

“The Provenance of the Federal Spending Power”

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I am currently undertaking an LLM by minor thesis at the University of Melbourne. In my research, I have looked at the power of the federal purse in Australia in search for the limits of this power, in the context of the accountability and federalism concerns often associated with its use. I have contemplated what limits the purse has in Australia by reference to local and foreign (particularly the United States and Canada) jurisprudence and also historical provenance.

Having spent some time researching the historical struggles behind the limits on the executive's spending power both in the United Kingdom and the United States this conference has given me the opportunity to further develop and present this. I will present this research in three parts: first, I will discuss very briefly the concerns that exist around the Australian spending power and the questions that the historical analysis may help inform. Then I will look at the UK history and the US history before turning to any “lessons” Australia can learn from its provenance.

A. Introduction – The problem

In Australia, the federal spending power remains something of an enigma. The High Court has not authoritatively told us where it comes from and what its limits are. The unlimited exercise of the spending power (particularly conditional spending) has wide ramifications for accountability, transparency and the operation of the states in the federal system.²

The general ability of the Federal Government to spend its funds is usually considered to be anchored in the combined operation of ss 81 (the appropriations power) and 61 (the executive power).³ The government's ability to spend money is dependent on a parliamentary appropriation – a parliamentary authorisation which allows the

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² Succinctly, these concerns are that often conditional spending is used to achieve quasi-regulative purposes of the government and push policy agendas but it lacks the transparency of the legislative process. The federal concern is related to this – if conditional spending is used as a regulatory tool it may transcend the strict separation of legislative powers in the Constitution and undermine the State's competence.

³ This is for spending outside its legislative competence in ss 51 or 52 and not provided in the form of grants to the states, which would be supported by s 96 of the Constitution.

government to withdraw a certain amount from its coffers. Today I want to focus upon two important constitutional facets of Australia's federal spending power:

1. Is the spending power limited to those areas within the Commonwealth's legislative jurisdiction? Does the phrase 'purposes of the Commonwealth' in s 81 achieve this?
2. What is the source of the spending power? Is its source s 81 of the Constitution or s 61? What implications does this have for the limits of the spending power and the Commonwealth's ability to attach conditions to funding?⁴

The purpose of the following historical account therefore is to attempt to answer, at least in part, these questions.

Parliamentary control of the purse strings originated in the United Kingdom and brought across into Australia through the adoption of a Westminster style parliamentary democracy and the conventions of responsible government. Parliament's role in approving expenditure plays an important role in the continuance of the government in such a system (that is, the rejection of supply, at least by the lower house, will act as a vote of no confidence in the government).

Bearing this in mind on the one hand, on the other weighs the idea of federation which was *not* adopted from the UK. Australia took its general federal structure from the US, and the issue of the impact of the federal spending power on the States was one that was grappled with by the fathers of the US Constitution over a century before the same debate was played out in Australia.

These two historical are therefore important for understanding the Australian position.

B. United Kingdom – Parliamentary fiscal accountability

The power of Parliament (and particularly in this context the lower house of Parliament) to supervise taxation and expenditure has been pivotal in its development as the supreme institution in the United Kingdom Westminster parliamentary system.

⁴ These questions stem from the accountability and federal concerns spoken of earlier – can the federal government use conditional funding to intrude into areas of State competence? Can funding conditions be used to circumvent the transparency and openness provided by the legislative process?

Erskine May described it as follows:

One of the ancient and valued rights of the Commons, is that of voting money and granting taxes to the Crown, for the public service. From the earliest times, they have made this right the means of extorting concessions from the Crown, and advancing the liberties of the people. They upheld it with a bold spirit against the most arbitrary kings; and the Bill of Rights crowned their final triumph over prerogative. They upheld it with equal firmness against the Lords.⁵

Parliament's control over executive appropriations has its roots in Parliament's control over taxation (note, Parliamentary control is usually associated with control by the House of Commons, due to its more representative nature it gradually became the stronger house, particularly with respect to money bills). As the House of Commons in 17th Century England gained more power over the Sovereign's ability to collect taxes, the related ability of the Sovereign's ability to spend those funds was similarly restricted. History also demonstrates the power of Parliament over taxation and supply increased when the Crown was weak.⁶

There are a number of important eras between 13th and 17th centuries that led to the establishment of the convention of parliamentary supervision of appropriations.

1. Early attempts – 13th century – Henry III

Grants of supply by the House of Commons for designated purposes became common by the 14th Century. The concept was originally proposed under Henry III in 1237 Century by William of Raleigh, that supply be designated to be spent by a committee according to the "needs" of the realm.⁷ This initial proposal was rejected and it was not until the reign of Edward III that such a practice became more accepted.

2. Edward III (1327-1377)

Under Edward III, the King was in desperate needs of funding the war against the French and the Scots. Examples of these earliest purposive appropriations include supply for "defence against the Scots" in 1348 and again in 1353 for continued

⁵ Thomas Erskine May *The Constitutional History of England since the Accession of George the Third 1760-1860*, (vol 1, 2007), 468-9.

⁶ Cheryl Saunders, 'Parliamentary Appropriations' in Cheryl Saunders (ed) *Current Constitutional Problems in Australia* (1982) 1.

⁷ William Stubbs, *Constitutional History of England in its Origin and Development* (5th ed, 1891), 595.

“prosecution of the war”.⁸ Regulation of supply went beyond specifying purpose. In 1340 and 1341 Parliament demanded the production of the Royal accounts.⁹

3. Richard II (1377-1399)

Under the Lancastrian Kings, the wars continued, as did reliance on parliamentary funds. In 1377, under Richard II, who inherited the war from his grandfather, Parliament not only designated the purpose for the grants, but appointed two persons to receive and expend the money voted for the war.¹⁰ In 1379, the King voluntarily produced his accounts to Parliament after requesting more funds for the war.¹¹ The King had called Parliament after initially obtaining an urgent loan from the Lords to cover the threat of an imminent invasion of England.¹² Thereafter, a practice developed whereby the Treasurers of the Subsidies were appointed to account to the next Parliament. In 1390, taxes were directly split into supply – for example $\frac{1}{4}$ of a tax to the King for ordinary services of the Crown and $\frac{3}{4}$ for the war.¹³

4. Henry IV (1399-1413)

After the demise of Richard II, under Henry IV Parliament maintained strong supervision of the purse and some interesting developments occurred. In 1404 a large subsidy was granted on condition that it should be expended for the defence of the kingdom according to the form and extent of the grant *and not otherwise*.¹⁴ Two treasurers of war, Thomas Lord Furnivall and Sir John Pelham, were appointed to receive the grant and to account to the commons for it at the next Parliament.¹⁵ In 1406, Parliament appointed auditors to review the Royal accounts.¹⁶ Henry IV asserted that the King did not render accounts, but by 1407, he had.¹⁷ Throughout Henry IV's reign, appropriations were given for specific purposes, with clauses specifying not to be used for other purposes.

⁸ Frederic William Maitland, *Constitutional History of England* (1908), 184; Theodore F T Plucknett, *Taswell-Langmead's English Constitutional History: From the Teutonic Conquest to the Present Time* (11th ed, 1960), 160.

⁹ Maitland, above n 8, 184.

¹⁰ Ibid, 184.

¹¹ Ibid.

¹² Plucknett, above n 8, 169.

¹³ Wals, ii, 196, referred to in Stubbs, above n 7, 271-2; Maitland, above n 8, 184.

¹⁴ *Annales Henrici IV*, 379-380: referred to in Stubbs, above n 7, 271-2.

¹⁵ Plucknett, above n 8, 169.

¹⁶ Maitland, above n 8.

¹⁷ Ibid.

5. Henry VI (1422-1461)

Henry VI, after the successful but short reign of his father Henry V, found himself again governing in great financial difficulty caused by the War of Roses, and therefore found it necessary to summon Parliament regularly.¹⁸

Once again you see Parliament specifying purposes and limiting this. An example of a clause accompanying supply in 1426 read 'it ne no part thereof beset ne dispendid to no othir use, but oonly in and for the defense of the seid roialme'.¹⁹

6. James I (1603-1625) and Charles I (1625-1649)

The principle subsequently lay in abeyance under the strong Tudor monarchy, but re-emerged under the Stuart Kings. Between 1603 and 1608, James I ran the accounts at an annual deficit of £90,000.²⁰ This environment led to the re-emergence of purposive grants as Parliament once again became the key to the public purse. In 1624, moneys were granted *to be paid to Commissioners* named by Parliament for relief of the Palatinate to ensure their application to naval and military defence.²¹ Perhaps surprisingly, this condition was at the suggestion of James I himself (presumably to secure the supply).

In 1641, under Charles I, similar purposive grants were made.²²

7. Charles II (1661-1685) and James II (1685-1688)

During the Commonwealth (1649-1661), Parliament became accustomed to financial control and regulation. After the fall of the Commonwealth, Parliament looked to continue this control. It was asserted in some, but not all cases under Charles II. It was not followed under James II but was invariably followed after the Revolution.²³

A couple of events deserve further attention to demonstrate the seriousness with which Parliament defended its supervisory role. In 1665, a very large sum of money (£1,250,000) was granted to the King by the *Subsidy Bill* introduced by Sir George

¹⁸ Ibid, 183.

¹⁹ Extracted in Plucknett, above n 8, 186.

²⁰ Colin Rhys Lovell, *English Constitutional and Legal History: A Survey* (1962), 294.

²¹ Maitland, above n 8, 309; Ibid, 363

²² Maitland, above n 8.

²³ Ibid.

Downing, a teller of the exchequer, for the ‘Dutch war’. The bill included a clause that the money was to be applied only to the purposes of the war and should not be issued out of the Exchequer except by order or warrant that they were for such purposes.²⁴ Parliament named Commissioners to audit the disbursement of the funds. The Lord Chancellor, Clarendon, opposed the bill, asserting it was ‘derogatory to the honour of the Crown.’²⁵ Charles II, in desperate need of finance, agreed to the inclusion of the clause, believing that the bankers would be more inclined to provide the funds with it.²⁶ The seriousness of Parliament’s resolve was tested when George Carteret, the Treasurer of the Navy, paid out moneys without a warrant; Parliament insisted on his dismissal.²⁷

Another interesting event occurred under Charles II. He appointed the Earl of Danby to a position somewhat akin to the contemporary position of Prime Minister, the Lord Treasurer. Danby was eventually impeached for, amongst other things, embezzlement of the Treasury. Parliament had appropriated money for ‘disbanding the army’. Danby used the money to retain it. He was impeached:

for that he had traitorously endeavoured to subvert the ancient and well-established form of government in this kingdom, and the better to effect that his purpose, he did design the raising of an army upon a pretence of war against the French king, and to continue the same as a standing army within this kingdom; and to that end he has misappropriated money, whereby the law is eluded, and the army is yet continued.²⁸

He was eventually pardoned by the King, but spent a significant time in the Tower of London.²⁹

8. A convention – Post Glorious Revolution

Thus, purposive supplies in the British Parliament gradually became a recognised principle.³⁰ By the time of the Glorious Revolution and the *Bill of Rights*, the Parliament’s regulation of appropriations was complete, concomitant with its sole authority to tax the populace. It became common to insert clauses into appropriation

²⁴ 17 Car 2 Cl: referred to *ibid*, 310.

²⁵ Plucknett, above n 8, 428.

²⁶ Plucknett, above n 8, 428-9.

²⁷ Lovell, above n 20, 369.

²⁸ Maitland, above n 8, 328.

²⁹ Saunders, above n 6, 5; Maitland, above n 8, 310; Lovell, above n 20, 369.

³⁰ Saunders, above n 6.

legislation prohibiting, under severe penalties, the Lords of the Treasury from issuing (as well as the officers of the Exchequer from obeying) any warrant for expenditure upon any service than that to which it has been specifically appropriated.

Maitland notes that the appropriation of supplies was done with ‘great minuteness’:

Thus, in 1886 it appropriated £2,902,900 for the payment of seamen and marines, £964,400 for their victuals and clothing, £1,000 as a gratuity for the widow of a certain distinguished public servant.³¹

C. *United States*

As discussed above, whilst Australia took the convention of responsible government and parliamentary supervision of expenditure from the United Kingdom, it also adopted a federal system. The idea of a federal spending power and the potential influence it may have within a federation is a hotly debated topic in many federations. To inform the debate in Australia, I have looked at the United States position. The position both for and against a broad spending power were put clearly by the opposing views of Madison and Hamilton.

The basis of the US spending power is Article 1, § 8, Cl 1 of the Constitution:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, *to ... provide for the ... general welfare of the United States...*³²

The clause was adopted instead of a provision which would be limited to specific enumerated heads of power, as proposed by James Madison, Charles Pinckney and Gouverneur Morris.³³ For example, Madison suggested giving the federal government spending power to:

- “establish an university”;
- “encourage by premiums & provisions, the advancement of useful knowledge and discoveries”; and

³¹ Maitland, above n 8, 395. See also at 445.

³² Emphasis added.

³³ Theodore Sky, *To provide for the General Welfare: A History of the Spending Power*, (2003) 36-38.

- “authorise the Executive to procure and hold [land] for the erection of forts, magazines and other necessary buildings.”³⁴

The term “general welfare” was originally included in the articles of confederation,³⁵ and was proposed in the drafting convention by Roger Sherman, a man known for his ability to craft compromise and move the debate forward between opposing factions.³⁶

The “general welfare” clause was used publicly by the anti-federalists to argue against the newly drafted Constitution – alleging that the term was unlimited in scope and therefore gave unbridled power to the proposed central government.³⁷ For example, Robert Yates wrote in Brutus VI of the argument that the term was limited:

I would ask those, who reason thus, to define what ideas are included under the terms, to provide for the common defence and general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by every one? No one will pretend they will. It will then be a matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter.³⁸

The federalists fought back – James Madison advocated in *The Federalist Papers* that the ‘general welfare’ *must be limited to within the enumerated powers of Congress*.³⁹

In Federalist Paper 41, he argued for a broad spending power:

It has been urged and echoed, that the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare.⁴⁰

He then dismissed the interpretation: “[n]o stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.”

³⁴ Ibid, 36.

³⁵ Article VIII.

³⁶ Sky, above n 33, 42.

³⁷ Ibid, 56-61.

³⁸ Robert Yates, ‘Brutus VI’ in Ralph Ketcham, *The Anti Federalist Papers and the Constitutional Convention Debates* (2003), 269

³⁹ It has been noted that this appeared to be a direct response to the Anti-Federalist papers of Yates – Brutus I and VI.

⁴⁰ James Madison, ‘No 41: General View of the Powers Conferred by the Constitution’ in Clinton Rossiter (ed), *The Federalist Papers* (1961), 251-260.

For Madison, the enumeration or definition of the powers of Congress in the Constitution indicates that a broad interpretation of the “general welfare” clause is not available:

For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its original with the latter.⁴¹

This was also the view of Thomas Jefferson, as set out in his *Opinion on the Constitutionality of the Bill for Establishing a National Bank*:

... they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the US and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect.⁴²

Alexander Hamilton – also in *The Federalist Papers* – disagreed.⁴³ His argument stems from the principle that the role of the federal government cannot and should not be defined in advance, and to ensure it is able to deal with the developing exigencies of the future, it needs unrestricted financial power. He framed his underlying thesis thus:

⁴¹ 257-258.

⁴² Thomas Jefferson, ‘Opinion on the Constitutionality of the Bill for Establishing a National Bank’ (15 February 1791) in Julian P Boyd, Ruth W Lester, Lucius Wilmerding, *The Papers of Thomas Jefferson* (1950), 275-280.

⁴³ Alexander Hamilton, ‘No 30: Concerning the General Power of Taxation’ and ‘No 34 The Same Subject Continued’ in Clinton Rossiter (ed), *The Federalist Papers* (1961), 183-188, 201-207.

Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible to safely limit that capacity.⁴⁴

Affirming his position, Hamilton's *Report on the Manufactures to the House of Representatives* concluded that the power was not limited to direct grants of legislative power. He said "the power to *raise money* is *plenary*, and *indefinite*; and the objects to which it may be *appropriated* are no less comprehensive". In relation to the term "general welfare" specifically, he said:

The terms "general Welfare" were doubtless intended to signify more than was expressed or imported in whose which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision.

He said that of *necessity*, to ensure that provision was made for numerous exigencies incident to the affairs of a nation, it must be left to the Congress as the national legislature to pronounce upon what is the "general welfare". Its confines were instead set by the clause which confers it; the purpose must be "general and not local".⁴⁵

This centralist view was the one adopted by Story in his *Commentaries on the Constitution*.⁴⁶ It is also the ultimate position that has been adopted by the Supreme Court in the 1930s.⁴⁷ I am not going to take you through this more recent jurisprudence, as the purpose of looking at the US experience is to ascertain the debates as to the breadth of the spending power when it is placed in a federal context.

Lessons

In the United Kingdom, Parliament has strongly asserted its role in supervising and limiting executive spending. This has then become an important convention in the Westminster parliamentary system. It is clearly an important and well-guarded power

⁴⁴ Alexander Hamilton, 'No 34 The Same Subject Continued' in Clinton Rossiter (ed), *The Federalist Papers* (1961), 183-188, 201-207.

⁴⁵ Alexander Hamilton, *Report on the Subject of Manufactures* (1791) in Harold C Syrett et al (ed) *The Papers of Alexander Hamilton* (1966), 303.

⁴⁶ J Story, *Commentaries on the Constitution of the United States* (1833), ch 14.

⁴⁷ *United States v Butler* 297 US 1 (1936).

– the rejection of a supply bill by the Parliament now operates as a vote of no confidence in the government. In Australia, with the adoption of a Westminster system, this supervisory role was given to the colonial parliaments and subsequently to the Commonwealth parliament.

What this provenance clarifies is that s 81 embodies a fiscal supervisory mechanism, and is not an empowering provision. That is, appropriation of money in itself does not empower the executive to spend it. All it does is give the executive parliament's permission to engage in proposed spending. The power to do so must come from somewhere else.

This provides an interesting perspective on the federal debate. For a long time in Australia focus has been on the words of s 81, particularly “for the purposes of the Commonwealth” to limit the central spending power to the Commonwealth heads of legislative power, but I would assert that this is misguided.

The core of the federal debate, as the US history demonstrates, focuses on the potential centralising tendencies of a broad spending power. This is particularly the case in the US, as in Australia, where the federal division of power is achieved by the enumeration of the central legislative powers. The historical US debate shows that there are a number of reasons on both sides of the debate as to whether the executive's power to spend should be similarly limited. In Australia, the debate becomes even more complex than that over the phrase “general welfare” in the US. The phrase “purposes of the Commonwealth” cannot be exactly equated with its US counterpart, as it embodies a principle of responsible government brought across from the UK which must also be considered in the interpretative process.

To attempt then to combine the “lessons” from these two contexts, I would assert that the following can be taken from history. Section 81 embodies only Parliament's fiscal supervisory mechanism and does itself neither “better or worsens” (to use the phrase of Rich and Isaacs JJ) the ability of the executive to spend. Therefore, the ability of the executive to spend must come from (and be limited by) the executive power itself. This is found in s 61 of the Constitution, which vests the “executive power” in the Crown. This then turns the question and the relevance of the US debate over the federal balance between the national and sub national governments to the

question of whether the executive's ability to spend is limited federally by the division of powers. This undefined power in s 61 is generally now accepted to include those areas within the legislative competence of the federal Parliament together with a "nationhood" power. In Australia, the spending power is therefore limited federally to the confines of the executive power in s 61.

Finally, it is worth noting that if my conclusions are correct, this interpretation of the spending power may allay the concerns of both Madison and Hamilton – the Executive's power is limited by s 61 but the 'nationhood' power in s 61 may allow it to deal with arising and unexpected federal exigencies in the future.