TOWARDS A THEORY FOR SECTION 96: PART 2

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[*This article describes the varied forms of grants made to the Australian States by the Commonwealth Parliament under section 96 of the Constitution. It questions whether conditions imposed on section 96 grants are enforceable in the Australian courts. Both private and public law models are examined, and found to provide only partial answers to the legal problems created by these grants.*]

1. *INTRODUCTION*

Section 96 of the Commonwealth Constitution states that:

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

The section provides the basis for all untied grants from the Commonwealth to the States for revenue redistribution purposes and for a host of conditional grants for specific purposes, including education, roads, hospitals, community services and local government, over which Commonwealth power would otherwise be doubtful.[1] Thus in 1987-88 an estimated $14 billion was paid by the Commonwealth to the States as untied revenue funds and a further $9 billion for specific, recurrent, or capital purposes covering almost one hundred programs.[2]

In the first part of this paper[3] I argued that section 96 is conceptually flawed, and therefore sits uneasily with the constitutional principles on which the Constitution is based and with other provisions of the Constitution itself. Responsibility for this result lies with the several colonial Premiers who agreed to the inclusion of the new clause 96 in the draft Constitution after the convention process was over, as part of the political settlement designed to bring New South Wales into the federation without sacrificing the participation of any of the smaller States. Amongst the features of the section which call for particular comment in this regard is the involvement of the Commonwealth Parliament, through legislation, in setting the terms and conditions of financial assistance. Acceptance of these terms and conditions, as the High Court has repeatedly stressed, is voluntary.[4] The consequences of this feature are explored further in this part.

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1 The doubt arises from uncertainty about the extent of the power of the Commonwealth to appropriate and spend moneys for purposes other than its substantive legislative powers. The most recent case in which this question was canvasssed in depth did not resolve the doubt: *Victoria v. Commonwealth and Hayden* (*Australian Assistance Plan* case) (1975) 134 C.L.R. 338. See generally Saunders, C., 'Development of the Commonwealth Spending Power' (1978) 11 M.U.L.R. 369. Aspects of some grant programs also might fall directly within Commonwealth power. Migrant education is an example.

2 Commonwealth of Australia, *Commonwealth Financial Relations with other levels of Government 1987-88*, Budget Paper No. 4, 138-40.

3 Saunders, C., 'Towards a Theory for Section 96: Part 1' (1987) 16 M.U.L.R. 1.

4 The voluntary or non-coercive nature of a section 96 law is discussed in section 3 *infra*.

The peculiarity of this use of the legislative form has been reflected in the different treatment of section 96 laws by the Parliament itself, and in confusion on the part of the courts over the relationship between section 96 laws and other sections of the Constitution which normally apply to an exercise of legislative power. The Commonwealth Parliament extensively and increasingly delegates to the executive government power to attach conditions to grants to the States.[5] There is frequently no requirement for the manner of the exercise of such power to be reported to the Parliament. Although extreme instances of delegation[6] under grants legislation may attract attention from the Senate Standing Committees on Scrutiny of Bills or Regulations and Ordinances, for the most part delegations go unnoticed or at least unremarked. There appears to be genuine uncertainty about the extent to which the executive is constrained in imposing conditions by the limits of authority granted by Parliament or by the absence of any authority at all.[7]

The contrast with the rules and practices followed in relation to other forms of delegated legislative authority is obvious. In all other contexts it is accepted without question that the executive must act within the terms of the authority granted by Parliament.[8]

The Senate Committees have been concerned in recent years to ensure that sections 48 and 49 of the Acts Interpretation Act 1901 (Cth), which provide for the tabling and disallowance of regulations and ordinances, apply to all forms of delegated legislation, by whatever name called. Their success in this regard can be gauged from the Eighty-third Report of the Senate Standing Committee on Regulations and Ordinances which listed 832 instruments considered by the committee in the preceding 12 months, covering 36 separate forms of delegated legislation ranging from statutory rules to fisheries notices.[9] Power to attach conditions to financial assistance to the States was not among them.[10]

The question of the relationship between grants legislation and other constitutional provisions has arisen primarily in connection with the prohibitions against

[5] *E.g.* Supply Act (No. 2) 1987 (Cth) lists 27 purposes for which payment might be made out of moneys appropriated by the Act 'on such terms and conditions (if any) as are from time to time determined in writing, for the purposes of Appropriation Acts by the Minister specified . . .'

[6] The Scrutiny of Bills Committee criticised clause 8 of the States Grants (Nurse Education Transfer Assistance) Bill 1985 which would have empowered the Minister to delegate all of his powers under the Act, including the power to enter into agreements with the States, to 'a person': *Seventeenth Report of 1985*, 29-30. On another occasion it criticised a power given to the Minister under clause 83 of the States Grants (Schools Assistance) Bill 1987 (Cth) to vary, by direction, the amount of the grant allocated in the Bill to each State, on the ground that the directions would not be subject to tabling and disallowance: *Alert Digest No. 13 of 1985*, 15. Neither of these examples however concern accountability for the extent of power given to the Minister to vary the conditions of a grant. Some acknowledgement of the problem came from the Scrutiny of Bills Committee in 1982 when, commenting on the delegation clause in Appropriation Bill No. 2, (1982-83) it noted that 'in any other type of Bill dealing more directly with payments to individuals [it] might be regarded as making rights unduly dependent upon insufficiently defined administrative powers': *Sixteenth Report*, 1982, 4.

[7] *South Australia v. Commonwealth* (*First Uniform Tax case*) (1942) 65 C.L.R. 373, 429 *per* Latham C.J.

[8] *R. v. Toohey; ex parte Northern Land Council* (1981) 151 C.L.R. 170.

[9] Senate Standing Committee on Regulations and Ordinances, *Eighty-third Report*, April 1988, para 1.5, Appendix 1.

[10] For the first time, however, the Committee listed amendments to the Schedules to two Grants Acts, the States Grants (Tertiary Education Assistance) Act and the States Grants (Petroleum Products) Act.

preference in section 99[11] and establishment of religion in section 116[12] and the requirement that property be acquired on just terms 'for any purpose in respect of which the Parliament has power to make laws'.[13] The cases reveal some confusion about the constitutional constraints to which section 96 laws are subject and the reasons why they are not subject to others.[14] Admittedly the confusion is dispersing: after an initial foray with the idea that section 96 laws are not subject to other sections of the Constitution at all,[15] it now appears settled that they are subject at least to section 116[16] and probably to section 51(31).[17] The distinction between these sections and section 99, to which section 96 laws are not subject,[18] lies in the literal words of the sections themselves. Nevertheless a degree of confusion remains, attributable almost solely to the voluntary character of section 96 laws. The problem lies in applying constitutional prohibitions or rules to laws which do not themselves have substantive legal effect but merely offer grants which may or may not be accepted. It is most readily overcome in theory in relation to a purposive provision, of which section 116 is an example, although in practice it may be difficult to establish the requisite purpose, as the *D.O.G.S.* case shows.[19]

There are two other sections of the Constitution which have not yet been considered by the High Court in relation to grants legislation but which have at least the potential to make an impact on section 96 law and practice. Section 109 provides that a Commonwealth law shall prevail over any inconsistent State law. Its application in this context presents the familiar paradox that, while an exercise of power under section 96 clearly constitutes a Commonwealth law, it is not immediately obvious how a non-coercive grants law can give rise to an inconsistency with a law of a State to which the grant is offered. The second provision is section 51(39) and is quite different in character. It confers on the Commonwealth Parliament legislative power over 'Matters incidental to the execution of any power vested by this Constitution in the Parliament . . .' Even on its face it would appear readily applicable to an exercise of section 96. Indeed it is surprising that the possibility has not attracted greater attention.[20]

I do not intend to argue against Commonwealth parliamentary involvement in the grants process by pointing to these various anomalies to which grants legislation gives rise. Ironically, from the perspective of responsible government, section 96 contains flaws of a different kind which suggest the need for the

11 'The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State . . .'

12 'The Commonwealth shall not make any law for establishing any religion . . .'

13 Section 51(31).

14 This issue is examined in detail in Part 1 of this paper: (1987) 16 M.U.L.R. 1, 22-7.

15 *Victoria v. Commonwealth* (*Roads case*) (1926) 38 C.L.R. 399; *Deputy Federal Commission of Taxation (N.S.W.) v. W.R. Moran* (1939) 61 C.L.R. 735, 771 *per* Starke J.

16 *Attorney-General for Victoria (ex rel. Black) v. Commonwealth* (*D.O.G.S.* case) (1981) 146 C.L.R. 559.

17 *P.J. Magennis Pty Ltd v. Commonwealth* (1949) 80 C.L.R. 382.

18 *Victoria v. Commonwealth* (1926) 38 C.L.R. 399; *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran* (1939) 61 C.L.R. 735.

19 (1981) 146 C.L.R. 559.

20 In *Victoria v. Commonwealth* (*Second Uniform Tax* case) Fullagar J. described s. 11 of the States Grants (Tax Reimbursement) Act 1946-1948 as an 'ancillary or incidental provision' but did not explore the significance of the idea further: (1957) 99 C.L.R. 575, 657.

Parliament of the Commonwealth, as well as those of the States, to be involved to a greater, rather than a lesser, extent. The flaws lie in the fact that a power unilaterally to offer grants on condition potentially impinges on the central role of each Parliament in financial matters: by removing from the Commonwealth Parliament the power to monitor the expenditure of moneys raised under its authority and by providing a source from which State governments can obtain funds without authority of State Parliaments. These problems are at least partially met if the Commonwealth Parliament is involved in setting the conditions on which grants are made and the State Parliaments are involved in accepting them.

The anomalies suggest, however, the need for more attention than usual to be paid to developing a consistent theoretical framework for section 96, to overcome as far as possible its inherent defects. No such framework presently exists. Such questions as have arisen so far about the meaning and operation of section 96 have tended to be answered on an ad hoc basis with results that do not withstand close scrutiny.[21] They include the scope of conditions that may be attached to a section 96 grant, the use of States as conduits for grants to be made to third persons, and the use of section 96 to circumvent other express and implied constitutional rules. In addition, there is at least one other major question which has not been directly addressed at all and remains unsettled. That question is the enforceability of section 96 grants arrangements by the Commonwealth against a State or vice-versa.

The purpose of this paper is to suggest a possible theoretical framework for section 96 grants which would enable that question to be answered without departing to an unacceptable degree from normal constitutional principle. Two different models are considered, drawn respectively from the spheres of private and of public law. First, however, the papers deals with two preliminary issues: the different types of grant arrangements that currently exist and the principle that a section 96 law is non-coercive, as developed by the courts.

2. *TYPES OF GRANT ARRANGEMENTS*

It is not possible to explore the enforceability of section 96 grants without at least a general notion of the forms which such grants take. Characteristics of particular relevance are the manner in which conditions are attached to grants, the categories of conditions, the extent to which a Grants Act itself confers entitlement to funds and the process by which grants are accepted by States. However, grants from the Commonwealth to the States take a wide variety of forms. While similarities in certain types of provisions can be traced across grant programs initiated at roughly the same period of time, there do not appear to be any broader models to guide the design of grant instruments. The absence of such models is probably a further manifestation of the fact that there is no conceptual framework within which grant arrangements operate.

The outline below is by no means intended as an exhaustive description and analysis of grant arrangements in Australia. Such a study is needed but is beyond

[21] This conclusion is fully argued in Part 1: (1987) 16 M.U.L.R. 1.

the scope of this paper. What is presented here is a somewhat stylised account of the most common varieties of grant arrangements. Examples of the different forms are given although it is not always possible to assign programs to categories quite as neatly as is suggested here. Further, this part focuses only on the four characteristics of grant arrangements listed above, which are particularly relevant to the argument in this paper. Other variables between grant programs are less directly relevant and will be mentioned later only as the need arises.

Finally, it should be emphasized that the discussion in this paper is not confined to specific purpose grants although that is the context in which conditions are most commonly encountered and in which the question of enforcement tends to arise. On one view at least, the untied grants which were in issue in the *Uniform Tax* cases[22] were also conditional, in the sense that they were payable only to States which refrained from imposing income tax in the relevant year. The question of enforcement against the Commonwealth may arise, of course, whether the grant is conditional or not.

Manner in which conditions are attached to grants.

Broadly speaking, conditions are attached to grants either by the Grant Act itself, or under power conferred by the Act. There may be instances in which conditions also are attached to payment of a grant without statutory authority, although by definition these are difficult to uncover. This possibility will not be pursued further here. Such a practice, if it exists, falls outside the scope of section 96 and therefore cannot attract the benefit of any legal status which section 96 might confer. In view of the fact that the Constitution confers power on the Parliament to prescribe grant conditions it can be argued that any attempt by the executive unilaterally to do so would be completely ineffective as a matter of law.

Several different mechanisms are available within each of the two broad categories described above. Conditions may be attached by the Grant Act itself either directly[23] or through an agreement scheduled to the Act.[24] Authority to impose conditions may be delegated to the Minister directly[25] or by way of an authority to enter into an agreement.[26] A hybrid model which is occasionally used delegates authority to make an agreement in accordance with the heads of agreement scheduled to the Act.[27]

22 *South Australia v. Commonwealth* (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

23 Australia Land Transport (Financial Assistance) Act 1985 (Cth) s. 32.

24 Housing Assistance Act 1984 (Cth). Section 4 authorises execution by the Commonwealth of an agreement 'substantially in accordance with the form' in the schedule. Section 6 authorises the payment of grants by the Minister where an agreement has been entered into, on the terms and conditions specified in the agreement.

25 Appropriation Act (No. 2) and Supply Act (No. 2) regularly confer authority of this kind.

26 *E.g.* National Water Resources (Financial Assistance) Act 1978 (Cth). Section 4 authorises the Commonwealth to enter into an agreement about financial assistance for water resources projects. The agreement may specify conditions to which the grant is subject. Under s. 5, financial assistance is payable to a State in accordance with an agreement. The Act does not attempt to particularise the content of the agreement which under s. 6 is required to be tabled in the Parliament.

27 *E.g.* Health Insurance Act 1973 (Cth).

It is necessary to distinguish between a statutory conferral of authority on the Minister to attach conditions to a grant and conferral of a discretion on a Minister under conditions imposed by the Act itself. Sometimes the distinction is obvious[28] but in other cases it may be difficult to draw. Section 16 of the Australian Land Transport (Financial Assistance) Act 1985 (Cth), for example, authorises the payment of financial assistance to States for projects and programs approved by the Minister for the construction and maintenance of specified categories of roads. The Minister's power to approve programs and projects is limited only by the need for the Minister to be satisfied that 'the undertaking . . . would further the policies of the Government of the Commonwealth relating to land transport',[29] which are nowhere stated in the Act. While on one view the Minister's power is a discretion to be exercised within conditions imposed by the Act, the scheme of the legislation is such that in substance the conditions are imposed by the Minister.

Types of conditions

For the purpose of this paper it is convenient to distinguish between procedural and substantive grant conditions. Procedural conditions embrace a range of requirements for a State to furnish information relevant to the grant program on the request of the Minister,[30] to provide a statement of expenditure of the grant moneys by the State during the relevant accounting period[31] and to certify that the projects on which the grant moneys were spent were carried out in accordance with the conditions of the grant.[32] A further special category of procedural conditions is directed to enforcement of grant conditions. One common model requires a State to repay a grant if it fails to fulfil the conditions, or, at least, if the Minister is satisfied that the State has failed to fulfil the conditions.[33] A variation on this model, designed to increase its effectiveness, authorises the Minister to deduct from future payment to a State amounts repayable to the Commonwealth in accordance with the provisions of the Act.[34]

Substantive conditions relate more or less directly to the subject matter of the grant. Typically they prescribe the purposes for which the grant may be used[35] and the manner in which it may be spent.[36] A wide range of other conditions might also be classified as substantive, however. Some programs, for example, specify a level of contribution which must be made or maintained by the recipient State itself in order to qualify for the grant.[37] In almost every case the conditions are specific to the individual grant program although similar conditions may

[28] The State Grants (Schools Assistance) Act 1984 (Cth) for example, empowers the Minister to vary the list of systemic schools in certain circumstances, by removing a school from the list: s. 6(17).

[29] Section 26(6)(a). Some other procedural limitations are also imposed: s. 26(6)(b), s. 26(7).

[30] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth), s. 29.

[31] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth), s. 30(1)(a).

[32] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth), s. 32(1)(g).

[33] *E.g.* States Grants (Aboriginal Assistance) Act 1976 (Cth), s. 5.

[34] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth), s. 33.

[35] *E.g.* State Grants (Schools Assistance) Act 1984 (Cth), ss 9, 13, 15, 18.

[36] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth), s. 32(1)(a), which requires tenders to be invited for certain national road construction projects.

[37] *E.g.* Home and Community Care Act 1985 (Cth) Schedule cl. 14.

appear in connection with different programs. There has been very little use made in Australia so far of the general cross cutting conditions which are so familiar in the United States.[38] The Environment Protection (Impact of Proposals) Act 1974 (Cth), which potentially applies to the operation of agreements with the States and to the incurring of expenditure by the Commonwealth, provides one example of an Australian condition of this kind.[39]

For present purposes again, it is convenient to include in the definition of a condition 'any requirement or circumstance that will qualify or disqualify a State from a federal program'.[40] It follows that grant conditions may have either a retrospective or prospective operation. Retrospective conditions operate on either existing or past circumstances. In some cases they are built directly into the description of the grantee. The States Grants (Income Tax Reimbursement) Act 1942 (Cth), for example, which was in issue in the *First Uniform Tax* case,[41] provided that financial assistance was payable to a State in any year 'in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes'.[42] In other cases the conditions are free standing but nevertheless operate on past events.[43] In both cases the retrospective character of the conditions qualifies the scope of the power to make payments to a State under the Act: in other words the condition is addressed to the appropriate Commonwealth officer, not to the recipient State. McTiernan J. drew this distinction in the *First Uniform Tax* case where he noted that it was 'a misunderstanding . . . to say that the grant is offered upon condition that the States agree not to impose income tax'.[44]

Prospective conditions, on the other hand, are addressed to the State in the sense that they require the State to act in specified ways if it receives financial assistance under the Act. The condition often will be able to be performed by the State government alone,[45] although sometimes it may require legislative action[46] or inaction.[47]

Many prospective conditions reach a long way into the internal procedures of State governments or the relationship between State governments and the State community. Existing conditions, for example, require States to create new

[38] Mizerk, D., 'The Coercion Test and Conditional Federal Grants to the States' (1987) 40 *Vanderbilt Law Review* 1159, 1171. Mizerk notes that 'The Office of Management and Budget has compiled a list of fifty-nine policy objectives that attach to every federal grant to the states', including anti-discrimination requirements, rules to protect cultural and physical environments, employment rules and privacy rules.

[39] Sections 6, 11.

[40] Mizerk, *op. cit.* 1166. Mizerk also describes this as the 'if-then' notion of a condition.

[41] *South Australia v. Commonwealth* (1942) 65 C.L.R. 373.

[42] Section 4.

[43] Section 10 of the Local Government (Financial Assistance) Act 1986 (Cth), for example, qualifies the State entitlement to financial assistance under the Act by reference to seven conditions, one of which is that a Local Government Grants Commission must exist in the State and another of which prescribes the manner in which the Commission must have performed its functions.

[44] *South Australia v. Commonwealth* (1942) 65 C.L.R. 373, 455. See also Latham C.J., 416.

[45] For example the notorious condition in the Australian Bicentennial Road Development Trust Fund Act 1982 (Cth) s. 23(d) that the State will ensure that signs are erected to indicate that projects are funded from the bicentennial trust fund.

[46] Requirements that the State provide matching funds or repay grants fall within this category.

[47] Section 23(5)(a) of the Interstate Road Transport Act 1985 (Cth) grants financial assistance to a State on condition that it does not impose a fee, charge or tax in relation to motor vehicles registered under the Commonwealth Act.

administrative agencies[48] to adjust their own public accounting procedures[49] and to influence the action or alter the rights of third parties including local government[50] and educational institutions.[51]

Entitlement to funds under a Grant Act

The discussion of this feature of grant legislation is not intended to preempt the question of whether, and to what extent, grants legislation is enforceable. The point here is a preliminary one of the circumstances in which the terms of a Grant Act alone are capable of providing a basis for an action to enforce payment of a grant, if enforcement is theoretically possible as a matter of law. Two aspects of grants legislation require attention for this purpose. The first is whether the Act itself purports to make the grant. The second is whether the Act includes a special appropriation for the purpose of the grant program.

Most Grant Acts do not use the language of entitlement or purport directly to make a grant. A common form of grants legislation merely provides that a grant is payable to a State. Even that form of words is capable of providing a basis for enforcement by a State, possibly after further agreement has been reached.[52] There are other cases still, however, in which a discretion to make a payment up to a maximum limit is conferred on the Minister or which enable the Minister to vary allocations between programs.[54] It is difficult to characterize these Acts as granting financial assistance to a State, although they may authorise the Minister to do so.

A few Grant Acts expressly confer an entitlement to financial assistance on the States, conditionally or unconditionally. In particular, section 6 of the States Grants (General Revenue) Act 1985 described the States as 'entitled' to payments by way of financial assistance, calculated in accordance with the statutory formula. The Local Government (Financial Assistance) Act 1986 (Cth) also uses the language of entitlement,[55] subject to compliance by the State concerned with conditions elsewhere in the Act. Other Acts less obviously create an entitlement of sorts. Section 9 of the Housing Assistance Act 1984 (Cth), for example, appears to require the Minister to make payments to a specified minimum if the conditions laid down in the Act have been met. Section 4 of the States Grants (Aboriginal Assistance) Act 1976 (Cth) directly grants financial assistance to the States in accordance with the Act.

Many Grant Acts provide a special appropriation for the purpose of the program. The Housing Assistance Act 1984 (Cth)[56], the States Grants (Schools

48 *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth) s. 32(1)(c) (creation of an advisory and planning committee); Local Government (Financial Assistance) Act 1986 (Cth) s. 4 (creation of Local Government Grants Commission with functions and a membership consistent with the Commonwealth Act).

49 Housing Assistance Act 1984 (Cth) Schedule 1, clauses 24-5 (operation of the Home Purchase Assistance Account).

50 Home and Community Care Act 1985 (Cth) Schedule, clauses 14, 26.

51 States Grants (Tertiary Education Assistance) Act 1984 (Cth) s. 9(3)(d),(e).

52 *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth) s. 16; National Water Resources (Financial Assistance) Act 1978 (Cth) s. 5.

53 State Grants (Tertiary Education Assistance) Act 1984 (Cth) s. 9(2).

54 States Grants (Tertiary Education Assistance) Act 1984 (Cth) s. 26.

55 Section 7.

56 Section 8.

Assistance) Act 1984 (Cth)[57] and the Australian Land Transport (Financial Assistance) Act 1985 (Cth)[58] are examples. The last Act is unusual in hypothecating certain tax revenues to assist in funding the program.[59] Equally, however, many major grant programs do not have special appropriations and rely on an allocation in the budget. The home and community care program falls into this category.[60] Appropriations for these programs are made under Appropriation or Supply Bill (No. 2) in accordance with the compact of 1965 between the House of Representatives and the Senate.[61]

Manner of acceptance by States

The final feature of grants arrangements to consider is the process by which the States themselves agree to enter into an arrangement or to accept the grant on the conditions prescribed by the Commonwealth. Overwhelmingly, State acceptance is signified by action taken by the State government. Sometimes a formal agreement for the program is signed by the government on behalf of the State.[62] Where this occurs, it is usually a requirement of the Commonwealth Grant Act.[63] More often, the basis for the agreement between the Commonwealth and the State is less formal, comprising at best an exchange of letters. While it is not uncommon for Commonwealth legislation to require intergovernmental agreements to be tabled in the Commonwealth Parliament,[64] if they are not scheduled to the Act, such agreements are rarely, if ever, tabled or required to be tabled in a State Parliament.

Occasionally, however, a State Parliament is called upon to enact legislation to authorise the State government to enter into an agreement with the Commonwealth and in that way becomes involved in the acceptance of a grant program on behalf of the State. At present this usually occurs only where legislation is necessary for implementation of the program.[65]

3. *THE COERCION TEST*

The proposition that '. . . in s.96 there is nothing coercive' has long been accepted as correct.[66] It was the central point of Dixon C.J.'s thoughtful and careful analysis of section 96 in the *Second Uniform Tax* case.[67] It has been echoed by other justices of the Court, in other cases, both before and since. Thus in the *First Uniform Tax* case Latham C.J. upheld the Grant Act as an exercise of section 96 because it offered 'no legal compulsion'.[68] In the *D.O.G.S.* case

57 Section 88.
58 Section 35.
59 Section 12.
60 Home and Community Care Act 1985 (Cth) s. 4. See Appropriation Bill (No 2), (relevant years) Div. 841.
61 Odgers, J.R., *Australian Senate Practice* (5th ed. 1976) 386.
62 For example, the home and community care program is based on a formal agreement.
63 *E.g.* Home and Community Care Act 1985 (Cth), s. 3(1).
64 *E.g.* National Water Resources (Financial Assistance) Act 1978 (Cth), s. 6.
65 *E.g.* Housing Assistance Agreement
66 *Victoria v. Commonwealth (Second Uniform Tax* case) (1957) 99 C.L.R. 575, 605.
67 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.
68 *South Australia v. Commonwealth (First Uniform Tax* case) (1942) 65 C.L.R. 373, 417.

Wilson J. expressly found the grants legislation valid as 'non-coercive law'.[69] While there was no explicit acceptance of this feature of section 96 in the earlier cases of *Roads*[70] and *Moran*,[71] both dealt with arrangements that were more readily identified as co-operative and both are compatible with it.

The proposition relates only to the legal character of grant arrangements, not to their practical effect. The *First Uniform Tax* case,[72] in which the coercion test was first clearly enunciated, in fact upheld arrangements to which the States had no practical alternative at all. Starke J.'s characterisation of the argument that the Grant Act merely offered an inducement as 'specious but unreal'[73] was obviously correct in all but the most narrow legal sense. The education grants at issue in the *D.O.G.S.* case[74] were hardly more voluntary from a practical political standpoint and the same holds true for most of the current major grant programs. This dichotomy between law and practice is a feature also of United States grant law where a similar coercion test applies from which the Australian version appears to have been derived.[75]

Nevertheless, the legal principle that section 96 grants are not coercive has been the dominant influence on the interpretation and application of the section. It facilitates characterization of a grant as financial assistance to a State, even where the State is used as a conduit: '[t]he State cannot be compelled to accept the moneys, and the fact that it does accept them may be regarded as an acknowledgement of the fact that the moneys granted are of assistance to the State.'[76] It can be used to justify the avoidance of other constitutional provisions[77] or principles[78] on the ground that the Commonwealth Act itself does not have substantive effect. It may be even more important in the future in this regard, given the High Court's recently expressed willingness to take a liberal view of the impact of the Constitution on intergovernmental co-operative arrangements.[79] It was an essential element in the elaborate argument put by Dixon C. J. in the *Second Uniform Tax* case to explain the virtual absence of any restriction on the terms and conditions which can be attached to section 96 grants.[80] The non-coercive character of an exercise of section 96 therefore must constitute the starting point for further analysis of its legal effect.

The problem is to determine what non-coercion means in this context. If it

69 *Attorney General (Vic): ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559, 659.

70 *Victoria v. Commonwealth* (1926) 38 C.L.R. 399.

71 *Deputy Federal Commission of Taxation (N.S.W.) v. Moran* (1939) 61 C.L.R. 735; on appeal (1940) 63 C.L.R. 338 (P.C.).

72 *South Australia v. Commonwealth* (1942) 65 C.L.R. 373.

73 (1942) 65 C.L.R. 373, 443. *Cf.* Latham C.J.: 'temptation is not compulsion', 417.

74 (1981) 146 C.L.R. 559.

75 The U.S. test was developed in *Charles C. Steward Machine Co v. Davis* 301 U.S. 548 (1937).

76 *Attorney-General (Vic): ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559, 592.

77 *Deputy Federal Commissioner of Taxation (NSW) v. Moran* (1939) 61 C.L.R. 735.

78 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 610 *per* Dixon C.J.; 636–7 *per* Williams J.

79 *R. v. Duncan: Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 C.L.R. 535.

80 '. . . the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament . . . In the case of what may briefly be described as coercive powers it may not be difficult to perceive that limitations of such a kind must be intended. But in s. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition': *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 605 *per* Dixon C.J.

means only that the Commonwealth cannot legally force a State to accept a grant it is a somewhat obvious principle of very limited use. For present purposes it is relevant to know whether it extends further, to compliance with the terms of a grant arrangement once the grant has been accepted. If it does, it follows that the conditions on which the grant is made cannot legally be enforced against a recipient State. In these circumstances, it is also unlikely that a Court would allow enforcement against the Commonwealth.[81] Barring the possibility that some provisions in grants legislation might operate as an exercise of the incidental power, grant arrangements in effect would be non-justiciable.

The authorities are inconclusive on the point, which has not yet been directly raised before the Court. The *Second Uniform Tax* case[82] came closest to it, when counsel for Victoria described the challenged arrangements as 'a system of standing grants to which there is a right on performance of a consideration' in the course of an argument that section 96 contemplates only ad hoc grants.[83] It was possible to reject this conclusion without disputing the description of the scheme, to which comparatively little attention was paid. There were problems with the description in any event. The condition in issue was retrospective in operation, merely authorizing payment to States which had not imposed an income tax in the relevant year, so that on one view no question of enforcement arose.[84] The reaffirmation of the non-coercive nature of grants arrangements in several of the judgments was directed to denying the application of the *Melbourne Corporation* principle[85] rather than to determining the limits of enforceability of the grant.

A different emphasis is discernable in the *D.O.G.S.* case,[86] where counsel for the Commonwealth sought to defend the schools grants from arguments based on section 116 of the Constitution[87] by arguing that laws made under section 96 are 'fiscal, non-regulatory and non-coercive'.[88] The Court held that section 96 grants were subject at least to a purposive guarantee such as section 116. The issues did not require the Court to consider the finer features of the non-coercion test, although they may have been the catalyst for some of the dicta on the obligations of States under grant arrangements, described below.

In fact dicta can be found either way on the question whether conditions attached to grants to the States are binding. Collectively, there appears to be more support for the proposition that the States are obliged to comply at least with some conditions. There is no analysis of the basis for this result, however.

81 Other problems involved in enforcement against the Commonwealth are discussed *infra*.

82 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

83 *Ibid.* 585 (Barwick Q.C.)

84 See in particular McTiernan J.: 'Parliament has done no more than to authorise payments of money to a State, on condition that the Treasurer of the Commonwealth is satisfied that the State has not in fact imposed any tax on incomes', (1957) 99 C.L.R. 575, 622; also Webb J. 643. This argument was muddied a little by s. 11 of the States Grants (Tax Reimbursement) Act 1946 (Cth) which authorised the Treasurer to make advances to a State, subject to repayment if the condition was breached.

85 *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31. At a general level the principle precluded interference with the 'governmental functions of the State in such a way as to take the law outside federal power' (1957) 99 C.L.R. 575, 610 *per* Dixon C.J. See also Williams J., 636.

86 *Attorney General (Vic): ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559.

87 'The Commonwealth shall not make any law for establishing any religion . . . '

88 (1981) 146 C.L.R. 559, 566.

In the absence of a thorough consideration of the issue by the Court it would not be appropriate to attempt to draw firm conclusions from any of the statements, each of which is clearly influenced by the context of the case in which it is found.

Several statements in one or other of the *Uniform Tax* cases[89] can be interpreted as denying that the States could be bound by the conditions in a Grant Act. One, by Latham C. J. in the *First Uniform Tax* case, is so clearly a response to the circumstances of the case, the nature of the conditions and the retrospectivity of its operation that it is difficult to generalize from it.[90] Another, by Webb J. in the *Second Uniform Tax* case is more explicit and represents the most comprehensive statement on this issue to date:

> Section 96 gives power to make a grant of financial assistance to a State on terms and conditions; but naturally the terms and conditions must be consistent with the nature of a grant, that is to say, they must not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement that s.96 contemplates. Then the *Grants Act* must not be read as providing for a contract to make a payment, if its language permits, as I think it does . . . In any event to hold that a binding agreement is contemplated by s.5 would be to impute to the Parliament . . . the erroneous opinion that a State Parliament can make the non-exercise of its taxation powers the subject of bargaining and of a binding agreement and that for this purpose the State Parliament can bind its successors. *Pye v. Renshaw* ((1951) 84 CLR, at p.83), as I understand it does not imply that a binding agreement might validly be made for a grant under the *Grants Act*.[91]

Nevertheless the meaning is far from clear. On no view were the State Parliaments parties to the uniform tax arrangements. Moreover, Webb J. appeared to accept, without giving reasons for the conclusion, that the obligation to repay an advance under section 11 was binding.[92]

Statements which favour the binding nature of conditions can also be found in the *Second Uniform Tax* case.[93] Williams J. used the language of consideration and contract.[94] Dixon C.J. described the arrangement upheld in the *Roads* case[95] as one under which the State was 'bound to apply the money specifically to an object that has been defined'.[96] A further sprinkling of equally tantalising suggestions are found in the more recent *D.O.G.S.* case[97] where Mason J. adopted Dixon C. J.'s description of the *Roads* case arrangements, and Wilson J. appeared to accept that States would be obliged to enter into an agreement with recipient schools in accordance with the condition in the Commonwealth Act once a decision to accept the grant was made.[98] Finally Gibbs C.J., possibly inadvertently, in support of the plaintiff's standing, noted that a State was 'perfectly entitled to say that it will accept the financial assistance if the Acts are valid *and the conditions are binding*, but that it nevertheless wishes to challenge the validity of the Acts and the conditions'.[99]

89 *South Australia v. Commonwealth* (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

90 'A State Parliament could not bind itself or its successors not to legislate upon a particular subject matter . . . The grant becomes payable if the Treasurer is satisfied that a State has not in fact imposed a tax upon incomes . . . ' (1942) 65 C.L.R. 373, 416.

91 (1957) 99 C.L.R. 575, 642-3.

92 ' . . . the Grants Act imposes no obligation on a State except the obligation to repay advances under s. 11 . . .': *ibid.*

93 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

94 (1957) 99 C.L.R. 575, 630.

95 *Victoria v. Commonwealth* (1926) 38 C.L.R. 399.

96 (1957) 99 C.L.R. 575, 606.

97 *Attorney-General (Vic): ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559.

98 *Ibid.* 660.

99 *Ibid.* 589. Emphasis supplied.

There have been other cases involving Commonwealth payments to the States in which the High Court has discussed and been prepared to countenance, the enforceability of some arrangements.[1] As these payments were largely, if not solely, attributable to other heads of Commonwealth power[2] they offer unreliable assistance on the meaning of the coercion test and will not be pursued further here. They are considered below in the broader context of the enforceability of intergovernmental agreements generally.

4. *ENFORCEABILITY*

The one thing that is clear about section 96 is that a State cannot be legally compelled to accept a grant of financial assistance. Once accepted, however, there is a question whether any conditions attached to it may be enforced by the Commonwealth against a State, or whether payment of the grant can be enforced by the State against the Commonwealth. While views on these questions have occasionally been hazarded in the case law[3] and in academic writings,[4] the theoretical basis for them is rarely explored. Nor has the question yet been addressed directly by the High Court.[5]

In practice, the question may arise in a variety of different contexts. Enforcement against the Commonwealth may become an issue if the Commonwealth refuses to pay a grant or the full amount of a grant. This might have happened in either 1986 or 1987, for example, when the Commonwealth sought to avoid payment of the additional 2 per cent in real terms to which the States were expressed to be entitled under the States Grants (General Revenue) Act 1985. In the event, the Commonwealth capitulated in 1986 and in 1987 the Act was amended to remove the 2 per cent entitlement.[6] Alternatively, dispute over the basis on which a grant is calculated under a complex agreement might induce State parties to the agreement to seek redress through the courts. The Medicare Agreement of 1984-85 made under the authority of the Health Insurance Act 1973 reputedly gave rise to disputes of this kind, although no judicial proceedings followed.

[1] *P.J. Magennis v. Commonwealth* (1949) 80 C.L.R. 382; *South Australia v. Commonwealth* (1962) 108 C.L.R. 130.

[2] See the elaboration of this point in Part 1 of this article: (1987) 16 M.U.L.R. 1, 15.

[3] See the discussion *supra* in section 3, above.

[4] Campbell, E., 'The Commonwealth Grants Power' (1969) 3 *Federal Law Review* 221; Myers, A.J., 'The Grants Power Key to Commonwealth-State Financial Relations' (1970) 7 M.U.L.R. 549; Sawer, *Australian Federalism in the Courts* (1967) 147; Cranston, 'From Co-operative to Coercive Federalism and Back' (1979) 10 *Federal Law Review* 121.

[5] Although in *Victoria v. Commonwealth (Second Uniform Tax* case) the High Court rejected a challenge to the validity of s. 11 of the States Grants (Tax Reimbursement) Act 1946 (Cth), which required a State to repay advances made under the section if the Treasurer was not satisfied that it had not imposed a tax on incomes, the issue appears to have been treated as incidental to the broad attack on the nature of conditions that could be attached to a grant and the effect of the Act on the powers of the States. Only three members of the Court specifically mentioned s. 11 and they did so only briefly: (1957) 99 C.L.R. 575, 629 *per* Williams J., 643 *per* Webb J., 657 *per* Fullagar J. Notably, Dixon C.J. was not amongst them. Fullagar J. described s. 11 as 'obviously designed for the benefit of the States'.

[6] States Grants (General Revenue) Amendment Act 1987 (Cth) s. 3. It received Royal Assent on 5 November 1987 but was given retrospective effect to 1 July 1987. At the same time, the opportunity was taken to condition the grant of general revenue assistance on State payment to the Commonwealth of a proportion of the unfunded superannuation liability of higher education institutions: s. 5.

For its part the Commonwealth might seek to enforce any of the range of procedural and substantive conditions attached to grants of financial assistance against a State. In particular, concern is expressed from time to time about the failure of States to comply adequately with reporting and audit conditions under grants legislation. In June 1987, for example, in his Efficiency Audit Report on the Community Employment Program administered by the Department of Employment and Industrial Relations, the Commonwealth Auditor General drew attention to a number of 'administrative deficiencies' of the States under the Program and recommended that 'the Department should be more active in ensuring that the States fulfilled their agreed obligations under the Program'.[7] Rather than enforcing specific substantive conditions, the Commonwealth might prefer to enforce any condition requiring repayment of a grant in case of breach or to compel repayment on any other available basis.

It is usually assumed that the question of legal enforcement of grant arrangements has no practical significance. Commonwealth displeasure with a breach of conditions by a State can be manifested effectively and simply by cutting or refusing to pay future grants. Conversely, enforcement by a State against the Commonwealth may be a pyrrhic victory if the sum recovered subsequently is offset against other payments. This assessment may be too simplistic, however. Specific purpose grant programs are becoming more complex and more pervasive. State governments and administrations are becoming more sophisticated. There is increased interest in the public accountability of both levels of government. Elimination or reduction of a grant program may not be a viable option where it would frustrate Commonwealth policy or political objectives. Even a pyrrhic victory may have value if it forces attention to be paid to propriety in intergovernmental dealings in the future.

It is not at all improbable that the question of enforcement of specific purpose grants will be raised before the courts in the near future. It is likely that the question is already a matter of debate within the public sector, at both Commonwealth and State levels. An answer might influence the form that grant arrangements take and the manner in which they are handled by governments and Parliaments, whether litigation is in the offing or not.

Two broad models are explored below for this purpose, drawn respectively from private law and public law.

(a) *Private Law*

The concepts and broad principles of contract provide the most obvious legal framework for section 96 grants arrangements if a basis is to be sought for them in the sphere of private law. It is possible to characterise section 96 grants in terms of offer and acceptance, with consideration constituted by the grant of financial assistance on the one hand and the promise to perform, or the performance of conditions on the other. This analysis cannot be applied to unconditional grants and can be applied only with difficulty to grants subject to the retrospective performance of conditions, of the kind in issue in the *Second*

[7] *Report*, overview and para. 8.3. For a complementary analysis by one State, see Victoria, *First Report of the Auditor-General for the year ended 30 June 1987*, 28.

Uniform Tax case.[8] Nor would this analysis apply to all conditional grants. Despite the fact that section 96 confers power on the Parliament itself to grant financial assistance, a Grant Act will often be incapable in its very terms of constituting a binding agreement: if a contract is to be found it may depend on later, more specific negotiations between the parties, albeit on the authority of the Grant Act. It is at least potentially useful, however, for the vast range of specific purpose grants.

Superficially at least, the case law appears to constitute a threshold problem for the use of the contract analogy. In the first place, the contractual force of the States Grants (Tax Reimbursement) Act 1946 was argued unsuccessfully in the *Second Uniform Tax* case.[9] The purpose of the argument in that case, however, was to establish that the Grant Act constituted a standing grant, to which a State would be entitled on performance of the condition, which disregarded the element of need and which therefore could not be supported by section 96. Some members of the Court were content to deal with the argument merely by dismissing the underlying premise that an element of need was necessary or that it was not sufficiently established.[10] At least two Justices also inferred that the conditions could be binding once a grant was accepted, without exploring the basis for that result.[11] Nevertheless, there were two other members of the Court, McTiernan and Webb JJ., who specifically denied that the Grant Act could found a contractual relationship.

Given the context in which the argument was set, these remarks should not be given undue weight. McTiernan J. in any event did not appear to be making a proposition of general application when he described the terms of the particular Grant Act as 'not making a contract' but merely authorizing payment of a grant 'on condition that the Treasurer of the Commonwealth is satisfied that the State has not in fact imposed any tax on incomes'.[12] Webb J. also took this point, but offered the additional argument that a State Parliament could not make the non-exercise of its tax powers the subject of a binding agreement.[13] While it may readily be acknowledged that there are some grant conditions which could not be specifically enforced or which detract from the contractual nature of an arrangement, it does not necessarily follow that conditional grants can never give rise to a contractual relationship.

Another line of cases, involving the transfer of revenue from the Commonwealth to the States in return for State legislative or executive action, but arguably not in exercise of section 96, also shows the Court reluctant to construe intergovernmental arrangements as contractual. Thus, in *P.J. Magennis Pty Ltd v. Commonwealth*,[14] Dixon C. J. described the 'general tenor' of the War Service Land Settlement Agreement as 'rather an arrangement between two governments

8 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.
9 *Ibid.*
10 In particular Dixon C.J., with whom Kitto and Taylor JJ. agreed: *ibid.* 606-7.
11 *Ibid.* 606 *per* Dixon C.J., 630 *per* Williams J. Williams J. referred to the condition as 'consideration of the grant'.
12 *Ibid.* 622.
13 *Ibid.* 643.
14 (1949) 80 C.L.R. 382.

settling the broad outlines of an administrative and financial scheme than a definitive contract enforceable at law'.[15] Similarly, in *South Australia v. Commonwealth*,[16] the whole Court denied that the Railways Standardization Agreement was itself a contract enforceable at law. All Justices, expressly or by implication, held that the Agreement evinced no intention to create legal obligations, either because the action required of the parties was too indefinite or depended on further agreement[17] or, more fundamentally, because it was political in nature. Windeyer J. who tended to the latter view, identified the 'status of the parties, their relationship to one another, the topics with which the agreement deals, the extent to which it is expressed to be finally definitive of their concurrence, the way in which it came into existence' as factors which might put an agreement 'outside the realm of contract law'.[18] Dixon C.J. quoted Harrison Moore as excluding from the category of contract agreements which 'are not such as are capable of existing between individuals' whose 'subject matter is the peculiar and exclusive characteristic of governments'.[19]

Nevertheless, all Justices acknowledged that intergovernmental agreements could have contractual force in appropriate circumstances. Further, most of them clearly took the view that further action under the Railways Standardisation Agreement could give rise to contractual obligations, enforceable in law.[20] It follows that there is no blanket rule, although there may presently be a presumption, against according contractual force to intergovernmental agreements. The terms of each agreement must be considered independently, to determine whether it represents 'a voluntary assumption of a legally enforceable duty'.[21]

Offer and Acceptance

There are obvious difficulties in construing modern grant arrangements in terms of an offer to enter into a binding agreement on the basis of the Commonwealth Act alone. While some Grant Acts, including those with agreements scheduled to the Acts themselves, might be sufficiently detailed, explicit and final to constitute one side of a bargain, it is often the case that the Act contemplates further action by the Commonwealth Minister, in the form, for example, of negotiations with States or approval of projects, before a grant is finally made. In extreme cases, some Acts[22] delegate to the executive the very power to grant financial assistance as well as the power to attach conditions to it: a variation on the delegation theme not yet specifically approved by the High Court. Even so, however, the point may come, after the further action has been taken, where the

15 *Ibid.* 409.
16 (1962) 108 C.L.R. 130.
17 *Ibid.* 150 *per* Menzies J., 157 *per* Owen J.
18 *Ibid.* 154.
19 *Ibid.* 141. See also McTiernan J., 148-9. The quotation was from Moore, W.H., 'The Federations and Suits between Governments', (1935) 3rd series 17 *Journal of Comparative Legislation* 163.
20 *South Australia v. Commonwealth* (1962) 108 C.L.R. 130, 141 *per* Dixon C.J. with whom Kitto, J. agreed; 150 *per* Menzies J.; 153 *per* Windeyer J.; 157 *per* Owen J.
21 *Ibid.* 153-4, *per* Windeyer J., quoting the joint judgment of the High Court in *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 92 C.L.R. 424, 457.
22 For example, Housing Assistance Act 1984 ss 6(1)(a), 11.

Commonwealth's position is sufficiently certain to provide the basis for a binding agreement, as envisaged in *South Australia v. Commonwealth*.[23]

From the standpoint of the acceptance of a Commonwealth offer by the States, two further difficulties arise. First, the point at which a State accepts a grant is often far from clear. While acceptance may sometimes be inferred readily from the signing or ratification of an agreement, in other cases no more than an exchange of letters, oral acceptance or even passive acquiescence by the State may take place. In this last case at least, it may be difficult to infer an intention to enter into a legally binding arrangement.

Secondly, there is a question of who has the authority to bind a State in an agreement of this kind. It has been accepted since *Bardolph's* case[24] that parliamentary authority is not required for government contracts, at least where a contract is made 'in the ordinary course of administering a recognized part of the government of the State'.[25] The distinction between ordinary and extraordinary contracts has since been criticised as artificial and unnecessary[26] and it is now at least arguable that, the problem of appropriation aside, parliamentary authority is not necessary to create a binding contract. On the other hand, section 96 arrangements possess special features which suggest that the relevance of parliamentary involvement should not be so hastily dismissed. Under most government contracts a State is paying, rather than receiving money. In that case the State Parliament plays at least some role, however token, through the appropriation process.[27] Moreover, given the critical significance of parliamentary control of finance to the operation of a system of responsible government, the regular receipt of moneys from an outside source, particularly in such large amounts, has the potential to distort the relationship between the executive and the legislature unless the latter is involved in the process of acceptance.

As mentioned earlier, it is rare for State Parliaments to be involved in the acceptance of section 96 grants. Whether the current practice is correct or not as a matter of law is one of the unanswered questions about section 96. Even if State executive power extends to the acceptance of conditional grants, however, there is a further question about the procedure that should be followed. Acceptance of a grant on behalf of a State may involve undertakings as to future legislative action, the conduct of the State administration or the provision of matching funds. In principle the matter would appear to be appropriate for decision through cabinet, whether ultimate acceptance is signified through the premier or the responsible minister in accordance with agreed procedures.

Enforcement

The most significant obstacle to characterisation of a grant arrangement as a contract is usually assumed to be the nature of the undertakings made on both

[23] (1962) 108 C.L.R. 130.
[24] *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.
[25] *Ibid.* 508 *per* Dixon J.
[26] Campbell, E., 'Commonwealth Contracts', (1970) 44 *Australian Law Journal* 14.
[27] Campbell gives this as one reason in favour of a broader independent executive authority to contract. Her other reason, that it is always open to a sovereign Parliament to legislate to control executive action, would apply also to State receipt of section 96 grants. Whatever the merits of the theory, in practice Parliament will not so legislate without executive acquiescence. *Ibid.* 15.

sides and the difficulty of their enforcement. The obstacle appears particularly formidable in the case of enforcement against a State, because of the range of conditions which might be attached to a grant.[28] Thus in the *Second Uniform Tax* case,[29] Webb J. was influenced in his conclusion that the parties were not in a contractual relationship by conditions which required a State to exercise or to refrain from exercising its legislative powers.[30] Conditions that require executive action potentially involve similar problems.

These considerations sometimes are used to support a conclusion that the parties did not intend to enter into legal relations.[31] Certainly the question of intention is a formidable one, which is taken up below. In isolation, however, the problem of enforcement of conditions against a State is not an insuperable bar to characterising an arrangement as a contract. Australian law is perfectly familiar with the notion that some contractual obligations will not or cannot be specifically enforced but that damages or a fixed sum may be awarded.[32] If a contractual relationship is found to exist, there is no reason in principle why an action cannot be brought against a State to recover grant moneys paid if the State has failed to comply with conditions and no other remedy is appropriate.

Section 58 of the Judiciary Act 1903 allows suits to be brought against a State in contract 'in respect of any matter in which the High Court has original jurisdiction'. The High Court has original jurisdiction in all matters in which the Commonwealth is a party.[33] Sections 64 and 65 of the Judiciary Act regulate the manner in which a judgment against a State shall be carried out. Under section 65, no execution or attachment shall issue against the property or revenues of the State, but a certificate of judgment shall be given as evidence that a specified sum has been awarded. Section 66 provides that on receipt of the certificate of judgment the Treasurer of the State 'shall satisfy the judgment out of moneys legally available'.

The requirement that the moneys be legally available potentially imposes another bar to the recovery of grant moneys paid. The State Constitutions either expressly provide or assume that moneys cannot be withdrawn from Consolidated Revenue without parliamentary authority in the form of appropriation:[34] if grant moneys are credited to Consolidated Revenue, it is always possible that parliamentary appropriation will not be forthcoming. Whether they need or even can be so credited is far from clear. The Victorian Constitution Act, for example, provides that 'all . . . revenues of the Crown in right of the State of Victoria . . . *which the Parliament has power to appropriate* shall form one Consolidated Revenue.'[35] The composition of the Consolidated Revenue under the Constitu-

28 *Supra.*

29 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

30 *Ibid.* 643.

31 *South Australia v. Commonwealth* (1962) 108 C.L.R. 130, 140 *per* Dixon C.J.; 148 *per* Dixon C.J.; 148 *per* McTiernan J.; 153–4 *per* Windeyer J.

32 Reynolds, F.M.B., 'Discharge by Breach as a Remedy'; Finn, P.D. (ed.), *Essays on Contract*, (1987) 183.

33 Commonwealth Constitution s. 75(3).

34 Constitution Act 1902 (NSW) s. 39; Constitution Act 1975 (Vic) s. 89; Constitution Acts 1867 to 1978 (Qld) s. 34; Constitution Act 1889 (W.A.) s. 64.

35 Section 89. Emphasis supplied.

tions of Queensland and Western Australia is similarly qualified. Clearly this qualification was not drafted with section 96 grants in mind, but the peculiar and unsettled legal character of transfers from the Commonwealth to the States under section 96 raises at least a question about their status in the public accounts of these States.

No such problem is created by section 39 of the New South Wales Constitution Act 1902, which was amended in 1982, apparently with section 96 grants in mind. The new section 39(2) provides that 'all revenues of the Crown . . . from whatever source arising, within New South Wales, and as to the disposal of which the Crown may otherwise be entitled absolutely, conditionally or in any other way shall form part of the Consolidated Fund'. Similarly, the Public Finance and Audit Act 1987 (S.A.) requires all moneys received by the Treasurer of South Australia to be paid to the Consolidated Account, where they are subject to parliamentary appropriation. In principle, from the standpoint of the relationship between the executive and the legislature of a State, this would appear to be more appropriate than the alternative, which is to credit them to a trust fund and by-pass the Parliament. Conditional grants are clearly a permanent feature of the Australian political system and there would be value in the other States updating their laws and practices accordingly.

The inability of the Commonwealth to compel repayment of a grant which has been credited to Consolidated Revenue does not depend on section 66 of the Judiciary Act alone, which could of course be repealed by the Parliament. The requirement that moneys spent by the executive must first be appropriated by the legislature is central to the system of responsible government. At least in the case of those States whose Constitutions expressly deal with appropriation, it is protected by Constitution section 106. It is unlikely that it could be circumvented by the Commonwealth in the absence of clear constitutional authority.[36]

The fact that payment in satisfaction of a judgment depends on parliamentary appropriation does not of itself prevent characterization of an arrangement as a contract.[37] Nor would such an exercise be pointless. It may be assumed in all but the most highly politically charged circumstances that the moneys would in fact be forthcoming. The real value of according legal force to such arrangements is likely to lie in the greater precision of undertakings given, in the circumstances in which they are given, and in the attitude of both parties to them, rather than in the ability to execute judgment in those relatively few cases where irreconcilable disputes arise.

The need for parliamentary appropriation also constitutes a potential barrier to enforcement of a contractual arrangement against the Commonwealth. No problem arises where the Grant Act itself appropriates the necessary funds.[38] Where no special appropriation is made, the applicable law is similar to that already described in relation to the States. Section 56 of the Judiciary Act 1903 (Cth)

[36] As was the case in the *New South Wales v. Commonwealth (No. 1) (Garnishee* case) (1932) 46 C.L.R. 155.

[37] *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.

[38] *E.g.* Australian Land Transport (Financial Assistance) Act 1985 (Cth); Housing Assistance Act 1984 (Cth); Local Government (Financial Assistance) Act 1986 (Cth).

enables suits to be brought against the Commonwealth in contract. The procedures for execution of judgment in sections 65 and 66 apply to the Commonwealth as well as to the States. The fact that, in the last analysis, satisfaction of a judgment debt requires parliamentary appropriation does not of itself detract from the contractual character of an arrangement.[39]

A possible complication may lie, however, in a provision usually found in those Grant Acts which do not include a special appropriation, that payments are to be made 'out of money appropriated from time to time by the Parliament for the purpose'.[40] A variant provides that payment shall be made 'out of moneys available under an appropriation by the Parliament'.[41] In *Bardolph's* case[42] Dixon J. quoted Isaacs C.J. in the *A.R.U.* case[43] to the effect that a contract was binding 'unless some competent statute properly construed makes the appropriation a condition precedent'. Dixon J.'s own rendition of this qualification referred to circumstances where 'Parliament has by an expression of its will in a form which the Court is bound to notice, refused to provide funds for the purposes of the contract'.[44] It is arguable, without being inevitable, that a reference in a Grant Act to subsequent appropriation amounts to such an 'expression of will' by the Parliament. In any event, provisions to this effect clearly would be taken into account amongst other features of an arrangement in determining whether the parties intended to enter into legal relations.

Intention to enter into legal relations

Finally, it remains to be considered whether section 96 grant arrangements can satisfy the requirement necessary for a binding contract that the parties intended to enter into legal relations and, if so, in what circumstances. For this purpose the courts will not be concerned with subjective intention alone but with the objective intention of the parties as revealed by the terms of the agreement and the circumstances in which it was made.[45]

As shown by the earlier discussion, the courts so far have been reluctant to find an intention to enter into legal relations where the parties to an agreement are the Commonwealth and a State, although at the same time they acknowledge that some intergovernmental agreements might be construed to be legally binding. Their reluctance appears to operate on two levels. The first concerns the practical detail of the arrangements themselves. The courts understandably are not prepared to find a contractual relationship where the terms of an agreement are uncertain or vague or require further action before they are settled.[46] This attitude is consistent with general contract law and may readily be accepted. It is not for the courts to create substantive terms of a contract on which the parties have not agreed.

39 *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.
40 *E.g.* Home and Community Care Act 1985 (Cth) s. 4.
41 *E.g.* States Grants (Nature Conservation) Act 1974 (Cth) s. 12. Section 7 of the Act used the language of entitlement.
42 *New South Wales v. Bardolph* (1934) 52 C.L.R. 455, 510.
43 *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 C.L.R. 319, 353.
44 (1934) 52 C.L.R. 455, 516.
45 Mason, A. and Gageler, S., 'The Contract' Finn, P.D. (ed.) *op. cit.* 1, 3–16.
46 *South Australia v. Commonwealth* (1962) 108 C.L.R. 130.

At another level, however, the courts appear to deny the existence of a contract, and to attribute that denial to the absence of intention to enter into legal relations solely because the parties are governments and the features of the agreement inevitably differ from those which would apply between private individuals. The premise is that, unless an intergovernmental agreement can be closely equated to a private bargain, it cannot have contractual force.[47] The premise is reinforced by section 64 of the Judiciary Act 1903,[48] which recognises, however, that there may be circumstances in which the rights of parties to a suit involving governments cannot be the same as in a suit between subject and subject.

At this level the attitude of the courts may be more questionable. While it may readily be accepted that the remedies which a court can grant are limited, there is no reason why bargains between governments the terms of which are sufficiently precise should not be justiciable in the courts. There may be advantages in their justiciability, in terms of the conduct of public affairs. It cannot automatically be assumed that governments do not intend to undertake legally enforceable duties when they reach agreements between themselves.[49] If adaptation of the existing contract law to suit the needs of public contracts is required, so be it: in this as in other respects, the development may be overdue.[50]

Assessment of the private law model

The law of contract or an adaptation of it provides a possible legal framework for section 96 grant arrangements. On the basis of this model, there would be a significant number of agreements entered into pursuant to grants legislation or under its authority which would be enforceable by the Commonwealth against the States and vice versa. Enforceability would depend on the clarity and certainty of the terms finally agreed upon by the parties and the absence of express or implied repudiation of intent to enter into a binding legal relationship.

Inevitably, however, the contract analogy does not provide a completely satisfactory or comprehensive solution. It cannot apply to unconditional grants and only with a degree of artifice to grants subject to retrospective compliance with conditions. The analysis does not readily accommodate cross cutting conditions, or any legislative variation of the arrangement after the initial bargain has been struck. In most cases only monetary remedies would be likely to be awarded. In many cases also, satisfaction of a judgment will depend on voluntary compliance by the parties, if parliamentary appropriation is to be secured.

(b) *Public Law*

One of the peculiarities of section 96 is that it involves the Commonwealth Parliament in a contractual arrangement of a kind which usually is the preserve of

47 *Ibid.* 139–40 *per* Dixon C.J.

48 Section 64: 'In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.'

49 For an example of an express repudiation of intention to create a legally enforceable agreement, see the Petroleum (Submerged Lands) Agreement 1967 cl. 26, in *Report of the Senate Select Committee on Off-shore Petroleum Resources 1971* I, Appendix A.

50 See the discussion in Aronson, M.I., and Whitmore, H., *Public Torts and Contracts* (1982), ch. 5.

the executive branch of government. However unusual, the result is a law of the Parliament which potentially attracts all those principles of constitutional and administrative law which apply to statute law in general and Commonwealth statute law in particular. In turn, this line of reasoning suggests that an answer to the question of enforceability of grants arrangements may lie in the sphere of public law. If so, it will be correspondingly qualified by the limitations of a public law analysis and in particular by the need for any obligations which it is sought to enforce to be laid down by, or attributable to, the statute.

Enforcement against the Commonwealth

It is convenient to consider first the application of this model to enforcement of grants legislation against the Commonwealth. The various ways in which grants legislation prescribes the basis on which grants are payable to a State, ranging from characterisation of a State's interest as an 'entitlement' to conferral on a Minister of a discretion to make payments within broad limits have been described already. The earlier discussion of the use of special appropriations in grants legislation is also relevant for present purposes.

It may be accepted that the question of enforcement of a Grant Act against the Commonwealth only arises where the obligation of the Commonwealth is or becomes sufficiently certain and that the same limitations on execution of judgment apply where an appropriation has not been made. Within these constraints, however, the model is a potentially useful one. All the usual administrative law principles and remedies would apply to the exercise of powers and discretions conferred on the executive under a Grant Act. It is immaterial for the purpose of this model whether the grant of financial assistance is made unconditionally or whether the performance of the conditions precedes entitlement to the grant.

Enforcement of a Grant Act against the Commonwealth might encounter the objection, by analogy with traditional assumptions about appropriation legislation, that such Acts are incapable of giving rise to binding obligations. The view that appropriation legislation is 'financial not regulative' and 'neither betters nor worsens transactions in which the Executive engages'[51] is widespread and constitutes the basis both for a broad interpretation of the spending power[52] and a narrow approach to the right to challenge its exercise.[53] The consequence of this view is that an Appropriation Act 'does not speak in the language of regulation, it neither confers rights or privileges nor imposes duties or obligations. It only permits of moneys held in the Treasury being paid out . . .'[54] The reason, explained by Griffith C.J. in the *Surplus Revenue* case, is that 'the appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disburse-

51 *Commonwealth v. Colonial Ammunition Company* (1924) 34 C.L.R. 198, 224–5, *per* Isaacs and Rich JJ.

52 *Victoria v. Commonwealth & Hayden* (*AAP* case) (1975) 134 C.L.R. 338, 396 *per* Mason J.; 410–1 *per* Jacobs J.

53 *Ibid.* 385 *per* Stephen J.

54 *Ibid.* 387 *per* Stephen J.

ments'.[55] The superficial similarity of section 96, through the involvement of the Parliament in allocation of funds, has led to speculation whether the effect of section 96 laws might not be similarly limited.[56]

I have argued elsewhere that this analysis may not be correct, even in its application to Appropriation Acts.[57] Substantive legal consequences are attached to Appropriation Acts in the United Kingdom,[58] from whence the Australian tradition is derived. They concern the extent of the authority for executive action which can be derived from appropriation, and do not involve recognition of rights based on an appropriation alone, but at least they establish that an Appropriation Act has some of the usual characteristics of statute law. In the *D.O.G.S.* case, at least three members of the Court[59] appeared to adopt a similar position, where they recognised that in appropriate circumstances an Appropriation Act might infringe section 116 of the Constitution.

In any event, however, it would be wrong to apply the same analysis to section 96. An Appropriation Act is quite distinct from an Act passed pursuant to that section. Section 96 confers powers on the Parliament itself to grant financial assistance to States and is in no sense a transaction internal to government. If the power is exercised, an interest in the grant may well be created. If the terms of the granting Act are not complied with, enforcement should be possible.

Enforcement against the States

Enforcement of conditions against a State under this model is more complex. One possibility is that the conditions laid down in a Grant Act operate as paramount law by virtue of section 109[60] of the Constitution and in that manner become binding on the States. On examination, however, this option presents too many difficulties for it to constitute a likely solution. The well-established principle that section 96 grants are not coercive would certainly prevent the operation of section 109 before the financial assistance was accepted by a State. As noted earlier, under current practice, there are likely to be practical difficulties in pinpointing the moment of acceptance in the case of many grants. It would be unusual, to say the least, for section 109 to take effect at some time after the Commonwealth law came into force, in respect to State law which had been in existence all along, although perhaps that could be accepted as merely a further manifestation of the oddity of section 96 itself.

More significant, perhaps, is the question whether conditions attached to a section 96 grant are capable of giving rise to an inconsistency with State law

55 *New South Wales v. Commonwealth* (1908) C.L.R. 179, 190.

56 *Attorney-General (Vic.); ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559, 618 *per* Mason J.

57 Saunders, C., 'Parliamentary Appropriation' in Saunders *et al. Current Constitutional Problems in Australia*, Centre for Research on Federal Financial Relations (1982) 1.

58 May, T. E., *Law, Privileges, Proceedings and Usage of Parliament*, (16th ed. 1957) Butterworth, 749.

59 *Attorney-General (Vic); ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559, 576 *per* Barwick C.J.; 618 *per* Mason J.; 621 *per* Murphy J.

60 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

within the meaning of section 109. The confusion of concepts which section 96 represents makes it difficult to be dogmatic about the answer. An enactment pursuant to section 96 clearly constitutes a 'law of the Commonwealth'. Nevertheless, it is equally clear that a power to attach conditions to a grant of financial assistance under section 96 is not a head of Commonwealth power in the traditional sense.[61] And if the principle of non-coercion has any substantive effect at all, it must mean that the conditions themselves do not operate as a legally enforceable command to a State.

If this is correct, section 109 would not resolve the problem of enforcement against a State in relation to most conditions, if it had any operation at all. At best, section 109 would enable grant conditions to override inconsistent provisions in State law when the grant had been accepted by a State. The performance of most grant conditions requires positive legislative or executive action on the part of a State, however, which a Grant Act alone would be unable to compel.

There is a further possibility that some of the procedural provisions in grants legislation, and in particular those which require repayment of grant moneys where conditions have not been fulfilled, might be supported by the incidental power and thus have substantive effect in their own right. It is accepted in relation to the coercive heads of power at least that 'everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter . . .'[62] Whether section 96 also carries within it an implied incidental power or not,[63] it clearly attracts the express power in section 51(39) to legislate with respect to 'Matters incidental to the execution of any power vested by the Constitution in the Parliament . . .'

There has been relatively little discussion in the cases of the distinctive meaning of section 51(39); in most contexts it is assumed to be interchangeable with the implied incidental power, or, at least, to produce the same result.[64] One obvious point of distinction is the express reference to the execution of the power in section 51(39), rather than to the subject matter of the power on which the implied incidental power is assumed to operate.[65] In the *A.A.P.* case[66] Jacobs J., admittedly in the course of an expansive approach to the concept and use of incidental power, described the difference between the two as follows:

> Whatever is incident . . . to the subject matter of power comes within the ambit of the main power. It is incident to that power in that it naturally appertains and attaches to that power. However, what is incidental to the execution of a main power includes every matter which occurs or is liable to occur in subordinate conjunction with the execution of that power, even though it forms no essential part of the main power itself. It is subordinate but just as importantly it is in conjunction. Thus a subject matter incidental to the execution of a power may have a wider ambit than the power implied in respect of the incidents of a subject matter of power.[67]

61 *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 604, 609–10, *per* Dixon C.J.
62 *Burton v. Honan* (1952) 86 C.L.R. 169, 177 *per* Dixon C.J.
63 *Cf.* Dixon C.J.: 'But s.96 does not deal with a legislative subject matter . . .' *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 604.
64 As was the case in *Burton v. Honan* (1952) 86 C.L.R. 169, 178.
65 *Ibid.*
66 *Victoria v. Commonwealth and Hayden* (1975) 134 C.L.R. 338.
67 *Ibid.* 414.

It is at least arguable that a provision in a Grant Act requiring a grant of financial assistance to be repaid if the conditions which accompanied it are not met is incidental to the execution of the grants power. Other procedural provisions relating, for example, to reporting and audit, might be sustained on this basis as well. On this analysis, these provisions are not conditions of financial assistance but substantive provisions of a Grant Act which would apply to States which accept the financial assistance in accordance with normal principles.

The need for appropriation by the Parliament of a State to satisfy a judgment debt, encountered earlier in relation to the private law model, constitutes a potential obstacle here as well. The obstacle is most obvious where the Constitution of a State expressly requires moneys to be paid to and appropriated from Consolidated Revenue.[68] The principle of parliamentary appropriation may be so fundamental, however, that it can be considered part of the Constitution of each State in any event. Section 51(39), is, like all the other heads of power, expressed to be 'subject to this Constitution'. The Constitution includes section 106, which guarantees the continuation of the Constitution of each State 'until altered in accordance with the Constitution of the State'.

Although, confusingly, section 106 is also 'subject to this Constitution', it may be possible to reconcile the two by applying that qualification only to modifications of State Constitutions effected by the Constitution itself.[69] If section 96 were construed to include an implied incidental power which would support repayment provisions, the same result could be reached through section 51(36) in combination with section 96.[70]

Assessment

The public law model also offers a partial legal framework for the enforcement of section 96 grants. It relies solely on the principles and remedies of constitutional and administrative law. It would be generally applicable to a broader range of grants than the private law model, including unconditional grants and grants subject to retrospective conditions.

The public law model would enable enforcement by a State against the Commonwealth by reference to the terms of the legislation alone, in the light of action taken pursuant to it. Like the private law model, it would enable the Commonwealth to enforce grants against a State, at least to the extent of requiring repayment for failure to comply with conditions, although the bases on which that result is reached are quite different. The extent to which a wider range of conditions would be enforceable against a State depends first on the scope of the incidental power in relation to section 96 grants and secondly on the unlikely possibility that section 109 applies to grant conditions. As with the private law

[68] Certainly New South Wales; by inference Victoria, Queensland and Western Australia.

[69] Crommelin, M., 'Offshore Mining and Petroleum: Constitutional Issues' (1981) 3 *Australian Mining and Petroleum Law Journal* 191, reprinted in Papers on Federalism 3, Intergovernmental Relations in Victoria Program, Law School, Univeristy of Melbourne, 24–6.

[70] For a discussion of this point see Saunders C., 'Towards a Theory for Section 96: Part 1' (1987) 16 MULR 1, 8–10.

model again, the execution of judgment against either the Commonwealth or a State would be inhibited by the requirement for parliamentary appropriation.

5. *CONCLUSION*

Both the private law and public law models are capable of providing a basis on which to analyse the legal relationship between the Commonwealth and a State under section 96 grants arrangements. Neither is completely satisfactory and both involve uncertain points of law. This is not surprising, because section 96 itself involves a confusion of concepts, mingling as it does consensual agreement and legislation, which usually is associated with the creation of a regulatory framework. The resulting mechanism is so unfamiliar that there has been a tendency in practice for Commonwealth Parliament and government alike to revert to their traditional roles in dealing with grants, irrespective of the words of the section. One consequence has been a breakdown in parliamentary supervision of executive action in this area. It is suggested here that this should be corrected.

This paper was primarily designed to answer questions which may soon be asked about whether section 96 grants are enforceable at law. It seems clear that some are enforceable although to what extent and with what consequences depends on the model used. This is unlikely to lead to any major shift of negotiations over grants arrangements from the political to the legal sphere. It might be expected, however, to result in more rigour in the manner in which grant arrangements are prescribed, a closer adherence to the terms of such arrangements and greater consciousness of the importance and purpose of grant design.

The public law and private law models overlap, but are not fully co-extensive. Nevertheless, it is not feasible to adopt one to the exclusion of the other. The public law model automatically applies, by virtue of the fact that a Grant Act is a law of the Commonwealth Parliament. Equally there will be circumstances in which an arrangement between the Commonwealth and the State under a section 96 Grant Act is enforceable between the parties by analogy with the private law of contract. The fact that the parties are governments provides no convincing reason why an agreement cannot be so enforced, if the other elements of binding agreement are present.

If this result is unsatisfactory, it is no more than the consequence of the features of section 96 itself. It may lend force to the argument that the Constitution should be amended to provide a new framework for arrangements between the levels of government which makes due allowance for the needs of flexibility, certainty and public accountability.[71]

[71] Saunders C., 'Commonwealth Power over Grants' in Brennan, G. (ed.) *Constitutional Reform and Fiscal Federalism*, Occasional Paper 42, Centre for Research on Federal Financial Relations (1987) 35.