THE DEVELOPMENT OF THE COMMONWEALTH SPENDING POWER

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[*In this article, Dr Saunders highlights the dichotomy between the wide powers, given by s. 96 of the Australian Constitution, that the Commonwealth has to enter and control any field of activity through the disbursement of funds to the States on condition, and the uncertainty about the scope or even existence of a general spending power, based, if at all, on s. 81. She examines the development of these diverging constitutional principles from the ambiguity about the key sections inherent in the convention debates of the 1890s to the various legislative and judicial interpretations of the past seven decades, including detailed discussions of the* Pharmaceutical Benefits *case and the much more recent* Australian Assistance Plan *case.*]

> No doubt the appropriating and spending power is intended to be confined to the purposes in respect of which the Parliament can make laws. Such a limitation, however, is not expressed; if it exists at all it is implied.
>
> (J. Quick and R. R. Garran, 1901)[1]
>
> The section [s. 96] is not intended to diminish the responsibility of State Treasurers, or to introduce a regular system of grants in aid . . . It is for use as a safety-valve, not as an open vent . . .
>
> (J. Quick and R. R. Garran, 1901)[2]
>
> Speaking personally, section 96 is, within this Constitution, quite central to all my hopes for the people of Australia and I profoundly believe, all the Australian people's hopes for their own future . . . a great charter by which and through which the national Government can achieve better things for the people of Australia.
>
> (E. G. Whitlam, 1973)[3]

A. THE PRESENT POSITION

A familiar problem in all the older federations which divide power horizontally between the centre and the regions is the extent to which the centre may spend revenue for purposes outside its express legislative powers. On the one hand it is argued that a wide spending power, particularly combined with a power to attach conditions to the expenditure and thus indirectly to regulate the subject matter of the grant, undermines the distribution of powers. On the other hand it is undoubtedly the case that however detailed and careful the distribution of powers, circumstances will arise which compel public expenditure for purposes which were not contemplated when the Constitution was framed. The national or central government will usually be the appropriate donor, either because the purpose is one which is unlikely to attract, or incapable of

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[1] *The Annotated Constitution of the Australian Commonwealth 1901* (1st ed. reprinted, 1976), 666.

[2] *Ibid.* 871.

[3] Australian Constitutional Convention, *Debates* (1973), 16.

attracting, regional financial support, or because the level of expenditure required is so great that systematic funding can be undertaken only by the centre.

Canada and the United States are the two federations most comparable to Australia. The Constitution of neither of these countries includes a provision which clearly authorizes central spending for purposes outside central legislative power. Nevertheless, both countries have well developed programmes of long standing involving federal grants on condition, both to the regions and to other recipients, the validity of which has either survived challenge,[4] is beyond challenge,[5] or is assumed. In the case of the United States at least, a substantial degree of regulation of the subject matter may accompany the grant. In the case of Canada this is in theory more doubtful, following the *caveat* of the Privy Council in *Reference re Employment and Social Insurance Act*.[6] Nevertheless, in the words of the well known Canadian constitutionalist, Laskin, 'This statement has not had any noticeable effect on dominion spending'.[7]

In neither country is there any significant difference between the constitutional principles which govern grants to the regions and those which govern grants to other recipients. In consequence the decision whether a grant would be more effective if made to a region or to some other body or individual is uncomplicated by constitutional considerations, albeit undoubtedly influenced by political factors.

The constitutional principles governing the disbursement of Commonwealth funds for purposes outside express Commonwealth legislative power in Australia have developed very differently.

On the one hand, it is now settled[8] that the Commonwealth can disburse funds to the States for any purpose within State constitutional competence subject to an almost unlimited range of conditions.

The constitutional basis for these grants is section 96 which provides that: 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the

[4] In the United States, payments are based on Art. 1, s. 8, which invests Congress with power to tax, and by inference to spend, for the 'general welfare'. See *U.S. v. Butler* (1935) 297 U.S. 1, *Helvering v. Davis* (1936) 301 U.S. 619. In Canada, constitutional support for federal spending probably derives from s. 91(1A) which empowers the Dominion Parliament to legislate with respect to 'The Public Debt and Property'; see *Reference re Employment and Social Insurance Act* [1937] A.C. 355.

[5] Payments may be beyond challenge for two reasons. First, the Courts may hold that a matter is not justiciable. *Helvering v. Davis* (1936) 301 U.S. 619, 640. Secondly, even if a matter is justiciable in theory, there may be no plaintiffs with standing to conduct the action: *Frothingham v. Mellon* (1922) 262 U.S. 447; *Massachutsetts v. Mellon* (1922) 262 U.S. 447, *cf. Flast v. Cohen* (1968) 392 U.S. 83.

[6] [1937] A.C. 355, 366-7.

[7] Laskin, B., *Canadian Constitutional Law* (4th ed., 1973), 638.

[8] *Victoria v. Commonwealth* (1926) 38 C.L.R. 399; *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty Ltd* (1939) 61 C.L.R. 735 (H.C.); (1940) 63 C.L.R. 338 (P.C.); *South Australia v. Commonwealth* (1942) 65 CL.R. 373; *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' The wide operation now accorded this section has not always been considered self-evident. Its opening words, together with the opening words of section 87, suggest that it was expected to operate only during the first ten years of federation. This conclusion is reinforced by the history of its inclusion in the Constitution as part of a compromise whereby the smaller States accepted the limitation of the Braddon clause to ten years in return for a financial assistance clause similarly limited. Other potential limitations appear on the face of the section itself. Does the concept of 'financial assistance' imply prior need on the part of the States? Is the assistance confined to general necessity, or does it extend to specific purposes? Are the terms and conditions which may be imposed by Parliament confined to financial matters, or do they extend to regulation of the purpose for which the assistance is given? To what extent can regulation be attempted, consistently with characterization of an Act as one with respect to financial assistance? Does the power expressly vested in the Parliament to determine terms and conditions preclude subordinate legislation or ministerial direction? Further questions arise over its relation to other sections of the Constitution; in particular, whether selective grants under section 96 contravene the prohibitions against discrimination in sections 51(2) or (3), or 99.

None of these limitations have been sustained by the High Court. By means of this section the Commonwealth now influences such diverse areas of State activity as education at all levels, housing, road building and maintenance, health services, social security and welfare, urban and regional development, industry assistance and State developmental projects.[9] There is no legal limit to the degree of detailed supervision which the Commonwealth may exercise over expenditure of the moneys by way of conditions attached to the grant. The conditions may extend beyond control of Commonwealth funds to control of State expenditure. Many grants are conditional on the provision of matching sums by the States, the expenditure of which usually is subject to the same conditions as the expenditure of the federal grant. The administration of these programmes may be facilitated by the establishment of departments, semi-governmental authorities or independent commissions by the Commonwealth, to advise upon and supervise the execution of conditions attached to the grants.

On the other hand there is considerable doubt whether the Commonwealth can disburse funds to persons or bodies other than the States for purposes beyond its express and implied legislative powers at all. Even if this doubt is resolved in the Commonwealth's favour, it is uncertain

[9] Details may be obtained from the budget document, 'Payments to and for the States and Local Government Authorities 1976-77', Ch. IV.

whether, and if so to what extent, the Commonwealth can regulate the expenditure of the grant.

The confusion arises initially because there is no section of the Constitution which unambiguously confers a general spending power on the Commonwealth. The section usually invoked to support general Commonwealth appropriation and by implication expenditure, is section 81, which 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'. It should be read with section 83, the first paragraph of which provides that: 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.' Nevertheless, the use of section 81 for this purpose gives rise to several problems of construction which have bedevilled the spending power since federation.

The first is the meaning to be attributed to the phrase 'purposes of the Commonwealth' in section 81. An obvious possibility is that the purposes of the Commonwealth are the purposes for which it is given express legislative power by the Constitution. One practical difficulty with this solution is the extent to which the Commonwealth in fact has disbursed funds since federation for purposes which not only lie outside its legislative power but which also would be unlikely to attract such extensive funding from any other governmental source: scientific research through the auspices of the C.S.I.R.O., medical research, literary grants and support for the arts generally, to name a few. This difficulty may be avoided, at the other extreme, by interpreting 'purposes of the Commonwealth' so widely as to encompass all purposes for which the Commonwealth Parliament deems it necessary to provide funds. The associated difficulty with this proposal is the opening it affords any Commonwealth government so minded to make inroads upon the already beleaguered federal distribution of legislative powers. This possible interpretation leads to the second problem of construction. Even if it may be identified as the source of Commonwealth power as opposed to a mere description of the Consolidated Revenue Fund, section 81 refers only to appropriation. The possibility therefore arises that it empowers the Commonwealth only to appropriate its revenue, and that power to deal with the revenue thus appropriated must be found elsewhere. Common sense requires that the power to appropriate money for a particular purpose must at least imply the power to disburse it for the approved purpose. Even so, the possibility remains that the power is strictly limited to expenditure and may not be accompanied by any degree of regulation unless power can be found elsewhere in the Constitution, such as in section 61 in combination, if necessary, with section 51(39).

The third problem is less a problem of construction than a problem of procedure consequential upon alternative constructions. It is the extent to which action pursuant to section 81 can be challenged before the Court. This problem has two aspects. The first is the question whether appropriation and expenditure by the Commonwealth under section 81 is a justiciable matter. This question may arise if the view is taken that section 81 deals only with appropriation which is seen to be an internal function of the legislature, not susceptible to investigation by the Court. It may arise also if the view is taken that 'purposes of the Commonwealth' for which appropriations may be made are those so designated by the Commonwealth Parliament: in this case the Court may not interfere with a decision which essentially lies within the discretion of the legislature.

The second aspect of the problem arises when it is conceded that an appropriation pursuant to section 81 is theoretically justiciable, but no plaintiff is available with the requisite *locus standi*. Again, this is likely to follow from a construction of section 81 as mechanical in its operation, of concern only to the Commonwealth Parliament itself. However, even if that view of section 81 is not accepted, the question of standing is likely to prove a substantial impediment to proceedings challenging Commonwealth expenditure, particularly if the expenditure is not accompanied by regulation of the subject matter which has the effect of creating justiciable rights and duties in individuals. In these circumstances the only potential plaintiffs will be the States or their Attorneys-General, who may or may not be granted standing, depending upon the view which the Court takes of the prerequisite interference with State functions necessary as a basis for standing and/or the mandatory effect of the long since obsolete section 94.

The existence and scope of the general spending power has been raised before the High Court twice, in *Attorney-General (Vic.) v. Commonwealth (Pharmaceutical Benefits Case)*[10] and *Victoria v. Commonwealth (Australian Assistance Plan Case)*.[11] Few of the problems outlined were answered with any degree of certainty by either case. There is still some doubt whether the purposes for which the Commonwealth may spend are limited and if so, what falls within the limits. More importantly, a great deal of uncertainty remains on the extent to which the Commonwealth may regulate the subject of the expenditure. Even on the most optimistic view it is unlikely that the Commonwealth could attach to expenditure of this nature anything approaching the degree of regulation which validly may accompany specific purpose grants.

In consequence, decisions in relation to Commonwealth spending on matters outside Commonwealth legislative power are influenced not by such rational considerations as the wisdom of the expenditure in question

[10] (1945) 71 C.L.R. 237.
[11] (1975) 7 A.L.R. 277.

and the appropriateness of a particular administrative procedure, but by the availability of likely plaintiffs and the degree of electoral approval which a programme of direct expenditure is expected to receive, measured, usually, in terms of the number of voters expected to benefit from it. Only spending programmes of unquestionable electoral popularity will be implemented by way of direct grants from the Commonwealth to the intended beneficiaries or to distribution agents other than the States. Even these will minimize the degree of regulation contained in legislative form, both to eliminate possible plaintiffs and to avoid suspected constitutional obstacles. All other programmes will be implemented by way of grants to the States subject to increasingly stringent conditions, almost regardless of the willingness of the States to accept the grants or the ability of their administrations to execute the schemes.

The federal spending power has developed differently in Australia from Canada or the United States primarily as a result of the presence of section 96 in the Constitution. In the first place it has influenced the legal construction by way of the inferences which can be drawn from its presence. In turn the constitutional doubts thus aroused concerning the extent or even existence of a federal spending power have discouraged its use or attempted use by the Commonwealth except under exceptionally propitious circumstances which make challenge unlikely.

Members of the High Court have relied on the presence of section 96 in the Constitution to support restrictive operations of the spending power in various ways. In the *Pharmaceutical Benefits* case, Starke J. argued that section 96 would be superfluous unless the purposes for which the Commonwealth can appropriate and spend under section 81 are limited.[12] Later members of the Court have rejected this argument. In the *Australian Assistance Plan* case, Mason J., for example, argued that unconditional grants to the States always would have been a 'purpose of the Commonwealth' within the meaning of section 81 and that the purpose of section 96 was to ensure that the Parliament could validly attach conditions to the grants.[13] In this view he was in direct opposition to the Chief Justice who in the same case had argued for a restrictive interpretation of section 81 on the ground that grants to the States would not have been a 'purpose of the Commonwealth' within the meaning of section 81 except for the presence of section 96 in the Constitution.[14] Nevertheless, Mason J. himself adopted the presence in the Constitution of the power to make grants to the States on condition as evidence that the Commonwealth executive power to regulate the subject matter of expenditure outside its express and implied constitutional power was limited.[15]

[12] (1945) 71 C.L.R. 237, 266. See also Williams J., 287. A similar argument was advanced tentatively by Gibbs J. in the *A.A.P.* case: (1975) 7 A.L.R. 277, 309.
[13] (1975) 7 A.L.R. 277, 325. See also Gibbs J., 309.
[14] *Ibid.* 293.
[15] *Ibid.* 328.

Despite their often conflicting views, all judges assumed that the inter-relation between section 81 and section 96 is, and on federation was, coherent and logical. Some even support the diverse development of the power to make grants to the States and the general spending power as consistent with federal theory.[16] With respect, all such interpretations are the result of hindsight. This is so not merely because the sequence of events, in particular the hasty insertion of the hitherto rejected section 96 in the Constitution after the Premiers' Conference of 1899 as part of the final compromise makes the picture of calm co-ordination an unlikely one. An examination of the Convention Debates reveals uncertainty amongst the delegates themselves about the meaning of both sections and the connection between them. That uncertainty was reflected for at least the first 25 years of federation in the activities of successive federal governments. The present constitutional position in which, while the Commonwealth controls vast areas of activity for which the States remain nominally responsible, it is unable to make and regulate confidently the disbursement of revenue to other recipients, is the consequence of compromise and chance development. It is the purpose of the rest of this article to examine the process by which this development took place.

B. CONVENTION DEBATES

Confusion over the connection between the general spending power and section 96 and uncertainty as to the extent and application of each, is evident even during the Conventions of the 1890s when the Constitution was framed.

(a) *The General Spending Power*

Debate on the possible existence of a general spending power in the Constitution began at the 1891 Sydney Convention. For the most part, it centred around two clauses of the 1891 draft bill: Clause 52(vi) which was then in the same terms as the present s. 51(4),[17] and chapter IV clause 1, the forerunner of the present s. 81. In the 1891 draft, clause 1 provided as follows:

> All duties, revenues, and moneys, raised or received by the Executive Government of the Commonwealth, under the authority of this Constitution, shall form one Consolidated Revenue Fund, to be appropriated for the Public Service of the Commonwealth in the manner and subject to the charges provided by this Constitution.

Chapter IV, clause 3 was in terms almost identical with the first paragraph of the present s. 83.

There was disagreement between delegates as to whether the 1891 draft empowered the Commonwealth to appropriate and to spend moneys

[16] *E.g.*, Barwick C.J. (1975) 7 A.L.R. 277, 295.

[17] The legislative power with respect to 'Borrowing money on the public credit of the Commonwealth'.

raised, whether by taxation or loans, for any purpose. There was almost equal disagreement about whether the bill should so empower the Commonwealth.

The matter was raised first in debate on clause 52, now s. 51.[18] Mr Thynne proposed the inclusion of a new sub-clause, clause 52(iii), empowering the Commonwealth Parliament to legislate with respect to 'the appropriation of any moneys raised by the commonwealth for any purpose authorized by the constitution'. He declared the purpose of the new clause to be to 'limit the power of the commonwealth to borrow money, or to raise money strictly for the purposes with which it is authorized to deal under the constitution'. His alarm apparently was occasioned by clause 52(iv) which, being general in its wording, could be construed to empower the Commonwealth to borrow for any purpose whatsoever, and to spend the moneys borrowed accordingly.[19] The wider issue of general spending was raised by his observation 'that there is nothing in the bill from end to end limiting the power of the Commonwealth to appropriate money for any purpose it thinks desirable for the benefit of the community'.[20]

The diversity of opinion provoked by that observation in the debate which followed is instructive. Inglis Clark, a member of the 1891 drafting committee and author of a bill which probably formed the basis of the 1891 draft,[21] denied that it empowered the Commonwealth to do any such thing: 'I am very sure that the supreme court [sic] would very soon declare any such law invalid'.[22] He based this analysis on the fact that the bill gave specific legislative powers to the Commonwealth Parliament and that spending must be limited accordingly.[23] Kingston, who with Griffith comprised the rest of the drafting committee, agreed in substance with Clark, adding that the provision in chapter IV, clause 3, requiring appropriations to be 'made by law', concluded the matter.[24] On the other hand Deakin, who also opposed the inclusion of the new sub-clause, did so not on the grounds that it would be superfluous, but that it would be unduly restrictive: that it would necessitate the inclusion of 'every conceivable purpose legitimately belonging to the commonwealth' in the Constitution.[25] It may be inferred from this that he, at least, thought that the Commonwealth's power to appropriate went beyond its specified powers. His reasoning was indignantly repudiated by both Thynne and Clark on the

[18] *Convention Debates* (Sydney, 1891), 698.
[19] The taxation power may have contributed to his alarm also. It was embodied as that time in 2 sub-clauses, (ii) and (iii), and was limited only by the requirement that taxation 'be uniform throughout the Commonwealth' not by any reference to purpose.
[20] *Convention Debates* (Sydney, 1891), 699.
[21] La Nauze, J. A., *The Making of the Australian Constitution* (1972), 49.
[22] *Convention Debates* (Sydney, 1891), 698.
[23] But *cf.* Clark's own bill, which was very much more specific about the purposes for which moneys might be spent; reproduced in La Nauze, J. A., *op. cit.*, 292.
[24] *Convention Debates* (Sydney, 1891), 700.
[25] *Ibid.*

grounds that specification of the purposes of the Commonwealth in the Constitution was precisely what the Convention was supposed to be doing.

Thynne was persuaded finally to postpone his proposed amendment, and to raise it in the more appropriate context of chapter IV clause 3. When he did so, his proposed amendment was negatived after a short debate which concluded with the assurance of Griffith that 'the words in the 1st clause of the chapter . . . contain all the limitations we can really insert, however many words we may use to express them'.[26]

It can be seen that the 1891 debates on the significance of s. 81 were not conclusive. There was very little direct discussion of it thereafter.[27] Nevertheless it arose indirectly in Melbourne in 1898, in the context of the debate on whether a provision similar to the present s. 96, enabling the Commonwealth to grant financial assistance to the States on condition, was necessary. Wise (N.S.W.) argued that the power already existed in the Constitution, by 'necessary implication from the fact of the Union . . . from the very circumstance of individual states coming together'.[28] He maintained his opinion despite interjections by Forrest drawing his attention to the effect of clause 81.[29]

Wise finally was answered by O'Connor:

> 'from the consideration and study which I have been able to give to the Constitution, I have no hesitation whatever in saying that there is no such power implied. The Constitution is formed for certain definite purposes. There are definite powers of legislation and definite powers of administration, and the clause that the Right Hon. Sir John Forrest called attention to just now — clause 81 — expressly provides that the revenues of the Commonwealth shall form one consolidated fund, to be appropriated for the public services of the Commonwealth in the manner and subject to the charges provided in this Constitution.'
>
> MR WISE:
>
> 'The order and good government of the Commonwealth would come under the term "public services of the Commonwealth".'
>
> MR O'CONNOR —
>
> I do not agree with the honourable member in his interpretation of the powers of the Commonwealth, especially when dealing with the expenditure of the money of the taxpayers . . . I do not think any expenditure will be constitutional which travels outside these limits . . . If any Act were carried giving monetary assistance to any state it would be unconstitutional, and the object sought would not be attained.[30]

Although there was some uncertainty in the debates over the effect of s. 81 in either its original or its final form, it seems unlikely on balance that it was intended to allow appropriation for any purpose. Nevertheless the potential confusion was foreseen by Quick and Garran in their commentary on s. 53:

[26] *Convention Debates* (Sydney, 1891), 789.
[27] Section 81 (then clause 79) was considered in a different context in Adelaide in 1897. The words 'and moneys' were deleted to make it plain that the section was not intended to apply to loan moneys. *Convention Debates* (Adelaide, 1897), 834-5.
[28] *Convention Debates* (Melbourne, 1898), 1105.
[29] *Ibid.* 1107.
[30] *Ibid.* 1108.

> No doubt the appropriating and spending power is intended to be confined to the purposes in respect of which the Parliament can make laws. Such a limitation, however, is not expressed; if it exists at all it is implied.[31]

The authors cite the United States' cases *United States v. Realty Co.* and *United States v. Gay*[32] in which it was held that the appropriation of public money by Congress to satisfy claims 'founded upon moral and honourable obligations, and upon principles of right and justice' can 'rarely, if ever, be the subject of review by the judicial branch of the Government'.

The Melbourne debate is also a useful indication of the reason for the eventual change in the wording of s. 81 from 'public service' to 'purposes'. There was some concern in the Conventions that 'public service' would not cover appropriations for payment to the States. This concern was demonstrated in relation to section 96, as has been seen, but it was greater still in relation to the provisions which guaranteed return of revenue to the States, sections 87, 89, 93 and 94. This is demonstrated by the exchange between Isaacs and Barton at the Melbourne Convention:

> in its wording the clause will require considerable alteration. It is limited in this way, that the revenues and moneys are to form one Consolidated Revenue Fund, to be appropriated for the 'public services' of the Commonwealth . . . Some of the provisions recommended in the Finance Committee's report are to the effect that a portion of this money is not to go to the public services of the Commonwealth, but to be returned to the States. I call attention to this, in order that the clause may be brought into harmony with whatever is determined with regard to the Finance Committee's report.
>
> BARTON: 'I understand Mr Isaacs to suggest that the words "public service of the Commonwealth" are not sufficiently large to cover the proposed return to the states.'
>
> ISAACS: 'Yes, I would like the honourable member to consider that point.'[33]

This concern explains the emphasis by Quick and Garran in their commentary on the final version of section 81. ' "The purposes of the Commonwealth" include the payments to the States made by virtue of the Constitution. The States being "parts of the Commonwealth", expenditure by the federal government in pursuance of its constitutional liability to the States is as much a "purpose of the Conmmonwealth" as its expenditure upon the services of the federal government.'[34]

I have been unable to discover debate on the actual change of wording in s. 81. Quick and Garran describe it as a 'drafting amendment' made before the first Report, which, with the insertion of the words 'and liabilities', was intended 'to make it clear that the payments to the States, under ss. 89 and 93, were included'.[35]

The first Report took place on 3rd March 1898.[36] Shortly thereafter sections of the bill were recommitted for the purpose of considering amendments of the Drafting Committee (a further recommital of rather

[31] Quick and Garran, *op. cit.*, 666.
[32] (1896) 163 U.S. 427.
[33] *Convention Debates* (Melbourne, 1898), 899-900.
[34] Quick and Garran, *op. cit.*, 812.
[35] *Ibid.* 811.
[36] *Convention Debates* (Melbourne, 1898), 1816.

more contentious provisions took place later). The purpose of the drafting amendments was explained several times by members of the Drafting Committee as in substance 'endeavours to carry out the known wishes of the Convention in a better way than they were previously expressed'.[37] That is precisely what the change of wording in s. 81 did.[38] This particular alteration was not brought explicitly to the attention of the Convention: it was presumably one of the '140 amendments of the Drafting Committee which are not likely to come directly under our notice'.[39]

It can be seen that an ambivalent connection between section 81 and section 96 existed even during the Conventions. In the minds of some delegates, section 81 had a wide operation and certainly sufficed to cover section 96 purposes. In the minds of others, section 81 was strictly confined, requiring minor verbal amendments to ensure that it covered appropriations for payments to the States pursuant to other sections of the Constitution. The fact that these amendments were made is evidence that the restrictive view of section 81 prevailed.

(b) *Section 96*

Section 96 itself was included in the Constitution late, after the Premiers' Conference in 1899.[40] Nevertheless, as mentioned above, it had been mooted earlier in principle.

The financial settlement had been one of the most troublesome issues before the Conventions. The imposition of customs and excise duties by a central authority was a primary aim of federation, but its consequence was that the States were deprived of their principal source of revenue. In general, the solution to the federal financial problem was seen to be a method whereby income was returned to the States roughly in proportion to the amount surrendered.[41] Controversy centred around how this should be achieved: whether a source of revenue should be guaranteed to the States, or whether it should be left to the Federal Parliament to determine the best method of revenue redistribution in the light of experience gained during the first few years of federation while the book-keeping clauses[42] were in force.

It was in this atmosphere that Henry of Tasmania proposed the forerunner of the present s.96: 'some general clause giving the Federal Parliament the necessary power to deal with a state under exceptional circumstances, so as to preserve it from financial shipwreck'.[43] The

[37] Sir John Downer (S.A.), *Convention Debates* (Melbourne, 1898), 1821. See also Barton, E., 1823.
[38] See the exchange between Barton, E. and Isaacs, I. A., quoted, *supra.*
[39] *Convention Debates* (Melbourne, 1898), 1914.
[40] Quick and Garran, *op. cit.*, 219.
[41] Dr John Quick, *Convention Debates* (Melbourne, 1898), 834.
[42] Sections 89, 93.
[43] *Convention Debates* (Melbourne, 1898), 813. The insertion of the clause was moved at 1100. It was in the following terms: 'The Parliament may, upon such terms and conditions and in such manner as it thinks fit, render financial aid to any state'.

suggestion was rejected by the Convention,[44] but reintroduced as part of the compromise reached by the 1899 Premiers Conference to compensate for the limitation of the Braddon clause to ten years. It was more than coincidence that both clauses were expressed to last '[d]uring a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides'.

Two observations should be made about the debate on section 96, as it now is.

First there is the point already noted that, while some delegates assumed the power to be inherent in the Constitution, most assumed that it was not, and that it would need to be expressed if it was desired. In its final form the Constitution not only made express provision for payments on condition to the States, but contained an altered s. 81 to enable appropriations to be made for such payments.

Secondly it was assumed by most that the purpose of s. 96 was to avert financial disaster particularly in the first few years after federation. It was on the basis of this assumption that many delegates opposed its inclusion in the Constitution. Dr Cockburn, for example, was both sceptical as to the need for such a clause and apprehensive as to its consequences:

> surely we are not going to form a federation of states that are trembling on the verge of bankruptcy. The thing is too preposterous, and this clause is too preposterous . . . There is no fear of the clause being accepted. If it were it would certainly sap the independence of the states by placing the Federal Parliament as a sort of Lord Bountiful over the states to whom ad misericordiam appeals could be made.[45]

Sir John Forrest from Western Australia foresaw the potential usefulness of the provision:

> There are a great many ways in which it may be necessary for the Federal Parliament to assist the states. There may be great public works which are altogether beyond the means of a state itself, but which are very necessary in the interests of Australasia . . .
> I am thinking of the more distant future — of a time further ahead than we can see now.[46]

But Forrest was in a minority. The prevailing attitude to the section was that expressed by Quick and Garran: 'It is for use as a safety valve, not an open vent; and it does not contemplate financial difficulties, any more than a safety valve contemplates explosions.'[47]

A review of the Convention debates demonstrates the interdependence of sections 81 and 96 from early times. It reveals also uncertainty amongst delegates as to their scope and effect of both sections, and failure to resolve that uncertainty even when it became obvious. To a considerable extent the confusion over the limits of the power of the Commonwealth to appropriate and spend for purposes other than those expressly stipulated

[44] *Convention Debates* (Melbourne, 1898), 1122.
[45] *Ibid.* 1119.
[46] *Ibid.* 1121-2.
[47] Quick and Garran, *op. cit.*, 871.

in the Constitution stems from the compromise nature of the entire financial settlement, and the desire of delegates to emphasise those matters on which they were agreed, and to suppress those on which they were not.

C. 1901-1926

(a) *The General Spending Power*

The debate on the extent of the power of the Commonwealth to appropriate and spend revenue continued after federation.

As had been the case in the Conventions, the preponderance of opinion was that the Commonwealth's spending power was circumscribed by its legislative powers.[48] This did not necessarily deter the Commonwealth from entering into schemes for expenditure which clearly could not be supported by any express Commonwealth power. A notable example of such a scheme is the Maternity Allowance Act 1912 which provided for the payment of an allowance of £5 to each woman (Asiatics and Aboriginal natives excepted) who gave birth to a live child within Australia. Nevertheless the doubts expressed affected the future development of the spending power. It began to be used cautiously, and only in circumstances which were regarded as propitious. In its place an alternative source of constitutional power for expenditure on purposes outside legislative power was found and developed: the power to make grants to the States on condition, pursuant to section 96. These developments are examined in detail below.

Caution in the use of the spending power manifested itself in two ways. Both were connected with the likely availability of a willing plaintiff with appropriate standing to challenge unconstitutional Commonwealth expenditure. Both gave rise to considerations which are still common in the use and interpretation of the Commonwealth spending power.

First, a tendency developed in the analysis of Commonwealth expenditure to distinguish expenditure *per se* from expenditure combined with a degree of regulation of the subject matter. Thus Sir John Quick in debate on the Maternity Allowance Bill 1912, conceding for the purpose of argument the existence of 'an unlimited power of appropriation' nevertheless was unprepared to admit the validity of the Bill before the House: '. . . there is not associated with that appropriating power what is called the incidental power for providing machinery for giving effect to the appropriating power . . . There are other clauses in this Bill which go beyond the appropriating power of Parliament. There are machinery and procedure sections; there are references to powers and functions to be vested in the Commissioner intrusted with the execution of the measure; and there is a clause giving power to pass regulations.'[49]

[48] See Higgins, H. B. in debate on the Naval Agreement Bill 1903, Commonwealth of Australia, 14 *Parliamentary Debates,* 1997-8; Forrest, Sir John, in debate on the Maternity Allowance Bill 1912, Commonwealth of Australia, 66 *Parliamentary Debates,* 3422-6; Quick, Sir John, *ibid.* 3639.

[49] Commonwealth of Australia, 66 *Parliamentary Debates,* 3639.

This is not an unprecedented distinction to make. The same distinction is drawn in theory in Canadian constitutional law,[50] although its practical effect in that country is negligible. Its practical effect in Australia has been more marked. It formed the basis of the decision of Latham C.J. in *Attorney-General (Victoria) v. Commonwealth*[51] that the Pharmaceutical Benefits Act 1944 was invalid. In his Honour's view, although mere appropriation and expenditure for pharmaceutical benefits was within Commonwealth power, a scheme which regulated the manner and circumstances in which the funds were expended was not.[52] Its influence may be seen also in the judgment of Mason J. in the *Australian Assistance Plan* case.[53] If developed further it is likely that the Court will be posed serious problems in distinguishing between regulation on the one hand and expenditure on the other.

Successive Commonwealth governments have adopted the distinction between regulation and expenditure in planning spending schemes. This has been due not only to the espousal of the distinction by the High Court but to the consequent reduction in available plaintiffs. A regulatory scheme embodied in legislative form creating rights, obligations and offences, is more likely to affect individual citizens in such a way as to give them standing to challenge its validity than a scheme which goes no further than appropriation. As doubts grew about the extent of the federal spending power, minimization of the number of potential plaintiffs became an important consideration. This could be achieved either by reducing the degree of regulation contemplated in the scheme, or by avoiding as far as possible resort to legislation.

Caution in the use of the spending power was evident not only in the details of the schemes devised, but also in the subject matter of the schemes. If a scheme could be so constructed that a challenge was unlikely or unable to be mounted by an individual citizen it followed (or was thought to follow) that the only potential plaintiffs were the States or their Attorneys-General. Accordingly it became relevant to devise schemes which would minimize the likelihood of challenge from this source, rendering the scheme in effect, if not in theory, non-justiciable. There was a body of legal opinion[54] to the effect that the States would have the requisite *locus standi* to challenge a federal appropriation, derived either from their position as members of the federation or as heirs apparent to the surplus revenue of the Commonwealth under s. 94.[55] It followed that State challenge could be averted more effectively by political than by legal

[50] *Reference re Employment and Social Insurance Act* [1937] A.C. 355, 366-7.
[51] (1945) 71 C.L.R. 237.
[52] *Ibid.* 250.
[53] *Victoria v. Commonwealth* (1975) 7 A.L.R. 277, 326.
[54] Forrest, Sir J., Commonwealth of Australia, 66 *Parliamentary Debates*, 3423-4, quoting Professor Harrison Moore.
[55] This argument was stronger while the Surplus Revenue Act 1910 (Cth) remained in operation.

means: in particular, by restricting the use of the general spending power to purposes uniformly regarded as so beneficial that no State would risk political opprobrium by challenging them, even if it wished to do so. This point of view appeared in connection with the Maternity Allowance Bill 1912: 'I do not think that there is in Australia any Government so inhuman as to raise an objection with a purpose of testing this legislation in the High Court. If any State Government is prepared to do so it must be prepared to take the responsibility . . . I have no doubt that in the end it will be called upon to pay the penalty.'[56]

The federal spending power was relied upon also in schemes which involved payments to the States for specific purposes. It was in the context of these schemes that the potential of section 96 as a basis for wide-spread Commonwealth expenditure and regulation of expenditure was recognized and explored. It is a commentary on the views which were held in the early years of federation on the scope and purpose of section 96 that it was not relied upon for these schemes from the beginning, although it had provided a constitutional basis for a variety of general revenue payments.[57] The process by which its metamorphosis was accomplished was as follows.

In 1923 a Bill was introduced into the Commonwealth Parliament which was designed to promote the purchase of wire netting for fencing by settlers in outback areas. It was called the Advances to Settlers Bill 1923. It was treated as 'urgent' in debate, and its subject matter described as a 'national' problem.[58] It provided for advances to be made by the Commonwealth Minister to the States and the Northern Territory for the purchase and distribution of wire netting 'at such price, on such conditions and security, and subject to such terms as to payment as are prescribed'.[59]

The Bill was attacked in debate by Mr Latham. The Attorney-General (Littleton Groom) had justified the bill as an exercise of the appropriation power,[60] but Latham insisted that it was unconstitutional in this form.

> If the mere voting of money is to bring a matter within the jurisdiction of the Commonwealth, any matter may be dealt with in this Parliament. Take, for example, the subject of education. That is distinctly a matter for State action. It is obvious, however, that by a liberal grant of money, the Commonwealth government could obtain control of the whole educational system of Australia.

He continued by arguing that the grants could be made nevertheless by 'constitutional means':

> If it were proposed that we should expend this £250,000 in the form of a grant to the States under conditions or terms determined by the Commonwealth, and agreed to by the States, that would be in accordance with the Constitution. The administration would then rest with the States, which would be responsible to their own people for the manner in which the loan was expended.[61]

[56] Charlton, M., Commonwealth of Australia, 66 *Parliamentary Debates,* 3589.
[57] Surplus Revenue Act 1910; Tasmania Grant Acts 1912, 1913, 1922, 1923, 1924.
[58] Cameron, M., Commonwealth of Australia, 105 *Parliamentary Debates,* 2616.
[59] Clause 5.
[60] Commonwealth of Australia, 105 *Parliamentary Debates,* 2690.
[61] *Ibid,* 2634.

This was one of the earliest references in the Commonwealth Parliament to the use of section 96 for specific purpose grants.

In the same year, shortly before the Advances to Settlers Act 1923, the Commonwealth Parliament had passed an Act to authorize the first systematic roads grants, the Main Roads Development Act 1923.

A proposal for such a scheme had been submitted by the Commonwealth to the Premiers for approval at the May-June conference of Commonwealth and State Ministers in 1923.[62] It had received a mixed reception from the Premiers. The conference had concluded by adopting a resolution to the effect that each State which desired to take up the grant should deal directly and separately with the Commonwealth government.

The Act established a trust account into which a sum not exceeding £500,000 was to be paid. A schedule specified the maximum amount payable to each State. The amount paid was to be matched by the State concerned, £1 for £1, and spent on 'the development of main roads'.[63] Regulations[64] subsequently passed described in some detail three classes of roads which were to be regarded as 'main roads' for the purpose of the Act.

The Act vested a considerable discretion in the Minister which, if exercised conscientiously, would have enabled the Commonwealth to supervise closely the expenditure of the grant. Under section 8, the grant was made conditional on ministerial approval of proposals specifying the main roads on which the money was to be expended, including full details of plans, methods of construction, and 'other particulars' required by the Minister.

The Act was amended twice: in 1924 and 1925.[65] The latter amendment authorized an additional unmatched grant of £250,000 for reconditioning and strengthening existing main roads.

There was no direct indication in the bills of their intended constitutional basis.

In his second reading speech on the Main Roads Development Bill 1923 Bruce defended Commonwealth interest in road construction as necessary for the purposes of development, referring in particular to the rather tenuous connection between development and immigration.[66] As is apparent from the definition of 'main roads' in the Regulations, some emphasis was also placed on the development of access to markets, presumably with the aim of attracting the operation of s. 51(1). If such a scheme were proposed today, there would be little doubt that it was based squarely upon section 96. That this was not so in the case of the Main Roads Development Bills can be deduced from the debate on these and subsequent bills submitted to the Commonwealth Parliament.

[62] Commonwealth of Australia, (1923) *Parliamentary Papers*, Vol. 2, 345, 423.
[63] Section 6.
[64] Statutory Regulations No. 104, 1923.
[65] Main Roads Development Acts 1924 and 2925.
[66] Commonwealth of Australia, 103 *Parliamentary Debates*, 311.

Although Latham had attacked the constitutional validity of the Advances to Settlers Bill 1923, he did not speak in debate on either the Main Roads Development Bill 1923 or the Main Roads Development Bill 1924. Both bills, together with the bill presented in 1925, were received with an uncharacteristic degree of the unanimity by both sides of the Parliament. Nevertheless he spoke on the Main Roads Development Bill 1925, attacking it on the basis that such legislation was *ultra vires* the Commonwealth Parliament. Properly characterized, the subject matter of the legislation was main roads, with respect to which the Commonwealth had no constitutional power:

> I am sorry that I am unable to join in the general chorus in praise of this bill . . . I venture to assert, although I know it will be unpopular to do so, that in passing legislation of this description we are not acting constitutionally. This Parliament has no power to legislate for main roads. It has power, of course, to grant financial assistance to States which need it . . . It cannot be said that the States require financial assistance from the Commonwealth. Does Victoria, for instance, require such assistance?[67]

As in debate on the Advances to Settlers Bill, he suggested that the scheme could be constructed to attract constitutional respectability pursuant to section 96. In neither speech did he identify precisely the way in which this could be done. By inference, he appears to have considered that State necessity for revenue assistance and consequent voluntary participation in the scheme should be apparent on the face of the legislation, to enable it to be characterized as legislation with respect to 'financial assistance'.

It is pertinent here to mention an opinion prepared by Mr Owen Dixon for the Victorian Government, on the validity of the Main Roads Development Act 1923.[68] Mr Dixon considered the Act to be invalid. Its sweeping provisions could be supported neither by the appropriation power, which he regarded as limited to appropriation for purposes lying within Commonwealth legislative power, nor by such other heads of power as s. 51(1) or s. 51(6). He considered further that its terms, particularly the regulation-making power of the Governor-General and the ministerial discretion to consent to proposed projects precluded reliance on section 96. The Act was 'a law with respect to road making and not one of granting financial assistance to one or more States upon terms within the discretion of and to be determined by Parliament itself'.

He concluded, with foresight in the light of subsequent decisions that 'probably it would be only with reluctance that a majority of their Honours would reach the position which appears to my mind to be correct'.

Latham's arguments had little impact on the Parliament during the passage of the Main Roads Development Bill. On the contrary: they were

[67] Commonwealth of Australia, 111 *Parliamentary Debates,* 2331.

[68] The opinion was dated 1 March 1926. The author was given access to it by the Law Department (Victoria).

dismissed as representing 'an academic point of view' by one speaker.[69] Nevertheless, they were remembered and quoted against him the following year when, as Attorney-General, he supported the Federal Aid Roads Bill.

(b) *Specific Purpose Grants Pursuant to Section 96*

The first specific purpose grant for a purpose not within the Commonwealth legislative power to be based expressly on section 96 was the Federal Aid Roads Act 1926. The Act provided for a greater actual Commonwealth control over road construction than its predecessors had done, or its successors were to do for the next forty years. It differed greatly in form from the Main Roads Development Acts 1923-25. Many of the differences reflected the constitutional opinions of Mr Latham, who had succeeded Littleton Groom as Attorney-General in the Bruce-Page Government on 18 December 1925.

The Act clearly purported to be an exercise of the Commonwealth power under section 96. It referred to the necessity for provision of 'financial assistance to the several States for the purpose of the construction and reconstruction of roads', and its stated purpose was to 'authorize the Execution by the Commonwealth of Agreements between the Commonwealth and the States in relation to the Construction and Reconstruction of Federal Aid Roads, and to make provisions for the carrying out thereof'. The sections of the Act itself were machinery sections, authorizing the execution of agreements,[70] appropriating the necessary funds,[71] setting up the Federal Aid Road Trust Account,[72] and investing the Governor-General with power to make regulations.[73] The Agreement was set out in the Schedule.

The Agreement provided for payment by the Commonwealth of two Million per annum for ten years, distributed between the States on a three-fifths population, two-fifths area basis, for the purpose of the construction and reconstruction of certain roads which were to be known as 'federal aid roads'. The grant was to be matched by each State.[74] At least one-quarter of the Commonwealth grant and the matching sum were to be spent on construction. The Minister was empowered to decide on the allocation of the remainder between construction and reconstruction.[75]

The classes of roads entitled to benefit from this largesse were substantially similar to those prescribed by Regulation pursuant to the Main Roads Development Acts.

The scheme provided for detailed Commonwealth supervision. Each State was to submit a five year plan to the Minister for his approval,

[69] Forde, F. M., Commonwealth of Australia, 111 *Parliamentary Debates*, 2333.
[70] Section 2.
[71] Section 3(3).
[72] Section 3(1).
[73] Section 4.
[74] Clause 3. The matching ratio was 15/– to £1.
[75] Clause 6.

followed by proposals for each financial year if his approval was forthcoming.[76] The requirement for approval might extend to all matters connected with road construction, as was made clear by the assurance given to Parliament by the Minister for Works and Railways that the Commonwealth would stipulate the grade and width of the road, and the depth of the metal.[77] The work was to be carried out by contract labour unless otherwise approved by the Minister.[78] The final payment towards each project was to be withheld until the Minister had satisfied himself 'by such means as he thinks fit' that the work had been carried out in accordance with the Agreement.[79] Each State was to maintain roads on which work had been done pursuant to the agreement, to the satisfaction to the Minister.[80]

Latham defended his opposition to the previous roads grant legislation and his support of the immediate proposals at length.[81] In particular he argued that the present bill overcame his objections to the constitutional invalidity of the Main Roads Development Act. The earlier legislation was invalid because it was legislation with respect to roads which was not a head of Commonwealth power. The Federal Aid Roads Bill was based on s. 96, as evidenced by the preamble, and was legislation with respect to the granting of financial assistance to the States. The scheme would not come into operation until the intergovernmental Agreement scheduled to the Act had been signed, and ratified by the respective State Parliaments. There was no compulsion involved: '[n]o State that does not wish to agree to a proposal of this nature is bound to accept it'.[82] Latham argued that under the Federal Aid Roads scheme the States had a greater scope for initiative than under the Main Roads Development Acts. Although the latter Acts had been passed after consultation with the States, their implementation required unilateral Commonwealth legislation only.

In practice the distinction is tenuous. The device of an inter-governmental agreement signed by all parties, scheduled to the Commonwealth Act and ratified by separate State legislation is no more than a formal gesture towards the view which Latham propounded, that section 96 can be used only to alleviate genuine State financial need, whether generally or for specific purposes. It adds nothing to the reality of the circumstances. In fact the Federal Aid Roads Act had been introduced pursuant to a promise made by Bruce in an election policy speech in October, 1925. He had undertaken that the Commonwealth would provide twenty million pounds for road construction and maintenance 'subject to a policy of

[76] Clause 9.
[77] Commonwealth of Australia, 114 *Parliamentary Debates,* 4597.
[78] Clause 9(4).
[79] Clause 11.
[80] Clause 8.
[81] Perhaps at too great length. It provoked a comment: 'Methinks the honourable member doth protest too much', from one interjector, Green, A., Commonwealth of Australia, 114 *Parliamentary Debates,* 4685.
[82] *Ibid.* 4684.

national road development being evolved at a conference between the Commonwealth and the States which was acceptable to the Commonwealth'.[83] Although the scheme was duly discussed with the States at conferences in February 1926 and May 1926, it was overshadowed by other even more controversial financial developments, the introduction of the States Grants Bill 1926 and the unilateral decision on the part of the Commonwealth to discontinue the system of per capita payments under the Surplus Revenue Act 1910. It was accepted only with reluctance and resentment on the part of some States at least.[84] Victoria, South Australia and New South Wales did not pass ratifying legislation until the decision of the High Court in *Commonwealth v. South Australia*[85] made it clear that it was not open to the States to levy petrol taxes in order to finance road construction and maintenance. In addition, Victoria issued a writ challenging the validity of the scheme.

The Victorian challenge to the Federal Aid Roads scheme led to the first and formative judicial pronouncement on section 96.[86] It was by no means obvious at the time what the scope of the section was.

It has been seen that the Commonwealth government itself approached the legislation with some caution as to its characterization as an Act with respect to 'financial assistance to any State'. Other arguments presented on behalf of Victoria and South Australia suggested limitations to the nature of the conditions which validly could be attached to section 96 grants, restrictions on the use of the section to overcome guarantees against discrimination between States, and a prohibition against delegation to the Commonwealth executive of the power to attach conditions to the grant. Many of the arguments had been advanced in the joint opinion of Menzies K.C. and Fullagar K.C. on the validity of the Federal Aid Roads Act 1926. Nevertheless, although in their opinion the Act was invalid, it contained the following reservation:

> [T]he trend of High Court decision has been in the direction of sustaining the Commonwealth power in all cases of substantial doubt . . . The comparatively short period during which the High Court has been applying these principles[87] renders it difficult for any constitutional lawyer to advise with certainty upon the extent to which the logical application of the later High Court doctrines will produce results which are possibly unexpected, and it may well be that the High Court, by giving to the important words of s. 96 the very widest operation, might hold the proposal a valid one.[88]

[83] *Ibid.* 4795.

[84] The South Australian Parliament passed a resolution which stated that 'roads construction is an encroachment on the State Government activities and beyond the powers of the Commonwealth Constitution'. Shortly afterwards the South Australian Government replied by telegram to an inquiry by Bruce as to its intentions 'submission of agreement to Parliament for ratification would be futile. The reluctant acceptance of proposals by this Government was forced by the introduction of legislation into Commonwealth Parliament dealing with proposals', *ibid.* 5030, 4866.

[85] (1926) 38 C.L.R. 408.

[86] *Victoria v. Commonwealth* (1926) 38 C.L.R. 399.

[87] Since the decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (Engineers' case)* (1920) 28 C.L.R. 129.

[88] Quoted by Page, Dr Earle, Commonwealth of Australia, 114 *Parliamentary Debates,* 5034.

In *Victoria v. Commonwealth*[89] the High Court upheld the validity of the Federal Aid Roads Act 1926. The judgment of the Court, delivered *per curiam,* lent no credence to the suggested limitations on the scope of section 96. Indeed, it barely acknowledged their existence. In a judgment remarkable both for its brevity and its momentous consequences it said:

> The Court is of opinion that the Federal Aid Roads Act No. 46 of 1926 is a valid enactment.
> It is plainly warranted by the provisions of sec. 96 of the Constitution, and not affected by those of sec. 99 or any other provisions of the Constitution, so that exposition is unnecessary.
> The action is dismissed.[90]

D. LATER DEVELOPMENTS

The events of 1923-26, culminating in *Victoria v. Commonwealth,*[91] laid the ground for the future development of the federal spending power in Australia. From that time judicial decision and political usage have combined to emphasise section 96 as the vehicle for the disbursement of Commonwealth funds on condition for purposes outside express Commonwealth power, and to diminish the role of the general spending power. The continuing divergence of these two aspects of federal spending in Australia during this period are outlined briefly below.

(a) *Section 96*

The decision in *Victoria v. Commonwealth*[92] cleared the way for the development of section 96 as a means whereby the Commonwealth could finance and regulate extensively matters which otherwise would not have been within its legislative competence.

Although not all problems connected with its use had been resolved, its potential was quickly recognized. For example participants in the then current debate over the institution of a scheme of payments for child endowment by the Commonwealth adopted section 96 as a means whereby the Commonwealth certainly could implement such a scheme, although they remained divided over whether it should do so.[93] On the other hand, very few section 96 grants for specific purposes were made until the 1950s. Although this is attributable in part to the fact that the need for extensive specific purpose grants programmes had not yet emerged so clearly as to override political considerations arising from the constraints of the federal distribution of powers, it is attributable also to the constitutional doubts which still existed over the scope of section 96.

[89] (1926) 38 C.L.R. 399.
[90] *Ibid.* 406.
[91] *Ibid.*
[92] *Ibid.*
[93] Evidence of Sir Robert Garran, Sir Edward Mitchell K.C., Mr Owen Dixon K.C. and Mr Maurice Blackburn, *Report of the Royal Commission on Child Endowment or Family Allowances* 1929, Commonwealth of Australia, (1929) *Parliamentary Papers,* Vol. 2, 1289.

Two major areas of uncertainty over the extent of the section remained after the decision in *Victoria v. Commonwealth*.[94] The first was its relation to other sections of the Constitution. It had been argued in that case that if, as was possible, only some States received grants under the Federal Aid Roads Act, the Act was invalid as a 'law of trade, commerce or revenue' giving 'preference to one State . . . over another State' in contravention of section 99. The other States would be prejudiced because there would be less surplus revenue to be distributed between them pursuant to section 94. There were several arguments against this view. In the first place it was by no means obvious that the Roads Act was a law of trade, commerce or revenue. Even if it was, the claimed preference was only an indirect effect of the Act. The argument was not improved by the fact that no surplus revenue had been available for distribution since the decision in the Commonwealth's favour in *New South Wales v. Commonwealth*.[95]

The argument was rejected by the Court in the sweeping terms quoted above. Nevertheless the possibility remained that section 96 could be used to nullify in effect the guarantees against discrimination between States in section 51(2)((3) and section 99. If this issue were to arise more directly, the attitude of a future High Court was uncertain.

The second area of uncertainty concerned the ambit of section 96 itself.

By upholding the validity of the Federal Aid Roads Act 1926 the High Court had rejected the argument that the terms and conditions attached to a grant pursuant to section 96 must be financial terms and conditions 'analogous to the terms and conditions of a mortgage, which are imposed to secure repayment of the loan'.[96] The conditions attached to the grants under the Federal Aid Roads Agreement 1926 extended far beyond financial matters to regulation of the subject of the grants: specification of the types of roads, the details of construction, the method of employment and the standards of future road maintenance. Most significantly the grants were conditional on the provision of matching sums by the States. As a result, the Commonwealth acquired a substantial measure of control not only over the construction and maintenance of roads, which were matters within State legislative competence, but also over the budget priorities of the States themselves in relation to road construction and maintenance. It appeared settled therefore that the conditions which could validly be attached to a grant pursuant to section 96 were far more extensive than had been supposed before.

Nevertheless it was not clear whether there was any limit to the nature of the conditions which could be attached to the grant. Nor was it clear

[94] (1926) 38 C.L.R. 399.
[95] *Surplus Revenue Case* (1908) 7 C.L.R. 179.
[96] As had been argued on behalf of the States of Victoria and South Australia, (1926) 38 C.L.R. 399, 405.

on what basis an Act which consisted primarily of regulatory provisions would be characterized as an Act granting financial assistance to any State and consequently within Commonwealth power, rather than as an Act with respect to the subject matter of the grant and thus *ultra vires.* As has been seen, the latter concern had been resolved in the Federal Aid Roads Act itself through the device of an inter-governmental agreement setting out the terms of the grant, ratified by all parliament. The Commonwealth Act thus became an Act to authorize the Commonwealth to enter into an agreement to grant financial assistance to the States. Even after the decision in *Victoria v. Commonwealth*[97] it was considered for a long time a necessary precaution that section 96 grants legislation be drafted in this form.

Both areas of doubt were resolved by a series of decisions between 1939 and 1942.

In *Deputy Federal Commissioner of Taxation (New South Wales) v. Moran*[98] the matter before the High Court directly raised the inter-relationship of section 96 with other financial sections of the Constitution. The issue arose in the following manner. Commonwealth and State Ministers devised a scheme to alleviate the depressed conditions of the wheat growing industry. Wheat growers would be guaranteed a 'payable price' for their wheat by way of subsidy from a fund raised by a tax on flour. The scheme would be implemented through Commonwealth legislation enacted pursuant to section 51(2) imposing a tax on flour,[99] and by further Commonwealth legislation transferring the proceeds of the tax to the States by way of grants pursuant to section 96.[1] The funds then would be distributed by the States to the growers.

The symmetry of the proposal was marred by the fact that almost no wheat was grown in Tasmania. The consequence was that Tasmanians would be required to pay the tax without receiving the compensating benefit of assistance to their wheat growers. A special arrangement therefore was made for Tasmania,[2] whereby a sum roughly equivalent to the tax collected in the State was returned to the State by way of financial assistance. Eventually it was distributed by the State for 'the relief of persons paying flour tax upon flour'.[3] The purpose of the arrangement was to put 'all parts of Australia, including Tasmania, upon substantially the same footing',[4] in the sense that only those States which could benefit from the tax would be obliged to contribute to the tax. It would not have been possible to achieve this more directly, by imposing

[97] (1926) 38 C.L.R. 399.
[98] (1939) 61 C.L.R. 735.
[99] Flour Tax Act 1938, Flour Tax (Stocks) Act 1938, Flour Tax (Imports and Exports) Act 1938, Flour Tax (Wheat Industry Assistance) Assessment Act 1938.
[1] Wheat Industry Assistance Act 1938.
[2] Wheat Industry Assistance Act 1938 s. 14.
[3] Preamble, Flour Tax Relief Act 1938 (Tas.).
[4] *Per* Latham C.J., 756.

the tax only in wheat-growing States, because the taxation power, section 51(2) is limited to taxation which does not discriminate between States.

This directly raised the question whether it would be possible to achieve indirectly by means of section 96 a result which could not have been achieved directly under section 51(2).

The majority, Latham C.J. with whom Rich and McTiernan JJ. concurred, and Starke J., upheld the validity of the legislation. The basis of their decision was that each Act should be considered separately; that the proviso in section 51(2) applied only to taxation Acts and the taxation Acts here in question plainly did not in themselves infringe it. In so far as any Act contributed to discrimination in the matter of taxation, it was the Tasmanian Act, which provided for redistribution of the moneys to those who had paid the original tax. The Tasmanian Parliament clearly was not subject to the limitation in section 51(2).[5]

Latham C.J. went even further. Not only was the use of section 96 not restricted by guarantees of non-discrimination between States contained in other sections of the Constitution, but its purpose was to rectify inequalities which arose in practice between the States as a result of the application of these sections; inequalities which he described as conferring 'a federal disability' on some States.[6] The circumstances in which section 96 should be used to replace 'unjust' equality with 'just' discrimination was a matter within the discretion of Parliament. 'The remedy for any abuse of the power concerned by section 96 is political and not legal in character.'[7] He was to maintain this attitude with even greater consequences three years later.

A vigorous dissent was delivered by Evatt J.:

> There has been a very thinly disguised, almost a patent, breach of the provision against discrimination; and the especial significance of the present case lies in its result, which practically nullifies a great constitutional safeguard inserted to prevent differential treatment of Commonwealth taxpayers solely by reference to their connection or relationship with the particular State.[8]

He opposed the approach of the majority which restricted judicial scrutiny to the provisions of the various Acts considered in isolation from each other, despite the obvious existence of the scheme as evidenced by the preamble to the Wheat Industry Assistance Act and by the record of the inter-governmental conference which he was prepared to admit into evidence.[9]

On appeal, the view of the majority of the High Court on the relation of section 96 to other sections of the Constitution was modified by the

[5] *Per* Latham C.J., 757-8; *per* Starke J., 772.
[6] *Ibid.* 764.
[7] *Ibid.*
[8] *Ibid.* 778.
[9] As was Latham C.J., 754, and to a more limited extent Starke J., 776. The relevant passage in the judgment of Evatt J. appears at p. 796.

Privy Council.[10] The Board rejected an approach to section 96 which would 'justify every case in which there is a taxation Act containing no discriminatory provisions followed by an appropriation Act or a tax-assessment Act passed by the Commonwealth Parliament authorizing exemptions, abatements or refunds of tax to taxpayers in a particular State'.[11] Nevertheless the validity of the legislation in the instant case was upheld. Section 51(2) proscribed discrimination between the States *qua* States in a taxing Act. It did not deal with variations between the actual burden of taxation which fell on each State as a result of differing conditions. The flour legislation was an attempt to equalize the burden. It was not a colourable device to avoid the protection of section 51(2) or (3).

The decision of the Privy Council left open the possibility that future schemes involving section 96 might be declared invalid as, in their 'real purpose and substance', mere expedients to avoid such guarantees as section 51(2) (3), section 99 or section 92. The overall effect however was to free section 96 from yet another potential limitation on its scope, except under extreme and obvious conditions of legislative malpractice.

The last major doubt as to the extent of section 96 was removed by the decision in *South Australia v. Commonwealth.*[12] As far as is relevant for present purposes, the decision in this case was confirmed in *Victoria v. Commonwealth.*[13]

The details of the scheme challenged in *South Australia v. Commonwealth*[14] are well known. Briefly it consisted of four Acts: the Income Tax Act 1942 which imposed income tax at a very high rate; the Income Tax Assessment Act 1942, which gave priority to the Commonwealth over the States in the payment of income tax, the States Grants (Income Tax Reimbursement) Act 1942, which provided for annual grants to each State calculated in accordance with the average amount of income tax collected in that State in the preceding two years on condition that the State did not impose income tax in a particular year; and the Income Tax (Wartime Arrangements) Act 1942, which provided for the compulsory transfer of State taxation offices, premises, returns and records to the Commonwealth. The original rationale for the scheme was to enable the Commonwealth to increase its level of income tax throughout Australia in order to meet the expenses of the war. Due to the constraints of section 51(2) this could not be done with maximum efficiency while the States continued to impose their own income tax at varying levels. The best solution was for the States to cease imposing income tax, leaving the

[10] *Moran v. Deputy Federal Commissioner of Taxation* (N.S.W.) (1940) 63 C.L.R. 338, (P.C.).
[11] *Ibid.* 345.
[12] *First Uniform Tax* case (1942) 65 C.L.R. 373.
[13] *Second Uniform Tax* case (1957) 99 C.L.R. 575.
[14] (1942) 65 C.L.R. 373.

Commonwealth to occupy the entire field, reimbursing the States for the loss of revenue in accordance with an agreed formula. This was in fact achieved by this scheme.

The question of the meaning of financial assistance and the entire scope of section 96 was thus directly raised. The scheme as a whole clearly was designed to prevent the States levying income tax. An integral part of the scheme was the Grants Act pursuant to which grants were payable to the States on condition that they did not exercise a particular power in a certain way. The power in question, the power to tax, is a power fundamental to the existence of any government. In a sense, the use of section 96 to prevent the States raising their own income, thereby artificially creating a need for federal grants, was the very antithesis of the original conception, such as it was, of section 96.

Nevertheless the majority of the High Court, Latham C.J., Rich, McTiernan, Williams JJ. with Starke J. dissenting, upheld the validity both of the scheme and of its indispensable concomitant the Grants Act itself. The attention of the majority was directed primarily to the fact that under the Grants Act the States were legally free to accept or reject the grant. Once the voluntary nature of the grant was determined arguments that the Act was in substance an attack on the 'constitutional functions or capacities'[15] of the States and therefore *ultra vires* the Commonwealth were more difficult to sustain. The counter-argument that although acceptance of the grant was voluntary in legal terms the economic and political consequence of the scheme of which the Act was a part was to compel the States to accept the grant was rejected.[16] The possible extension of the majority approach to the point where the States were 'almost completely dependent, financially and therefore generally, upon the Commonwealth', with the amount of reimbursement grants dependent upon 'the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States . . .' was considered by the Chief Justice but discounted as a relevant consideration for the Court. 'The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.'[17]

The *First Uniform Tax* case[18] removed most remaining doubts on the limits and scope of section 96. It could be seriously apprehended no longer that grants must be made pursuant to formal inter-governmental agreement, or that the conditions attached were limited in any way by the original conception of the power. An attempt was made to revive these arguments in the *Second Uniform Tax* case[19] but rejected by Court —

[15] *Ibid.* 419.
[16] The attitude of the majority is exemplified by the aphorism of Latham C.J.: 'temptation is not compulsion' (1942) 65 C.L.R. 373, 417. *Cf.* Starke J., 443.
[17] *Ibid.* 429.
[18] *Ibid.*
[19] (1957) 99 C.L.R. 575.

somewhat regretfully in the case of Dixon C.J.[20] The only major restriction on the use of the power which remained was that the Commonwealth could not legally compel acceptance by the States of the grant with its conditions attached. This was of little consequence in the light of the degree of financial dependence of the States on the Commonwealth. From this time, both the purposes for which specific purpose grants have been made and the nature and extent of the conditions attached to the grant expanded rapidly.

It is now settled that the nature and extent of the conditions attached to grants depend solely on political rather than legal considerations. In the case of specific purpose grants the most relevant political consideration is the philosophy of the current federal government. There has been a clear demonstration of this in recent years. During the three years of the Whitlam administration, which must be classified centralist in its attitude to the States whatever its attitude towards regional devolution, the conditions attached to grants became very much more detailed in pursuance of the following aims outlined by the then Prime Minister to the Premiers' Conference in June 1973:

> from now on, we will expect to be involved in the planning of the function in which we are financially involved. We believe that it would be irresponsible for the national government to content itself with simply providing funds without being involved in the process by which priorities are met, and by which expenditures are planned and by which standards are met.[21]

This may be contrasted with the approach of the present Commonwealth government which is to minimize the control of the Commonwealth over grants for 'matters in respect of which priorities should appropriately be left to the States and their authorities to determine',[22] to the point where it is proposed that specific purpose payments be absorbed into general purpose payments as far as possible.

Despite fluctuations, there is an overall tendency towards increased Commonwealth control through the conditions attached to the grants. A standard pattern of development appears in most specific purpose grant schemes. Often the proportions of, and the conditions attached to grants in new areas will be modest. Even so, any new scheme is likely to give rise to some growth in the Commonwealth administration, as well as to more or less regular inter-governmental conferences at both the ministerial and officer level.

The complexity of the administration usually increases with the complexity of the scheme with the consequence that at some point a statutory authority may be created to advise the government on suitable conditions to be attached to the grants. This in turn accelerates the process of Commonwealth control.

[20] *Ibid.* 609.
[21] *Payments to or for the States and Local Government Authorities, 1976-77,* 31.
[22] *Ibid.* 32.

Nevertheless, it appears that there are limits to the extent to which Commonwealth control over an activity can be increased efficiently within the framework of payments to the States. Leaving aside the extreme circumstances in which grants may be refused, States may exercise political bargaining power to modify proposed conditions in a way which the Commonwealth may consider unsatisfactory. Further, very detailed Commonwealth control and supervision requires the frequent transmission of detailed information between State and Commonwealth administrations. Inevitably this increases the workload on State administrations, sometimes to an extent which they are not equipped to bear. Attention was drawn to this problem in the Bland Report on the Victorian Public Service.[23]

For these reasons, as well as for the clarification of political responsibility for spending programmes, Commonwealth governments from time to time spend directly for purposes outside their legislative powers in purported reliance on the spending power and actual reliance on the improbability of challenge. This development will be described below.

(b) *The General Spending Power*

In *Victoria v. Commonwealth*[24] the High Court upheld the validity of Commonwealth expenditure for purposes outside its express legislative powers by means of grants to the States pursuant to section 96 subject to the conditions which amounted in fact to extensive Commonwealth regulation of the subject matter of the grant. In doing so it reinforced already existing doubts on the validity of Commonwealth spending in reliance on other powers, in particular section 81. These doubts were reflected soon afterwards in the reports of two Royal Commissions: the Royal Commission on the Constitution, and the Royal Commission on Child Endowment or Family Allowances.[25] The report of the former related the supposed constitutional position blandly, referring to the doubts raised as to the validity of the Main Roads Development Acts 1923-25,[26] and the varied opinions which had been presented to it on the existence and extent of a general spending power.[27] Opinions had in fact been received from Sir Robert Garran, Sir Edward Mitchell and Mr Owen Dixon. Sir Robert Garran's opinion was that the purposes for which the Commonwealth might appropriate revenue under section 81 included any purpose considered by the Parliament to be a purpose of the Commonwealth, and was in any event non-justiciable unless 'the purpose was one which could, by no conceivable means, have any interest for the Commonwealth qua Commonwealth'.[28] He argued further that '[i]n practice the

[23] *First Report of the Board of Inquiry into the Victorian Public Service,* paras. 6.36-6.45.
[24] (1926) 38 C.L.R. 399.
[25] Commonwealth of Australia, (1929) *Parliamentary Papers,* Vol. 2, 1281.
[26] *Report of the Royal Commission on the Constitution, 1929,* 203.
[27] *Ibid.* 137-40.
[28] *Ibid.* 138.

Commonwealth Parliament has, it is said, always acted on the assumption that section 81 gives it an absolute power of appropriation for general purposes'.[29] On the other hand both Sir Edward Mitchell and Mr Owen Dixon considered the power of appropriation limited although they differed as to the extent of the limitation.

All three reaffirmed their respective positions in evidence to the Royal Commission on Child Endowment or Family Allowances on the constitutional issues raised by the proposed implementation of a child endowment scheme by the Commonwealth. A fourth, Mr Maurice Blackburn, also gave evidence to the effect that the power of appropriation was limited but that its invalid exercise, if carefully drafted, would be susceptible to challenge only by the States. On the basis of this evidence and of similar doubts expressed by Dr Evatt in the New South Wales Legislative Assembly, the Royal Commission advised that the constitutional position was 'at best, doubtful' and that it 'would . . . be calamitous for a Commonwealth government to introduce a scheme of Child Endowment, unless the validity of the necessary legislation was beyond dispute'.[30] A minority, consisting of Mr John Curtin and Mrs Muscio appended a dissenting report to the effect that the Commonwealth should proceed with the scheme despite its uncertain constitutional powers.

The consequence was that no major programmes involving direct Commonwealth expenditure on matters beyond its legislative powers were initiated for some years. No doubt there were instances of minor spending which might have been technically invalid. It was claimed by Mr R. G. Menzies, then Attorney-General for the Commonwealth, at the Conference on Constitutional Matters in 1934 that section 81 'should be regarded as authorizing the Commonwealth to appropriate revenue for any purpose under the sun' and that the Commonwealth had always acted upon that assumption.[31] Nevertheless these lesser instances of spending attracted no attention and certainly no concern, whereas more major projects such as child endowment were, as has been seen, deferred. Such spending programmes as the Maternity Allowance Scheme and the Science and Industry Research Acts, which were already in existence, were maintained.

A spate of direct Commonwealth spending for welfare purposes took place in the early 1940s following upon the election of a Federal Labor Government under Curtin. Not surprisingly, the long delayed Child Endowment Scheme was implemented in 1941. Other spending schemes included Widows Pensions (1942), Unemployment and Sickness Benefits (1944), and Pharmaceutical Benefits (1944).

[29] *Ibid.* 140.

[30] Commonwealth of Australia, (1929) *Parliamentary Papers,* Vol. 2, 1281, paras. 32, 34.

[31] *Proceedings of the Conference on Constitutional Matters,* Commonwealth of Australia, (1934) *Parliamentary Papers (General)* 1934-37, Vol. 2, 20.

It can be seen that most of these schemes were for social welfare purposes. The only express legislative power of the Commonwealth for these purposes was section 51(23), the power to legislate with respect to invalid and old age pensions. There could be little question therefore that they depended for their validity on the dubious existence of the general spending power.

It is in relation to social welfare that the constitutional limitations on the general spending power are most likely to come into conflict with the philosophic aims of altruistic federal governments and the practicalities of efficient administration. In the first place there is a widespread, although by no means universal, feeling that the right to benefit from such major welfare schemes as invalid, old age, widows and orphans pensions, maternity and child endowment and social insurance should be uniform throughout Australia. This view was propounded in the minority report of the Royal Commission on Child Endowment or Family Allowances: 'any reform which represents a direct development of the social conscience and expresses itself in provision for certain categories of citizens, who by reason of youth, old age or disability beyond their control have received less than the degree of justice recognized in current social theory, should be a measure which affects all Australian citizens falling within a particular category defined'.[32] Further, most welfare programmes are expensive, far beyond the capacity of poorer States to implement and now, possibly, beyond the capacity of any State. Inevitably therefore they must be funded by the Commonwealth by one means or another. In Australia, the choice lies between funding by way of grants to the States, or directly to respective beneficiaries. The choice is likely to fall upon direct funding, for both practical and political reasons. Spending by way of conditional grants to the States may be a rational choice in such areas as roads or housing, where State administrations with the necessary experience and technique are in existence already. The same rationale does not apply to the same extent to social welfare partly because technical expertise in administration is less important, and partly because most programmes of this nature initiated by the Commonwealth are new. Consequently it may be preferable to establish the necessary administration at federal level rather than to burden the States with administration of a programme with which they are ill equipped to deal. In political terms, a Federal government may prefer to spend directly for social welfare purposes in order to derive maximum electoral popularity from these popular but expensive schemes.

In addition to the positive reasons in favour of direct Commonwealth spending for social welfare purposes, there is the negative one, already discussed, that they are more likely to avoid or survive constitutional challenge. Despite all such precautions, however, it was inevitable that

[32] Para. 38.

sooner or later a scheme would be implemented which transcended the practical difficulties of challenge.

The Pharmaceutical Benefits Act 1944 was such a scheme. The expenditure in question was for the purpose of the provision of free pharmaceutical benefits to all Australian residents. The Act went beyond mere expenditure however. It included provisions creating rights in and imposing duties on consumers and suppliers of pharmaceutical benefits which, if valid, would have overridden inconsistent State legislation. Although it was a scheme which was popular with the bulk of the electorate it also restricted the freedom of action of a significant section of the community, which duly reacted against it. The Attorney-General for Victoria, at the relation of the President, Vice President and Honorary Secretary of the Medical Society of Victoria, brought an action challenging its validity.[33]

The legislation was held invalid by a majority of the Court which comprised Latham C.J., Rich, Starke and Williams JJ. McTiernan J. dissented, on the grounds that the purposes for which the Commonwealth might appropriate and spend pursuant to section 81 included '[a]ny purpose for which the elected representatives of the people of the Commonwealth determined to appropriate the revenue . . .'[34] As '[t]he purpose of the appropriation is not the supply of pharmaceutical benefits in the air'[35] some degree of regulation was acceptable. Those provisions of the Act which 'define, specify or limit the purpose to which the revenue is appropriated or . . . are merely machinery for the expenditure of the money appropriated or provide safeguards for its due expenditure on the purpose of the appropriation . . .' were within power.[36] The only section which went beyond these purposes was section 8(3) which empowered persons supplying pharmaceutical benefits to make special charges as prescribed. In his Honour's opinion, this section was *ultra vires* the Commonwealth, but severable from the rest of the Act.

Even amongst the majority, however, there was no unanimity of reasoning. Latham C.J. agreed with McTiernan J. that the purposes for which Parliament might appropriate revenue under section 81 were virtually unlimited. He disagreed with him on the extent of the Commonwealth regulation which might validly accompany appropriation and expenditure. Whilst McTiernan J. had propounded a comparatively generous test with which to measure the validity of regulation Latham C.J. was prepared to allow regulation only as 'safeguards against wrongful expenditure of the money'.[37] In his view most of the Pharmaceutical Benefits Act

[33] *Attorney-General (Vic.) v. Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 C.L.R. 237.
[34] *Ibid.* 274.
[35] *Ibid.*
[36] *Ibid.* 275.
[37] *Ibid.* 258.

transgressed this limit, and was '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'.[38] Accordingly he held it invalid.

Dixon J. with whom Rich J. concurred, agreed with Latham C.J. that the degree of regulation attempted in the Pharmaceutical Benefits Act 1944 rendered that Act 'only too clearly' *ultra vires*,[39] whatever view was taken of the scope of the appropriation power. It was an Act containing 'a general legislative plan covering much more than the spending of money and involving, moreover, control and regulation by law operating directly upon the individual'.[40] In reaching this conclusion, he offered no test against which the validity of regulation accompanying expenditure might be measured, an omission which was due to the more limited scope he accorded the purposes for which the Commonwealth Parliament could appropriate and spend pursuant to section 81. While emphasising that 'no narrow view' should be taken of the extent of the power he nevertheless considered it limited, primarily by the 'distribution of powers and functions between the Commonwealth and the States', after due allowance has been made for the 'position a national government occupies'.[41]

Although his reasons for judgment were based on the degree of regulation achieved by the legislation rather than on this analysis of the scope of section 81, his views on the latter point are crucial to an evaluation of the decision.

Both Starke J. and Williams J. held the Act invalid on the basis that the Commonwealth's power to appropriate and spend under section 81 is limited. Both had similar conceptions of the limitations applicable to Commonwealth spending. For Starke J., the purposes of the Commonwealth were to be found in 'the Constitution and other Acts conferring authority upon the Commonwealth' and accordingly were limited to 'matters in respect of which it can make laws . . . the exercise of executive and judicial functions vested in the Commonwealth' and 'matter arising from the existence of the Commonwealth and its status as a Federal Government'.[42] For Williams J. the purposes were discoverable 'within the four corners of the Constitution'.[43] Unlike Williams J., however, Starke J. added a significant rider to his decision that the purposes of the Commonwealth were limited, to the effect that if they were not so limited he would 'have some difficulty in denying to the Commonwealth power to

[38] *Ibid.* 263.
[39] *Ibid.* 267.
[40] *Ibid.* 268-9.
[41] *Ibid.* 271-2.
[42] *Ibid.* 266.
[43] *Ibid.* 282.

provide for the manner and method of its expenditure under the incidental power in the Constitution'.[44]

It can be seen that no clear constitutional principles emerged from the case. Two judges based their decision on different formulations of limitations inherent in the power of the Commonwealth to spend and appropriate for the 'purposes of the Commonwealth'. Two other judges also postulated limitations (with yet a third formulation) by way of *obiter dicta.* The remaining two held the purposes of the Commonwealth to be virtually unlimited, but differed as to the extent to which the Commonwealth might validly regulate its expenditure, a question on which those of the rest of the Court who considered the matter were similarly disunited.

Standing had been claimed by the Attorney-General for Victoria primarily on the basis that the Pharmaceutical Benefits Act was invalid legislation extending to and operating in Victoria. All members of the Court upheld the claim in the circumstances of this particular case. Some ambiguities remained however: in particular whether a State would have standing to challenge a simple appropriation by the Commonwealth. Only two judges expressly adverted to this problem, Latham C.J.[45] and McTiernan J.[46] Both reserved decision on the point.

The consequences of the decision were disastrous for the general spending powers of the Commonwealth, although not, as it transpired, for its activities in relation to social welfare. The judgments were inconclusive on the question of the existence and extent of a general spending power, but they nevertheless made it plain that the power was severely limited, if it existed at all. The constitutional doubts which had been ignored by the Commonwealth in the past, cautiously but with success, had received their first judicial confirmation. The decision spelt invalidity not only for the Pharmaceutical Benefits scheme but for all other welfare spending schemes at least one of which, the Maternity Allowance scheme, had been in existence since 1912. An unexpected advantage was salvaged from this; rare success at referendum to invest the Commonwealth with express power to legislate with respect to a wide range of social services.[47]

The *Pharmaceutical Benefits*[48] case discouraged direct spending on major projects by the Commonwealth for the next thirty years, during the time of the most rapid expansion of the use of section 96 for conditional grants to the States for specific purposes. It was revived by the Whitlam government after 1972 for the execution of several of its major and most controversial projects: in particular, the Australian Assistance Plan, the Regional Employment Development Scheme, and Legal Aid.

The reasons for the reintroduction of direct Commonwealth spending in the face of likely although by no means certain judicial disapproval were

[44] *Ibid.* 266.
[45] *Ibid.* 247.
[46] *Ibid.* 276.
[47] Constitution S. 51(23A).
[48] *Attorney-General (Vic.) v. Commonwealth* (1945) 71 C.L.R. 237.

complex. Several of them stem from the policy of maximum Commonwealth control over the expenditure of its own funds, explained by the Prime Minister to the June 1973 Premier's Conference.[49] Plainly such control was most easily achieved by direct spending. The other alternative was to attach detailed and extensive conditions to grants to the States, at the risk of duplicating work and over-burdening State administrations. Allegations were in fact made that State administrations were obstructing, either wilfully or by mismanagement, the execution of federal grants programmes. This provided a further justification for the adoption of direct spending by the Commonwealth wherever feasible.

There was an additional reason for the introduction of Commonwealth spending schemes other than by way of State grants, which might be peculiar to the policies of the Whitlam government. Before taking office and during his time in office Mr Whitlam propounded his 'new Federalism' based on the devolution of responsibility to rationally ordered regions rather than to the larger and more unwieldy States.[50] At least two of the direct spending programmes, the Australian Assistance Plan and the Regional Employment Development Scheme, involved grants to such regions.

The techniques whereby the schemes were implemented had been refined since the 1940s in the light of such judicial guidance as might be extracted from the *Pharmaceutical Benefits Case*.[51] This can be demonstrated by the Australian Assistance Plan, which itself became the subject of constitutional challenge.

The expenditure in the Australian Assistance Plan was for the purpose of assessing and providing for welfare needs throughout Australia. Like most earlier Commonwealth spending schemes, it attracted widespread electoral support. Unlike earlier spending schemes, however, it was embodied in legislation only to the extent necessary to ensure an appropriation from the Parliament. The following brief description in Item 4 Division 530 of Schedule 2 of the Appropriation Act (No. 1) 1974-75 was the only legislative acknowledgment of its existence:

4. Australian Assistance Plan	
0.1. Grants to Regional Councils for Social Development	$5,620,000
0.2. Development and evaluation expenses	350,000
	$5,970,000

The regulation which necessarily accompanied the expenditure in order to establish regional councils, appoint Community Development officers, and evaluate and process applications for grants, was carried out by executive

[49] Quoted in *Payments to or for the States and Local Government Authorities 1976-77*, 31.

[50] It has been explained more recently by Mr E. G. Whitlam in 'The Labor Government and the Constitution', in Evans, G. (ed.) *Labor and the Constitution 1972-75* (1977), 307-8.

[51] *Attorney-General (Vic.) v. Commonwealth* (1945) 71 C.L.R. 237.

rather than legislative action. In itself, the absence of general legislation made challenge to the scheme difficult. It was complicated further still by the fact that part of the appropriation could be supported by such express legislative powers of the Commonwealth as section 51(23A).

There were some similarities to the events of 1945. Once again there was a challenge, again by Victoria.[52] Once again there was a referendum proposal which would have conferred on the Commonwealth power to pass legislation the subject of the challenge.[53] But the outcome of the events was different. The referendum failed, and the challenge to the scheme was rejected, by a majority of four to three, comprising McTiernan, Stephen, Jacobs and Murphy JJ. with Barwick C.J. and Gibbs and Mason JJ. dissenting.

Nevertheless, the decision did little to clarify the uncertainty as to the scope of the spending power. This was due partly to the different nature of the legislation challenged: a simple appropriation, the expenditure of which was regulated by executive action. Consequently the argument for the Commonwealth emphasized rather more than in 1945 the scope of the executive power under section 61.

Barwick C.J. and Gibbs J., in dissent, adopted the same approach as might have been elicited from a rather shaky majority in the *Pharmaceutical Benefits* case.[54] The purposes of the Commonwealth for which the Parliament might appropriate funds under s. 81 were circumscribed by the express legislative powers of the Commonwealth and by 'powers which are inherent in the fact of nationhood and of international personality'.[55] They considered that the Australian Assistance Plan fell outside these purposes and therefore was *ultra vires* the Commonwealth. The third dissentient, Mason J., construed s. 81 widely as extending to 'such purposes as Parliament may determine',[56] but limited its operation to appropriation and expenditure. The power to regulate the expenditure consequently must be found elsewhere; in this case in s. 61, the executive power. But the scope of the executive power itself was limited to 'the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government'.[57] In the instant case, 'the activities which call for the expenditure of this money, the elements which comprise

[52] *Victoria v. Commonwealth (Australian Assistance Plan Case)* (1975) 7 A.L.R. 277.
[53] Constitution Alteration (Local Government Bodies) 1974. The proposal would have inserted a S. 96A in the Constitution to empower the Commonwealth Parliament to make grants to local government bodies on such terms and conditions as it thinks fit.
[54] *Attorney-General (Vic.) v. Commonwealth* (1945) 71 C.L.R. 237.
[55] *Per* Barwick C.J. (1975) 7 A.L.R. 277, 298. See also Gibbs J., 308-9.
[56] *Ibid.* 326.
[57] *Ibid.*

the scheme known as the Australian Assistance Plan' fell outside the permissible bounds of the executive power and were invalid.[58]

In reaching these conclusions, Mason J. was influenced by the opinion he held on the nature of the appropriation power as a facultative procedure developed in response to Parliament's historical discretion to grant supply. Section 81 enabled the Commonwealth Parliament to do no more than appropriate revenue and expend it upon the purpose of the appropriation. He did not define what he meant by expenditure: consequently it is not clear from his judgment whether, for example, expenditure may be accompanied by 'safeguards against wrongful expenditure' as postulated by Latham C.J. in the *Pharmaceutical Benefits* case.[59] Nor is it clear to what extent administrative bodies may be established by the Commonwealth Parliament to advise it upon levels of expenditure and appropriate donees, although it was clear that the 'establishment and operation of the Regional Councils' was in his view *ultra vires*.[60]

The rest of the Court rejected the challenge for widely varied reasons. Jacobs J. apparently adopted the prevalent view in the *Pharmaceutical Benefits* case that 'purposes of the Commonwealth' were limited to its express purposes as prescribed by the Constitution in conjunction with such purposes as could be implied from the existence of 'Australia as a nation externally and internally sovereign'. Unlike any previous protagonist of this view, however, he proceeded to assign a broad scope to these inherently national powers which included 'co-ordination of services' to meet the 'various interrelated needs' of a complex society.[61] The appropriation was valid partly on this basis and partly on the basis that the part of the expenditure which could not be attributed to such express Commonwealth powers as s. 51(23A) was supported by the incidental power s. 51(39) *in conjunction* with s. 61.[62] The degree of executive regulation which accompanied the appropriation likewise was valid, if not as incidental to the exercise of the Commonwealth legislative power then on the basis that expenditure and regulation of expenditure of moneys voted by Parliament lies within the prerogative of the Crown.[63]

Of the rest of the majority Murphy J., like Mason J., held that s. 81 was virtually unlimited in scope.[64] By necessary implication from the fact that he held the scheme valid, he also considered that the degree of regulation inherent in the Australian Assistance Plan did not over-step constitutional limits. He was vague on the existence and extent of the limits in question.

[58] *Ibid.* 330.
[59] *Attorney-General Vic.) v. Commonwealth* (1945) 71 C.L.R. 237, 258.
[60] (1975) 7 A.L.R. 277, 330.
[61] *Ibid.* 340.
[62] *Ibid.* 342.
[63] *Ibid.* 343.
[64] *Ibid.* 344.

McTiernan J. also also held that s. 81 extended to expenditure for any purposes so prescribed by the Parliament and consequently was non-justiciable.[65]

The fourth member of the majority, Stephen J., dismissed the action on the grounds that neither the State of Victoria nor its Attorney-General had standing to challenge an item in a Commonwealth Appropriation Act. This was a question left open by the *Pharmaceutical Benefits* case.[66] In his Honour's view, the significance of an Appropriation Act lay in 'the control which, by its means, is exercised by the legislature over proposed government expenditure' within one polity:[67] it 'is not in any way directed to the citizens of the Commonwealth; it does not speak in the language of regulation, it neither confers rights or privileges nor imposes duties or obligations'.[68] In accordance with this analysis appropriation was of concern only to the Commonwealth itself, and neither the State nor its Attorney-General had standing to maintain the challenge.[69] He declined to decide whether an individual taxpayer would have standing in these circumstances.

Stephen J. was the only member of the Court to take and rely upon the objection to the standing of the plaintiffs, although Murphy J. 'was inclined to agree' with him but found it unnecessary to do so in the light of the decision he reached on the merits.[70] Neither McTiernan nor Jacobs JJ. decided the question of standing, although both dealt with the related question, the justiciability of the issue. McTiernan J. held that the matter was non-justiciable.[71] Jacobs J. considered the appropriation *simpliciter* to be beyond challenge but conceded that expenditure could be challenged if, which he doubted, practical difficulties surrounding such a challenge could be surmounted.[72] Barwick C.J.,[73] Gibbs[74] and Mason JJ.[75] were prepared to allow the standing of the State of Victoria to challenge the expenditure and associated executive action primarily on the basis of the position of the States as 'constituent elements in the federation'[76] although each Judge referred also to the significance of section 94 for this purpose. Consequently there was at least a majority of four in favour of the capacity of the State to challenge appropriation and expenditure in these circumstances.

The true significance of Stephen J.'s judgment lies therefore not in what he decided but in what he failed to decide: in the approach he would take

[65] *Ibid.* 304.
[66] *Attorney-General (Vic.) v. Commonwealth* (1945) 71 C.L.R. 237.
[67] (1975) 7 A.L.R. 277, 319.
[68] *Ibid.* 318.
[69] *Ibid.* 319-20.
[70] *Ibid.* 350.
[71] *Ibid.* 305.
[72] *Ibid.* 338-9.
[73] *Ibid.* 301-2.
[74] *Ibid.* 314-6.
[75] *Ibid.* 330-1.
[76] *Ibid.* 330, *per* Mason J.

to the substance of the constitutional questions if the matter were raised before the Court again. This may be demonstrated by an analysis of the conclusions reached by members of the Court in the *Australian Assistance Plan* case.[77] No definite majorities can be extracted in favour of clear principles guiding the operation and extent of the Commonwealth spending power, but majorities in favour of some propositions can be constructed by inference.

Three judges, Mason, McTiernan and Murphy JJ. favoured the broadest interpretation of the purposes for which the Commonwealth can appropriate revenue pursuant to s. 81. Two judges, Barwick C.J. and Gibbs J. favoured the approach of the majority of the Court in *Pharmaceutical Benefits*[78] that the purposes of the Commonwealth are limited by its express powers in conjunction with whatever purposes may be inferred from the fact of nationhood. Although the sixth judge, Jacobs J. formally adopted the latter approach he was prepared to infer such extensive purposes from the national status of the Commonwealth that the effective consequence of his approach is closer to that of Mason, McTiernan and Murphy JJ. The seventh judge, Stephen J. did not decide the point. It is perhaps a logical inference from his view of the appropriation power as providing machinery internal to the working of the Parliament, on the basis of which he denied the plaintiff standing, that he would adopt a view of the breadth of the purposes for which the Commonwealth might appropriate funds similar to that of Mason J. If so, a majority may appear to favour the view that the purposes for which the Commonwealth may appropriate money pursuant to s. 81 are virtually unlimited.

Even if this were accepted as relatively settled, the gain thus made is off-set by uncertainty over the way in which the Commonwealth validly may deal with the revenue thus appropriated. Probably a majority consisting of McTiernan, Mason, Jacobs and Murphy JJ. can be extracted in favour of the proposition that the Commonwealth may expend the money for the purposes for which it was appropriated although there is doubt in Jacob's judgment on this point.[79] But even this majority is fractured on the question of whether, and if so how far, the Commonwealth may go beyond mere expenditure into regulation of the subject matter. McTiernan, Murphy and Jacobs JJ. are generous although obscure on this point in up-holding the validity of the Australian Assistance Plan itself. On the other hand, Mason J. appears to limit strictly the extent of the Commonwealth power to regulate expenditure and decides against the validity of the scheme.

It has been argued by Mr Whitlam that the decision in the Australian Assistance Plan case would support future disbursement of funds directly

[77] *Victoria v. Commonwealth* (1975) 7 A.L.R. 277.
[78] *Attorney-General (Vic.) v. Commonwealth* (1945) 71 C.L.R. 237.
[79] (1975) 7 A.L.R. 277, 339.

to regional or local government bodies by the Commonwealth.[80] It is possible to arrive at this conclusion on the basis of the judgments of McTiernan, Mason, Jacobs and Murphy JJ., but the victory, if it is a victory, is far from complete. Even a generous reading of the judgment of Mason J. could not support general Commonwealth expenditure accompanied by more than very minor regulation. Further, it is doubtful whether he would be prepared to go as far as Jacobs J. in identification of matters of national importance expenditure on which might be freely regulated by the use of the executive power. The future attitude of Stephen J. on this matter can be only the subject of speculation. Finally, the decision of a bare majority of the Court cannot be regarded as having settled the law on the question in such circumstances as these, where the meaning of the decision itself is obscure and open to differing interpretations. It should be noted that the composition of the Court already has changed since the decision was handed down.[81]

The federalist philosophies of the present Commonwealth government make further experimentation with direct Commonwealth spending and consequent further judicial clarification of the relevant constitutional principles unlikely in the near future.

E. CONCLUSION

There is not and never has been a rational basis for the federal spending power in Australia. The original provisions were included in the Constitution as a result of compromise between delegates who differed amongst themselves as to their meaning. The uncertainty has persisted, and has pervaded the decisions of the High Court. The consequence is that on the one hand the Commonwealth may enter and control any field of activity through the disbursement of funds to the States on condition. The only limitation on its capacity to do so is that it cannot compel the States to accept the grant by legal means. This is a feeble limitation if the States are unable to reject them for economic reasons. On the other hand there is considerable doubt whether the Commonwealth can spend directly on matters outside its express constitutional powers particularly if it wishes to regulate the expenditure.

It is generally assumed that this development is consistent with the theory of federalism. It is doubtful indeed that this is so. Healthy federalism, and for that matter healthy government, would be served better by a spending power the use of which to control State policies and undermine constitutional prohibitions was subject to some constraints, while giving the Commonwealth some latitude to spend in the national interest in a manner directed by considerations of need and efficiency.

[80] Australian Constitutional Convention, *Debates* (1976), 161.
[81] Mr Justice Aickin replaced Sir Edward McTiernan on 12 September 1976.