to *legislate* in a similar way.
In this context, it is sometimes suggested,
New "national" powers and textual *placita* must be assimilated.

This would add one kind of fuel
(It is said) to the critical fires
Of Mr Justice Mason's eschewal
Of "radical" change. He requires
(On this view) that before we accept a new "national" claim
We must see if the new head of power to which it aspires
Corresponds to an old one: is either the same,
Or so closely analogous that it is clearly a natural further accrual.

On this view, a power for the nation
To regulate animal health
Would not be a "radical" transformation,
Since laws of the Commonwealth
Can already, by *placitum* (ix), impose "Quarantine".
And since *placitum* (v) has already expanded by stealth
To include television, the same test would mean
That a power pertaining to films would be a legitimate amplification.

But such perverse ingenuities,
Extending powers piecemeal
By mere accidental contiguities,
Surely distort the *feel*

Of His Honour's eschewal of "radical transformation".
His *dictum* seems rather designed to address an appeal
To a broad indeterminate limitation
Invoking the notion of "federal spirit", not grasping at patchwork gratuities.

Such a principle falls into place
As a further application
Of the *Melbourne Corporation Case,*
Or the *Payroll Tax* litigation.
The notion there was that power cannot be used
To destroy the existence of units of federation.
So "national" power will be refused
If its use involves "radical" plastic surgery on the federal face.

One other aspect needs mention.
Mr Justice Jacobs thinks
That a matter may merit the nation's attention
Simply because of its links
With a need for Australia-wide planning and integration.
Such a "national" power is different from that which drinks
From the fountain of "federal" consultation;
And the former power may even permit the latter's circumvention.

On the one hand, the "national" need
Will far more rarely arise.
For instance, it is widely agreed
That the law of libel cries
For uniform national treatment. This would favour
Concerted "federal" efforts to synthesize,
But would not give libel a "national" flavour.
In this sense, "federal" power is wider than "national". But proceed.

On the other hand, clear satisfaction
That particular needs or complaints
Could *only* be dealt with by Commonwealth action
Would largely transcend the constraints
Of the usual need for "federal" consultation.
So long as the Commonwealth avoided the taints
Of outright "radical transformation",
It could simply ignore the States and embark on an independent transaction.

The time has come for summation.
The heads I have sought to rehearse
Show executive power in operation
In aspects extremely diverse.
As to all of these aspects, section 61
Gives the power of government action, and of "the purse".
Incidental *lawmaking* powers run
In a parallel track, having *placitum* (xxxix) as their formal location.

The power of appropriation
Of the funds the executive spends
On these various areas' implementation
Clearly also depends
On *express* incidental power. For powers bestowed
More directly, however, each *placitum* comprehends
Its own *implied* incidental mode
Of giving Appropriation Acts constitutional justification.

No doubt we should also allow a
Significant job to be done
By implied incidental executive power
In section 61.
For the powers here listed it may be a part of the source;
And also for spending. But further than this I would shun
Use of "incidental" power. Its force
Is supplementary: adding a buttress, not erecting a tower.

On this ground, I would decline
To follow (though with regret)
Mr Justice Jacobs' ingenious line
Between matters which merely abet
A power, as *incidents* of it, and those which arise
On the sidelines, and *incidentally* offset
A "main action" sustainable otherwise.
I doubt if the words will bear the elaborate meanings he seeks to assign.

Incidental powers *implied*
Cover "incidents", no more.
"Independent actions on the side"
Are authorized in law
(He says) by *express* incidental power. If so,
Then express incidental power would ensure
That the Commonwealth *Parliament* can go
Into areas of activity that would otherwise be denied.

But consider how his holding
Applies this ingenious theme.
The Australian Assistance Plan was moulding
A social welfare scheme
In *some* areas covered by *placita* (xxiii)
And (xxiiiA). His Honour would therefore deem
Other social welfare payments to be
Legitimate as "incidental to" the main action which was unfolding.

This reasoning seems infected
By the very heretical claim
That Mr Justice Mason rejected:
That is, that a Commonwealth aim
May be justified by the "convenience" of the moment.
And even if Justice Jacobs overcame
This objection, his "incidental" bestowment
Of power could only extend to matters the *Parliament* has selected.

For what he had earlier coined
Was a strict definitional test
By which "independent" acts, "conjoined'
To substantive powers, must rest
On *express* incidental power. Powers *implied*
Were confined to "incidents". Yet the only *expressed*
Incidental power is classified
As *lawmaking* power: Parliament's property, not to be purloined.

It therefore could not aid
The Australian Assistance Plan.
For this involved grants of money paid
On no firmer basis than
An *executive* scheme, unaided by legislation.
But if Mr Justice Jacobs' argument *can*
Be supported, its only operation
Is in the lawmaking province, which the executive cannot invade.

Thus, for the scheme to be valid,
It had to be firmly moored
In *executive* power. The tossed fruit salad,
The motley smorgasbord,
Of executive powers explored here had to yield
An accumulation of arguments which would afford
Sufficient powers to "cover the field".
Perhaps they did. But in the end the argument seems rather pallid.