TOWARDS A THEORY FOR SECTION 96
PART I

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[*Section 96 was included in the Constitution as a political compromise. As a result, it is a constitutional misfit. Some features of its wording give rise to fundamental questions about the relationship between section 96 and the rest of the constitutional system. These questions have not yet been answered.*

Part I of the article explores three of these features: the effect of the limitation of the section 'until the Parliament otherwise provides', the significance of the conferral on the Parliament of power to impose terms and conditions, and the vagueness of the description of the recipient of financial assistance as 'any State'. The author argues that the absence of any general theory encompassing them underlies the unsatisfactory state of the case law on section 96.]

1. *BEGINNINGS*

The circumstances in which section 96[1] was inserted in the Commonwealth Constitution are in outline fairly well known. A similar provision, to enable the Commonwealth Parliament to 'render financial aid' to any State 'upon such terms and conditions and in such manner as it thinks fit' was considered but rejected by the Australasian Federal Convention in 1898.[2] A Constitution Bill in the form eventually approved by the Convention was put to referendum in four colonies. It was passed in Victoria, South Australia and Tasmania but deemed to be rejected in New South Wales. A conference of the Premiers of all six colonies was held from 29 January to 3 February 1899 at which some changes to the Bill were agreed, primarily to overcome objections held by New South Wales. Amongst the changes was the limitation to ten years of the Commonwealth's obligation in section 87[3] to return three quarters of the customs and excise revenue to the States, which had been a particular bone of contention in New South Wales. Clearly associated with it, by virtue of the similarity of its opening words if for no other reason, was another change, in the form of a new clause, which now is section 96.

The extraordinary nature of the role of the Premiers' Conference in these events has been noted before[4] but deserves mention again. There were obvious objections in principle to alteration by the Premiers of a Bill which had been negotiated and approved by a body of delegates directly elected for the purpose. These were compounded in practice by the fact that the changes were made at the

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1 S. 96: 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.

2 Australasian Federal Convention, *Official Record of Debates, Melbourne, 1898*, (hereafter, *Melbourne, 1898*) 1100 ff. See generally Saunders, 'The Hardest Nut to Crack: the Financial Settlement in the Commonwealth Constitution', *Papers on Federalism 8, Intergovernmental Relations in Victoria Program*, University of Melbourne (1986) 34-39.

3 Known as the Braddon clause, after Sir Edward Braddon of Tasmania who had successfully proposed it at the Melbourne session of the Convention: *Melbourne, 1898*, 2378.

4 LaNauze, J.A., *Making of the Australian Constitution* (1972) 242-6.

instance of two colonies which were perceived to have been less than co-operative in the federal movement so far. One was New South Wales, where the failure of the first referendum was widely attributed to the equivocation of Premier Reid[5] and to some last minute fiddling with the statutory minimum number of votes required.[6] The other was Queensland, which had not participated in the Convention of 1897-8 at all. In the circumstances it is not surprising that a New South Wales proposal in June 1898 for a Premiers' Conference to be convened to consider the referendum failure was rejected by all the other colonies except Queensland.[7] Although Victoria apparently relented,[8] this initial overture clearly failed.[9] It was renewed towards the end of the year,[10] when it succeeded at least partly because most of the Premiers would be in Melbourne in January anyway for a meeting of the Federal Council of Australasia.[11]

Considering the importance of the Conference when it eventually met, its deliberations were kept remarkably secret. No detailed record of the proceedings appears to have been taken. The text of the resolutions was released immediately after the meeting[12] but contained only the decisions themselves and a brief and circumspect statement of the reasons for them; hardly a satisfying record of discussions which lasted for five days during which, Reid said, he had 'never had a more anxious or a more strenuous time'.[13] Further, although the Premiers could hardly avoid outlining the proposed changes to their respective Parliaments during passage of the new Enabling Bills, the resolutions do not appear to have been tabled at this stage. They were eventually tabled in the New South Wales Parliament in 1905 as a prelude to a motion expressing the 'profound dissatisfaction with the treatment accorded to this state by the Federal Parliament in many matters of serious concern and more especially in regard to the selection of the federal territory for the seat of government'. Speaking to the motion, Treasurer Carruthers expressed his 'astonishment' that the resolutions had not been tabled before and noted the difficulty he had had in finding the document at all.[14]

5 See for example the telegram from Premier Kingston (S.A.) to Reid in June 1898: 'We note that you were unable to cordially support the Bill for which you voted, and no doubt the withholding of your powerful influence considerably reduced the majority by which it was carried', New South Wales, Legislative Assembly, *Votes and Proceedings 1898*, Vol. 2, 1.

6 An amendment to the Enabling Act to increase the statutory minimum from 50,000 to 80,000 was enacted in New South Wales on 12 December 1897. The affirmative vote in New South Wales in the first referendum was 71,595; a majority of 5,367: Quick, J. and Garran, R.R., *Annotated Constitution of the Australian Commonwealth* (1901, repr. 1976) 193-4, 213.

7 The suggestion began an exchange of telegrams between the Premiers, tabled in the New South Wales Parliament in 1898 at the instance of Bernhard Wise, M.L.A.: see *supra* n.5.

8 The second telegram from Premier Turner (Vic.) offered to assist in persuading other Premiers to attend a Conference 'with a view to affording every possible opportunity for the consideration of the federal issue'.

9 The final telegram from Reid to the Tasmanian Premier read: 'I accept your strongly worded message, just received, as a final refusal to join in the proposed Conference of Premiers, and will make no further communication with you on the subject'.

10 Reid, G. H., *My Reminiscences* (1917) 176.

11 New South Wales had never been a member of the Council and South Australia was no longer a member. In Melbourne for the Premiers' Conference, however, the Premiers of both colonies were granted leave to attend the Council meeting on 25 January, their presence making it a unique occasion: Federal Council of Australasia, *Official Record of Debates*, 1899, 32.

12 La Nauze, *op. cit.* 242.

13 Reid, *op. cit.* 176.

14 'I have obtained a copy . . . I only got it this evening. I had a great search made and at last discovered this one document.' New South Wales, *Parliamentary Debates*, 7 December 1905, 4797.

Apart from this brief public record the only other information about the Conference from contemporary sources comes from descriptions by individual participants or those associated with them. Most notable are Reid's *Reminiscences*,[15] Deakin's *Federal Story*,[16] and Quick and Garran's *Annotated Constitution of the Australian Commonwealth*.[17] The account in each is brief and, for one reason or another, unsatisfactory. Reid's observations were discursive, and written long after the Conference. Deakin was not a participant and although he was apparently in touch with the Victorian Premier, Turner, during the Conference, his account has been shown to be inaccurate in at least one significant respect.[18] Quick and Garran's report is necessarily second-hand.

The circumstances surrounding the Premier's Conference were particularly odd in relation to section 96. In the first place the Premiers had, or said they had, very different views about what the clause meant. The Victorian Premier, Turner, emphasized its temporary nature.[19] Kingston from South Australia, on the other hand, appears to have contemplated that the clause would have an ongoing operation.[20] Dickson of Queensland, who had the rather unusual view that the clause gave 'a statutory appropriation to the Treasurer' probably would have agreed with him.[21] The ambivalence on this central issue is reflected in the observation by Quick and Garran that 'the financial assistance clause will not necessarily perish with the Braddon clause — though it may be that the Premiers' Conference meant that it should'.[22]

This divergence of views was not surprising, although it hardly inspires confidence in the underlying reasons for the recommendation. In considering whether the new clause should be included in the Constitution the Premiers undoubtedly would have relied on the debate on the issue in the Convention in 1898. Evidence for this is provided by their decision to place the clause in the Constitution after clause 95 dealing with special assistance for Western Australia, in which context it had been considered before, rather than after the Braddon clause as new clause 88. In 1898 also, however, proponents of the clause had been divided over the period for which it should be expressed to last. Henry of Tasmania, who moved the original motion, probably represented the majority view. He argued that the clause would be particularly necessary during the early years of federation when

15 *Op. cit.* 176-8.

16 Deakin, A., *The Federal Story* (1944) 97-100.

17 *Op. cit.* 218-220 and commentary on relevant sections.

18 Deakin says that Reid took Garran, his 'counsellor upon legal and constitutional matters' to the Conference: *op. cit.* 97. According to La Nauze, Garran was in New South Wales at the time and another lawyer, Cullen, accompanied Reid to the Conference: *op. cit.* 243. This may be reinforced by Garran's own comment to the Royal Commission on the Constitution in 1927: 'I am afraid that the conference of Premiers did not have a draftsman with them,' *Evidence, 1927*, 66.

19 'During that period of ten years it will be in the power of the Federal Parliament, if they so desire, to give financial assistance to any state' Victoria, *Parliamentary Debates*, 29 June 1899, 98 (Turner). See also Premier Reid (N.S.W.) who described the power as valuable in itself 'during this transitional period of finance': New South Wales, *Parliamentary Debates*, 21 February 1899, 48.

20 He 'hoped it would be long before any State would have to avail itself of it.' South Australia, *Parliamentary Debates*, 28 February 1899, 1221.

21 Queensland, *Parliamentary Debates*, 23 May 1899, 64.

22 *Op. cit.* 871.

the book-keeping provisions[23] left the Commonwealth no latitude in allocating revenue between the States. On this basis Henry, when the clause encountered opposition, had been prepared to accept its limitation to five years,[24] which would have coincided roughly with the end of the mandatory operation of section 93. Other delegates, however, most notably Forrest, thought that the Commonwealth would have an implied power to grant financial assistance to the States in any event. For these delegates it necessarily followed that an express grants power should have an ongoing operation.[25]

Secondly, although the resolutions of the Premiers' Conference were stated to be unanimous the support of at least three of the Premiers for the new clause 96 was open to question. Reid, Turner and Kingston had all opposed the clause in the Convention the previous year. Reid in particular, who described it to his Parliament in 1899 as 'a distinct improvement in the bill'[26] had earlier dismissed it as an 'unworthy clause'.[27] Possibly for this reason the significance of the clause was noticeably understated to the point where it was barely mentioned, in the debate that followed the Conference. Reid's reference to it came as an apparent afterthought: he had finished giving the House what he described as 'a pretty full explanation' of the manner in which its proposals had been dealt with by the Premiers' Conference, when the Secretary for Public Works reminded him that he had left out the new clause 96.[28] Eighteen years later, in *My Reminiscences*, it was left out of his account of the results of the Conference again. Turner disposed of the new clause 96 in half a sentence in describing the changes to the Victorian Legislative Assembly.[29] Deakin, in *The Federal Story*, dismissed 'the alterations allowing the Federal Parliament after ten years the power of revising the Customs distribution and financial arrangments generally' as 'trifling arrangements of procedure': an extraordinary assessment of the decisions which, according to Turner, had occupied the Conference 'hour after hour, and day after day'.[30]

In the circumstances it is overwhelmingly likely that the decision of the Premiers in 1899 to include clause 96 in the draft Constitution Bill represented little more than a political compromise designed to secure federation. Contrary to the decision of the Melbourne session of the Convention[31] the duration of the Braddon clause was limited, to meet the objections of New South Wales. Contrary to another decision of the Convention[32] an express power to grant financial

23 Ss 89 and 93, which prescribed in detail the procedure for calculating each State's entitlement to redistributed revenue in the years immediately following federation. Compliance with them was mandatory for five years after the imposition of uniform customs duties, which was required to take place within two years after federation: s. 88.

24 *Melbourne, 1898*, 1102, 1100: 'the first five years . . . will be really the crucial period'.

25 *Ibid.* 1104, 1121.

26 New South Wales, *Parliamentary Debates*, 21 February 1899, 48.

27 *Melbourne, 1898*, 118. Turner's opposition, which was less colourful, can be found at 1102-5. Kingston's can be inferred from his remarks to the South Australian Parliament in 1899: 'If he had consulted his own inclinations he would have opposed it,' South Australia, *Parliamentary Debates*, 28 February 1899, 1223.

28 New South Wales, *Parliamentary Debates*, 21 February 1899, 48.

29 Victoria, *Parliamentary Debates*, 29 June 1899, 98.

30 *Ibid.*

31 *Melbourne, 1898*, 2378-9.

32 *Ibid.* 1102.

assistance to the States was also included, to overcome the opposition of the smaller States to the limitation of the Braddon clause. Despite the textual similarity of their opening words, there was no conceptual connection between the two clauses.

This relative lack of attention on the part of the Premiers to the substance of the change they were proposing resulted in ambiguities in the wording of section 96 and discrepancies between it and the scheme of the rest of the Constitution. The primary purpose of this paper is to outline some of these problems and their consequences. Possible solutions will be examined in Part II. One preliminary issue should be explored first, however; namely, the relationship between section 96 and the other financial clauses. The assumption that section 96 is compatible with the rest of the financial settlement has contributed to the confusion about the intended operation of both.

2. *SECTION 96 AND THE FINANCIAL SETTLEMENT*

The uncertainty amongst delegates in 1898 about the duration and purpose of the proposed grants power has already been pointed out. That uncertainty was not resolved by the Premiers in 1899, as their public statements show. The confusion was further compounded in 1899, however, by the changes that had been made to the content of the financial settlement since the original debate on the grants power took place.

At the time when the grants power was first discussed, in the Melbourne Convention, the revenue redistribution provisions in the draft Bill were at their most simple.[33] During an initial 'book-keeping' phase of at least five years, sections 89 and 93 prescribed in detail a system whereby each State received the balance of the revenues deemed to have been collected in it by the Commonwealth, less Commonwealth expenditures incurred. After this period expired, the only ongoing provision dealing with revenue redistribution was section 94. Its effect was to confer a general power on the Parliament to distribute 'surplus revenue' to the States 'on such basis as it deems fair'.

The requirement in section 87 for the Commonwealth to redistribute annually to the States at least three-quarters of its customs and excise revenue was itself a later addition to the draft, having been moved by Braddon towards the end of the Melbourne session after the Bill had been reported for the first time.[34] One effect of superimposing it on the financial settlement as it then stood was to complicate the calculations under the book-keeping provisions. It would also, however, have ensured the existence of a surplus for the purposes of section 94, as long as customs and excise duties remained a significant source of Commonwealth revenue. By 1908 at the latest the Commonwealth would have been unfettered in the manner in which it distributed the surplus, being obliged under section 94 only to adopt whatever basis it deemed 'fair'.

The later addition of the new clause 96 by the Premiers affected the operation

[33] Those provisions were changed a number of times, sometimes quite dramatically, during the Convention process, before the final version was agreed: Saunders, *op. cit.* 2-14.

[34] *Melbourne, 1898*, 2378-9.

of both section 87 and the book-keeping provisions. There was a question, for example, whether financial assistance to a State under section 96 would consititute expenditure of the Commonwealth to be met from its one-quarter share of customs and excise revenue under section 87. There was a similar, although less significant, question whether payment under section 96 would be Commonwealth expenditure which should be charged to all States in proportion to population under the book-keeping provisions. The answer to both questions almost certainly was yes, as a matter of statutory interpretation.[35] If this was correct, however, particularly in relation to section 87, it was highly unlikely in practice that financial assistance would be granted to a State under section 96, even if the constraints of the book-keeping provisions created a need for that to happen.[36]

The practical incompatability of sections 87 and 96 was partially mitigated by the Premiers' decision to limit the mandatory operation of section 87 itself to ten years. A paradox was thus created, however. Henry had forseen that an additional power to grant financial assistance to individual States might be necessary during the first five to seven years of federation when the Commonwealth would have no flexibility in determining the basis on which to distribute revenue between the States. Nothing had occurred to avert this possibility. Considered solely from this standpoint, the limitation of the mandatory operation of section 96 to the first ten years of federation made sense.[37] As a result of the existence of the Braddon clause, similarly limited to ten years, however, this was precisely the period during which the clause was unlikely to be used. In these circumstances, it is no wonder that the opening words of section 96 have given rise to such confusion.

Section 96 was no better suited to the original constitutional financial settlement if it was treated as having an ongoing operation. The obstacle to its use posed by section 87 was of course likely to be removed after ten years when the operation of that section was brought to an end by the Parliament.[38] By this time, however, section 94 should have come into operation. There were only two differences of substance between sections 94 and 96, both of which would have appeared relatively minor. On the basis of this analysis, after the first ten years of federation, section 96 would have been almost completely superfluous.

The first difference between the two sections was that section 96 authorised financial assistance from borrowings as well as from surplus revenue. The genesis of section 96 suggests that this aspect of the provision was considered important at one time[39] although it received little attention subsequently. In particular, it was not mentioned by any of the Premiers in their admittedly unsatisfactory explanations of the provision in 1899.

35 Quick and Garran, *op. cit.* 870-1.

36 The problem with s. 87 was noted by Barton: New South Wales, *Parliamentary Debates*, 21 February 1899, 32. Glynn foresaw the difficulty with the book-keeping provisions: South Australia, *Parliamentary Debates*, 28 February 1899, 1229.

37 Even though a grant would diminish the entitlement of other States under s. 93.

38 Which took place as soon as possible: Surplus Revenue Act 1910 (Cth).

39 The section appears to have originated in a proposal by the Tasmanian Parliament to empower the Commonwealth to 'lend to any State, on such terms and conditions as the Parliament may prescribe, any sum or sums of money borrowed on the public credit of the Commonwealth'. Quick and Garran, *op. cit.* 870.

Even this residual operation of section 96 was partially duplicated in 1929 with the inclusion in the Constitution of section 105A and the ratification of the Financial Agreement between the Commonwealth and the States. From that time it was open to the Commonwealth, under section 105A(1), to borrow money for the States pursuant to an agreement made under the section. From that time also it was arguably unlawful for the Commonwealth to lend money to the States other than in accordance with the Financial Agreement,[40] although the practice has continued.[41] It must be conceded, however, that section 105A is designed primarily to deal with a different problem and does not clearly authorize the grant of loan moneys to the States pursuant to agreement. If it does not, section 96 is the sole source of this power; an important, but much more limited function than is usually ascribed to it.

The second difference between the two sections lies in the extent of the power of the Commonwealth Parliament. Under section 94, the Parliament is limited to determining the basis of the distribution of the surplus revenue. Section 96, on the other hand, confers power to grant financial assistance 'on such terms and conditions as the Parliament thinks fit'.

It is now clear, following decisions of the High Court on section 96, that this distinction is highly significant. The power to attach terms and conditions to financial assistance has facilitated the involvement of the Commonwealth in a range of activities far broader than the powers formally conferred on it by the Constitution would suggest.[42] The nature of the power thus conferred by section 96 and the framework within which it should be exercised is the principal subject-matter of this paper. The point for present purposes, however, is that this development apparently was not foreseen by those who included the provision in the Constitution. There was no public discussion of the power to attach terms and conditions in 1899. From the small amount of comment on the question in 1898 it appears to have been assumed that the terms and conditions would be strictly relevant to the circumstances which called for financial assistance, which were expected to be rare.[43] The power in section 96 to attach terms and conditions therefore does not affect the proposition that, in the context of the original financial settlement, an ongoing section 96 would have substantially overlapped with section 94.

The fact that section 96 was a largely superfluous component of the financial settlement was obscured by the results of the decision in the *Surplus Revenue* case.[44] Just as the limitation of the Braddon clause to ten years enabled the Commonwealth to adjust its revenues in a way that would make it practicable to

40 S. 105A(5) provides that agreements made under the section shall be binding on the parties notwithstanding anything in the Constitution, including, of course, s. 96.

41 For example, National Railway Network (Financial Assistance) Act 1979 (Cth).

42 *Cf.* Fullagar J. in the *Second Uniform Tax* case: 'Even if the reference to terms and conditions had been omitted, it would not, I think, have been easy to maintain that the Commonwealth could not impose conditions on the making of a grant to a State' (1957) 99 C.L.R. 575, 656.

43 'I think it ought to go without saying that the Federal Parliament which we are erecting should have power to make terms and conditions with any state, in order to save its credit, if unhappily that step should ever be necessary . . . States must not be allowed to get extravagant, get into difficulty, and then expect the Commonwealth to come to their rescue. But still, as the words "upon such terms as it may think fit" are inserted, the proposal can do no harm', *Melbourne, 1898*, 1104 (Forrest).

44 *New South Wales v. Commonwealth* (1908) 7 C.L.R. 179.

grant financial assistance to a State, so it paved the way for section 94 to be neutralized by ensuring that there was no 'surplus revenue' at all. The device of appropriating all surplus revenue to trust accounts, which was upheld in the *Surplus Revenue* case[45] achieved that effect and has been continued ever since, in increasingly sophisticated forms.[46] In consequence, section 94 has been effectively inoperative since 1908 and it has become the received wisdom that the section which was dismissed so lightly by the commentators in 1899 is a pivotal provision of the Constitution.

3. *SOME PROBLEMS OF INTERPRETATION*

Some serious questions are raised and difficult problems caused by the interaction of section 96 with other constitutional provisions and with the principles on which the Constitution was based. Given the history of the section, this is not surprising. Even if the Premiers had been concerned with the niceties of constitutional design in negotiating what essentially was a political compromise it is unlikely that they would have recognised the significance of what they were doing. Not one of them had been a member of the drafting committee responsible for the overall form of the Constitution.[47] Nor was Robert Garran, secretary to both the Convention and the Committee, in attendance on the Premiers in 1899.[48]

These problems are attributable to three features of section 96 in particular. Two are fundamental: the conferral of power specifically on the Parliament and the description of the recipient of financial assistance as 'any State'. The third is the limitation of the operation of the section to a period of ten years 'and thereafter until the Parliament otherwise provides'. As this last feature raises more limited issues, which have some relevance to the other two, it will be dealt with first.

Until the parliament otherwise provides

The operation of section 96 is limited to ten years 'and thereafter until the Parliament otherwise provides'. The expression would have seemed familiar to the Premiers. They had themselves inserted it in the Braddon clause. It appeared elsewhere in the Constitution so often that a power[49] to legislate generally with respect to 'matters in respect of which this Constitution makes provision until the Parliament otherwise provides' was inserted in the Bill, out of an excess of caution, as 'a drafting amendment' during the Melbourne session.[50] In the context of section 96, however, these words had a very different operation. The effect of the exercise of the power to 'otherwise provide' under any of the other

[45] The issue in that case concerned the existence of a surplus within the one quarter customs and excise revenue which the Commonwealth was permitted to retain under s. 87, which had not yet expired: (1908) 7 C.L.R. 179, 193, *per* Barton J.

[46] Boehm, E. A. and Wade, P. B., 'The Anatomy of Australia's Public Debt' (1971) 47 *Economic Record* 315.

[47] The Committee comprised Barton, Downer and O'Connor: La Nauze, *op. cit.* 129.

[48] *Supra* n. 18.

[49] S. 51(36).

[50] Quick and Garran, *op. cit.* 647.

sections in which it appeared was to expand the power of the Parliament: to enable it to spend more than one quarter of the customs and excise revenues for its own purposes under section 87, for example. The effect of its exercise under section 96 was to eliminate a power which the Parliament possessed. Quite apart from the improbability of the Parliament exercising a power in these circumstances, the possibility that it might do so sat oddly with the paraphernalia of parliamentary sovereignty; in particular with the notion that a Parliament could not bind its successors.[51]

The inverted operation of section 96 also complicates the application of the power in section 51(36) to legislate for 'matters in respect of which this Constitution makes provision until the Parliament otherwise provides'. In most other sections attracted by this power the Constitution itself prescribed a substantive regime which was to operate during the interim period. That regime in turn became the 'matter' on which section 51(36) operated.[52] Thus the power of the Commonwealth Parliament to legislate for the receipt and audit of public moneys derives from section 51(36) in combination with section 97, which provides for State audit laws to apply to Commonwealth receipts and expenditure 'until the Parliament otherwise provides'.

In the case of section 96, however, the matter 'in respect of which the Constitution makes provision' is the very power to grant financial assistance to a State itself. The implications of this distinction are potentially important. If the section 51(36) matter is interpreted narrowly to refer only to the power of the Parliament to grant financial assistance it may be, as Dixon C.J. implied in the *Second Uniform Tax* case, that the paragraph performs no useful purpose in relation to section 96 at all.[53] Another possibility, however, is that section 51(36) gives the Parliament a continuing power to legislate with respect to its own power under section 96 which would include not only termination of the power to grant financial assistance but regulation of its use. On this view no termination or regulation of the power to grant financial assistance would be final, because section 51(36) would provide continuing authority for further legislation.

A further possibility arises that an exercise of the power to grant financial assistance under section 96 is a law with respect to a matter 'in respect of which this Constitution makes provision until the Parliament otherwise provides', and thus a law pursuant to section 51(36). If this were so, grants of financial assistance on terms and conditions would, like any other laws enacted pursuant to section 51, be 'subject to this Constitution'. In particular, they would be subject

[51] A point perceived at once by Quick and Garran: 'Parliament is not likely to pass a self-denying ordinance to diminish its own powers', *op. cit.* 870.

[52] S. 87 also is atypical in this regard, being a restriction on the power of the Parliament to spend. It is usually assumed that the power to spend itself derives from elsewhere: from the several heads of substantive legislative power or from s. 81 in combination with s. 61. But *cf.* Dixon C.J. in *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 604: 'Section 87 does deal with such a matter, *viz.* the disposal of the net revenue of the Commonwealth.'

[53] *Ibid.*: 'On its face para. (xxxvi) presupposes that the Parliament is authorised to provide otherwise as to "matters" with respect to which the Constitution immediately provides: they will be matters defined, like those enumerated in s. 51, in such a way as to be subjects "with respect to" which laws may be made. . . . But s. 96 does not deal with a legislative subject matter . . .'

to relevant constitutional guarantees[54] and, possibly, to section 106.[55] It might also have implications for the character of a law granting financial assistance, the significance of which is discussed below.

Any such conclusion admittedly requires a broad view to be taken of the power to legislate 'with respect to' a section 51(36) matter. There is no shortage of authority on the expansive effect of these words, although none of it has been developed in precisely this context.[56]

The parliament may grant

Section 96 specifically confers on the Parliament the power to grant financial assistance and to determine the terms and conditions to which it is subject. It is not a feature to which any particular significance is likely to have been attached at the time; in this respect section 96 clearly is modelled on section 94, which vests the Parliament with a superficially similar power to distribute surplus revenue to the States 'on such basis as it deems fair'. Nevertheless the contrast with the more recent section 105A, where the power to make agreements with the States is conferred on that much more nebulous entity, 'the Commonwealth', is obvious.

Conferral on the Parliament of power to grant financial assistance to the States in itself is unremarkable. It is consistent with the constitutional scheme for parliamentary control of finance and might be regarded as an extension or clarification of the appropriation power in section 81. The power to determine the terms and conditions attached to the grant, however, is of greater substance, being, at least potentially, regulatory in nature. It is quite different in kind from the power to determine the basis of distribution of surplus revenue under section 94. Its conferral on the Parliament has implications both for the powers exercisable by the respective arms of government at the Commonwealth level and for the absolute scope of Commonwealth legislative power.

The power to determine terms and conditions of financial assistance to the States might have been considered to fall within the scope of executive power had it not been conferred on the Parliament under section 96. A close analogy would have been provided by the practice presently followed[57] under the general Appropriation Acts whereby moneys appropriated by the Parliament for purposes which are briefly described in the Act are disbursed by the government, often in

54 This would not necessarily affect the proposition that the grants power is not subject to s. 99, which depends also on a narrow construction of a 'law . . . of . . . revenue' in the latter section: *Deputy Federal Commissioner of Taxation v. W. R. Moran Pty Ltd* (1939) 61 C.L.R. 735, 758 (Latham C.J.), 775 (Starke J.), 802 (Evatt J.).

55 S. 106 also includes the words 'subject to this Constitution'. For a suggested reconciliation of ss 51 and 106 in this regard see 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, University of Melbourne, 24-26.

56 For example *Victoria v. Commonwealth* (*Payroll Tax* case) (1971) 122 C.L.R. 353, 399, *per* Windeyer J.

57 For a criticism of indiscriminate use of this practice see Saunders, 'Parliamentary Appropriation' in Saunders, C. *et al.*, *Current Constitutional Problems in Australia*, (1982) 1.

accordance with executive guidelines or conditions.[58] The legal character of the resulting arrangement between the Commonwealth and the intended recipient is unclear.[59] In some circumstances at least, where the appropriate intention to create legal relations can be divined from the arrangement between the government and the grantee, it is akin to a contract. It is usually accepted however that the bare appropriation itself gives rise to no legally enforceable right in the grantee. Where the grantee is a State it is likely to be more difficult to establish an intention to create a legal relationship.[60]

It would be odd if this traditional, albeit nebulous, position were not affected by conferral on the Parliament of the power to determine terms and conditions. One consequence, for example, might be to withdraw from the executive power to attach terms and conditions to financial assistance without parliamentary authority. Another, presumably, is that where Parliament has given such authority, the executive must act within it. The practical significance of either conclusion depends on the existence of legal sanctions to enforce a grants arrangement.

A further consequence concerns the nature of the power to determine terms and conditions under section 96. Having been conferred on the Parliament, presumably it is legislative in character. Like other legislative powers it may be delegated to the executive.[61] Like other legislative powers also, however, both the delegation itself and the exercise of the power by the executive should be subject to parliamentary scrutiny, through the mechanisms that have been established in the Commonwealth Parliament. As a necessary precondition, any instrument in which the delegated power is exercised should be tabled in the Parliament and subject to disallowance by either House in accordance with the procedures laid down in sections 48 and 49 of the Acts Interpretation Act 1901 (Cth).[62] The functions of examining the Bills and subordinate legislative instruments and reporting on them to the Senate should be carried out by the Senate Standing Committees for the Scrutiny of Bills and Regulations and Ordinances respectively.

The conferral on the Parliament of the power to impose terms and conditions under section 96 also may have implications for the absolute scope of Commonwealth legislative power. A Grants Act is a law. *Prima facie* it therefore is subject to all other constitutional provisions that apply to Commonwealth laws. It is however an unusual law, because it represents involvement by the Parliament, as a principal, in an arrangement between two levels of government which conceptually is consensual in nature. To what extent, if at all, does this modify the application of the other provisions? A similar question has arisen over Appropriation Acts. Some members of the High Court have suggested that a distinction

[58] See, for example the Australian Assistance Plan, for which the sole legislative authority was an appropriation in Appropriation Act (No. 1) 1974-75. A challenge to its validity was dismissed in *Victoria v. Commonwealth* (*Australian Assistance Plan* case) (1975) 134 C.L.R. 338.

[59] *Australian Assistance Plan* case (1975) 134 C.L.R. 338, 387, *per* Stephen J. See Saunders, 'Parliamentary Appropriation' *op. cit.* 12-13.

[60] *South Australia v. Commonwealth* (1962) 108 C.L.R. 130.

[61] *Victorian Stevedoring Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73.

[62] A distinction should be drawn for this purpose between the exercise of the delegated legislative power by the executive and an exercise of a discretion conferred on the executive by an instrument of a legislative character.

should be drawn between these laws, which are characterized as financial laws, on the one hand and regulatory laws on the other.[63] The distinction is far from universally accepted, however, even for Appropriation Acts.[64] In any event it would be much harder to apply to a Grants Act, the practical effect of which often is to establish an extensive regulatory regime with a significant impact on both the States and individual members of the community.[65]

The question is raised with varying degrees of difficulty in relation to different constitutional provisions. The problem of the relationship between section 51(36) and section 96 was described earlier. Quite apart from its significance for the ongoing operation of section 96, if a section 96 law attracted section 51(36) it would strengthen the argument that such laws are subject to other appropriate constitutional provisions. There is a sprinkling of constitutional guarantees, including sections 51(31),[66] 92,[67] 99,[68] and 116[69] which might be argued to apply to a Grants Act. Each raises different questions based on the wording of the section itself but a threshold problem common to all is whether there is anything in the nature of a Grants Act to exempt it from their operation. Section 51(39)[70] clearly applies to an exercise of the power vested in the Parliament by section 96, although the consequences of this for the scope of legislative power have not been explored.

Most difficult of all, however, is the relationship between section 96 and the rule in section 109 that '[w]hen 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'. Consideration of this relationship raises most starkly the nature of an exercise of the hybrid power in section 96. The most immediate question is whether there is anything in a Grants Act which is capable of giving rise to an inconsistency with State law for the purposes of section 109. That question in turn is logically connected with two other questions which are fundamental from the standpoint both of principle and practical importance. The first is whether a grant of financial assistance on terms and conditions in a section 96 law is capable of giving rise to binding rights and duties on the part of either the Commonwealth or the recipient State which can be enforced *inter se*. The second is whether a section 96 law confers any right or interest on third parties designated as ultimate recipients of the grant which can legally be enforced.

63 *Commonwealth v. Colonial Ammunition Company* (1924) 34 C.L.R. 198, 224-5; *Australian Assistance Plan* case (1975) 134 C.L.R. 338, 396 (Mason J.); 385 (Stephen J.); 411 (Jacobs J.).

64 See Saunders, 'Parliamentary Appropriation' *op. cit.* 24-34.

65 But *cf.* Mason J. in *Attorney-General (Vic.); ex rel. Black v. Commonwealth* (*D.O.G.S.* case) (1981) 146 C.L.R. 559, 618 who referred to the distinction and suggested that perhaps 'a similar comment may be made about the purpose of laws made under s. 96'.

66 S. 51(31) provides for '[t]he acquisition of property on just terms . . . for any purpose in respect of which the Parliament has power to make laws'.

67 'trade, commerce and intercourse among the States . . . shall be absolutely free'.

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

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

70 The power to legislate with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament . . .'

Financial assistance to any State

In contrast to the precision of the reference to the Commonwealth Parliament in section 96 the potential recipient of financial assistance is described simply as 'any State'. Again, section 94 was the obvious model.[71] Again also, the parallel proves unhelpful. The action under section 94 is all one-sided. Although it assumes that a State will ultimately receive its share of the surplus revenue, the role of the State is essentially passive. Any moneys made available under section 94 would be received and dealt with in the same way as any other State revenues.

The reference to any State in section 96 might be interpreted in one of three ways. First, it might refer to the government of a State. The consensual nature of a section 96 grant would provide some support for this interpretation. Otherwise, however, it is unconvincing. The system of responsible government established by State Constitutions which in turn are preserved by section 106 relies on parliamentary control of financial resources. It would be significantly undermined by a Commonwealth constitutional provision which authorized payments of financial assistance to a State government alone.

Secondly, section 96 might be interpreted to refer to the Parliaments of the States, thus avoiding the objections based on responsible government. Interpreted in this way, the section would provide the basis for a system which would satisfy the interests of both a State Government and a State Parliament in a decision to accept a grant of financial assistance from the Commonwealth. The involvement of the State Parliament as a principal in a quasi-contractual arrangement of this kind would be, however, as unusual as the involvement of the Commonwealth Parliament. For this reason, section 96 should not be interpreted to compel the involvement of State Parliaments in the absence of an express requirement to that effect.

Finally, the reference to a State in section 96 might be interpreted to depend on the constitutional rules of the State concerned.[72] On this view it would be open to each State, in its Constitution or elsewhere, to prescribe how and by whom grants from the Commonwealth were to be accepted.[73] This approach has the merit of being consistent with constitutional principle without reading into section 96 requirements for which there is little warrant in the text. It also would provide for flexibility in the arrangements for the acceptance and receipt of grants which each State puts into place.

It should be noted, however, that the arrangements which a State made in this regard might affect any Commonwealth power to enforce grant conditions. In particular, a requirement that grants be credited directly to the Consolidated Fund

71 'The Parliament may provide . . . for the monthly payment to the several States of all surplus revenue . . .'

72 Some support for this approach is provided by s. 112 of the Commonwealth Constitution which confers on 'a State' limited power to levy charges on imports or exports. The nature of the function and the terminology make it fairly clear that the power is expected to be exercised by the State Parliaments but this result in fact follows from State Constitutions and constitutional practice.

73 All State Constitutions have provisions which could be construed to deal with this matter. For the most part, however, they were not specifically designed to cover s. 96 grants and are ambiguous for that reason. See for example, Constitution Act 1975 (Vic.) s. 89: '. . . all . . . revenues of the Crown in right of the State of Victoria . . . which the Parliament has power to appropriate shall form one Consolidated Revenue . . .'

and be subject to appropriation by the State Parliament might inhibit Commonwealth power to enforce compliance with a condition that a grant be repaid if certain events took place. Whether it would do so depends in part on the relationship of section 96 with section 106.[74] The operation of section 109 in relation to grant legislation also is relevant. The question whether grant conditions are legally enforceable even in the absence of these problems is unresolved.

Concluding comment

Fundamental as these problems are, they have not yet directly been considered by the High Court. While the questions to which they give rise can be canvassed, therefore, no final, authoritative answers can be given. The situation is unlikely to last. The increasing range and complexity of grants arrangements and heightened concern with the accountability and efficiency of government at both the Commonwealth and the State levels call for new techniques for the structure and management of grant programs. One impediment to their development so far has been uncertainty about the constitutional framework within which grant arrangements are made. Eventually however, they will be put in place, whether the legal framework exists or not. If the framework does not exist it will have to be constructed on the run, with results that are likely to be less than satisfactory.

Narrower questions concerning the interpretation of section 96 have, however, come before the Court for decision. Some of them form part of the broader issues outlined above. They are the validity of the determination of the terms and conditions of financial assistance by the government rather than by the Parliament; the meaning of 'financial assistance', including the use of States as conduits to pass Commonwealth moneys to third parties; the relationship of an exercise of power under section 96 to constitutional guarantees, and in particular to sections 51(2), 99 and 116; and the type of terms and conditions that can be attached to financial assistance. It is generally assumed that these questions are largely settled.

The remainder of Part I of this article will examine these cases, to see what has been decided, on what basis and with what result. They are relevant not only for the conclusions which they reach on the issues in dispute but also because their reasoning may throw at least some light on answers to the more fundamental problems of section 96. Part II will explore in greater detail the pressures for a coherent framework for grants arrangements. A possible framework will be suggested, in the light of any guidance provided by judicial decisions, the constraints of constitutional principle, and comparative grant law.

4. *JUDICIAL INTERPRETATION*

There have been only five major High Court decisions on section 96.[75] Four other decisions have involved agreements under which Commonwealth funding

[74] *Supra* n.55.

[75] *Victoria v. Commonwealth* (*Roads* case) (1926) 38 C.L.R. 399; *Deputy Federal Commissioner of Taxation (NSW) v. W. R. Moran* (1939) 61 C.L.R. 735 (H.C.), appealed to Privy Council as *Moran v. Deputy Federal Commissioner of Taxation* (1940) 63 C.L.R. 338; *South Australia v. Commonwealth* (*First Uniform Tax* case) (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (*Second*

has been made available to the States for purposes which arguably would fall within other heads of Commonwealth power.[76] These cannot unambiguously be treated as section 96 cases[77] although undoubtedly both the legislative schemes and the judicial decisions themselves assume the relevance of section 96 to a degree.[78] The analysis of the judicial interpretation of section 96 which follows will concentrate on the former using the latter only as a supplementary source. First, however, an outline of the circumstances of each of the five cases is necessary.

The Federal Aid Roads Act 1926 (Cth), which was the subject of the challenge in the *Roads* case,[79] was the first use of section 96 for a specific purpose. It authorized the execution of agreements between the Commonwealth and the States in the form set out in a schedule and appropriated moneys for the purpose of the Agreement. The Agreement itself, which was expressed to require ratification by both the Commonwealth and State Parliaments, prescribed in detail[80] arrangements for the approval of projects, the types of project that would be eligible for funding and the future obligations of the States in relation to work on which Commonwealth money had been spent. Significant discretionary powers were conferred on the Commonwealth Minister. The plaintiff State of Victoria sought declarations that the Act and the Agreement were ultra vires and that the moneys appropriated by the Act constituted surplus revenue within the meaning of the Surplus Revenue Act 1910 and section 94 of the Constitution. The action was dismissed *per curiam*, in a judgment three sentences long.

Moran's case [81] involved a co-operative scheme under which the proceeds of a Commonwealth levy on flour were paid to the mainland States under section 96 for distribution to wheatgrowers. In recognition of the special position of Tasmania, in which little wheat was actually grown, a special grant to that State was authorized, of an amount determined by the Commonwealth Minister within a maximum statutory limit. The Flour Tax Relief Act 1938 (Tas.) provided for these moneys to be credited to a trust account from which payments were to be

Uniform Tax case) (1957) 99 C.L.R. 575; *Attorney-General for Victoria (ex rel. Black) v. Commonwealth (D.O.G.S.* case) (1981) 146 C.L.R. 559.

[76] *P. J. Magennis v. Commonwealth* (1949) 80 C.L.R. 382; *Pye v. Renshaw* (1951) 84 C.L.R. 58; *Gilbert v. Western Australia* (1962) 107 C.L.R. 494; *South Australia v. Commonwealth* (*Railway Standardization* case) (1962) 108 C.L.R. 130.

[77] *Magennis*, *Pye* and *Gilbert* involved war service settlement schemes which arguably attracted the defence power. *South Australia v. Commonwealth* dealt with a railway construction agreement which could have been based on ss 51(34) and 122.

[78] The agreement in *Magennis* needed to rely on s. 96 only insofar as it extended to 'eligible persons' who were not discharged soldiers: (1949) 80 C.L.R. 382, 429, *per* Webb J. *Cf.* Dixon J., who upheld the Act as legislation with respect to a matter incidental to the execution of a power vested by the Constitution in the Government, under s. 51(39); 80 C.L.R. 382, 410-11. The reconstruction of the scheme following *Magennis*, which was considered in both *Pye* and *Gilbert*, was more obviously designed to attract s. 96. Presumably this would not affect the relevance of the defence power, however. The *Railway Standardization* case at best involved the future provision of financial assistance and has the least connection with s. 96.

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

[80] For example, cl. 7(1): 'Where a road being constructed . . . under this Agreement passes through a town whose population . . . does not exceed Five Thousand . . . persons such road may be constructed thorugh the town . . . as if the town did not exist. Provided that the width of any road constructed . . . through a town pursuant to this clause shall not except with the approval in writing of the Minister exceed twenty feet.'

[81] *Deputy Federal Commissioner of Taxation (NSW) v. W. R. Moran* (1939) 61 C.L.R. 735 (H.C.); (1940) 63 C.L.R. 338.

made to persons in Tasmania who had paid the flour tax and who applied for relief.[82] The practical effect was to exempt Tasmanian millers from payment of the Commonwealth tax, a result which could not have been achieved directly in view of the prohibition against use of the Commonwealth power to tax 'to discriminate between States.'[83] The invalidity of the Commonwealth legislation was raised by W. R. Moran, a New South Wales miller, in defence to a suit seeking payment of the tax. The argument was rejected by the Court, Evatt J. dissenting strongly, and judgment entered for the Commissioner of Taxation. An appeal to the Privy Council was dismissed, with a caution.[84]

The two *Uniform Tax* cases[85] involved challenges to a legislative scheme whereby the Commonwealth assumed sole control over the imposition and collection of income tax. An integral part of the scheme was an Act granting financial assistance to the States by way of reimbursement for the amounts they might have raised from a State income tax. The States Grants (Income Tax Reimbursement) Act 1942 (Cth) which was in issue in the first case set out in a schedule the amount payable to each State in every year 'in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes.' By 1957, when the second case was heard, this part of the scheme was more elaborate. Section 5 of the States Grants (Tax Reimbursement) Act 1946-48 (Cth), like the earlier Act, provided that a grant was payable in any year in which the Treasurer was satisfied that the State had not imposed a tax upon incomes. The amounts payable for 1947 and 1948 were specified in the Act, and a statutory formula provided for calculating them thereafter. In addition, however, section 11 empowered the Treasurer to make advances to a State of any amount to which it appeared it would be entitled, on condition that the State did not impose a tax on incomes in respect of that year. Under section 11(2), if the Treasurer gave notice in writing to the State Treasurer that he was not satisfied that the State had not imposed an income tax 'the advances shall be repayable and shall be a debt due by the State to the Commonwealth.'

The validity of the entire scheme, including the States Grants Act, was unwisely[86] challenged by the State of South Australia immediately after its enactment in the *First Uniform Tax* case. The challenge failed, Starke J. dissenting on the validity of the States Grants Act. The Grants Act component of the scheme was challenged again, also unsuccessfully, by the State of Victoria in the *Second Uniform Tax* case.

Finally, the *D.O.G.S.* case[87] involved a challenge to the validity of various

82 The way in which this was done is described in detail in the judgment of Evatt J.: (1939) 61 C.L.R. 735, 787-8. Where the tax was paid over the counter, for example, 'the Commonwealth tax officials advised the taxpayers as and when they paid, that they should apply for refunds to the Tasmanian officials.'

83 S. 51(2).

84 (1940) 63 C.L.R. 338, 350. The caution is described below.

85 *South Australia v. Commonwealth* (*First Uniform Tax* case) (1942) 65 C.L.R. 373; *Victoria v. Commonwealth* (*Second Uniform Tax* case) (1957) 99 C.L.R. 575.

86 The Acts received assent the day after the battle of Medway Island ended. Even if the circumstance of the war had exercised no influence over the Court's attitude to the validity of the scheme by reference to the full range of powers, including s. 96, on which it ostensibly relied, it would have been likely at this time to have been upheld by reference to the defence power.

87 *Attorney-General for Victoria (ex rel. Black) v. Commonwealth* (1981) 146 C.L.R. 559.

States Grants Acts providing financial assistance to the States for payment to non-government schools.[88] The purposes of the grants were specified in detail. A range of significant discretions to approve projects and determine amounts payable was conferred on the Commonwealth Minister or on members of the Schools' Commission as the Minister's delegates. Additional conditions attached to the moneys in the hands of a State were that the State would pay the amount in question to the school 'without undue delay'; describe the amount paid as having been provided by the Commonwealth; withhold payment unless the school had agreed with the State to be bound by certain conditions; and repay to the Commonwealth such amounts as the Minister determined in the event that a condition was not met by the State.

The challenge was brought by the Attorney-General for Victoria on the relation of various private citizens, some of whom were members of the association for the Defence of Government Schools. The plaintiffs sought declarations that the Acts were invalid and injunctions restraining the defendant Commonwealth Ministers from applying the Consolidated Revenue Fund for the purposes of the Acts. The action was dismissed, Murphy J. dissenting.

Determination of the terms and conditions

The first issue, which the Court has considered on several occasions, is whether an Act which delegates authority to the executive to determine terms and conditions of a grant of financial assistance is a valid exercise of power under section 96. The question was raised initially and most clearly in the *Roads* case where the Agreement, somewhat oddly in view of the elaborate nature of its other provisions, conferred power on the Minister to make payments 'subject to such conditions as the Minister may from time to time determine'.[89] The validity of the provision was challenged by Counsel for the State of Victoria, Robert Menzies, on the ground that the terms and conditions of a grant 'must be imposed by . . . the Parliament itself and not . . . fixed by executive authority'.[90] The question was not canvassed at all in the judgment, however, which dismissed all objections to the validity of the Act with the general observation that it was 'plainly warranted by the provisions of s. 96'.[91]

The argument in the *Roads* case did not ostensibly rely on the doctrine of separation of powers. *Dignan's* case,[92] in which the Court ultimately accepted that the Constitution establishes a three-way separation of powers, would not be decided for another five years. *Dignan* also held, however, that the separation of powers did not preclude extensive delegation of legislative power to the executive. In reaching that conclusion, the Court was expressly influenced by several earlier cases in which the opportunity had existed to object to a statutory delegation of power on the ground that it infringed the separation of powers, but had not

88 The States Grants (Schools Assistance) Act 1978 (Cth) was the most recent and was used for the purpose of analysis in the judgment of Wilson J., on which the rest of the Court relied in this respect.
89 Cl. 2(3).
90 (1926) 38 C.L.R. 399, 405.
91 (1926) 38 C.L.R. 406.
92 *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73.

been taken.[93] The *Roads* case was not amongst them. The failure of the Court in *Dignan's* case to mention the *Roads* case is a further manifestation of the tendency to isolate section 96 from the mainstream of constitutional theory.

The issue was raised again in argument in both *Moran* and the *First Uniform Tax* case, although with less justification: in both cases the power conferred on the Minister was relatively confined, constituting rather a discretion to be exercised within the limits of a framework prescribed by Parliament than part of the power itself which section 96 conferred on the Parliament.[94] The Acts nevertheless were challenged as an unconstitutional delegation of legislative power. The challenges were dismissed. Latham C.J. with whom the other majority justices agreed on this point[95] based his conclusion largely on the principle of *Dignan's* case:

> Parliament does fix the terms and conditions of the grant if, by legislation, it authorizes a Minister to determine such terms and conditions. It is too late now to argue that terms and conditions determined by a Minister under such legislation are not determined by the Parliament.[96]

He relied also on the *Roads* case which, he said, was 'conclusive against the defendant upon this point'.

Latham C.J. and Williams J. were the only two justices to deal with the delegation argument in the *First Uniform Tax* case. Williams J. described it as a 'faint objection'. Both he and Latham C.J. dismissed it out of hand,[97] citing by way of authority the judgment of the latter in *Moran's* case.

None of the decided cases has raised in its starkest form the issue of the extent to which Parliament can delegate to the executive power to attach terms and conditions to a grant of financial assistance under section 96.[98] Nor has the issue been examined in any depth by the Court. Nevertheless, it must be taken as settled that the terms and conditions of the financial assistance need not be fixed by the Parliament itself but that the power may be delegated. This result has been reached by analogy with cases in which it has been held that the Parliament can delegate its other legislative powers. It is justified on the same basis namely, the theoretical retention of parliamentary control over the exercise of delegated power under a parliamentary system of government.[99] By implication, therefore, the mechanisms which the Parliament has adopted[1] to give practical effect to its

[93] *E.g. Baxter v. Ah Way* (1909) 8 C.L.R. 626. *Cf. Roche v. Kronheimer* (1921) 29 C.L.R. 329 which was accepted as having decided that the legislature could delegate power to the executive although 'it might well be thought that no infringement of such a rule had been attempted by the enactment then in question' (1931) 46 C.L.R. 73, 99, *per* Dixon J.

[94] A detailed description of the powers under the respective Acts can be found in (1939) 61 C.L.R. 735, 762; (1942) 65 C.L.R. 373, 415. The distinction described here is similar to that drawn by Dixon J. in *Roche v. Kronheimer*, *supra* n. 93.

[95] (1939) 61 C.L.R. 735, 763. Rich and McTiernan JJ. concurred. The reasons of Starke J. were similar: at 770.

[96] (1939) 61 C.L.R. 735, 763.

[97] (1942) 65 C.L.R. 373, 416 (Latham C.J.), 464 (Williams J.).

[98] Compare the blanket authorization to attach terms and conditions to the 31 items listed in Schedule 2 in Appropriation Act (No. 2) 1986-87, s. 5.

[99] Articulated most confidently by Dixon J. in *Dignan's* case: (1931) 46 C.L.R. 73, 101-2.

[1] The provisions for tabling and disallowance by either House in the Acts Interpretation Act 1901 (Cth) ss. 48, 49; and regular scrutiny by the Senate Standing Committee on Regulations and Ordinances.

theoretical control should apply to delegations of power under section 96. At present this is not the case.[2]

The cases have not addressed the more difficult question whether the executive can impose conditions on a grant of financial assistance without or in excess of parliamentary authority. In any other context such action on the part of the executive would be void. *Prima facie* there is no reason why the same rule should not apply to section 96. The position is complicated, however, by uncertainty about whether the terms and conditions attached to a grant have legal effect in any event. The obvious parallels between a section 96 grant and an Appropriation Act also make it unclear whether there are any circumstances in which a State could claim to receive financial assistance granted to it by the Parliament free from unauthorized conditions imposed by the executive. The question therefore cannot be dealt with in isolation from the discussion of the nature of section 96 laws. It should be noted at this point, however, that Latham C.J. appeared to assume in the *First Uniform Tax* case that executive action of this kind would have at least practical effect. In a frequently quoted passage from his judgment he suggested that:

> If the Commonwealth Parliament, in a grants Act, simply provided for the payment of moneys to States, without attaching any conditions whatever, none of the legislation could be challenged by any of the arguments submitted to the Court in these cases. The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States, no reference being made to such matters in any Commonwealth statute. Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth.[3]

The passage sits somewhat oddly with his justification for the delegation of power under section 96 in *Moran's* case and the *First Uniform Tax* case itself.

Financial assistance

A second aspect of section 96 which has been the subject of repeated consideration by the Court is whether the reference to 'financial assistance' governs the circumstances in which a grant can be made. Three views have been advanced. The first emphasizes the word 'assistance' to conclude that the section can be used only where a State has a need for which a grant of moneys will provide genuine relief. This view would preclude 'a system of standing grants to which there is a right on performance of a consideration with a predetermined uniform formula irrespective of the current need of a State . . .'[4]

At the other extreme, it has been argued that need is irrelevant and that the 'mere handing over of money' satisfies the terms of the section.[5] This view attributes little significance to the reference to 'assistance' treating the phrase as a synonym for 'money' or 'moneys worth'.

[2] The current practice is examined in greater detail in Part II of this paper. For present purposes it is relevant to note the vast range of other instruments which are subject to disallowance, in Senate Standing Committee on Regulations and Ordinances, *Eightieth Report*, Appendix 3.

[3] (1942) 65 C.L.R. 373, 429.

[4] Argument of Sir Garfield Barwick Q.C., Counsel for Victoria, in the *Second Uniform Tax* case (1957) 99 C.L.R. 575, 585.

[5] P. D. Phillips Q.C. put this argument, as counsel for the Commonwealth, in the *Second Uniform Tax* case (1957) 99 C.L.R. 575, 594.

A broad intermediate position accepts the relevance of need but recognizes a range of ways in which need might be demonstrated, producing vastly different results. A requirement of need would not constitute much of a limitation on section 96, for example, if it were presumed from the acceptance of a grant by a State. A requirement for more active involvement on the part of the State, or even of evidence that the State initially sought financial assistance, would be far more constraining. There is a connection here with the proposition, discussed below, that acceptance of a grant by a State is voluntary. It would be more difficult to conclude that acceptance was evidence of need if acceptance itself were not a voluntary act.

The *Uniform Tax* cases raised the issue in an extreme form: whether a grant subject to a condition which itself created the need which the grant was designed to meet was a valid exercise of section 96. It was complicated by the fact that the need was created not just by the Grants Acts but by the other Acts in the scheme which, at least in 1942, would have precluded the States from raising adequate revenue through their own income tax whether the Grants Act had been subject to this condition or not.

In the *First Uniform Tax* case both Latham C.J. with whom Rich J. agreed, and McTiernan J., chose to deal with the argument on the basis that the need for financial assistance was created by the other Acts in the scheme and relieved by the Grants Act in a valid exercise of section 96. Latham C.J. observed that 'the need for financial assistance to States not infrequently results from Commonwealth policy',[6] while for McTiernan J. it was 'in truth and in fact made to relieve a disability arising from the incorporation of the State in the Commonwealth . . . to reimburse the State for the loss of revenue which it has not been expedient to collect because of the circumstances flowing from the operation of valid Commonwealth law'.[7] Williams J., on the other hand, accepted that the condition itself created the need. He held the Act valid in any event, apparently on the basis of a more general principle that the Commonwealth could, in the national interest, seek to dissuade the States from raising revenue from a particular source and compensate them for any loss caused by their co-operation.[8] Starke J. also took the view that the condition created the need, but differed from Williams J. in his analysis of the scheme and thus reached the opposite result. The notion of the voluntary co-operation of the States in the uniform tax scheme in his view was 'specious but unreal'.[9] It is not clear whether he would have upheld the arrangement had it been the result of genuine co-operation on the part of the States.

All the judgments in the *First Uniform Tax* case accepted the relevance of need on the part of the States. By contrast, those justices who dealt with the point in the *Second Uniform Tax* case attached no significance to need at all. Dixon C.J. discussed the point at greatest length,[10] in the context of a general analysis of

6 (1942) 65 C.L.R. 373, 413.
7 *Ibid.* 455.
8 *Ibid.* 463-4.
9 *Ibid.* 443.
10 (1957) 99 C.L.R. 575, 607-10. Kitto and Taylor JJ. agreed. See also McTiernan J., at 623 and Williams J., at 630.

section 96. While the power might have been conceived by the framers as 'confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose' the course of decisions on section 96 now precluded that interpretation. He took *Moran's* case in particular to have concluded the point of which he clearly, however, was not personally persuaded.[11] Later in his judgment he used the term 'grant of money' interchangeably with 'financial assistance'.[12] Neither he nor the other justices expressly acknowledged the significant shift in judicial opinion on this issue between the two uniform tax cases.

The uniform tax scheme raised the significance of 'financial assistance' in a relatively unusual guise. It is raised more obviously under schemes where the State apparently is used solely as a conduit for a grant from the Commonwealth to some other recipient. The two cases in which schemes of this type were in issue were *Moran's* case and the *D.O.G.S.* case. The former in particular provided a stark example: the grant there was expected to be passed on either to wheatgrowers or to millers and in no sense was a direct subvention to the State Treasury.[13]

The issue was complicated in *Moran*, however, by the obvious co-operative nature of the scheme for which, apparently, the initiative originally came from the States.[14] There was a sense, moreover, in which the assumptions on which the scheme rested might have justified its description as financial assistance to a State.[15] Although the Commonwealth legislation in fact taxed all flour on the same basis it was perceived to operate unfairly in Tasmania where there were fewer wheatgrowers to benefit from the scheme. The grant to Tasmania in the expectation that Tasmanian millers would be reimbursed was defended against the charge of discrimination by a majority of the High Court justices and by the Privy Council on the ground that its purpose was to 'adjust inequalities',[16] although from the standpoint of the taxpayers, as opposed to the State of Tasmania, the result clearly was to create inequality.

Possibly for these reasons, the objection to this use of a State as a conduit was barely discussed in the judgments at all. The only justice to deal with the point expressly was Evatt J., for whom it was part of a wider argument that the scheme was unconstitutional.[17] While it may be assumed from the result, therefore, that the majority in *Moran's* case did not accept the conduit argument, it is impossible to say why. In these circumstances, Dixon C.J.'s apparently reluctant reliance on *Moran* in the *Second Uniform Tax* case is hard to understand.[18] Nor is the decision of the Privy Council of any assistance in this regard. Although the

[11] 'I should myself find it difficult to accept this doctrine in full and carry it into logical effect . . .' (1957) 99 C.L.R. 575, 607.

[12] *Ibid.* 610.

[13] See the description and analysis by Evatt J.: (1939) 61 C.L.R. 735, 785-6.

[14] See the argument by Weston K.C., Counsel for the States of New South Wales, Victoria and South Australia, intervening on the side of the Deputy Federal Commissioner of Taxation: *Ibid.* 747.

[15] *Cf.* Dixon C.J. in the *Second Uniform Tax* case (1957) 99 C.L.R. 575, 607.

[16] (1939) 61 C.L.R. 735, 763, *per* Latham C.J.

[17] *Ibid.* 785-6. Notably, Evatt J. also disagreed on the nature of the discrimination prohibited by the Constitution. He identified the practical effect of the scheme as discriminating between taxpayers solely by reference to their connection with a particular State: 778.

[18] (1957) 99 C.L.R. 575, 607.

point is not dwelt on at any length, their Lordships concluded their judgment with the observation that:

> there seems to be no valid ground for suggesting that the sums payable to the Government of Tasmania . . . are not in the nature of genuine financial assistance to the State, paid for the purpose of equalizing the burden on the inhabitants of Tasmania . . .[19]

The grants for schools which were challenged in the *D.O.G.S.* case also were susceptible to the conduit argument; probably to a greater degree than was recognized by the Court.[20] The argument was rejected, on grounds that were equivocal. The plaintiffs had sought to distinguish *Moran* as a scheme initiated by the States themselves, involving State co-operation and active participation. No justice accepted the distinction although several gave the impression that they might not be unwilling to reconsider *Moran* on a future occasion.[21] Barwick C.J., and Stephen and Wilson JJ. noted that, as education was a constitutional responsibility of the States, the grants in this case inevitably would constitute financial assistance in any event.[22] Gibbs and Mason JJ., with whom Aickin J. agreed, accepted the use of the States as conduits under section 96, although the former did so on the ground that acceptance of the grant by a State was acknowledgement of need.[23] Murphy J. dismissed the argument without elaboration, citing *Moran*.[24]

The result on the conduit point may be summarized as follows. An objection to a section 96 grant on the ground that it does not constitute financial assistance to a State has never been sustained by the Court. The opportunity to do so has arisen at least twice in cases which were compelling, although not overwhelmingly so. Judicial opinion apparently is divided between unqualified acceptance of the use of the States as conduits under section 96 and the requirement that a grant satisfy the description of financial assistance to a State even if that is demonstrated solely by its acceptance. This last interpretation, represented by the judgment of Gibbs J. in the *D.O.G.S.* case[25] constitutes the middle ground and possibly the present law. While it holds sway, it is unlikely that the conduit argument will be accepted by the court. The logical connection between this doctrine and the assumed voluntary nature of a section 96 law should be reiterated however. The point also should be made that the conclusion that a grant constitutes financial assistance when it is accepted by a State enhances the significance of the latter function.

Section 96 and other constitutional provisions

The relationship of section 96 with other constitutional provisions is the third issue to have arisen with some regularity before the Court. The responses of the Court have not been entirely consistent. At least one question is settled and may

[19] (1940) 63 C.L.R. 338, 350.

[20] The 1979-80 *Report of the Auditor-General* describes the relevant arrangement between the Commonwealth and from States as follows: '. . . the Commonwealth makes grants to the States and the 4 States then pay the grants to special State Government bank accounts. Payment to individual schools or school systems are then made from the bank account by Commonwealth officers who are appointed to do so by States': p. 52

[21] (1981) 146 C.L.R. 559, 591 (Gibbs J.); 611 (Stephen J.); 659 (Wilson J.)

[22] *Ibid.* 584-5, 611-2, 660.

[23] *Ibid.* 592, 619.

[24] *Ibid.* 620.

[25] *Ibid.* 592.

be disposed of at once, however. It is no objection to the validity of a section 96 grant that the conditions relate to purposes outside Commonwealth power. This proposition is taken to have been established by the *Roads* case and has been accepted ever since.[26] A more difficult question is the relationship between section 96 and constitutional guarantees or prohibitions, express or implied. It is convenient to begin with the express prohibitions, to which the Court has taken a more stringent approach.

Counsel for the State of New South Wales, intervening on the side of Victoria in the *Roads* case, argued that the Federal Aid Roads Act constituted a preference of a kind prohibited by section 99 of the Constitution,[27] because if the agreement were accepted by only one State 'there would then be so much less surplus revenue to be divided among the States'. Although predictable, the argument was not a strong one. It was rejected by the Court in the brief but sweeping statement that the Act was 'not affected by . . . sec. 99 or any other provisions of the Constitution'.[28]

The statement in the *Roads* case has been interpreted literally on occasion, to mean that section 96 grants are not, as a general proposition, affected by any other provisions of the Constitution at all, including section 99.[29] It is clear, however, that this interpretation is unwarranted. The remarks in the *Roads* case necessarily were tailored to the particular circumstance of the Federal Aid Roads Act. In any event, it has since been held that an exercise of power under section 96 can be affected by section 116[30] and, possibly, by section 51(31).[31] It therefore can be accepted that a section 96 grant is subject to some other provisions of the Constitution. It might be noted that the possibility that section 96 might be 'subject to this Constitution' by virtue of the link with section 51(36) has played no part in this analysis. On the contrary, the Privy Council in *Moran's* case found it 'more plausible' that section 51 was subject to section 96.[32] The decision that section 96 grants could be affected by section 116 was reached in the *D.O.G.S.* case on a literal construction of the reference in section 116 to 'any law'.[33] The point was not discussed at all in *Magennis*, possibly because of the ambiguous character of the Act as an exercise of section 96.

The influence of the *Roads* case has lingered in the acceptance of the proposition that section 96 is not subject to section 99.[34] This result necessarily involves

[26] *Second Uniform Tax* case (1957) 99 C.L.R. 575, 606, *per* Dixon C.J.; *D.O.G.S.* case (1981) 146 C.L.R. 559, 650, *per* Wilson J.

[27] 'The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State . . . over another State . . .'. The argument is summarized at (1926) 38 C.L.R. 399, 406.

[28] *Ibid.*

[29] *Moran's* case (1939) 61 C.L.R. 735, 771, *per* Starke J.; *D.O.G.S.* case (1981) 146 C.L.R. 559, 593, *per* Gibbs J. *Cf.* Wilson J., clearly sceptical of this interpretation, *ibid.* 649-50.

[30] *Attorney-General (Vic.); ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559.

[31] *P. J. Magennis Pty Ltd v. Commonwealth* (1949) 80 C.L.R. 382. The Act could be characterized also as an exercise of the defence power s. 51(6) (*per* Webb J. at 429) or the incidental power s. 51(39) (*per* Dixon J. at 410).

[32] (1940) 63 C.L.R. 338, 346-7.

[33] 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion . . .'

[34] *Moran's* case (1939) 61 C.L.R. 735, 764 (Latham C.J.), 775 (Starke J.); (1940) 63 C.L.R. 338, 348-9; *First Uniform Tax* case (1942) 65 C.L.R. 373, 426 (Latham C.J.); 451 (McTiernan J.); 464 (Williams J.); *D.O.G.S.* case (1981) 146 C.L.R. 559, 593 (Gibbs J.), 650 (Wilson J.).

a conclusion that a section 96 grant is not a 'law of revenue' within the meaning of section 99. The argument is rarely placed directly on that basis, however.[35] Rather, it has proceeded since *Moran's* case on the assumption that, by its reference to 'any State', section 96 expressly contemplates preference and that therefore it could not be subject to section 99. The logic of this argument does not overcome the problem of interpreting the word 'revenue' in section 99 to exclude Grants Acts. It does, however, provide further evidence of the incompatability of section 96 with the rest of the constitutional scheme.

The theory that section 96 grants may be affected by other constitutional provisions is difficult to apply in practice for reasons which again are connected with the unusual nature of an exercise of power under section 96. The problem lies in the characterization of a law which does no more than offer a grant on conditions which may or may not be accepted, as a law which offends against a constitutional injunction. The problem would be compounded if compliance with the conditions were as voluntary as acceptance of the grant, in the sense of being unenforceable; a question which is not yet settled.[36]

The High Court has twice acknowledged the effect of a constitutional guarantee on a section 96 grant. On both occasions the guarantee has operated by reference to the purpose of a law. Thus section 116 prohibits laws 'for establishing' religion. Section 51(31) requires a law with respect to the acquisition of property, including a law the purpose of which is to acquire property, to make provision for 'just terms'. It is easier to identify a section 96 Grants Act as having a particular purpose, whether that purpose in fact is achieved or not,[37] than as, for example, constituting a preference to a State contrary to section 99 or burdening inter-State trade contrary to section 92.[38] In this sense the case law still provides only a partial answer to the question of the relationship between section 96 and other constitutional provisions as a whole.

Even under the purposive approach, it may be difficult to establish that a Grants Act has the requisite purpose.[39] The difficulty is greater where the conditions are left to the general discretion of the executive, and may be insuperable where the existence of conditions is not mentioned in the Act at all.[40] While on

35 But *cf.* McTiernan J. in the *First Uniform Tax* case (1942) 65 C.L.R. 373, 451.

36 It will be examined in Part II.

37 This point was made expressly by Wilson J. in the *D.O.G.S.* case (1981) 146 C.L.R. 559, 650: 'The salient feature, for present purposes, of a s. 96 law is that through the exercise of the power to impose conditions to a grant of financial assistance the Commonwealth Parliament may pursue a particular purpose. It is not to the point that a State may refuse to accept the assistance because it is unwilling to comply with the conditions. The fact that the law may fail of its purpose does not deny the characterisation of the law in terms of that purpose.'

38 A grant on condition that a State infringe s. 92 probably would be ineffective for reasons connected with the validity of the conditions, if not the characterization of the Act.

39 The problem of proof is expressly recognized by Mason J. in the *D.O.G.S.* case (1981) 146 C.L.R. 559, 618.

40 The war service land settlement scheme was restructured after *Magennis* to achieve just this result. See the very explicit description of the arrangements made to avoid 'the legal impediments created by the decision of this Court' in *Gilbert v. Western Australia* (1962) 107 C.L.R. 494, 505. They included the provision of financial assistance 'by direct grant to the States pursuant to s. 96 of the Constitution — the grants to be for the purposes of war service land settlement, and to be on such conditions as the Commonwealth Minister for the Interior should determine'. A letter from the Prime Minister was quoted, in which he expressed his wish 'to avoid, for constitutional reasons . . . any arrangement of a formal character . . .'

one view this may constitute an argument against including conditions in a Grants Act, deliberate avoidance of constitutional provisions in this way is questionable, to say the least, from the standpoint of public policy. Its feasibility underscores the need to settle the question of the role of the Commonwealth Parliament under section 96 and the status of conditions attached to a grant both with and without parliamentary authority.

The device outlined above is designed to avoid characterization of the Grants Act itself as an Act for a purpose prescribed by the Constitution. In practice it can be effective only with the co-operation of the States. Limitations on other Commonwealth powers also can be circumvented, however, through intergovernmental co-operation involving the use of section 96 grants. The issue of the validity of a Grants Act in these circumstances is part of a broader question of the extent to which intergovernmental co-operation should be accepted by the Court as effective to avoid constitutional limitations.

Moran's case was an example of the use of such a scheme. The practical effect of the wheat industry assistance arrangements was to avoid the requirement in section 51(2) of the Constitution that Commonwealth taxation not discriminate between States.[41] Argument on this point centred around section 14 of the Wheat Industry Assistance Act 1938 (Cth) which authorized the payment to Tasmania of amounts determined by the Commonwealth Minister within maximum limits referable to the amount of the flour tax collected in the State. There was no statutory condition that the moneys be used to reimburse Tasmanian millers.[42] It was in fact used for that purpose under the Flour Tax Relief Act 1938 (Tas.), passed contemporaneously with the Commonwealth Act. There was however a power in section 10(b) of the Commonwealth Act for payments to a State to be suspended where the Governor-General was satisfied that a State had not taken adequate steps to protect consumers of flour against excessive prices.

Considered in isolation, the Flour Tax Acts imposed the tax uniformly throughout Australia and were unobjectionable. The defence could succeed therefore only if it could establish that the Assistance Act was invalid and that the Tax Acts were invalid in consequence; or that the scheme could be impugned as a whole. In the High Court, only Evatt J. was persuaded. In his view, section 14 of the Wheat Industry Assistance Act was an Act with respect to taxation which infringed the constitutional prohibition in section 51(2) and consequently was invalid. He reached this conclusion on the basis of the known connections between the Assistance Act, the Tax Acts and the Tasmanian Flour Relief Act. For present purposes it is relevant to note his denial that the Commonwealth legislature could 'evade overriding constitutional guarantees like that contained in s. 51(ii) by authorizing and requiring the Commonwealth executive to play a vital part in the Commonwealth's plan of taxation discrimination' as was done under section 14.[43] The Act was not saved as a grant of financial assistance

41 There was an argument also that the scheme enabled avoidance of the requirement in s. 51(3) that bounties be uniform, which need not be considered for present purposes.

42 Leading Starke J. to conclude that 'the State is free to deal with the grant free from any control of the Commonwealth'. (1939) 61 C.L.R. 735, 775.

43 *Ibid.* 792.

pursuant to section 96 because 'sec. 96 cannot be employed for the very purpose of nullifying constitutional guarantees elsewhere in the Constitution.'[44] The Assistance Act was not severable from the remaining Commonwealth Acts in the scheme, the whole of which failed.[45]

The majority of the Court rejected the arguments for the defence. Latham C.J. and Starke J. delivered the substantive majority judgments.[46] While acknowledging the existence of the scheme, which was clear on the face of the Acts themselves, their approach nevertheless was to determine the validity of each Act individually by reference to its legal operation. Section 96 was not subject to a prohibition against discrimination; the Assistance Act therefore was valid. To the extent that the scheme resulted in discrimination in taxation it was achieved by the Tasmanian Act alone, which also was not subject to section 51(2). Far from being subject to a prohibition against discrimination, the very purpose of section 96 was to enable adjustment of the inequalities inevitably caused by other constitutional requirements of equal treatment. The result in this particular case in their view was fair,[47] but in any event the remedy for abuse of section 96 was 'political and not legal in character.'[48]

For Starke J. the justification for the scheme lay also in its intergovernmental character:

> Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The Court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the Constitution.[49]

Serious divisions over this use of section 96 thus appeared in *Moran's* case, with the views of Latham C.J. narrowly predominant. The divisions were aggravated, rather than resolved, by the Privy Council on appeal. The Board declared its willingness to consider the scheme as a whole.[50] It agreed with the majority that section 96 was not subject to a guarantee against discrimination, that its purpose was to achieve real 'equality of burden' and that the Assistance Act had just such an effect. On this basis it upheld its validity. Its judgment is sprinkled with cautions, however; in particular its description of the Assistance Act as 'in its purpose and substance unobjectionable' and its warning against the use of section 96 'with a complete disregard of the prohibition contained in s. 51(ii)'.[51] Like Starke J., it also noted the co-operative nature of the scheme. The result is sufficiently equivocal that it might be unwise to assume that comparable schemes would automatically succeed, particularly in view of the greater preparedness of the more recent High Court to consider the substance of challenged laws.[52]

The *Uniform Tax* cases involved the analogous issue of the effect of implied constitutional prohibitions on an exercise of the grants power, either alone or as a

44 *Ibid.* 802.
45 *Ibid.* 806-7.
46 Rich and McTiernan JJ. concurred with Latham C.J.
47 (1939) 61 C.L.R. 735, 756. *Cf.* the diametrically different view of Evatt J. on this point, at 790.
48 *Ibid.* 764.
49 *Ibid.* 774.
50 (1940) 63 C.L.R. 338, 349.
51 *Ibid.*
52 *Hematite v. Victoria* (1982) 151 C.L.R. 599.

component of a legislative scheme. In both cases the plaintiffs argued that the scheme represented an attack on the existence of the States and their capacity to perform an essential function, namely, raising moneys by way of taxation. In both cases an important factor in its rejection was the Court's analysis of a grant of financial assistance under section 96 as non-coercive in nature.[53] It is clear that while this analysis stands a Grants Act is unlikely to be impugned on the ground of federal implications which the Court generally is unwilling to invoke in any event.

Terms and Conditions

The final major aspect of section 96 to have been the subject of judicial decision is the nature of the terms and conditions that may be attached to a grant of financial assistance.

The possibility that terms and conditions might have been limited to the circumstances that called for financial assistance was mentioned by Dixon C.J. in the *Second Uniform Tax* case.[54] Nevertheless, as the Chief Justice also recognized, the course of judicial decisions since federation indicated a very different result. The *Roads* case had accepted that terms and conditions need not be financial in character,[55] and that the Commonwealth could, through use of the grants power, influence in detail the exercise of State legislative power in the expenditure not only of moneys received from the Commonwealth but of revenue raised by the State from its own sources.[56] It was irrelevant that the result achieved was one for which the Commonwealth could not have legislated directly. *Moran's* case added little to the learning on the nature of terms and conditions, although it later was used as negative authority in the form of a proposition that the Court had 'placed no limitation upon the terms and conditions it was competent to the Commonwealth to impose under s. 96.'[57] On one view the *Uniform Tax* cases merely extended the principle that had been accepted with so little deliberation in the *Roads* case to the non-exercise of the taxation power as a condition of a grant.[58] In the words of Dixon C.J.:

> The interpretation flowing from these two decisions . . . is inconsistent with the view that the terms or conditions cannot require the exercise of governmental powers of the State to conform with the desires of the Commonwealth in the exercise of such powers. It seems a short step from this to saying that the condition may stipulate for the exercise or non-exercise of the State's

53 *First Uniform Tax* case (1942) 65 C.L.R. 373, 417, 424, *per* Latham C.J. Starke J. in dissent disputed this analysis as 'specious but unreal' leading him inexorably to the conclusion that the Act was invalid as an attack on the States in a manner contrary to the assumptions on which the Constitution was based: at 422-3. *Second Uniform Tax* case (1957) 99 C.L.R. 575, 609-10, *per* Dixon C.J. The analysis had the additional merit in 1957 of enabling the Court to avoid application of the Melbourne Corporation principle: *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31: see (1957) 99 C.L.R. 575, 610, *per* Dixon C.J.

54 (1957) 99 C.L.R. 575, 609.

55 See the argument by Counsel for Victoria (1926) 38 C.L.R. 399, 405. *Cf.* the argument on behalf of South Australia: 'The terms and conditions referred to . . . are analogous to the terms and conditions of a mortgage which are imposed to secure repayment of a loan.'

56 Federal Aid Roads Agreement 1926, cl. 8.

57 *Second Uniform Tax* case (1957) 99 C.L.R. 575, 607, *per* Dixon C.J.

58 Note however, that the Reimbursement Acts took the form of a grant to States who had not imposed an income tax in the period in question rather than a grant on condition that they refrain from doing so in the future. Only McTiernan J. drew this distinction: *First Uniform Tax* case (1942) 65 C.L.R. 373, 455.

> general legislative power in some particular or specific respect. Once this step is taken it becomes easier to ask than to answer the question — 'Why then does this not apply to the legislative power of imposing this or that form of taxation?'[59]

The conclusion in the *Second Uniform Tax* case was that the decisions of the Court involved 'the entire exclusion of the limited operation' which might have been assigned to section 96 including, presumably, any limitations on the nature of the terms and conditions which might be attached to a grant.[60] Some limitations nevertheless have been suggested by individual justices. Thus in the *Second Uniform Tax* case Williams J., in the context of an expansive description of the scope of section 96, suggested that 'it must include at the very least any terms or conditions with which a State might lawfully comply.'[61] In the same case Fullagar J. stated that if the terms and conditions required State action 'the action must be action of which the State is constitutionally capable.'[62] Neither elaborated their comments; both limitations are, however, potentially significant. In *Moran's* case Evatt J. argued that a condition could not require infringement of constitutional prohibitions.[63] In so far as the constitutional prohibitions apply to the States,[64] this *dictum* would fall within the formulation of Fullagar J. A Grants Act subject to a condition designed to avoid constitutional prohibitions applying only to the Commonwealth raises more the difficult issues discussed earlier. The decision of the Privy Council might provide some support for Evatt J. in this regard.[65]

Finally, the voluntary character of a section 96 grant has provided both a limitation on the conditions which might be imposed and a justification for the conclusion that few limitations can be imposed at all. Its influence in this latter respect has been decisive. Once again, the point can be illustrated by the reflective judgment of Dixon C.J. in the *Second Uniform Tax* case. His analysis of the grants power as financial in character rather than 'a power to make laws with respect to a general subject matter' led him to conclude that:

> Once it is certain that a law which is either valid under s. 96 or not at all does contain a grant of financial assistance to the States, the further inquiry into its validity could not go beyond the admissibility of the terms and conditions that the law may have sought to impose.[66]

The voluntary nature of a Grants Act meant that even the inquiry into the terms and conditions was a formality. Restrictions on terms and conditions:

> 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.[67]

The significance of the converse proposition, that the voluntary nature of a section 96 law limits the nature of the terms and conditions that may be attached

[59] *Second Uniform Tax* case (1957) 99 C.L.R. 575, 610.
[60] *Ibid.* 611, *per* Dixon C.J.
[61] *Ibid.* 630.
[62] *Ibid.* 656.
[63] (1939) 61 C.L.R. 735, 802.
[64] For example s. 92, which Evatt J. used as an example.
[65] (1940) 63 C.L.R. 338.
[66] (1957) 99 C.L.R. 575, 610.
[67] *Ibid.* 605.

is much less obvious. It is less likely to affect the substance of the terms and conditions than their enforceability.[68]

5. *CONCLUSION*

Some features of the development of the present law on section 96 through the cases call for comment.

The first is the remarkable influence of the perfunctory judgment in the *Roads* case. Almost all the issues raised in later cases were involved in the *Roads* litigation and most were expressly canvassed in argument before the Court. The challenge was however dismissed in the briefest of judgments in the most sweeping terms. The Act was described as 'plainly warranted by the provisions of sec. 96' and 'not affected by those of sec. 99 or any other provisions of the Constitution'.[69] No supporting reasons were given; apparently they were considered self-evident.

In consequence there should be some uncertainty about the principles for which the *Roads* case stands. The terms of the judgment make it clear that the Court rejected all the arguments put to it against the validity of the Federal Aid Roads Act. In the absence of reasons, however, it is not clear whether the arguments would be considered equally worthless in relation to any grants legislation or whether their rejection is confined to the particular circumstances of the *Roads* case.

It is possible, for example, that the delegation argument was rejected because of the degree of detail in the Agreement setting the conditions of financial assistance, which was authorized by the Parliament; that the appeal to section 99 was refused because all States were given an equal opportunity to participate in the Agreement; that the references to other provisions of the Constitution meant that no other provisions were transgressed by the Federal Aid Roads Act; and that any suggestion that the grant did not constitute financial assistance within the meaning of section 96 was considered to be precluded by the requirement for State parliamentary ratification of the Federal Aid Roads Agreement, thus signifying need.

This evident difficulty has had little influence on subsequent cases.[70] Instead, the *Roads* case has been interpreted with apparent confidence to have decided that power can be delegated generally to the executive under section 96;[71] that the section is satisfied if payments are left to the discretion of the Commonwealth Minister;[72] that a grant will constitute financial assistance within the meaning of the section if it is made for a purpose that is a State function;[73] and that all grants

68 See for example the commments of Webb J. in the *Second Uniform Tax* case (1957) 99 C.L.R. 575, 642 '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.'

69 *Victoria v. Commonwealth* (1926) 38 C.L.R. 399, 406.

70 An exception is the judgment of Evatt J., in *Moran's* case: (1939) 61 C.L.R. 735, 802.

71 *Ibid.* 763, *per* Latham C.J.

72 *Second Uniform Tax* case (1957) 99 C.L.R. 575, 606 *per* Dixon C.J.

73 *Ibid.* Presumably if the purpose is a Commonwealth rather than a State function the grant would be sustained by another head of power.

of financial assistance are unaffected by section 99 or other constitutional provisions.[74] It has been relied upon as the first step on an inexorable path to a conclusion that a grant of financial assistance under section 96 can be used to induce a State to refrain from exercising its powers, including the power to tax.[75] It has been the foundation case on which the edifice of argument has been built in relation to every issue.

Secondly, each of the subsequent cases has had unusual features which complicate its value as a precedent of general application on section 96. In *Moran's* case section 96 was a side issue; the primary concern of the defence was the validity of the Act which imposed the levy, rather than the Grants Act, unless the former depended on the latter, which the Court held it did not.[76] The uniform tax scheme was first challenged during a period of national crisis when it would have been almost inconceivable that the Court should find the scheme invalid. By the time it was challenged again the Court assumed that the principles had been settled by the three cases that had gone before. There were signs in the *D.O.G.S.* case that at least some members of the Court were open to persuasion on this point. The opportunity thus presented was at least partially wasted by the vacillation of the States between preserving the current schools funding arrangements and obtaining a thorough review of section 96 doctrine.

A close examination of the cases reveals that in any event the results are less settled than has been supposed. The Parliament may delegate its power to impose terms and conditions under section 96 but the significance of its doing so is completely ignored in Commonwealth parliamentary practice. There has been no decision on whether the executive can attach conditions to financial assistance without parliamentary authority. Whether it matters or not depends on whether grants arrangements are enforceable either way; an issue which also is undecided.

Views have differed between cases and between judgments within cases about whether a power to provide financial assistance implies an element of need on the part of the recipient State. One current view appears to be that need is relevant, but that acceptance of a grant by a State is evidence of need, acceptance in turn being voluntary. This analysis neatly overcomes the problem but flagrantly ignores the real world. It makes it impossible to make allowances for the effect of intergovernmental co-operation, as suggested in *Re Duncan*[77] because all grants arrangements are deemed to be co-operative in nature. The Court has not yet considered an arrangement in which the involvement of a State was completely nominal, although such arrangements exist and are likely to become more frequent.

Again, there are conflicting views about the relationship between section 96 and other constitutional provisions. The earlier denial that grants legislation could be affected by other provisions has been modified by the decision in the

[74] *Moran's* case, (1939) 61 C.L.R. 735, 771, *per* Starke J. This proposition no longer can be sustained after the *D.O.G.S.* case (1981) 146 C.L.R. 559.

[75] *First Uniform Tax* case (1942) 65 C.L.R. 373, 417, *per* Latham C.J.: *Second Uniform Tax* case (1957) 99 C.L.R. 575, 610, *per* Dixon C.J.

[76] (1939) 61 C.L.R. 735, 762, *per* Latham C.J.; 770, *per* Starke J.

[77] *Re Duncan; ex parte Australian Iron and Steel* (1983) 57 A.L.J.R. 649.

D.O.G.S. case. It remains accepted that section 96 laws are not subject to section 99 although the basis for the rule is unclear. The question of the relationship between section 96 and section 109 is completely untouched.

Finally, while it has long since been established that the terms and conditions that can be attached to a grant of financial assistance are not narrowly confined it is far from settled where, if at all, the outer limits are set. Suggestions that conditions may not require the States to act unconstitutionally or contrary to law are tantalizingly imprecise. If the reference is to actions contrary to State Constitutions or State law the limitations may be more significant than has been thought. In this case also, the argument for State parliamentary involvement in the acceptance of grants would be more compelling still.

The flaws in the form and conception of section 96, discussed earlier in the paper, underlie the uncertainty and confusion in the case law. The ambiguous character of section 96 laws in particular makes it almost impossible satisfactorily to resolve such questions as whether the executive can impose conditions on grants to the States, whether grants are enforceable by the Commonwealth against the States or *vice versa*, and whether section 96 laws are subject to other sections of the Constitution, including section 109. The proposition that, in law, section 96 grants arrangements are voluntary does not provide an adequate theoretical framework to cover all the issues that have arisen and will arise.