THE COMMONWEALTH GRANTS POWER

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The Commonwealth grants power refers to the legislative power conferred by section 96 of the federal Constitution. Section 96 provides that:

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

There is no exact counterpart of this section in the United States Constitution, though Congress has authority to make grants to States under the so-called General Welfare clause—section 8 of Article I—which declares that:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

Whether in the absence of section 96 the Commonwealth Parliament would have power to grant financial assistance to States pursuant to its power under section 81 to appropriate federal moneys "for the purposes of the Commonwealth" is debatable. Legislative grants to States are accompanied by parliamentary appropriation, but since the power to grant to States is an express power, appropriations for that purpose are clearly for the purposes of the Commonwealth.

As judicially interpreted, section 96 gives the Commonwealth considerable leverage over State policies and actions. The strength of this leverage is increased as more vigorous use is made of the Commonwealth's taxing power. Use of the grants power to influence State action does not always depend on the legislative prescription of the conditions that a State must comply with in order to qualify for financial assistance. In some circumstances the same result can be achieved by unconditional grants as could be achieved by conditional ones. The Commonwealth Parliament could grant or withhold assistance or vary the amount of assistance according to whether a State had complied with conditions previously announced by the executive. A State which had acted in reliance on a Commonwealth promise of grant would certainly have no legal claim against the Commonwealth, and an unconditional grants Act would afford no foothold for judicial review, regardless of the nature of the conditions precedent which had been previously stipulated.

As Latham C.J. explained in the *First Uniform Tax Case:*

> If the Commonwealth Parliament, in a grants Act, simply provided for the payment of moneys to States, without attaching any con-

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> ditions whatever, none of the legislation could be challenged. . . 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—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision.[1]

Unconditional grants are best suited to those cases where what is required of States is inaction, for example, non-exercise of powers that are exclusively State powers. They are less appropriate when what is expected of States is the carrying out of activities which they are unlikely or unable to perform without financial aid. In these situations, grants on condition are usually preferred. The conditions may be ones specified in the body of the grants Act, or in a prior Commonwealth-State agreement incorporated in, or appended to, the Act, or else they may be conditions prescribed by a federal minister or officer pursuant to statutory power to prescribe such terms and conditions as he thinks fit.[2]

As judicially interpreted, the grants power allows the Commonwealth Parliament wide discretion in the choice of terms and conditions. The decided cases make it clear that a federal Act granting financial assistance to States is a valid exercise of the power conferred by section 96, notwithstanding that the conditions of the grant are conditions, the performance of which by States could not validly be commanded by the federal Parliament.[3] Such an Act is also valid even though the conditions to be performed are conditions which the Commonwealth Parliament could not validly command the Commonwealth to perform.[4] On the other hand, section 96 does not empower the Commonwealth Parliament to impose a legal duty on States either to accept assistance or to comply with conditions. To be valid, a grants Act must preserve the legal liberty of States to accept the grant and any conditions annexed to it or to reject it. No legal sanctions can be attached to choosing one course rather than the other. A grant to States on condition that they do not levy income taxation is valid, for the State incurs no legal liability by levying such tax but merely disqualifies itself from receiving financial assistance.[5] But a federal Act granting financial assistance to States on condition that they did not levy receipt duty and providing that all revenues yielded by the levy of such a tax should

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[1] *The State of South Australia v. The Commonwealth* (1941) 65 C.L.R. 373, 429.

[2] *The State of Victoria v. The Commonwealth* (1926) 38 C.L.R. 399.

[3] *The State of South Australia v. The Commonwealth* (1942) 65 C.L.R. 373; *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575.

[4] *The State of Victoria v. The Commonwealth* (1926) 38 C.L.R. 399; *Pye v. Renshaw* (1951) 84 C.L.R. 58.

[5] *The State of South Australia v. The Commonwealth* (1941) 65 C.L.R. 373, 416-417, 455; *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575, 605, 610, 623.

be paid to the Commonwealth would be invalid, at least to the extent that it penalized States for not complying with a condition they might choose not to comply with or for disqualifying themselves from entitlement to financial assistance.

A coercive law, according to Dixon C.J., is a law "that demands obedience".[6] A grants Act is not a coercive law merely because it can be proved that as a result of other federal legislation, a political or economic situation has arisen in which a State cannot, for political or economic reasons, resist acceptance of the federal grant and the conditions that go with it. That kind of coercion is regarded by the High Court as irrelevant to determination of the validity of grants legislation. Were the Court to adopt as a criterion of validity whether a State was politically or economically free to accept or reject the grant, it would be making judgments of a kind that would be extremely difficult to relate to legal-type norms. Its judgments would draw it into an arena of controversy it has sought to avoid, and would vary according to the particular State and with different times and circumstances.

Section 96 does not itself indicate what the scope and reach of judicial review of grants legislation should be. The terms and conditions that may be imposed are those that the Parliament thinks fit, but the power conferred is a power to grant financial assistance to States and the section occurs in a part of the Constitution relating to finance. When section 96 first came up for judicial consideration in *Victoria v. The Commonwealth*[7] in 1926, there was no legal rule or principle that would have compelled the High Court to hold a Commonwealth Act a valid exercise of the power conferred by section 96 merely because the Parliament had granted financial assistance to a State or States. It was open to the Court to hold that an Act granting financial assistance on the condition that States do something that the Commonwealth Parliament could not validly authorize to be done was not an Act under section 96 and was invalid. It was also open to the Court to hold that to be a valid exercise of section 96 power, a grants Act must grant moneys to assist a State in dealing with its own financial situation. In fact the High Court accepted neither of these alternative interpretations of the grants power, although why it did not choose to do so, it did not explain. The Federal Aid Roads Act 1926 (Cth), it was said, "is plainly warranted by the provisions of section 96 of the Constitution, and not affected by those of section 99 or any other provisions of the Constitution, so that exposition is unnecessary".[8]

Having regard to the importance of the issue raised for decision, it is a pity that the Court did not elaborate on the judicial policy implied

[6] *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575, 610.
[7] (1926) 38 C.L.R. 399.
[8] *Ibid.* 406.

in its judgment, that is to say, why it was that it had decided to interpret section 96 in such a way as to limit the scope of judicial review of legislation purporting to have been made in exercise of the grants power.

Many years later, Dixon C.J. questioned the correctness of the decision in *Victoria v. The Commonwealth* and ventured to say that if section 96 had been before the Court for the first time, he might have interpreted it differently[9]. He might, he said, have held that:

> the true scope and purpose of the power which s. 96 confers upon the Parliament of granting money and imposing terms and conditions did not admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief or assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power. But the course of judicial decision has put such limited interpretation of s. 96 out of consideration.[10]

The supposition held by Dixon C.J. is substantially correct. Section 96 was inserted during the closing stages of the drafting of the Constitution to overcome disagreement over the Braddon clause.[11] Provision had been made in the draft Constitution for the imposition of uniform customs duties within two years after federation; when these duties were imposed, the Commonwealth's power to impose duties of customs and excise was to become exclusive. During the first five years after the imposition of uniform customs duties, the Commonwealth was to pay to the States the unexpended balance of customs and excise revenues. The Braddon clause, favoured by those colonies pursuing protectionist policies, sought to secure a minimum return of surplus revenue to the States by limiting Commonwealth expenditure out of the revenue yielded by duties of customs and excise to a maximum of one quarter of those revenues (net). New South Wales, a free trade colony, objected to the Braddon clause and at the Conference of Premiers, held in Sydney in 1899, pressed for its deletion. New South Wales argued that until such time as its economy adjusted to the system of uniform tariffs it would bear a greater tax burden than the formerly protectionist States. Furthermore, there was nothing in the draft Constitution to force the States to meet their expenses by more vigorous use of direct taxation and their continued dependence on revenue yielded by customs and

[9] *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575, 609.

[10] *Ibid.*

[11] For the history of section 96 see Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 869-871; Davis, "A Vital Constitutional Compromise" (1948) 1 *University of Western Australia Annual Law Review* 21, 28.

excise duties would put pressure on the Commonwealth to impose higher rather than lower tariffs. If, as the Braddon clause required, Commonwealth spending against customs and excise revenue was limited, the only way in which the Commonwealth could increase its revenue and thereby its expenditure was by increasing tariff rates.

The other Premiers would not agree to the deletion of the Braddon clause unless other means were found...

> of giving some security to the States that a reasonable amount of the revenue collected in the States. . . be returned to them, while, if possible, avoiding excessive burdens of taxation, a prolonged system of book-keeping, uncertainty as to the amount of the surplus to be divided, and uncertainty as to the method of distributing the surplus amongst the States.[12]

Eventually a compromise was reached. The Braddon clause should operate for ten years after federation and thereafter until Parliament chose to repeal or alter it. To compensate...

> the smaller States for the amendment in the Braddon clause. . . to meet the difficulties that might be caused, in the first few years of the uniform tariff, by the unyielding requirements of the distribution clauses, and to remove any possible necessity for an excessive tariff,[13]

it was resolved that the federal Parliament be empowered to grant aid to the States. The outcome was section 96 which, like the amended Braddon clause, section 87, was to operate during a period of ten years after federation and thereafter until the Parliament otherwise provided. It seems that most of the Premiers assumed that the grants power would be terminated as soon as the States' financial arrangements were adjusted to the uniform tariff scheme and as soon as the operation of the Braddon clause was itself terminated.

When section 96 was drafted no attempt was made to fetter Parliament in its prescription of terms or conditions, but it was generally assumed that Parliament would use its discretion sparingly and that grants under section 96 would be exceptional. Writing in 1901, Quick and Garran emphasized that the grants power was "not intended to be used, and ought not to be used, except in cases of emergency". It was not. . .

> intended to diminish the responsibility of State Treasurers, or to introduce a regular system of grants in aid. Its object. . . [was] to strengthen the financial position of the Commonwealth in view of possible contingencies, by affording an escape from any excessive rigidity of the financial clauses. It . . . [was] for use as a safety-valve, not as an open vent; and it [did]. . . not contemplate financial difficulties, any more than a safety valve contemplates explosions.[14]

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[12] Quick and Garran, *op. cit.* 219.

[13] *Ibid.* 869.

[14] *Ibid.* 871.

Had he not chosen to abide by previous judicial interpretations, Dixon C.J. would have allowed section 96 no greater scope than that contemplated by its framers. Possibly, he would not have justified his narrow interpretation merely by reference to the history of the section. The extended meaning which had been given to the words "grant financial assistance to any State" was, he said, wider than that suggested by the literal interpretation of those words. Presumably if "financial assistance" were interpreted literally, a court reviewing legislation in purported exercise of section 96, whether or not the legislation imposed terms or conditions, would need to be satisfied that "some special or particular need or occasion" had arisen for assistance.[15] Unless the High Court decided to apply highly conventional criteria for determining when special need or occasion had arisen—for example, in the case of a request by a State for assistance, an excess of expenditures over revenues—assessment of need would involve the making of enquiries and decisions of a kind which the Court has generally regarded as better left to other branches of government.

Even if the Court were to accept Parliament's judgment on the question of need for assistance as conclusive, it would not thereby deny itself power to pass judgment on the statutory terms and conditions annexed to the grant. Had the scope of section 96 not been considered before, Dixon C.J. would, it seems, have insisted that any terms or conditions be "relevant to the situation which called for special relief or assistance". Presumably what he meant was that if, for example, the Commonwealth Parliament granted financial assistance to New South Wales for relief of flood victims and laid down conditions regarding the manner in which the relief was to be distributed and further conditions relating to flood mitigation measures, the Court would first have to decide what situation it was that called for special relief, and if it decided that the situation was relief of victims of a particular flood or floods, it would then have to decide whether the condition regarding flood mitigation measures was relevant to that situation. Once again the decision to be made would be of a kind that the High Court has regarded as inappropriate for judicial determination.

Section 96 does not itself limit the Commonwealth in its choice of terms and conditions. The section speaks of "such terms and conditions as the Parliament thinks fit". Some limitations have been implied though none of the grants Acts which have been judicially reviewed have been held to exceed these suggested limitations. In the *Second Uniform Tax Case*, Williams J. said that the terms and conditions must be ones with which a State may lawfully comply.[16] In the same case Fullagar J. said that "if a condition calls for State action, the action must be action of

[15] (1957) 99 C.L.R. 575, 609.
[16] *Ibid.* 630.

which the State is constitutionally capable".[17] According to Evatt J., "Sec. 96 cannot be employed for the very purpose of nullifying constitutional guarantees contained elsewhere in the Constitution".[18] If this is so the federal Parliament cannot condition a grant to States on their taking action which would infringe section 92. Action which a State is constitutionally incapable of taking includes not only action which is prohibited by those provisions of the federal Constitution applying to the Commonwealth and the States, for State legislative competence is also limited to some degree by the Imperial enactments; so if compliance with a federal legislative condition requires the enactment of State legislation which would be beyond the competence of the State Parliament to enact, then the Commonwealth's condition may be invalid.

If compliance with the Commonwealth's condition requires the enactment of State legislation which would be void for repugnancy to Imperial legislation (other than the Commonwealth Constitution Act) extending to the State, the action contemplated is not for that reason action of which the State is constitutionally incapable, for repeal or amendment of the Imperial legislation might enable the State Parliament to enact the required legislation without any addition to the powers already conferred upon it. (One can of course argue that the void for repugnancy rule is a rule limiting legislative competence.) But so long as the Imperial legislation remains in operation, the State cannot lawfully comply with the condition. Legally it cannot enact valid legislation of the kind required.

If the condition is one requiring the enactment of State legislation inconsistent with valid federal legislation, once again it cannot be said that the condition is one requiring action of which the State is constitutionally incapable. Section 109 operates only in relation to inconsistency between valid State laws and valid federal laws, and when it does apply, its effect is not to render the inconsistent State law invalid but to suspend its operation.[19] It is unlikely that a federal government would deliberately impose conditions the fulfilment of which would be immediately frustrated by the operation of section 109, but the inconsistency between the contemplated State legislation and existing federal legislation may not be immediately apparent. It may be argued that all that the federal condition requires is the enactment of valid State legislation and that the condition is fulfilled when the State enacts the legislation, notwithstanding that the operation of that legislation is immediately suspended. On the other hand, it may be argued that the

[17] *Ibid.* 656.

[18] *Deputy Federal Commissioner of Taxation (New South Wales) v. W. R. Moran Proprietary Ltd* (1939) 61 C.L.R. 735, 802.

[19] *Butler v. Attorney-General for Victoria* (1961) 106 C.L.R. 268.

condition implies that the State shall enact not only valid but operative legislation. A condition requiring the enactment of valid and operative State legislation cannot legally be fulfilled if at the time it is imposed, there is federal legislation in being which would render the required State legislation inoperative. In that case the federal grant on condition might be held invalid on the ground that the condition was legally impossible of performance. Validity, it should be noted, is determined with reference to the state of affairs existing at the time the federal law takes effect. Hence, if at the time the federal grants Act came into force the condition to be fulfilled by States could legally be fulfilled, the grants Act is valid.

A federal grants Act on the condition that a State or States abdicate their constitutional powers presents special problems. A State Parliament cannot effectually rid itself of any part of the legislative authority conferred on it by, or by virtue of, Imperial enactment.[20] That authority may be reduced by Imperial statute or by amendment of the federal Constitution, but not by State legislation. A federal grant on condition that States abdicate legislative powers would therefore be invalid. On the other hand, a federal grant on the condition that the States refer legislative powers that are exclusively State powers to the Commonwealth Parliament would be valid. The power of State Parliaments to refer "matters" to the Commonwealth Parliament arises under section 51 (xxxvii) of the federal Constitution, so the condition is constitutionally capable of performance. Section 51 (xxxvii), it should be noted, does not authorize State Parliaments to abdicate legislative power so that powers referred become exclusive Commonwealth powers, nor does it authorize them to make a reference irrevocable, indefinitely or for a definite period of time. It is not altogether clear whether having referred power to the Commonwealth, a State Parliament can revoke the reference both before the Commonwealth Parliament has legislated and afterwards.[21] The Commonwealth Parliament can, it seems to me, effectively protect referred powers from revocation by States by coupling a grants condition that power be referred with the further condition that power once referred be not revoked.

For the purpose of deciding whether a condition imposed in, or by virtue of, a federal grants Act is one with which a State may lawfully comply, it is probably immaterial that at the time the condition is imposed the action to be taken in order to comply cannot be lawfully taken without a change in State law. Where the action necessary for compliance may be taken legally or illegally, the condition probably would be interpreted as being satisfied only when what was done, was

[20] But a State Parliament may by statute reconstitute itself and by doing so, it necessarily abdicates its legislative authority to the reconstituted Parliament.

[21] Anderson, "Reference of Powers by the States to the Commonwealth" (1951) 2 *University of Western Australia Annual Law Review* 1.

done lawfully. Thus if the condition was that the State compulsorily acquire land in a manner contrary to that laid down in existing State law, and a State minister purported to acquire land in the terms prescribed by the federal grants Act but contrary to the State legislation, the conclusion probably would be that the Commonwealth's condition had not been fulfilled. The purported acquisition by the minister would not in law amount to acquisition.

The Commonwealth Parliament may make it a condition of a grant of financial assistance that a State has not exercised powers it is constitutionally empowered to exercise, whether they are exclusive or concurrent powers.[22] It is not yet settled by judicial decision whether the Commonwealth Parliament has power to impose a condition that a State agree not to exercise its powers or to exercise its powers in a certain way. In the *First Uniform Tax Case*, Latham C.J. observed that the grants Act under consideration did not require a State to abdicate power to levy income tax.[23] The Act did not, McTiernan J. noted, offer moneys on terms that the States agree not to tax.[24] If a State does enter into an agreement with the Commonwealth, and the agreement is a legally binding one,[25] it may be legally liable for breach of the agreement irrespective of any disqualification it may suffer in relation to entitlement to federal financial assistance. But why should a Commonwealth grants Act be invalid because the condition it imposes is that a State should enter into an agreement? The Act does not seek to impose a legal obligation on States to agree with the Commonwealth. The States are legally free to enter into an agreement, or not to enter into an agreement. Having entered into an agreement, they might be said to have accepted the condition on which the federal grant was made, a condition which by implication would require the States to perform whatever they had agreed to perform or else forfeit their claim to financial assistance. It may be that some conditions, the performance of which requires that States enter into agreement with the Commonwealth, would be held invalid on the ground that what States must agree to do in order to comply is something they are constitutionally incapable of doing or is something by which they could not be legally bound. If, for example, the condition were that States agree with the Commonwealth not to exercise their powers to levy income taxation, any such agreement by the States would almost certainly be held not to create any legally binding obligation in the sense that the Commonwealth might sue for damages for its breach or obtain an injunction to restrain a State and its officers from collecting money due as State income tax.

[22] *The State of South Australia v. The Commonwealth* (1941) 65 C.L.R. 373; *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575.

[23] (1941) 65 C.L.R. 373, 416-417.

[24] *Ibid.* 455.

[25] *The State of South Australia v. The Commonwealth* (1962) 108 C.L.R. 130.

To that extent the federal condition might be said to be one requiring the State to enter into an agreement which could not be legally binding upon it. Nevertheless, such an agreement could be complied with without any breach of law or the Constitution or without any excess of State constitutional authority. For the purposes of determining State entitlement under federal grants legislation, the fact of agreement and compliance with the agreement can surely be the only relevant considerations, unless of course the condition imposed implies that the agreement entered into shall be a legally binding one. If that is what is implied, then the question would arise whether the condition was one with which the State was legally capable of complying.

The courts appear to have tolerated the use of section 96 in combination with Commonwealth powers to circumvent constitutional limitations on the exercise of power, for example, the prohibition on discriminatory taxation in section 51 (ii) and the just terms requirement that qualifies the compulsory acquisition power.[26] But in *Moran's Case* the Privy Council entered this caveat. The Commonwealth Parliament cannot, it said:

> exercise its powers under sec. 96 with a complete disregard of the prohibition contained in sec. 51 (ii), or so as altogether to nullify that constitutional safeguard. . . Cases may be imagined in which a purported exercise of the power to grant financial assistance under sec. 96 would be merely colourable. Under the guise of pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be *ultra vires* the Commonwealth Parliament.[27]

The reasoning of the Privy Council in this case presents a number of difficulties. The Wheat Industry Assistance Act 1938 (Cth), the Privy Council said, was part of a scheme the effect of which was to be determined by reference to the other legislation making up the scheme.[28] On the other hand, the motives for enactment of the Act were irrelevant to the question of its validity.[29] Section 96 was not subject to the prohibition in section 51 (ii) against discrimination between States. Because of differing State circumstances, non-discriminatory federal taxation could result in unequal distribution of tax burdens. Section 96 might be used "for the purpose of preventing an unfairness or injustice" to a State.[30] A grants Act passed for that purpose would not be an Act to effect discrimination in regard to taxation.

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[26] *Deputy Federal Commissioner of Taxation (New South Wales) v. W. R. Moran Proprietary Ltd* (1939) 61 C.L.R. 735; *W. R. Moran v. Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) 63 C.L.R. 338, [1940] A.C. 838; *Pye v. Renshaw* (1951) 84 C.L.R. 58.

[27] (1940) 63 C.L.R. 338, 349-350.

[28] *Ibid.* 341.

[29] *Ibid.*

[30] *Ibid.* 349.

If the Commonwealth grants unequally to States and judicial enquiry is made to determine whether the "real substance and purpose" of the federal legislation is to effect discrimination in regard to taxation, the Court would find it difficult, it seems to me, to avoid enquiry into what the Privy Council conceded was irrelevant, that is to say, the motives behind the legislation. Neither could it avoid enquiry into the probable operation of the associated taxing measure. Would it impose an unfair or unjust burden on the State or States benefiting under the grants Act? But by what criteria could a court of law adjudge the fairness or justice of the burden ? Having decided that a non-discriminatory tax law did work unfairness or injustice to a State, would it then measure the validity of the associated grants Act according to whether it was calculated to prevent the unfairness or injustice ? Conceivably the grants Act might go further than was necessary to equalize the tax burden, in which case the Court would, according to the Privy Council's reasoning, have to conclude that the "real substance and purpose" of the grants Act was to infringe the prohibition in section 51 (ii). I doubt whether the questions which would need to be decided if the Privy Council's views on the scope of section 96 were accepted are questions suitable for judicial determination. Further, to construe section 96 as conferring power subject to prohibitions against discrimination contained in other provisions of the Constitution, notably sections 51 (ii), 51 (iii) and 99, is to violate a basic principle of statutory interpretation. "There is no general prohibition in the Constitution of some vague thing called 'discrimination'. There are specific prohibitions or restrictions. . ."[31] and none is contained in section 96.

As already stated, the Commonwealth Parliament cannot by exercise of section 96 power impose a legal obligation on States to accept financial assistance or to take any particular course of action. A valid grants Act operates by way of inducement rather than by legal compulsion. States must be legally free to choose between accepting the grant and any accompanying conditions and rejecting the grant and its conditions, without exposing itself to legal sanctions. All this is not to say that legal obligations cannot come into being pursuant to a federal grants Act. The Commonwealth Parliament may grant financial assistance to a State on condition that the moneys granted are applied in a certain way and on the further condition that the moneys are repaid if the principal condition is not complied with. The State Grants (Tax Reimbursement) Act 1946-1948 (Cth) which was reviewed in the *Second Uniform Tax Case*, contained a section (section 11) authorizing the federal Treasurer to make advances of portions of grants. Any such

[31] *The Deputy Federal Commissioner of Taxation (New South Wales) v. W. R. Moran Proprietary Ltd* (1939) 61 C.L.R. 735, 764 *per* Latham C.J.

advance was to be on condition that the recipient State did not impose tax on income in respect of that year. If after the end of the year the federal Treasurer notified the State Treasurer that he was not satisfied that the State had not imposed income tax, then the money advanced was repayable as a debt. It could be argued that once money was advanced to a State, the State was thereupon legally obliged to refrain from levying income tax under pain of refunding the money advanced. The High Court did not raise any objection to the presence of section 11. Webb J. thought the creation of a debt under section 11 was a proper exercise of section 96. In his opinion the condition regarding repayment of advances did not materially affect the voluntary nature of the transaction.[32] Whether the nature of the transaction would be altered by the presence of a condition requiring the State to refund more than the amount advanced in the event of non-fulfilment of other conditions is debatable. It is clear that there is no constitutional impediment to the use of section 96 for the lending of money to States on condition that they repay the principal and pay interest. If payment of interest is a permissible condition of a loan, is there any reason why the Commonwealth Parliament should not grant financial assistance to a State for the carrying out of prescribed public works by a given date on the condition that if the work is commenced but not completed by that date to the satisfaction of a Commonwealth officer, the State shall pay a sum of money to the Commonwealth in respect of every day after the prescribed completion date the work remains uncompleted ? The State is not compelled by the Commonwealth Act to accept the grant or undertake the public works. The arrangement is little different from one whereby the Commonwealth Parliament grants on conditions X and Y, condition Y being that if money is advanced to the State and condition X is only partially performed, the State shall repay a proportion of the grant moneys. Such a scheme is really one whereby the Commonwealth Parliament grants financial assistance on alternative conditions, the amount of financial assistance depending on which of the alternative conditions is performed. The only possible difference between this type of scheme and the scheme whereby a State is liable to pay a monetary penalty in respect of incomplete performance of a condition is that, in the case of the latter, the amount payable by the State may possibly exceed the amount of the Commonwealth's financial assistance. A condition whereby the State pays more to the Commonwealth than it receives cannot be objectionable, for otherwise grants on the condition that the principal be repaid with interest would be invalid.

Private law analogies are seldom very helpful or apposite in deciding constitutional issues. Up to a point, the legal concepts on which conditional grants of financial assistance to States depend are much the

[32] (1957) 99 C.L.R. 575, 642-643.

same as those involved in conditional grants of proprietary interests by and to private parties. But the rules which inhibit the power of private grantors to annex conditions to their grants are clearly inapplicable to the Commonwealth Parliament's grants power. Parliament is empowered to impose such terms and conditions as it thinks fit. Is it empowered to impose uncertain conditions ? In private law a condition must be so framed that it is possible at any moment to determine whether or not it has been fulfilled. Uncertainty in a condition precedent renders the grant void; uncertainty in a condition subsequent renders the condition void. The rules regarding uncertain conditions in private grants of proprietary interests are rules designed to promote certainty in those interests and the standard of precision required by those rules may be considerably higher than the standard or precision that may be required in legislation, the validity of which is to be determined with reference to a superior law. These rules are also ones for application by courts, so that the certainty required is that which a court thinks necessary for it to make a decision on whether a condition has been fulfilled or breached. Whether or not the exercise of the Commonwealth's conditional grants power is controlled by a requirement that conditions of grants be certain —certain in the sense that at any moment of time it may be ascertained whether the condition has taken effect—may very well depend on whether the High Court regards the question of State entitlement to financial assistance under a Commonwealth grants Act as justiciable. If the Court would, let us say, entertain a suit by a State for a declaration that having performed the condition specified in Commonwealth grants legislation it was entitled to receive financial assistance, it might well take the view that to be valid, a Commonwealth Act in purported exercise of the conditional grants power had to define the conditions to be satisfied with such precision that the Court could determine at any time whether the condition had been fulfilled. Were this view taken, it could be that a Commonwealth grant on condition that States did not enact legislation discriminating between persons on the basis of race, colour, national origin, class or religion would be held void for vagueness. But a grants Act under which a State became entitled to federal financial assistance if and when a federal agency was satisfied that the State had not enacted such discriminatory legislation would probably be held valid inasmuch as entitlement depended on a readily ascertainable fact, namely an agency being satisfied of something.

Despite the plain wording of section 96, the Commonwealth Parliament cannot impose any terms and conditions it thinks fit. The High Court and the Privy Council have suggested examples of impermissible conditions and despite the fact that none of the legislation which has been challenged has been held *ultra vires*, both tribunals have made it clear that legislation in purported exercise of section 96 is judicially reviewable. What has not been decided is what legal consequence flows

from a judicial determination that a condition annexed to a federal grant is not one that the federal Parliament can validly impose. Does the unconstitutionality of the condition make the whole Act invalid or is the unconstitutional condition severable so that the Act takes effect as an unconditional grants Act ? I assume that the same principles apply as apply to all federal legislation some parts of which are *ultra vires* and other parts *intra vires*. Certainly, if a grants Act contained but one condition which was invalid, the whole Act would be held invalid. But if the Act specified several conditions some of which were subsidiary, the invalidity of subsidiary conditions might not materially alter the character and operation of the legislation, in which case the invalid conditions might be severed from the Act.

How far, if at all, do the implied and express incidental powers authorize the enactment of legislation in support of federal grants-in-aid ? Do, for example, the incidental powers in this regard authorize the enactment of federal legislation which of its own force imposes legal obligations ? The question of what are matters incidental to the execution of the federal Parliament's grants power has particular relevance to the question of what legislation may be passed to facilitate the process of enquiry and decision-making preliminary to the exercise of the grants power[33] and to the methods by which grants-in-aid are administered—what degree of superintendence and control may be exercised by the Commonwealth over the State activities it subsidizes.

The Financial Relief Act 1932 (Cth), to take but one example, did much more than grant financial assistance on condition. Money was granted to States for the assistance of certain primary producers, the amount payable being determined with reference to the money paid to primary producers by the State for fertilizer used in primary production. The Act provided that in computing the federal grant payable, no account was to be taken of any money paid by a State to a primary producer unless the primary producer had obtained a certificate from the Secretary of the Commonwealth Department of Commerce certifying that he had produced satisfactory evidence of having used the quantity of fertilizer stated. It was made an offence to obtain payment by false or misleading statements or to make any false statement to officers or other persons who were performing their statutory duties. The minister or persons authorized by him were empowered to call on persons for such information as the minister thought necessary for the purpose of, or in relation to compliance with, the Act or contravention thereof. Failure to comply with such a request for information was punishable by a fine of one hundred dollars or six months' imprisonment.

In this case a State's entitlement to financial assistance was dependent on its having made certain payments to individuals. When a grant of

[33] Grants Commission Act 1933-1957 (Cth) ss. 9-13.

federal financial assistance is conditioned in this way, it seems not unreasonable that legislative provision should be made to give Commonwealth officers legal authority to take whatever measures may be necessary to ascertain whether the conditions of the grant have been complied with. On the other hand, if State entitlement is conditioned on the State having made payments to individuals who have fulfilled certain conditions or qualifications, it is difficult to understand how a federal law penalizing individuals who have obtained payment from the State by false or misleading statements could be characterized as incidental to the execution of the grants power. The fact that an individual had obtained payment from the State by such statements would affect the State's entitlement *vis-à-vis* the Commonwealth, and if the State had been overpaid, the Commonwealth might claim the excess as a debt; but punishment of the individual would I think be solely a matter for State law. The most the Commonwealth Parliament could do would be to make it a condition of the grant that a State legislate to penalize persons who obtained payment—from the State—by false or misleading statements.

The conditions annexed to a federal grant may leave little discretion to the State in the way in which the money is used. State entitlement may depend on the enactment and continued operation of State legislation complying with federal specifications and the administration of the State legislation according to federally defined criteria. A federal legislative provision giving federal officers power to enter premises occupied by State authorities administering the State programme, to inspect papers and take copies might conceivably be held to be *ultra vires* the Commonwealth Parliament on the ground that it was a law with respect to the carrying out of State functions. But this difficulty, if indeed it is one, can be avoided by making Commonwealth access and inspection a condition of the grant. Breach of that condition might disentitle the State to receive the financial assistance. The prospect of forfeiting any right to assistance would surely be a more effective sanction than any penalties that might be attached to interference with or obstruction of the exercise of statutory rights of inspection.

Hitherto, all conditions which have been annexed to Commonwealth grants to States have been specified by or pursuant to authority delegated by the Act granting financial assistance. No statute has yet been passed which prescribes conditions for all federal grants to States or any particular class of grants. An example of the type of condition which is declared by statute to apply to all or some grants appears in section 12 of the United States Hatch Act. Section 12 (a) provides that:

> No officer or employee of a State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any federal agency shall. . . take any active part in political management or in political campaigns.

Section 12 (a) is expressed to impose a duty on individuals rather than on States; however, the sanction prescribed by section 12 (b) for breach of that duty is withdrawal from the State or local agency of an amount equal to the delinquent officer's salary for a period of two years. In *Oklahoma v. Civil Service Commission*,[34] the United States Supreme Court treated section 12 of the Hatch Act as imposing a condition attaching to federal grants to States and local agencies. Any such condition stipulated by Congress had to comply with the Constitution, but the condition laid down in section 12 (a) was not one that violated any constitutional provision. Congress, the Court agreed, "has no power to regulate local political activities as such of state officials", but "it does have power to fix the terms on which its money allotments to states [*sic*] shall be disbursed".[35] The Act, which was characterized as an appropriation Act, was plainly adapted to an end permitted by the Constitution: namely, "better public services by requiring those who administer funds for national needs to abstain from political partisanship".[36] If the Commonwealth Parliament has power to grant financial assistance to States on condition, and may delegate power to prescribe conditions, I can think of no reason why Parliament cannot prescribe the conditions on which grants are to be made quite independently of the legislation by which it grants financial assistance.

The High Court has not so far had occasion to consider whether legal action may be brought by States to enforce payment of grants by the Commonwealth or by the Commonwealth to enforce repayment by States in the event of breach of conditions on which financial assistance was granted. Nor has the Court considered whether performance of conditions may be specifically enforced. There can be little doubt that if the Commonwealth can be legally liable to pay financial assistance granted by Parliament, the beneficiary States have standing to sue for the money due.[37] It is also clear that the Commonwealth cannot discharge any debt it owes to a State or States if the federal Parliament has not authorized payment.[38] Whether or not the Commonwealth is legally liable to pay money to a State once the State has performed the conditions upon which the grant was made probably depends on whether the High Court considers itself a proper or competent agency to decide when a State has or has not fulfilled the conditions laid down.

In *Oklahoma v. Civil Service Commission*,[39] the United States Supreme Court held that the question of State entitlement to a federal grant-in-aid

[34] (1946) 330 U.S. 127.

[35] *Ibid.* 143.

[36] *Ibid.*

[37] *New South Wales v. The Commonwealth* (1908) 7 C.L.R. 179; and *Oklahoma v. Civil Service Commission* (1946) 330 U.S. 127.

[38] *Kidman v. The Commonwealth* [1926] A.L.R. 1; *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.

[39] (1946) 330 U.S. 127.

was a justiciable issue, but Congress had entrusted determination of whether the relevant condition of grant had been infringed to the Civil Service Commission, and the Commission's determination was expressly made subject to judicial review. Congress had provided that if any federal aid dispensing agency had reason to believe that the condition regarding political activities of State or local officers had been violated, it should report to the Commission which was then to hold a hearing. If the Commission found that there had been a violation of the condition, and the State or local office did not remove the offending officer, then the Commission was to make an order requiring the appropriate federal agency to withdraw part of the grant moneys. The Supreme Court thought that the particular federal aid legislation, under which Oklahoma, claimed, conferred on the State a legal right to receive funds and that any violation of that right created a cause of action. It conceded that before actual payment to the State, Congress could withdraw its grant or add further conditions. But, the Court continued, when Congress . . .

> erected administrative bars, that is, a condition that a part of the allotment might be withheld by action of the Commission, with judicial review of the Commission's determination, we think those bars left to Oklahoma the right to receive all federal highway funds allotted to that State, subject only to the condition that the limitation on the right to receive the funds complied with the Constitution.[40]

By providing for judicial review of the Commission's determination, Congress had made Oklahoma's right to receive funds a matter of judicial cognizance and had given federal courts power to examine the constitutionality of the conditions.

It is not entirely clear whether the Supreme Court's ruling on the legal effect of a federal grant-in-aid would have been any different if power to determine alleged breaches of condition had not been vested in the Civil Service Commission. Why the prescription of a judicial mode of determination should affect the question of whether a State has a legally enforceable right to funds is difficult to understand. One can understand why it should affect the justiciability of the issue whether conditions have been violated. If the power to decide whether conditions have been infringed has been invested in an agency which is directed to hold a hearing, and that agency's decision is made subject to judicial review, a court may well take the view that it has a statutory mandate to adjudicate whether the legislative conditions have been fulfilled. Such a mandate cannot be found when the State's entitlement to funds is expressed to depend on a federal minister being satisfied that conditions have been met or when the State's liability to repay funds it has received is expressed to arise when a federal minister is satisfied that conditions have not been met. In these cases, a court would probably decide that

[40] *Ibid.* 136.

the minister's judgment was not judicially reviewable. On the other hand, if the minister had adjudged that the conditions had been satisfied, his judgment could be taken to have established an immediate right on the part of the State to be paid in which case the High Court might hold the Commonwealth legally liable to pay.

Grants legislation, it should be noted, may be framed in such a way that the allocation of federal money to States is wholly discretionary. Parliament may provide, for example, that amounts determined by the Commonwealth Treasurer up to a maximum sum may be paid to a State for certain purposes and on compliance with prescribed conditions. Such legislation could in no circumstances be interpreted as conferring any right to payment upon the State.

When a State has received federal financial assistance on conditions and the conditions have not been complied with, I see no reason why the amount paid should not be recoverable at the suit of the Commonwealth irrespective of whether the federal grants Act under which the assistance was given specifically provides for repayment. If such action for recovery were brought, the court's determination of whether the Commonwealth was entitled to repayment would turn on exactly the same considerations as those mentioned above in relation to State action to obtain payment. Were a State liable to repay what it had received from the Commonwealth or part of what it had received, the question would then arise whether in order to satisfy its liability the State would need the authority of the State Parliament. The legislative powers invested in the Commonwealth by section 51 of the Constitution "which otherwise extend to the operations of the States do not", it has been said, "authorize the imposition upon the States of obligations which are not subject to the condition that funds shall be appropriated by the Parliaments of the States";[41] do not, that is, authorize impairment of the rule in State constitutions that moneys of the Crown cannot be lawfully expended without the State Parliament's sanction. But is money received by the States as financial assistance from the Commonwealth money which cannot be spent or be repaid to the Commonwealth without the State Parliament's authority ?

The moneys which the Commonwealth Parliament appropriates for the purposes of grants to States are moneys of the Crown in right of the Commonwealth. When such moneys are paid to States they thereupon become moneys of the Crown in right of the States. In exercise of their legislative powers, the State Parliaments may direct how those moneys shall be spent, but does it follow from this that they cannot legally be spent by the Crown in right of the States unless the State Parliaments

[41] *New South Wales v. The Commonwealth (No. 1)* (1931) 46 C.L.R. 155, 176; and *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 C.L.R. 319, 352, 389.

authorize the expenditure? This problem has not been authoritatively resolved and the State Constitution Acts which contain provisions dealing with the expenditure of public moneys do not provide a clear answer one way or the other. Most of the Constitution Acts provide that all revenues of the Crown arising within the State and over which the Parliament has power of appropriation shall form a consolidated revenue fund to be appropriated for the public service of the State, subject to specified charges. They also provide that after and subject to the payment of the prescribed charges, the consolidated revenue shall be subject to be appropriated for such specific purposes as may be prescribed.[42] It is not clear whether revenues in this context means all moneys of the Crown arising within the State, but even if it does, there can be little doubt that the constitutions of the States—the relevant statutes and common law principles—make it illegal for the Crown in right of the States to spend any moneys of the Crown accruing within the State unless the State Parliament has authorized the expenditure. *Prima facie*, I can see no reason why the same principle should not apply to those moneys of the Crown in right of a State which have been received from another State, from the Commonwealth or from a foreign government.[43] There is nothing in the terms of section 96 of the federal Constitution which would lead one to suppose that the section had modified the State Constitutions such that if the Commonwealth Parliament granted financial assistance to a State on the condition that the money paid should be repaid by the State, the State was thereby authorized to repay without the concurrence of the State Parliament. When a State enters into an agreement of the kind referred to in section 105A (1) of the federal Constitution—an agreement with the Commonwealth with respect to the public debts of the State—and the State thereby assumes an obligation to pay money to the Commonwealth, fulfilment of that obligation is not dependent on State parliamentary appropriation because sub-section 5 of section 105A makes the agreement binding on the parties notwithstanding anything in the federal Constitution, State constitution or any federal or State law.[44] Although the federal Constitution does not prevent the creation of legally binding obligations as a result of the exercise of section 96 power, for example, an obligation to repay the Commonwealth money received on the condition that it should be repaid, section

[42] Constitution Act 1902 (N.S.W.) ss. 39, 45; The Constitution Acts 1867 to 1961 (Qld) ss. 34, 39; Constitution Statute 1855 (Vic.) ss. XLIV, LV; Constitution Act 1889 (W.A.) ss. 64, 72.

[43] For budgeting purposes, the States treat federal grant moneys as revenue subject to State parliamentary appropriation though special purposes grants are usually paid into State trust funds and moneys so paid in may be drawn upon pursuant to permanent parliament authority. An example would be the Public Account Act 1958 (Vic.).

[44] *New South Wales v. The Commonwealth (No. 1)* (1931) 46 C.L.R. 155.

96 fails to indicate whether once such obligations have been assumed, they are binding notwithstanding anything in the State constitution.

It may be argued that when the Commonwealth does enact legislation granting financial assistance to a State on the condition that money received shall be repaid, or repaid if other conditions are not fulfilled, there is an inconsistency between that Commonwealth law and the State law which says that the moneys of the Crown in right of the State cannot be spent without the State Parliament's authority, and that to the extent of the inconsistency, the federal law overrides the State rule; that is to say, overrides the State rule as it applies to the moneys which the Commonwealth claims. If the Commonwealth's right to repayment of money granted to States on the condition that it be repaid, or repaid on non-performance of other conditions, is liable to be frustrated simply by the refusal of the Parliament of the debtor State to appropriate moneys for the purpose, the conditional grants power is in result only a power to grant unconditionally.

The conditions annexed to a federal grant to a State or States can never be specifically enforced. In the first place, any legal rights and duties which do arise as the result of the enactment of such legislation can only be rights to receive money and obligations to pay it. Specific performance is never granted in these circumstances, though it may be that in certain cases *mandamus* could lie against a Commonwealth public officer whose duty it was to disburse grant moneys to compel him to pay moneys to which a State was entitled.[45] The main reason why the Commonwealth could not obtain, let us say, an injunction to restrain a State from infringing the conditions on which federal financial assistance was given, is that such a remedy is not really susceptible of judicial enforcement.

[45] The use of *mandamus* to compel payment out of public funds is considered elsewhere: Enid Campbell, "Private Claims on Public Funds" (1969) 3 *University of Tasmania Law Review* (forthcoming).