

# THE GRANTS POWER

## KEY TO COMMONWEALTH—STATE FINANCIAL RELATIONS

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### INTRODUCTION

A continuing source of conflict between the Commonwealth government and the state governments in Australia is the financial structure of the federation. Few founding fathers foresaw the extent to which the Commonwealth has come to dominate almost every aspect of Australian life principally through its pre-eminent financial power.<sup>1</sup> No attempt will be made in this paper to trace the growth of the Commonwealth's financial dominance nor to set down the factors which prompted it.<sup>2</sup> The legal sources of the Commonwealth's present power are primarily sections 51(ii), 96 and 105A. This paper deals with section 96 and those other sections of the Constitution which might support similar Commonwealth action.

Broadly, three types of grants have been made under section 96. 'Needy' states have received special grants of assistance. Grants of this type are now of less significance, Tasmania being the only state in receipt of special assistance. Grants are also made to the states for special purposes. 'Special purpose' grants commenced with the Main Roads Development Act 1923 (Cth) which authorized the payment of certain maximum amounts to each state subject to the conditions, *inter alia*, that the states would match the Commonwealth grant with an amount equal to it and that the recipient states would adhere to a previously approved plan of expenditure.<sup>3</sup> Special purpose grants have, since 1923, come to assume a much greater importance. They are the means by which the Commonwealth assists and exercises control over tertiary education,<sup>4</sup> secondary<sup>5</sup> and technical<sup>6</sup> schools,

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<sup>1</sup> See quotation *infra*.

<sup>2</sup> For brief account of these matters see Reichenbach (ed.), *Federalism in Australia* (1949); Crisp, *Australian National Government* (3rd ed. 1961) 83-104; Davies, *Australian Democracy* (2nd ed. 1964); Menzies, *Central Power in the Australian Commonwealth* (1967) 74-115; *Report of the Royal Commission on the Constitution* (1929) 187-204.

<sup>3</sup> For a discussion of the beginnings of 'special purpose' grants see *Report of the Royal Commission on the Constitution* (1929) 203-4.

<sup>4</sup> For some recent Commonwealth grants in this area see Universities (Financial Assistance) Act 1963-1967 (Cth); States Grants (Advanced Education) Act 1967 (Cth); States Grants (Teachers Colleges) Act 1967 (Cth).

<sup>5</sup> States Grants (Science Laboratories and Technical Training) Act 1964 (Cth); States Grants (Science Laboratories) Act 1965-1967 (Cth).

<sup>6</sup> States Grants (Science Laboratories and Technical Training) Act 1964 (Cth); States Grants (Technical Training) Act 1965 (Cth).

research,<sup>7</sup> water resource investigations<sup>8</sup> and many other matters.<sup>9</sup> Many such grants are subject, in effect, to the condition that the grant moneys be used as directed by the appropriate Commonwealth minister. Such grants very often require matching state grants and almost invariably provide for repayment of the moneys to the Commonwealth if the conditions attached are not adhered to by the recipient state.<sup>10</sup> However, the most important grants are the 'taxation reimbursement' payments made by the Commonwealth according to a formula worked out on a five yearly basis, the latest re-negotiation of which took place recently. In both *Uniform Tax* cases<sup>11</sup> the High Court held valid the condition that the states in receipt of income tax reimbursement grants should not themselves levy income tax.

This paper is concerned with the legal bases and limitations of the Commonwealth power to make grants of financial assistance subject to conditions. The area of Commonwealth-State financial relations is politically contentious. Much of the conflict is extra-legal. It is an area in which the High Court, if it is to retain the confidence of Australians, must be scrupulous to maintain a stance of 'excessive legalism'. Clearly, many political solutions may be advanced to solve the problems of Commonwealth-State financial relations but these are outside the scope of this paper.<sup>12</sup>

## SECTION 96

### SETTLED LAW

Section 96 provides:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

<sup>7</sup> States Grants (Research) Act 1965-1966 (Cth).

<sup>8</sup> States Grants (Water Resources Measurement) Act 1967 (Cth).

<sup>9</sup> See e.g. States Grants (Mental Health Institutions) Act 1964-1967 (Cth); States Grants (Petroleum Products) Act 1965 (Cth); Weipa Development Agreement Act 1965 (Cth); Western Australia (South-West Region Water Supplies) Agreement Act 1965 (Cth); Queensland Beef Cattle Roads Agreement Act 1966 (Cth); States Grants (Drought Assistance) Act 1966 (Cth); Western Australia Grant (Beef Cattle Roads) Act 1966 (Cth); Natural Gas Pipeline (South Australia) Agreement Act 1967 (Cth); Sugar Marketing Assistance Agreement Act 1967 (Cth); Tasmania Grant (Fire Relief) Act 1967 (Cth); Tasmania Grant (Gordon River Road) Act 1967 (Cth).

<sup>10</sup> *Infra*.

<sup>11</sup> *South Australia v. Commonwealth* (First Uniform Tax case) (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (Second Uniform Tax case) (1957) 99 C.L.R. 575. For the recent history of the 'income tax reimbursement' grants see Lane, 'Victoria's Receipt Duty and Commonwealth-State Relations' (1968) 41 *Australian Law Journal* 529.

<sup>12</sup> One interesting 'political' solution would be for the Commonwealth to permit the states to levy income tax, and to achieve this by granting rebate on its own income taxes for taxes paid to the states. This is the method adopted as between the Canadian Dominion and Provincial governments: Canada, *Report of the Royal Commission on Taxation* (1966) ii, 93. However, perhaps this would, in some circumstances, amount to 'discrimination'.

In the *Second Uniform Tax* case<sup>13</sup> the High Court approved, in the widest terms, the power of the Commonwealth to grant financial assistance subject to terms and conditions. The case was a half-hearted attempt to invalidate the priority and grants provisions, the predecessors of which had been upheld in 1942 in the *First Uniform Tax* case.<sup>14</sup> In the *Second Uniform Tax* case<sup>15</sup> the Chief Justice, Sir Owen Dixon, referred to and examined 'a course of decisions upon section 96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition'.<sup>16</sup> His Honour said that:

it is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied. For the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament or from some general constitutional limitations upon the powers of the Parliament which otherwise an exercise of the power given by section 96 might transcend.<sup>17</sup>

Given the adherence of the High Court to *stare decisis*, a change in the interpretation of section 96 must now be unlikely in the extreme. Certain matters are settled beyond doubt.

In *Moran's* case<sup>18</sup> Evatt J. suggested that section 96 could be regarded as a merely transitory provision. His Honour said that the court should perhaps take judicial notice of the fact that section 87 and section 96 were so closely associated that they might have been intended to stand together and terminate together.<sup>19</sup> But these doubts were set at rest in the *Second Uniform Tax* case.<sup>20</sup> Dixon C.J. said:

In the cases in this Court in which s. 96 has been considered, except in the passage to which a reference has already been made in the judgment of Evatt J. in *Moran's Case*, it seems to have been taken for granted that the scope and purpose of the power conferred by s. 96 was to be ascertained

<sup>13</sup> (1957) 99 C.L.R. 575. On s. 96 generally, see Campbell, 'The Commonwealth Grants Power' (1969) 3 *Federal Law Review* 221.

<sup>14</sup> (1942) 65 C.L.R. 373. For an explanation of why matters decided in the *First Uniform Tax* case could be relitigated 15 years later see Sawyer, 'The Second Uniform Tax Case' (1957) 31 *Australian Law Journal* 347.

<sup>15</sup> (1957) 99 C.L.R. 575.

<sup>16</sup> *Ibid.* 605. The 'course of decisions' consisted of *Victoria v. Commonwealth (Roads case)* (1926) 38 C.L.R. 399; *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd. (Moran's case)* (1939) 61 C.L.R. 735 (H.C.); *W. R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) 63 C.L.R. 338 (P.C.); *First Uniform Tax case* (1942) 62 C.L.R. 373; *Pye v. Renshaw* (1951) 84 C.L.R. 58. For a discussion of these cases see Singh, 'Legislative Schemes in Australia' (1964) 4 *M.U.L.R.* 355.

<sup>17</sup> (1957) 99 C.L.R. 575, 605.

<sup>18</sup> (1939) 61 C.L.R. 735.

<sup>19</sup> *Ibid.* 803. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 869, 870; Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1962) 474.

<sup>20</sup> (1957) 99 C.L.R. 575.

on the footing that it was not transitional but stood with the permanent provisions of the Constitution.<sup>21</sup>

As Fullagar J. pointed out in the same case, to regard section 96 as merely transitional would be to permit one Parliament to bind its successors by 'providing otherwise'.<sup>22</sup> Section 51(xxxvi) gives the Parliament power to legislate 'with respect to matters in respect of which this Constitution makes provision until Parliament otherwise provides'. It is a measure inserted *ex abundanti cautela* to ensure that Parliament was not left without power to legislate on certain matters once it had legislated to vary the interim provisions of the Constitution.<sup>23</sup> For example, section 48 provides that members of the House of Representatives and the Senate shall receive an allowance of £400 *per annum* until Parliament otherwise provides. The founding fathers clearly did not envisage that parliamentarians were thereafter to be without any allowance whatsoever. If section 96 is merely transitional, it is arguable that section 51(xxxvi) preserves the power accorded Parliament in the former section. However, Dixon C.J. considered this not to be the case. Section 96, His Honour said, did not deal with legislative subject matter but merely conferred 'a bare power of appropriating money to a purpose and of imposing conditions. Either the power is terminated or it continues'.<sup>24</sup>

Not only is section 96 permanent, but, as the above quotation from Dixon C.J. indicates, the words 'financial assistance . . . on terms and conditions' have been construed in the broadest manner. Conditions prescribing the purpose (and persons) to which (or whom) grant moneys are to be devoted are clearly valid. That the grants are to be used for purposes outside Commonwealth legislative powers is no objection. Nor is it that grants are conditioned on state contribution, are at executive discretion or require the states to exercise or refrain from exercising a constitutional power.<sup>25</sup> However, some limitations have been suggested. In the *Second Uniform Tax* case<sup>26</sup> Fullagar J. said that 'if a condition calls for State action, the action must be action of which the State is constitutionally capable'.<sup>27</sup> Webb J. added that:

naturally the terms and conditions must be consistent with the nature of the grant, that is to say, they must not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement which s. 96 contemplates.<sup>28</sup>

<sup>21</sup> *Ibid.* 604-5. See Quick and Garran, *op. cit.* 868-9; Sawyer, 'The Second Uniform Tax Case' (1957) 41 *Australian Law Journal* 347, 348. The Royal Commission on the Constitution considered the opening words of s. 96 to be ineffective and confusing. Their deletion was recommended: *Report of the Royal Commission on the Constitution* (1929) 264.

<sup>22</sup> (1957) 99 C.L.R. 575, 656. It is a nice point as to what could amount to 'providing otherwise'.

<sup>23</sup> Other such sections are 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 73, 97.

<sup>24</sup> (1957) 99 C.L.R. 575, 604.

<sup>25</sup> See *infra*.

<sup>26</sup> (1957) 99 C.L.R. 575.

<sup>27</sup> *Ibid.* 656.

<sup>28</sup> (1957) 99 C.L.R. 575, 642-3.

The judgment of the Privy Council in *Moran's case*<sup>29</sup> contained certain vague statements concerning possible restrictions on the scope of section 96.<sup>30</sup> But, whatever the true meaning of the Privy Council *dicta*, they have not restrained the High Court in later cases concerning the section.<sup>31</sup>

Throughout, the High Court has emphasized the non-coercive nature of section 96. The quotation above from the judgment of Webb J.<sup>32</sup> in the *Second Uniform Tax case*<sup>33</sup> is an instance. With the exception of Starke J. in the *First Uniform Tax case*,<sup>34</sup> the Court has refused to look behind the effect of the terms and conditions on the legal rights and obligations of the Commonwealth and states. In short, the imposition of terms and conditions is a political matter resting 'with the Commonwealth Parliament and ultimately with the people'.<sup>35</sup> The states in terms of legal rights and obligations are *compelled* to do nothing, though the political and economic realities are quite different. It is this factor which has made section 96 such a potent source of Commonwealth power. However, it appeared for a while that the view propounded by Starke J. in the *First Uniform Tax case*,<sup>36</sup> which in many ways resembled the pre-*Engineers'* case<sup>37</sup> doctrine of implied immunities, might find some favour with the High Court. In the *State Banking case*<sup>38</sup> Latham C.J., in particular, executed a *face volte*. But after the *Second Uniform Tax case*<sup>39</sup> it appears that no terms and conditions can be held invalid on the grounds that they offend against some such implication from the nature of federalism.

The main effect of the broad scope given section 96 was the failure of the states at their two attempts to upset the scheme of uniform taxation. 'Uniform taxation' allows the Commonwealth a high degree of control over the national economy and is to this extent desirable. The most obvious defect of the system is that the bodies directly responsible for many essential services such as education, police, health, public transport, town and country planning have not sufficient revenue to provide these services without subventions from the Commonwealth. Where responsibility is thus divided each government tends to blame the other for shortcomings in the services. If education is inadequate it is too easy for the states to blame

<sup>29</sup> (1940) 63 C.L.R. 338. For a convenient summary of the scheme under attack in *Moran's case* and the reasoning both of the High Court and Privy Council see Howard, *Australian Federal Constitutional Law* (1968) 74-9.

<sup>30</sup> (1940) 63 C.L.R. 338, especially 349-50.

<sup>31</sup> E.g. (1942) 65 C.L.R. 373, 429 *per* Latham C.J.

<sup>32</sup> *Supra* n. 28.

<sup>33</sup> (1957) 99 C.L.R. 575.

<sup>34</sup> (1942) 65 C.L.R. 373.

<sup>35</sup> *Ibid.* 429.

<sup>36</sup> (1942) 65 C.L.R. 373.

<sup>37</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (Engineers' case)* (1920) 28 C.L.R. 129.

<sup>38</sup> *Melbourne Corporation v. Commonwealth (State Banking case)* (1947) 74 C.L.R. 31.

<sup>39</sup> (1957) 99 C.L.R. 575.

the Commonwealth for providing insufficient money and the Commonwealth to lay the blame with the states which, it is said, bear the direct responsibility.

#### LIMITATIONS ON SECTION 96

##### (i) Section 106

Section 106 provides:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 106 has received very little judicial attention. However, it may be that the section can be used to limit the power of the Commonwealth to attach terms and conditions to grants of financial assistance. Dixon J. has said that it

may be that sec. 106 provides the restraint upon the legislative power over States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State. No doubt, sec. 106 is conditioned by the words 'subject to this Constitution' but so too is sec. 51.<sup>40</sup>

Section 96 is not 'subject to the Constitution'. It is difficult, therefore, to see how section 106, which is 'subject to the Constitution', can be used to limit it. Dixon J. in the *A.R.U.* case<sup>41</sup> envisaged section 106 as a limitation on the Commonwealth ability to use its legislative powers to bind states. But section 96 is not a grant of legislative power in respect to a certain subject matter. It is merely a power to make grants of financial assistance subject to terms and conditions.<sup>42</sup> Section 106 is possibly only directed at legally binding interference with state Constitutions rather than 'inducements' to the states to exercise or refrain from exercising even an 'essential' governmental power. Further, the words of section 106 are so vague that to give any content to them in the context of section 96 would, in effect, be a revival, in a new garb, of an implication from the 'federal' nature of the Constitution not unlike the implied immunities doctrine set at rest in the *Enginners'* case.<sup>43</sup> It is noteworthy that Latham C.J. saw section 106 as no objection to the condition in issue in the *First Uniform Tax* case.<sup>44</sup> It is difficult in the absence of judicial consideration to envisage the scope of section 106, but it appears not to be a restriction on the Commonwealth power in section 96.

##### (ii) Characterization

If the terms and conditions imposed upon a state accepting a grant from the Commonwealth under section 96 were very elaborate, then the 'grant' may well be characterized not as 'a grant of financial assistance

<sup>40</sup> *Australian Railways Union v. Victorian Railways Commissioners (A.R.U. case)* (1930) 44 C.L.R. 319, 391-2.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Cf.* (1959) 99 C.L.R. 575, 604, 609 *per* Dixon C.J.

<sup>43</sup> (1920) 28 C.L.R. 129.

<sup>44</sup> (1942) 65 C.L.R. 373, 416, 425.

on terms and conditions' but an attempt to indirectly legislate on the matter the subject of the terms and conditions. It may be, by this argument, that the Commonwealth by the terms and conditions it imposes, must not regulate too closely the disposition of the moneys granted but must leave the recipient states a certain amount of freedom. Detailed prescription on a matter at a certain point may not be able to be characterized as terms and conditions of financial assistance.

In the *Pharmaceutical Benefits* case<sup>45</sup> a similar argument seems to have been accepted by at least some of the members of the Court. The case concerned section 81, and the validity of the *Pharmaceutical Benefits Act 1944* (Cth) was successfully questioned. The Act established a scheme of free medicines, to be supplied by approved chemists. Approved chemists were required to display a sign and supply free a pharmaceutical benefit on presentation of a prescription in the proper form signed by a qualified medical practitioner. Payment was made to both chemist and doctor at rates fixed by Commonwealth regulations. Forms of prescription were to be supplied to medical practitioners, but could not be used except where the practitioner was satisfied by personal inspection or otherwise as to the necessity of the benefit. Penalties were provided for the use of the prescriptions by practitioners unless so satisfied, or for charges by approved chemists as well as penalties to prevent other abuses and dishonesty. One provision penalized anyone other than a registered body or licensed medical practitioner who wrote a prescription in accordance with the form. Powers of entry, examination and enquiry were conferred, as well as a power to make regulations. One power vested in the Minister was to make special arrangements for isolated areas. There was no legal compulsion for doctors or chemists to participate in the scheme, though doubtless, especially in the case of the latter, there was considerable financial compulsion. The Attorney-General for Victoria at the relation of the president, vice-president and honorary secretary of the Medical Society for Victoria sued for a declaration that the Act was *ultra vires* Commonwealth power. The Commonwealth demurred on two grounds. First, that the plaintiff did not have the *locus standi* to seek the relief sought. Secondly, that the Act was a valid enactment supported by section 81 and the incidental power: section 51 (xxxix).

Counsel for the plaintiff argued, *inter alia*, that the Act was

not a finance Act at all. Its subject matter is 'welfare' and 'social services', as to which there is no [Commonwealth] legislative power . . . Even if it is assumed that under s. 81 of the Constitution the Commonwealth has an unlimited spending power, so that it can appropriate money for 'pharmaceutical benefits' or any other purpose over which it has no legislative power, nevertheless the power to spend money will not support the provisions contained in the *Pharmaceutical Benefits Act*. The real nature of the Act is to provide a partial scheme of public health. It cannot be said that the

<sup>45</sup> *Attorney-General (Victoria) v. Commonwealth (Pharmaceutical Benefits case)* (1945) 71 C.L.R. 237.

object of the Act is to appropriate money and that the other matters . . . are merely incidental to the appropriation . . . On the contrary, the appropriation of money is the incidental matter . . . The Act purports to regulate the actions of doctors, chemists and people generally in a way for which there is no constitutional authority.<sup>46</sup>

This argument was unequivocally accepted by Latham C.J. as the reason for striking down the Act. His Honour said that if

the Act can properly be described as an Act for the appropriation of money with safeguards against wrongful expenditure of the money, it is in my opinion valid. If, on the other hand, it is an Act which, though it appropriates money, is really an Act for the control of doctors, chemists, sale of drugs and the conduct of persons who deal with doctors and chemists, then . . . it is invalid . . .<sup>47</sup>

In holding the Act invalid after an elaborate examination of its provisions, the Chief Justice concluded that the:

Act is far more than an appropriation Act; it is just the kind of statute which might well be passed by a parliament which had full power to make such laws as it thought proper with respect to public health, doctors, chemists, hospitals, drugs, medicines and medical and surgical appliances.<sup>48</sup>

Of the other members of the Court, McTiernan J.<sup>49</sup> held the Act valid, and Starke and Williams JJ.<sup>50</sup> held it invalid on different grounds. Dixon J. (who also held the Act invalid) appears to have considered the Act, properly characterized, not to be an appropriation measure, though his reasons on the matter were brief.<sup>51</sup>

It is submitted that the reasoning of Latham C.J. is apposite to section 96. Of course, there are difficulties with any characterization argument. *R. v. Barger*<sup>52</sup> is probably the sole example of its successful application to strike down a Commonwealth law. Characterization arguments may be suspected of concealing a federal implication premiss.<sup>53</sup> A matter, for example, may properly be characterized as a set of regulations concerning pharmaceutical benefits and also as terms and conditions of financial assistance. One chooses to permit the first characterization to predominate, in order to strike down Commonwealth action one considers to be outside its sphere, on the basis of an implication to be drawn from the Constitution. Further, in the *Roads* case<sup>54</sup> (the first and perhaps most significant

<sup>46</sup> *Ibid.* 241-2.

<sup>47</sup> *Ibid.* 258.

<sup>48</sup> *Ibid.* 263.

<sup>49</sup> *Ibid.* 273-7.

<sup>50</sup> *Ibid.* 266 *per* Starke J.; 282 *per* Williams J.

<sup>51</sup> *Ibid.* 269-70. Rich J. concurred with Dixon J., 264.

<sup>52</sup> (1908) 6 C.L.R. 41. *Barger's* case has however never been overruled (*cf.* *First Uniform Tax* case (1942) 65 C.L.R. 373, 420, 426 *per* Latham C.J.). Perhaps the case has been saved by the High Court for application in a situation such as the one under discussion. See also *Osborne v. The Commonwealth* (1911) 12 C.L.R. 321.

<sup>53</sup> See Sawyer, 'The Second Uniform Tax Case' (1957) 31 *Australian Law Journal* 347, 350, n. 19; Sackville, 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7 *M.U.L.R.* 15.

<sup>54</sup> (1926) 38 C.L.R. 399.



section 96 case<sup>55</sup>) a similar characterization argument was rejected. Counsel for the State of Victoria, argued first that the terms and conditions referred to in section 96 must be imposed by Parliament itself, not fixed by executive authority. Secondly, 'the terms and conditions referred to in sec. 96 are financial terms and conditions unless they are terms and conditions falling within one of the legislative powers in sec. 51'.<sup>56</sup> Thirdly,

it is a law relating to roadmaking and not a law for granting financial aid to the States . . . Looking at the preamble to the Act and its substance, and applying the rule in *R. v. Barger*, the Act is one to provide for the construction and reconstruction of roads, and the States are only concerned as contributors to the costs of construction and reconstruction and as agents of the Commonwealth for the purpose of carrying out the works.<sup>57</sup>

The provisions of the Commonwealth legislation under attack were elaborate and detailed yet the High Court, *per curiam*, rejected the arguments in the following words:

the *Federal Aids Roads Act* . . . is a valid enactment. It is plainly warranted by the provisions of sec. 96 . . . , and not affected by those of sec. 99 or any other provisions of the Constitution, so that exposition is unnecessary.<sup>58</sup> After the *Roads* case<sup>59</sup> it is, therefore, difficult to envisage a situation in which terms and conditions of financial assistance could be struck down except if the terms and conditions are opposed to what the Court sees as the nature of federalism. In such a case characterization may be the justification for their invalidation.

(iii) Conditions Providing for Repayment<sup>60</sup>

In the *Second Uniform Tax* case<sup>61</sup> the High Court had to consider only one section which was substantially new and not considered in 1942. That was section 11(2) of the States Grants (Taxation Reimbursement) Act 1946-1948 (Cth),<sup>62</sup> requiring payment of Commonwealth advances of financial assistance if a state, later in the relevant year, imposed its own income tax. The section no longer exists in the Commonwealth taxation reimbursement enactments, but it has equivalents in many Commonwealth Acts providing for 'special purpose' grants.<sup>63</sup> In the *Second Uniform Tax*

<sup>55</sup> Cf. remarks of Dixon C.J. in the *Second Uniform Tax* case (1957) 99 C.L.R. 575, 606.

<sup>56</sup> (1926) 38 C.L.R. 399, 405.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* 406.

<sup>59</sup> (1926) 38 C.L.R. 399.

<sup>60</sup> See Sawyer, 'The Second Uniform Tax Case' (1957) 31 *Australian Law Journal* 347.

<sup>61</sup> (1957) 99 C.L.R. 575.

<sup>62</sup> The subsection provided that any advance of financial assistance to a state 'shall be made on the condition that the State shall not impose a tax upon incomes in respect of that year, and if, after the close of that year, the Treasurer gives notice in writing to the Treasurer of the State that he is not satisfied that the State has not imposed such a tax, the advances shall be repayable and shall be a debt due by the State to the Commonwealth'.

<sup>63</sup> E.g. States Grants (Advanced Education) Act 1967 (Cth), s. 9(a) provides that 'if the Minister informs the Treasurer of the State that he is satisfied that the State has failed to fulfil the conditions applicable to that amount, the State will repay that amount to the Commonwealth'. Almost every Commonwealth grant of financial assistance has a similar provision: see *supra* nn. 4-9.

case,<sup>64</sup> section 11(2) was held to be valid. Yet, with respect, this is open to doubt.

Dixon C.J. and Taylor J. did not explicitly consider section 11(2). Fullagar<sup>65</sup> and Williams<sup>66</sup> JJ. regarded it as merely ancillary to section 5 and therefore valid, since section 5 was valid. McTiernan<sup>67</sup> and Webb<sup>68</sup> JJ. emphasized the voluntary nature of section 96 but considered section 11 valid. However, it is difficult to agree with the conclusion of the High Court on the matter, even though the issue of the section's validity was not pressed by the plaintiff's counsel and it was perhaps considered unimportant. The whole Court in this and previous cases has repeatedly emphasized that the acceptance of conditions must remain a voluntary matter. A provision such as section 11(2) appears contrary to that. Both McTiernan and Webb JJ. declared that the section did not create a contractual right in the Commonwealth to require repayment in certain events.<sup>69</sup> In addition, there are many High Court *dicta* to the effect that section 96 does not create a legislative power in the Commonwealth Parliament to bind the states.<sup>70</sup> If a state is in breach of terms and conditions attached to financial assistance the only remedy the Commonwealth has, it is submitted, is to withhold future assistance. To hold otherwise is to ignore the voluntary nature (in a legal sense) of section 96 and the difficulties of enforcing a judgment against a state.<sup>71</sup>

#### (iv) Delegation of Executive Power to a State

By section 61<sup>72</sup> of the Constitution, the executive power of the Commonwealth is vested in the Governor-General. It may be that the Commonwealth is not permitted to delegate this executive power to the states; that is, the Commonwealth is not permitted to condition grants of financial assistance on the execution by a state of a law of the Commonwealth.

The matter of the executive authority of the Commonwealth is virtually untouched by authority,<sup>73</sup> but the delegation to the states of this responsi-

<sup>64</sup> (1957) 99 C.L.R. 575.

<sup>65</sup> *Ibid.* 657.

<sup>66</sup> *Ibid.* 629.

<sup>67</sup> *Ibid.* 622.

<sup>68</sup> *Ibid.* 642-3.

<sup>69</sup> Indeed, it is difficult to see how a provision as vague as s. 11(2) could create contractual rights. It appears to lack sufficient certainty.

<sup>70</sup> *E.g.* see *Second Uniform Tax case* (1957) 99 C.L.R. 575, 604, 609, 610 'Further there is nothing which would enable the making of a coercive law. By coercive law is meant one that demands obedience.' *per* Dixon C.J.

<sup>71</sup> See Howard, *op. cit.* 58-61.

<sup>72</sup> Section 61 provides that '[t]he 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 this Constitution, and of the laws of the Commonwealth'.

<sup>73</sup> See *Heiner v. Scott* (1914) 19 C.L.R. 381, especially 392-3; *Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.* (*Wooltops case*) (1922) 31 C.L.R. 421, 437; *Re K. L. Tractors Ltd.* (1961) 106 C.L.R. 318; Wynes, *op. cit.* ch. ix.

bility reposed in the Governor-General is becoming increasingly common.<sup>74</sup> Wide delegations of the legislative power of the Commonwealth, vested by section 1 of the Constitution in the Parliament, have been held to be valid.<sup>75</sup> However, the objection raised is not to the delegation, as such, of the Executive powers of the Commonwealth but to the delegation to the states. The Constitution itself yields few indications on the matter, but it may be implied, that since section 77(3) expressly provides for the 'delegation' of federal judicial authority to the states, that no other delegation of Commonwealth authority is permitted. Further, section 51 (xxxvii) provides for the reference of matters by state Parliaments to the Parliament of the Commonwealth; yet there is no provision whereby the Commonwealth can refer its powers (except judicial) to the states.

#### CONCLUSION

It is settled law that section 96 is a permanent part of the Constitution. Equally well settled is that few, if any, limits can be set on the power of the Commonwealth to impose terms and conditions. It is unlikely that at some point detailed prescription of a matter would be characterized as other than terms and conditions of financial assistance. The Commonwealth might not be able to require repayment of grant moneys, or to delegate its executive power. But these limitations provide little comfort for the states. Certainly the Commonwealth is able to condition its grants on the states agreeing not to levy income tax. Further, it is difficult to see how most limitations on the Commonwealth's power to impose terms and conditions can be effective, if the Commonwealth wishes to evade them. The terms and conditions need not be set down in the Act granting assistance to the states. Rather they may be the subject of a political agreement or understanding.<sup>76</sup> The High Court would scarcely require evidence of terms and conditions imposed or agreed to in political negotiations. This would clearly be to trespass beyond the Court's function. Indeed, in respect of taxation reimbursements this is now the practice. There is now no provision in the States Grants Act 1965-1967 (Cth) conditioning grants on the states refraining from income taxation. Section 7(2) merely provides that:

<sup>74</sup> *E.g.* Matrimonial Causes Act 1959 (Cth), s. 20; Marriage Act 1961-1966 (Cth) s. 9; Petroleum (Submerged Lands) Act 1967 (Cth), s. 15. If such a delegation is invalid it is difficult to see who would have the *locus standi* to challenge it, since obviously neither the Commonwealth nor State Attorneys-General will do so. Note also, that the more closely the Commonwealth were to prescribe the execution of its legislation by the states, the less likely it is to be held an unconstitutional delegation.

<sup>75</sup> See *Roche v. Kronheimer* (1921) 29 C.L.R. 329; *Le Mesurier v. Connor* (1929) 42 C.L.R. 481; *Victorian Stevedoring etc. Co. Pty. Ltd. v. Dignan* (1931) 46 C.L.R. 73; *Radio Corporation Pty. Ltd. v. Commonwealth* (1938) 59 C.L.R. 170; Sawer, 'Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177; Howard, *op. cit.* ch. 3.

<sup>76</sup> *First Uniform Tax case* (1942) 65 C.L.R. 373, 429 *per* Latham C.J.

if there has occurred . . . a substantial change in the financial arrangements between the Commonwealth and a State or States, the Government of the Commonwealth may review the provisions of this Act in consultation with the States.

## SECTIONS 81 and 94

### Section 81

Section 81 provides:

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.<sup>77</sup>

It may be that this section empowers the Commonwealth Parliament to make grants of money to the states (and other organizations and persons) subject to conditions. Whether this be so or not depends on the meaning of the words 'for the purposes of the Commonwealth'. Can it be said that grants of financial assistance to the states subject to conditions are appropriations for 'the purposes of the Commonwealth'?

Section 81 was considered by the High Court in the *Pharmaceutical Benefits* case,<sup>78</sup> the facts of which are set out above.<sup>79</sup> Counsel for the plaintiff argued that section 81 contains no substantive grant of power at all, or that, in all events, the power of appropriation is limited to the particular provisions of the Constitution which call for the expenditure of money and the purposes of the Commonwealth's legislative powers. Section 81 'cannot confer an unlimited power to appropriate money to any purpose whatever, whether or not it is a purpose which can be the subject of Commonwealth legislation'.<sup>80</sup> In other words, it was argued that the words of section 81 commencing with 'to be appropriated' are redundant, since if each grant of legislative power does not contain the power to appropriate moneys to effectuate the legislative purpose, then the 'incidental' power, section 51(xxxix) surely must. It was argued that section 81 was not similar to Article I, section 8, clause 1 of the United States Constitution.<sup>81</sup> The second principal submission was that discussed above:<sup>82</sup>

<sup>77</sup> That the revenue should be paid into one Consolidated Fund is in accordance with constitutional practice: see British North America Act 1867 (U.K.), s. 103. Wynes, *op. cit.* 469 says that 'the words "revenues or moneys" do not include loan moneys which have always been kept separate, and moreover "moneys" is probably to be read *eiusdem generis* with "revenues". This section [81], however, includes all public income from whatever source derived'. See also Quick and Garran, *op. cit.* 811. The appropriations are to be made 'subject to the charges and liabilities imposed by this Constitution'. The first charge is set out in s. 82, then follow the special obligations of the Commonwealth: *e.g.* s. 3 (Governor-General's salary), s. 72(iii) (remuneration of judges), s. 87 (Braddon clause payments to states during first 10 years). Subject to these Parliament may make appropriations for Commonwealth purposes. Whatever is left over is surplus revenue distributable under s. 94. No appropriation may be made except 'by law': s. 83. See Wynes, *op. cit.* 469-70.

<sup>78</sup> (1945) 71 C.L.R. 237; See also *Report of the Royal Commission on the Constitution* (1929) 137-40.

<sup>79</sup> *Supra* 555.

<sup>80</sup> (1945) 71 C.L.R. 237, 240-1.

<sup>81</sup> *Infra* 562.

<sup>82</sup> *Supra* 554-7.

that the Pharmaceutical Benefits Act 1944 (Cth) was in substance not an appropriation Act, but a social welfare scheme.

Latham C.J. held that the words the 'purposes of the Commonwealth' conferred a general power of appropriation. 'It is general in the sense that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth.'<sup>83</sup> His Honour pointed out that the 'Supreme Court of the United States has taken the same view of the Constitution of the United States',<sup>84</sup> though he did concede that the

precise argument does not apply to the Australian Constitution, because there is not the same collocation and association of words. . . .

[T]he determination whether a particular purpose should be regarded and adopted as a Commonwealth purpose is a political matter. If the proposed limitation to 'legislative purposes' in the sense stated is rejected, no test has been suggested which would enable a court to undertake a judicial review upon any legal basis of the multifarious expenditure which a Parliament may consider it necessary or desirable to undertake . . . I see no reason for limiting the words 'the purposes of the Commonwealth' to governmental purposes in the sense of the discharge of legislative, judicial or executive functions. The word 'Commonwealth' in this section refers to the people who, by covering clause 3 of the Constitution, are 'united in a Federal Commonwealth under the name of the Commonwealth of Australia.' . . . [I]t is the Commonwealth Parliament, and not any Court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.<sup>85</sup>

McTiernan J. substantially agreed. He alone considered the Act valid.

Any purpose for which the elected representatives of the people of the Commonwealth determine to appropriate the revenue is a purpose of the Commonwealth. If it were otherwise judicial scrutiny of a purpose for which Parliament appropriated revenue could take place in order to determine whether the purpose was lawful or not. The Constitution puts the power of the purse in the hands of Parliament, not in the hands of the Courts . . . As the Constitution is an instrument of government it has the quality of adaptability to new needs and conditions. The purposes of the Commonwealth are not fixed or immutable. They expand and change with the growth and development of the nation. As the Constitution is an instrument of government it should not be construed as if it were merely an Act of Parliament or a contract. When Parliament has appropriated revenue for any purpose the Court could not decide the question whether it was a purpose of the Commonwealth without entering into a consideration of matters of policy which are peculiarly and exclusively within the legislative sphere.<sup>86</sup>

If the *dicta* of the Chief Justice and McTiernan J. represent the law, then section 81 would permit the Commonwealth to appropriate money for the purpose of granting it to a state subject to any conditions, if, in

<sup>83</sup> (1945) 71 C.L.R. 237, 254.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* 255-6.

<sup>86</sup> *Ibid.* 274.

the opinion of the Chief Justice, those conditions were not such as to change the character of the Act from that of an appropriation measure. Of course, such a liberal interpretation of section 81 would have ramifications in areas outside that with which this paper is concerned.<sup>87</sup> However, other members of the court took a narrower view of Commonwealth purposes.

Williams and Starke JJ. considered that, though section 81 does contain a substantive grant of power, the purposes of the Commonwealth 'are those of an organized political body, with legislative, executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government'<sup>88</sup> and no others.

Dixon J. did not define closely what he saw to be the limits of section 81. He did not need to, since in his opinion the Pharmaceutical Benefits Act was clearly invalid. But His Honour did express the opinion that section 81 should not be read as if it were the 'general welfare' provision of the United States Constitution. Article I, section 8 of the Constitution of the United States confers upon Congress a power 'to lay and collect Taxes Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States'. This power to tax has been construed as conferring also a very wide power to appropriate. Appropriations have been made by Congress in aid of purposes outside the enumerated subjects of legislative power and have been common since the first Congress.<sup>89</sup> But Dixon J. said that the words of section 81

cannot be regarded as doing the work which the words 'general welfare' have been required to do in the United States . . . [Though] in deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and . . . to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and States.<sup>90</sup>

In the light of these statements any conclusion concerning section 81 must be tentative. Judicial opinion is divided but on balance appears to indicate a narrow view of section 81. Starke J. in the *Attorney-General (Victoria) v. Commonwealth*<sup>91</sup> put forward exactly the view he later espoused in the *Pharmaceutical Benefits* case.<sup>92</sup> Fullagar J. in the *Second Uniform Tax*

<sup>87</sup> See the *Report of the Royal Commission on the Constitution* (1929) 137.

<sup>88</sup> (1945) 71 C.L.R. 237, 266.

<sup>89</sup> See *United States v. Butler* (1936) 297 U.S. 1; *Helvering v. Davis* (1937) 301 U.S. 619.

<sup>90</sup> (1945) 71 C.L.R. 237, 271-2. In his evidence before the Royal Commission on the Constitution Mr. Owen Dixon, as he then was, took a narrow view of s. 81. It was, he said, restricted to the appropriation of money in aid of subjects assigned to federal legislative power. Sir Robert Garran took the view that s. 81 was as wide as the 'general welfare' power in the United States: *Report of the Royal Commission on the Constitution* (1929) 138.

<sup>91</sup> (1935) 52 C.L.R. 533, 567-8.

<sup>92</sup> (1945) 71 C.L.R. 237.

case<sup>93</sup> could perhaps be interpreted as adhering to a narrow construction of the section. Wynes<sup>94</sup> suggests that section 81 does not confer an unlimited power of appropriation on the Commonwealth and appears to indicate a preference for the view that it confers no power of appropriation. He says that 'any law of appropriation must . . . rest for its validity upon some one or other of the enumerated powers, including of course par. (xxxix) of sec. 51 as to incidental matters'.<sup>95</sup>

But the views of Latham C.J. and McTiernan J. appear, with respect, to be more compelling. Certainly the words of the Constitution of the United States are not the same as those of the Australian Constitution but in the case of both the national government surely needs to be free to appropriate money without being subject to court scrutiny. In particular, it is difficult to believe that in the absence of section 96 that the Commonwealth would not have been permitted to appropriate moneys for the purpose of making a grant of financial assistance to a state. Further, it may well be trespassing beyond the judicial function to interfere with a Commonwealth appropriation on the ground that the Court is satisfied that the purpose is one in which the Commonwealth has no interest, or the Act is properly characterized as an enactment on some matter outside Commonwealth legislative power, rather than an appropriation measure with conditions attached to ensure the moneys are expended for the purposes for which they were appropriated. It is submitted, therefore, that section 81 should be construed so as to justify appropriations of financial assistance to the states and that the Commonwealth could make such assistance conditional. But, of course, whilst section 96 is given broad scope the Commonwealth needs to turn to no other provision of the Constitution to support its actions. Further, if section 96 were ever to be limited (in respect of the terms and conditions to which a grant could be made subject) it is likely that similar limitations would be imposed on the appropriation power. The main significance of section 81 is that it may justify grants to a wide range of other persons and organizations for purposes strictly outside the Commonwealth's legislative power. Indeed, section 81 is probably the legislative justification for the support of organizations like the Commonwealth Scientific and Industrial Research Organization.<sup>96</sup>

<sup>93</sup> 'Section 96 does not confer legislative power in the same sense in which s. 51 confers legislative power. It authorizes the appropriation of money for a specific purpose, declaring, in effect that the purpose of providing financial assistance for any State is a "purpose of the Commonwealth" within the meaning of s. 81.' (1957) 99 C.L.R. 575, 655 *per* Fullagar J. The implication from this statement being, perhaps, that the Commonwealth would have no power to appropriate moneys to grant to the States were it not for s. 96 declaring appropriations for that purpose to be one of the 'purposes of the Commonwealth'.

<sup>94</sup> Wynes, *op. cit* 469-73.

<sup>95</sup> *Ibid.* 473.

<sup>96</sup> See Science and Industry Endowment Act 1926-1949 (Cth); Science and Industry Research Act 1949 (Cth).

## Section 94

Section 94 provides:

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Like section 81, section 94 has received very little judicial attention. Unlike section 96, there are no words which even suggest that section 94 is merely transitional.<sup>97</sup> Indeed, the words 'on such basis as it deems fair' seem to be less susceptible of limitation than do the equivalent words of section 96. The discussion above concerning characterization, delegation of Commonwealth executive power and imposition of conditions requiring repayment would be equally applicable to section 94. But, it is arguable that section 94 is subject to further limitations.

It is arguable that the words 'on such basis as it deems fair' empower the Commonwealth merely to determine the amount of the surplus to be distributed as between the various states and would not support conditions of the sort commonly imposed under section 96. No doubt, this argument has a sound historical basis<sup>98</sup> and derives support from the juxtaposition of the section with sections 89 and 93, but it is unlikely that the High Court would impose such a restriction on section 94, whilst refusing to impose an equally plausible similar limitation on section 96. In any case, so long as the Commonwealth has the power to grant or withhold moneys from the states it can always make any conditions the subject of a separate political agreement.

In the case of *New South Wales v. Commonwealth*<sup>99</sup> the plaintiff attacked the Commonwealth practice of appropriating, to trust accounts, moneys not to be disbursed in the current financial year. The plaintiff argued that such moneys, though appropriated from the Consolidated Fund, were 'surplus revenue', since they had not been actually spent. The plaintiff further claimed that, by section 94, it was entitled to a share of this 'surplus revenue'. The High Court upheld the Commonwealth practice and said that moneys, as soon as they were appropriated from the Consolidated Fund, ceased to be 'surplus revenue'. The Court, therefore, took a very narrow view of what constitutes 'surplus revenue'. Unless one were to take the absurd position that in the very act of appropriating moneys from the Consolidated Fund to distribute them among the states, the moneys, since they are appropriated, cease to be 'surplus revenue' and therefore are not distributable to the states under section 94, 'surplus revenue' appears to be exactly what the Commonwealth decides it to be. This seems to be the only solution consistent with giving section 94 some effect and permitting the Commonwealth proper control of its finances.

<sup>97</sup> *Report of the Royal Commission on the Constitution* (1929) 13.

<sup>98</sup> See Quick and Garran, *op. cit.* 863-5.

<sup>99</sup> (1908) 7 C.L.R. 179.



But there is a further possible limitation on section 94. Together with sections 89 and 93 it forms part of a scheme for the distribution of surplus Commonwealth revenue.<sup>1</sup> Sections 89 and 93 deal with the distribution, respectively, of surplus revenue before the imposition of uniform duties of customs and excise, and thereafter, for a period of five years. The Constitution sets down the basis of the distribution in this, the so called 'bookkeeping' period. Section 94 confers power on the Parliament to alter the basis of distribution set out in the Constitution. It is arguable that the whole scheme deals only with the revenue from customs and excise. It is set among sections dealing with customs and excise and the timing of the scheme is tied to the imposition of uniform duties of customs and excise. Further, it may be this limitation that Barton J. had in mind when he said, in *New South Wales v. Commonwealth*, that 'it may be mentioned, by the way, that the money in question has not been identified with Customs and Excise revenue, but no point is made of that'.<sup>2</sup> But in 1901 customs and excise revenue was immeasurably more significant than it now is. It is understandable, therefore, that the distribution should be tied to its uniform imposition. But this does not mean that the word 'revenue' is to be understood in any but its ordinary sense<sup>3</sup> and restricted to mean customs and excise revenue only.

Section 94 appears therefore, to confer on the Commonwealth powers similar to those created by section 96.

### CONCLUSION

The power of the Commonwealth to grant financial assistance to the states subject to terms and conditions is almost unfettered. The conditions are not regarded as a fit matter for judicial scrutiny. They are a political matter. The states are under no legal obligation to accept them or abide by them. Yet, though largely unfettered it may be that there are a few restrictions on Commonwealth power. A matter must be able to be characterized as 'terms and conditions of financial assistance' before it will be justified by section 96. However, the High Court has properly kept this restriction of Commonwealth power (which could lead the Court into consideration of political matters) within very narrow limits. In addition, it is submitted that there may be as yet unexplored limitations on the power of the Commonwealth to delegate its executive authority to the states. Finally, conditions requiring repayment by the states of Commonwealth grant moneys appear to be contrary to the oft emphasized voluntary nature of section 96. The 'only' action the Commonwealth can take to

<sup>1</sup> In *N.S.W. v. Commonwealth* all the Justices saw s. 94 as part of a scheme. See also *Report of the Royal Commission on the Constitution* (1929) 14. Though not strictly required for the decision in the case before them, all five Justices in *N.S.W. v. Commonwealth* adverted to the problem of whether s. 94 gave a mandatory direction to the Commonwealth to distribute 'surplus revenue', or merely empowered the Commonwealth to do this. It seems all favoured the latter view.

<sup>2</sup> (1908) 7 C.L.R. 179, 193-4.

<sup>3</sup> *Supra* n. 77.

ensure that conditions are adhered to is threaten the withdrawal of future grant moneys. A most effective sanction. As well, sections 81 and 96 would support grants by the Commonwealth to the states. But of course, the Commonwealth has no need to rely upon them in the event that section 96 was restricted, it is probable that similar restrictions would be imposed on sections 81 and 94, insofar as those sections justified grants to the states. Section 81 appears also to justify grants of financial assistance to other organizations.

But about the whole subject there is an air of unreality. Not only are the legal powers of Commonwealth ample, but as the dominant government of the federation it could now ensure the fulfilment of its policies in any event by extra legal means. One is left to admire the prescience of Deakin.

As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the Central Government. Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortune will follow; and, finally, even the greatest and most prosperous will, however reluctantly, be brought to heel. Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the States and the Commonwealth. The Commonwealth will have acquired a general control over the States, while every extension of political power will be made by its means and go to increase its relative superiority.<sup>4</sup>

<sup>4</sup> From a letter by Alfred Deakin to the *Morning Post* (London) 1 April 1902 and quoted Deakin, *Federated Australia* (1968) 97.