# SOCIAL WELFARE IN AUSTRALIA: THE CONSTITUTIONAL FRAMEWORK

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*In an examination of the Commonwealth Government's power to enact social welfare legislation, Professor Sackville explores the tendency toward federal control of this field since* 1901 *and the judicial reaction to it. His conclusion is that although certain of the restrictions imposed upon Commonwealth freedom of action by the High Court have been removed by constitutional amendment, the trend towards a wider concept of Commonwealth involvement in community welfare schemes may well exceed the present limits upon Commonwealth legislative competence; and he looks to the Constitutional Convention now in progress as the possible prelude to an era in which extension of these limits might more readily take place.*

## *Introduction*

The advent of the first federal Labor Government for over two decades has brought issues of social welfare to the forefront of the political arena. No doubt proposals of current interest such as those for the extension and reorganization of existing welfare services,[1] will receive detailed consideration by policy formulating bodies and, in due course, by the Parliament itself.[2] However in Australia all proposals for reform must comply with the requirements and limitations of the Commonwealth Constitution. For this reason it is appropriate to examine the constitutional framework governing the provision of social welfare benefits in Australia.[3]

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[1] The National Commission on Social Welfare, for example, has been entrusted with the task of recommending methods by which the Australian Government can develop integrated systems of welfare services at regional level. See press statement by the Chairman, National Commission on Social Welfare, 24 May 1973. See also the First *Annual Report* of the Commission for 1972-73.

[2] In October 1973 at least nine separate Commonwealth Committees or Commissions were investigating problems connected with social welfare. These were the National Rehabilitation and Compensation Scheme, Committee of Enquiry; Taxation Review Committee; Independent Enquiry into the Repatriation System; Commonwealth Commission of Enquiry into Poverty; National Superannuation Committee of Enquiry; National Commission on Social Welfare; Health Insurance Planning Committee; National Hospitals Commission.

[3] For a brief examination of the concept of the welfare state and the role of lawyers within it see R. Sackville, "Lawyers and the Welfare State" (paper presented to the Second National Convention of Councils for Civil Liberties in Australia, Sydney, 1973).

*The Expansion of Commonwealth Power*

The Commonwealth Constitution, as originally drafted, conferred only limited power upon the Commonwealth to enter the social services field directly. At the suggestion of Mr J. H. Howe of South Australia, the Commonwealth Parliament was given power under what became s. 51(xxiii) of the Constitution to make laws "with respect to . . . [i]nvalid and old-age pensions". Even this modest clause represented a departure from the drafting of the American and Canadian Constitutions, which made no specific provision for federal control of social services expenditure.[4] Mr Howe was moved partly by his attraction to a German-style contributory pensions scheme, which he thought could be implemented most effectively by Commonwealth legislation, and partly by the need to cope with the problem of the migratory poor in a federation.[5] The opposition to Howe's proposal was not directed to the need for invalid and old-age pensions, but to the issue of whether the power should be conferred upon the Commonwealth or reserved to the States.[6] No serious consideration was given to the framing of broader Commonwealth powers, presumably because the philosophy of the time accorded governments a relatively restricted role in matters of social welfare and, in any event, the colonies had developed their own systems of social services.

Since 1901 the trend in Australia, as in other federal systems, has been towards great central responsibility for the administration of social welfare schemes.[7] In 1908 the Commonwealth exercised its powers under s. 51(xxiii) and passed the Invalid and Old-Age Pensions Act.[8] The Maternity Allowance Act 1912 followed, providing for the payment of £5 to the mother of a child upon the birth of the child, without regard to the means of the applicant. The Act was passed despite criticism of the extension of benefits to unmarried mothers[9] and, more

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[4] T.H. Kewley, *Social Security in Australia* (1965) 64. In both Canada and the United States means have been found to enable the federal governments to enter the social welfare field despite the lack of specific constitutional authority. Thus, in the United States the power conferred on Congress "to lay and collect Taxes . . . and provide for the common Defence and general welfare of the United States" (Art. 1, s. 8) has been interpreted as authorizing expenditure for any purpose considered by Congress to be for the "general welfare": *United States* v. *Butler* (1936) 297 U.S. 1, 64-66; *Helvering* v. *Davis* (1937) 301 U.S. 619, 640-641 (old-age benefits).

[5] *Convention Debates*, Sydney (1897), 1086.

[6] J. Quick and R. R. Garran, *Annotated Constitution of the Commonwealth of Australia* (1901) 612-613.

[7] E. M. Burns, *Social Security and Public Policy* (1936) Ch. 11. The latest move in Australia is the introduction of the supporting mothers' benefit; *infra* n. 63.

[8] See generally T. H. Kewley, *supra* n. 4, chs. 4-5.

[9] The Women's Christian Temperance Union of Adelaide considered that the application of maternity allowances to mothers of illegitimate children might encourage "an evil which is already too prevalent. It is almost a premium on vice". A deputation of the Council of Churches felt that "the proposal would lead to an undesirable increase in illegitimacy". *Commonwealth Parliamentary Debates*, 25 September 1912, vol. 46, 3441.

seriously, doubts as to the constitutional competence of the Commonwealth to enact the legislation. The constitutional argument, pursued at considerable length in the House of Representatives, raised fundamental issues still not definitively resolved by the High Court. Opponents of the Maternity Allowances Bill presented a restrictive interpretation of the Commonwealth's power under s. 81 of the Constitution to appropriate moneys from consolidated revenue "for the purposes of the Commonwealth".[10] They argued that s. 81 authorized expenditure only for purposes incident to existing federal legislative powers or to the exercise of the functions of a national government.[11] Since the Commonwealth had no specific power to make laws with respect to maternity allowances, it followed that expenditure for that purpose was *ultra vires* the Commonwealth Parliament. The contrary argument was that the power in s. 81 was capable of receiving the same interpretation as the comparable provision in the United States Constitution.[12] Even by 1912 the established constitutional doctrine in the United States accepted that the Congressional spending power was, in effect, unlimited in scope. In the words of Alexander Hamilton,[13] it is

> of necessity left to the discretion of the national Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper.

However, Mr L. E. Groom, who delivered the most detailed exposition of this view in the House, conceded that the appropriations power, while sufficient to support charitable relief, did not permit the establishment of administrative machinery to carry out the scheme.[14]

From 1912 until the outbreak of World War II the Commonwealth Parliament introduced no significant new social welfare benefits, although in 1927 a Royal Commission was appointed to examine a proposal for child endowment[15] and unsuccessful attempts were made in 1928 and 1938 to implement a national insurance scheme. There were several factors contributing to the Commonwealth's inertia during these years,[16] but undoubtedly the constitutional uncertainties played some part. By 1926 it had become apparent that s. 96 of the Constitution[17] allowed the Commonwealth to make grants to the States subject

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[10] *Commonwealth Parliamentary Debates*, 25 September 1912, vol. 46, 3422-3423, 3587-3589, 3637 (Sir John Forrest), 3429 (Mr B. Smith).

[11] Cf. the judgment of Dixon J. in *Attorney-General for Victoria (ex rel. Dale) v. The Commonwealth (The Pharmaceutical Benefits Case)* (1945) 71 C.L.R. 237, 269.

[12] *Supra* n. 4.

[13] *Report on Manufactures* (1791) cited by E. Campbell, "The Federal Spending Power" (1967-1968) 8 West. Aust. L. Rev. 443, 445.

[14] *Commonwealth Parliamentary Debates*, 26 September 1912, vol. 46, 3516.

[15] See generally T. H. Kewley, *supra* n. 4, 165-169.

[16] T. H. Kewley, *supra* n. 4, 165-169.

[17] Section 96 provides that "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit".

to any conditions at all, no matter how unrelated they appeared to be to Commonwealth concerns.[18] However, the extent to which the Commonwealth could enact social welfare measures involving the expenditure of money otherwise than by means of grants to the States remained unclear.[19] Constitutional difficulties notwithstanding, the wartime Labor government passed the Child Endowment Acts of 1941 and 1942, providing for payments on a weekly basis to parents or custodians in respect of each child under 16 (other than the first) maintained by them.[20] These measures were followed by the Widows Pensions Acts of 1942 and 1943, marking the first entry of the Commonwealth into an area of pressing need. Despite the title of the legislation, the scheme was not confined to widows, but extended, *inter alia*, to certain deserted wives, divorced women and *de facto* "wives" whose "husbands" had died. A third enduring measure was the Unemployment and Sickness Benefit Act 1944, providing not only unemployment and sickness benefits, but "special benefits" for any person, otherwise ineligible for payments, who "by reason of age, physical or mental disability, or domestic circumstances, or any other reason . . . is unable to earn a sufficient livelihood for himself and his dependants".

The Commonwealth Government was alert to the formidable constitu-

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[18] *Victoria* v. *The Commonwealth* (1926) 38 C.L.R. 399, upholding grants to the States under the Federal Aid Roads Act 1926 to be applied by them for the purpose of constructing roads. This doctrine has been re-affirmed consistently by the High Court: *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735 aff'd (1940) 63 C.L.R. 338, [1940] A.C. 838; *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 (*First Uniform Tax Case*); *Victoria* v. *The Commonwealth* (1957) 99 C.L.R. 575 (*Second Uniform Tax Case*). See generally A. J. Myers, "The Grants Power Key to Commonwealth-State Financial Relations" (1970) 7 M.U.L.R. 549.

[19] The constitutional issue was canvassed by the Royal Commission on Child Endowment or Family Allowances in 1928. The Federal Solicitor-General, Sir Robert Garran, advised in evidence that the Commonwealth could establish an endowment scheme pursuant to the appropriation power. He supported his conclusion by advancing a broad Hamiltonian interpretation of s. 81 as conferring an absolute power of appropriation for general purposes. However he apparently conceded that an exclusive, detailed Commonwealth-wide scheme could be implemented only through grants to the States under s. 96 of the Constitution, with appropriate conditions attached to the grants. *Report of the Royal Commission on Child Endowment or Family Allowances* (1928) 10-11. Other witnesses, including Mr Owen Dixon K.C., contended that a valid appropriation of money by the Commonwealth had to deal with one or more of the enumerated subjects of Commonwealth power of which child endowment was not one. Dixon's opinion was that the appropriations effected by the Maternity Allowances Act 1912 were invalid, although doubts were expressed by some witnesses as to whether any person or State would have standing to attack the constitutionality of a statute appropriating money for a purpose outside the legislative competence of Parliament. *Report* 11 ff. The members of the Commission stated that in their opinion it would be calamitous for the Commonwealth Government to introduce a scheme of child endowment unless the validity of the necessary legislation was beyond dispute, which it clearly was not. *Report* 14.

[20] During the debate on the Child Endowment Bill 1941 Mr H. E. Holt, then Minister for Labour and National Service, sought to avoid the constitutional problem, at least temporarily, by offering the opinion that the Bill could be supported during wartime by the defence power (s. 51(vi)). *Commonwealth Parliamentary Debates*, 2 April 1941, vol. 166, 526-527.

tional difficulties posed by its social welfare innovations. In 1942 Dr H. V. Evatt, then Federal Attorney-General, initiated the process of constitutional amendment by seeking leave to introduce the Constitution Alteration (War Aims and Reconstruction) Bill.[21] The purpose of the Bill was to confer power on the Commonwealth

> to make laws for the purpose of carrying into effect the war aims and objects of Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world, and for the purpose of post-war reconstruction generally.[22]

The Bill was referred to a special Constitutional Convention comprising representatives of the Commonwealth and State Parliaments.[23] The Convention rejected a modified, but still sweeping, proposal submitted by Evatt to the Convention after attacks had been made on the scope of his original Bill. The Convention finally resolved that the Commonwealth should have adequate powers to deal with post-war reconstruction, but that it was undesirable to effect permanent alterations to the Constitution at that critical time. Consequently it was agreed that legislative powers on fourteen specified topics, including employment and unemployment, national health "in co-operation with the States" and family allowances, should be referred by the States to the Commonwealth Parliament under s. 51(xxxvi) of the Constitution for a limited period following the cessation of hostilities.[24] These recommendations were not implemented because only two of the States passed the necessary legislation as drafted by the Convention.[25] Following the elections of 1943, Evatt introduced the Constitutional Alteration (Post-War Reconstruction) Bill 1944,[26] drafted in similar terms to the Bill approved by the Convention, to which certain guarantees of individual freedom were added during the debate. The Bill, expressed to remain in force only until the expiration of five years from the close of hostilities, was passed by Parliament but defeated at a referendum so that the constitutional problems remained unresolved.

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[21] *Commonwealth Parliamentary Debates*, 1 October 1942, vol. 172, 1338-1341.

[22] *Id.*, 1338. The Bill introduced a novel conception into Australian constitutional theory, in that it empowered the Commonwealth Parliament to enact any law which *in its own declared opinion* would tend to achieve economic security and social justice. The avowed purpose of this proposal was to make Parliament and not the High Court responsible for determining the extent of its powers: *Id.*, 1341.

[23] *Commonwealth Parliamentary Debates*, 8 October 1942, vol. 172, 1514-1515. The Convention met from 24 November 1942 to 2 December 1942 .

[24] *Record of Convention Proceedings* (1942) 144-145.

[25] See Kewley, *supra* n. 4, 180-183, G. Sawer, *Australian Federal Politics and Law* 1928-1949 (1962) 140, 171-172. For the terms of the proposed legislation (the Commonwealth Powers Bill 1942) see *Record of Convention Proceedings* (1942) 152-154.

[26] *Commonwealth Parliamentary Debates*, 11 February 1944, vol. 177, 136 ff.

The scope of the Commonwealth's power to appropriate moneys "for the purposes of the Commonwealth" was finally raised before the High Court in the *Pharmaceutical Benefits Case*,[27] as the result of the passing of the Pharmaceutical Benefits Act 1944.[28] The Act incurred the wrath of the medical profession and thus attracted a challenge to its validity brought by the Attorney-General of Victoria acting at the relation of officers of the Medical Association of Australia. Counsel for the plaintiff[29] urged the old argument that the appropriation power was confined, in essence, to authorizing expenditure for purposes related to the legislative, executive or judicial powers of the Commonwealth. In the result, three members of the majority were able to avoid an authoritative determination of this issue by holding that even the very widest reading of s. 81 of the Constitution could not support the provisions of the Pharmaceutical Benefits Act.[30] The Act not only appropriated moneys to pay chemists for medicines supplied by them, but governed the manner and circumstances in which doctors were to write prescriptions, regulated the composition of drugs to be supplied by chemists and authorized inspection of chemists' premises to ensure compliance with the Act. In the words of Latham C.J., the Act was not "really" an appropriation measure, but one "for the control of doctors, chemists, sale of drugs and the conduct of persons who deal with doctors and chemists".[31]

Five members of the High Court did consider the scope of s. 81. Latham C.J. concluded that the term "purposes of the Commonwealth" in s. 81 referred simply to purposes approved by the Commonwealth Parliament.[32] In his view it was for Parliament to determine whether or not a particular purpose should be adopted as a purpose of the Commonwealth; in short it was a political and not a judiciable issue. The Chief Justice rejected the argument that, apart from the incidental power (s. 51(xxxix)), s. 81 was the only source of Commonwealth power to appropriate money and thus was to be read as an adjunct to specific heads of legislative authority. He pointed out that a power to make laws with respect to lighthouses, for example, included in itself the power to provide for the expenditure of money in relation to light-

[27] (1945) 71 C.L.R. 237. Latham C.J., Rich, Starke, Dixon and Williams JJ., McTiernan J. dissenting.

[28] For a discussion of the case see E. Campbell, *supra* n. 13, 446-451.

[29] Mr P. D. Phillips K.C. (as he then was) was leading counsel for the Attorney-General of Victoria in the *Pharmaceutical Benefits Case*. For his account of the case see Phillips, "Federalism and the Provision of Social Services" in Hancock (ed.), *The National Income and Social Welfare* (1965).

[30] Latham C.J., Dixon and Rich JJ. (who agreed with Dixon J.).

[31] (1945) 71 C.L.R. 237, 258. The High Court also held that the Attorney-General of a State had sufficient standing to challenge the validity of Commonwealth legislation operating within the State whose interests he represented: *id.*, 246-248 (Latham C.J.), 266 (Starke J.), 272-273 (Dixon J.), 277-279 (Williams J.).

[32] (1945) 71 C.L.R. 237, 253-254.

houses, so that s. 81 must have been intended to have an additional effect.[33] The Chief Justice further argued that, on the usual canons of statutory interpretation, a distinction was to be drawn between the phrase "purposes of the Commonwealth" used in s. 81 and "any purpose in respect of which the Parliament has power to make laws" employed in s. 51(xxxi). Plainly Latham C.J. was influenced by the fact that previous Commonwealth governments (including one in which he was Attorney-General) had appropriated moneys for purposes not referable to an existing head of legislative power, such as medical and scientific research and the advancement of literature.[34] However, his judgment warned that the Commonwealth was not permitted to exercise legislative control over a subject simply by expending money for a purpose associated with that subject. It was proper in an appropriation measure to include safeguards against wrongful expenditure of money, but Parliament could go no further without reliance on another head of legislative power.[35] The views of Latham C.J. were shared by McTiernan J.[36]

Starke and Williams JJ. decided the case squarely on the basis that s. 81 did not authorize the appropriation of revenue for any purpose "without regard to whether the object of expenditure is for the purpose of and incidental to some matter which belongs to the Federal Government".[37] The purposes of the Commonwealth included not only matters in respect of which the Parliament had legislative power, but also those related to the executive and judicial functions of the Commonwealth and other matters "arising from the existence of the Commonwealth and its status as a Federal Government". Even so, the scheme established by the Pharmaceutical Benefits Act 1945 could not be supported as a purpose of the Commonwealth. Williams J. acknowledged the existence of a different doctrine in the United States, but pointed to differences in the structure and wording of the two Constitutions. In particular, the phrase "for the purposes of the Commonwealth" was more specific than the term "general welfare of the United States" and had to be given some limiting effect.[38] Dixon J.[39] specifically disclaimed the necessity for a decision on the scope of the appropriation power, since the Pharmaceutical Benefits Act could not be regarded primarily as an appropriation measure. Under the Act "appropriation of money (was) the consequence of the plan; the plan (was) not consequential

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[33] *Id.*, 251.
[34] *Id.*, 254.
[35] *Id.*, 256-258.
[36] *Id.*, 273-274.
[37] *Id.*, 266 *per* Starke J., quoting from Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed. 1910) 523; *id.*, 281-282 *per* Williams J.
[38] *Id.*, 281-282.
[39] With whom Rich J. expressed "substantial agreement". It is not clear whether Rich J. intended to agree with all the *dicta* of Dixon J. concerning the appropriation power.

upon or incidental to the appropriation of money".[40] Nevertheless Dixon J. expressed adherence to the view presented by him to the Royal Commission on Child Endowment in 1927, that the appropriation power was not to be regarded as without limitation. For this conclusion he placed principal reliance, not on s. 81 itself, but on s. 83 which provides that "no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law". Dixon J. considered

> that s. 83, in using the words 'by law' limits the power of appropriation to what can be done by the enactment of a valid law. In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and . . . to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States.[41]

In common with Starke and Williams JJ., Dixon J. did not adopt the narrowest possible interpretation of the appropriation power. The judgments sanctioned expenditure relating to the executive and judicial functions of the Commonwealth, as well as expenditure incidental to federal legislative powers. Moreover, their views admitted of some flexibility, in that the notion of Commonwealth purposes was tailored to the demands of a national government. Nevertheless, even allowing for some uncertainty as to the standing of individuals and State Attorneys-General to challenge federal expenditure,[42] the case was sufficient to crack, if not shatter, the long-standing assumption by many lawyers that the federal appropriation power was unlimited in scope.

The approach of the majority in the *Pharmaceutical Benefits Case* was not compelled by logical analysis alone. As is usual in constitutional adjudication, the Court was influenced by preconceptions about the nature of federalism and the proper distribution of powers between the Commonwealth and States. In particular, the views of Dixon J. favouring a limited role for the Commonwealth within the federal structure were beginning to gain acceptance by other members of the Court.[43] These views are perhaps less likely to be accepted in more

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[40] (1945) 71 C.L.R. 237, 270.

[41] *Id.*, 271-272.

[42] The orthodox view in Australia is that "a citizen has no standing to challenge legislation or executive action for unconstitutionality unless his rights or liabilities are affected by the action impugned": E. Campbell, *supra* n. 13, 452. On the other hand, "a State Attorney-General may sue to challenge the constitutionality of any federal action which affects his public and . . . his standing does not depend upon proof that the federal action will in any way affect the legal powers of the State": *id.*, 457.

[43] See L. Zines, "Sir Owen Dixon's Theory of Federalism" (1965) F.L.Rev. 221; R. Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 M.U.L.R. 15, 16-18, 46 ff.

recent times, in part because they confer on the High Court the "counter-majoritarian"[44] power to scrutinize Commonwealth appropriations according to vague criteria that are unrelated to the political demands of the particular situation. Be that as it may, the *Pharmaceutical Benefits Case* obviously cast grave doubt upon the validity of much federal social services legislation,[45] although just as clearly the Commonwealth was not devoid of power to ensure that money was spent in accordance with its wishes. The *First Uniform Tax Case*,[46] decided in the absence of Dixon J., had again applied a literal interpretation of the grants power in s. 96. The effect of the decision was to affirm the Commonwealth's power to impose conditions on State grants, even if designed specifically to induce the States to exercise (or refrain from exercising) their powers in a specified way. Thus at the end of World War II it remained clear that social welfare schemes, otherwise beyond federal power,[47] could be implemented by means of conditional grants to the States, but direct federal expenditure on social services, unless authorized by a specific head of legislative power, was of dubious constitutional validity.

In an attempt to assess the significance of the *Pharmaceutical Benefits Case*, the Commonwealth government sought the advice of five eminent King's Counsel as to the validity of a number of enactments thought to depend on the appropriation power.[48] The opinions varied to some extent,[49] but suggested that at least four major social welfare measures were invalid[50] and six other Acts were possibly invalid in whole or in part.[51] After considering the advice the Government, again acting at the initiative of Evatt, decided to amend the Constitution to ensure the validity of existing and future legislation providing social welfare benefits and to enable the Commonwealth to administer its own schemes. To this end the Constitution Alteration (Social Services) Bill 1946 was introduced and, in the result, passed through Parliament without significant opposition. The Bill empowered the Commonwealth to make laws with respect to

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[44] The term is used by L. Bickel, *The Least Dangerous Branch* (1962) 16.

[45] *Infra* nn. 48-51.

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

[47] Of course certain social welfare measures in force in 1945 rested upon specific heads of Commonwealth power. For example the Invalid and Old-age Pensions Act 1908-1943 was supported by the power in s. 51(xxiii) to make laws with respect to invalid and old-age pensions. Portions of the Re-establishment and Employment Act 1945 were referable to the defence power in s. 51(vi).

[48] The counsel were Sir Robert Garran, Dr E. G. Coppel and Messrs Maughan, Barwick and Ham.

[49] The opinions as to each Act are set out in tabular form in Dr Evatt's speech moving the second reading of the Constitution Alteration (Social Services) Bill 1946: *Commonwealth Parliamentary Debates*, 27 March 1946, vol. 186, 648.

[50] Maternity Allowance Act 1912-1944; Child Endowment Act 1941-1945; Widows' Pensions Act 1924-1943; Unemployment and Sickness Benefit Act 1944.

[51] Science and Industry Research Act 1920-1939; Education Act 1945; Hospital Benefits Act 1945; Re-establishment and Employment Act 1945; Medical Research Endowment Act 1937; National Fitness Act 1941.

> the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription),[52] benefits to students and family allowances.

This clause which, following the approval of a referendum, became s. 51(xxiiiA) of the Constitution, certainly overcame the immediate difficulties posed by the *Pharmaceutical Benefits Case*. The Social Services Declaratory Act 1947 declared that eight existing measures, invalid in whole or in part on the principles discussed in the *Pharmaceutical Benefits Case*, were still in force and were validated to the extent necessary.[53]

On any analysis the changes effected by s. 51(xxiiiA) are of great significance. The Commonwealth Parliament is empowered to legislate with respect to the provision of eleven kinds of allowances, benefits and pensions. Not only is the Commonwealth enabled to appropriate moneys for the benefits and allowances mentioned in s. 51(xxiiiA),[54] but it can also legislate for the administration of any scheme to the extent deemed necessary, whether or not the details of the administrative structure can be characterized as incidental to the appropriation of money.[55] Nor is the language of s. 51(xxiiiA) narrow in terms of the benefits that may be provided by the Commonwealth. The point may be illustrated by taking as a potential object of federal largesse a family unit comprising an unmarried mother and her child.[56] The Commonwealth is empowered to pay an allowance to the mother in respect of the birth of her child and to contribute regular payments after the birth by way of child endowment. There is power also to provide for medical

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[52] The words in parentheses were introduced to the Bill as an amendment moved by the Leader of the Opposition, Mr R. G. Menzies. *Commonwealth Parliamentary Debates*, 10 April 1946, vol. 186, 1214-1215. The amendment was designed to remove the risk of the Commonwealth nationalizing medical and dental services. See *Commonwealth Parliamentary Debates*, 27 March 1946, vol. 186, 648-649; 3 April 1946, vol. 186, 899-900. Although the Opposition did not vote against the measure, Menzies expressed doubts as to whether unemployment and sickness benefits, hospital services and medical and dental services should have been included in the Bill, instead of being dealt with through an expansion or clarification of the Commonwealth's insurance power under s. 51(xiv) of the Constitution: vol. 186, 899.

[53] Sawer, *Australian Federal Politics and Law* 1929-1949 (1963) 191.

[54] *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201, 280 *per* McTiernan J.

[55] The Social Services Consolidation Act 1947 consolidated all the Commonwealth legislation relating to age, invalid and widows' pensions, maternity allowance, child endowment and unemployment and sickness benefits. The Act implemented a recommendation of the Commonwealth Joint Parliamentary Committee on Social Security. See T. H. Kewley, *supra* n. 4, 185-186 and 176 ff. The Social Services Act 1947-1973 now serves as the basis for the distribution and administration of Commonwealth Social Services benefits.

[56] Of course the Commonwealth does provide in fact many of the benefits referred to in the text. The object is to consider the kind of benefits that could be provided if the power in s. 51(xxiiiA) were fully utilized.

and dental services, pharmaceutical supplies and hospital attention required by the mother or child at any time. This may be accomplished through a contributory scheme[57] or by means of Commonwealth payments to hospitals and practitioners such as doctors or dentists providing services to patients. There appears to be no constitutional impediment to the Commonwealth's deciding to distribute benefits through its own institutions established for the purpose, such as Commonwealth hospitals or pharmacies.[58] Free education for the child may be provided by way of scholarship assistance ("benefits to students") or, rather more doubtfully, by the establishment of a federal school system. The term "benefits"

> is used as a word covering provisions made to meet needs arising from special conditions with a recognized incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services. . . .[59]

It follows that the word, "benefits" as used in s. 51(xxiiiA) authorizes not only payments of money, but benefits in kind (such as free milk for school-children)[60] or by way of services. Perhaps the broadest power in s. 51(xxiiiA) is to provide "family allowances", a term undoubtedly wide enough to embrace some of the benefits specified earlier in the section. The term had appeared in the Report of the 1942 Constitutional Convention, as one of the powers to be referred by the States to the Commonwealth.[61] Following the failure of the States to implement the recommendations of the Convention, a power to legislate with respect to family allowances was included in the Constitution Alteration (Post-War Reconstruction) Bill 1944. In supporting the Bill, Evatt stated that the power would not only place beyond doubt the federal social services legislation enacted during the War, but permit other grants to be made to the family, including allowances for health benefits or vocational training. He contended that the power

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[57] *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201, 261 *per* Dixon J.

[58] Provided that the scheme does not authorize "any form of civil conscription" in contravention of s. 51(xxiiiA). It should be noted that the text is concerned with Commonwealth power to implement social welfare measures within the States. The Commonwealth has plenary power under s. 122 of the Constitution to legislate for the Territories in the field of social services.

[59] *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201, 261 *per* Dixon J. Under the current subsidized medical benefits scheme contributions to hospitals and medical funds by low income families are subsidized by the Commonwealth: National Health Act 1953-1971, Pt. VI, Div. 3. Of course, the report of the Health Insurance Planning Committee (1973) recommends a National Health Scheme that would replace the existing Scheme.

[60] In *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201, 229-230, Latham C.J. considered that items such as eye droppers, insulin syringes and bandages could not be described as drugs or medicines and thus were not pharmaceutical in character, but could be regarded as sickness benefits.

[61] *Supra* n. 24.

authorized any allowances thought proper by Parliament, so long as the family was the unit through which the allowance was granted.[62] Thus it is constitutionally competent for the Commonwealth to have introduced its own scheme for the payment of allowances or pensions to unmarried mothers.[63] The fact that the recipient of the allowance is unmarried does not preclude her from being regarded as the head of a "family", constitutionally eligible to receive federal assistance: certainly there is no warrant for importing a requirement of a marriage into the concept of "family" as used in s. 51(xxiiiA).

*Restrictions on Commonwealth Power*

Some restrictions in the scope of s. 51(xxiiiA) were discussed in *British Medical Association* v. *Commonwealth*,[64] the only High Court case in which the interpretation of the section has been in issue. Following the decision in the *Pharmaceutical Benefits Case* and the introduction of s. 51(xxiiiA) into the Constitution in 1946, the Commonwealth enacted a fresh Pharmaceutical Benefits Act in 1947. This Act, as amended in 1949, was challenged on a variety of grounds by the Federal Council of the British Medical Association in Australia and six medical practitioners. On this occasion the medical profession enjoyed only limited success as the High Court upheld the statutory scheme, subject to one qualification. Essentially the Act provided for the supply of pharmaceutical benefits by chemists without charge to persons presenting a prescription completed by a doctor in an approved form. Under the Act, approved chemists participating in the scheme were not permitted to charge the public for the supply of medicaments, but were to look to the Commonwealth for payment. Chemists remained free, in theory at least, to refuse to participate in the scheme and to charge customers for items supplied, but in such cases the patient was denied the benefit of any Commonwealth subsidy. The Court had no difficulty in regarding the Act as a law for the provision of pharmaceutical benefits or, in relation to certain items, for the provision of sickness benefits.[65] Objections raised to the conditions imposed by Parliament on the supply and receipt of free medicines were dismissed on the ground that the

> Commonwealth Parliament, in providing for gratuitous pharma-

[62] *Commonwealth Parliamentary Debates*, 11 February 1944, vol. 177, 151-152; Kewley, *supra* n. 4, 181-182.

[63] By the Social Services Act (No. 8) 1973 the Commonwealth introduced a Supporting Mothers' Benefit which applies (subject to a means test and certain other restrictions) in favour of a woman, whether married or unmarried, who has the custody of a child who has attained the age of six months. Thus single mothers are now eligible for a Commonwealth pension. As to the previous position see R. Sackville, "Social Welfare for Fatherless Families in Australia" (1972) 46 A.L.J. 607; (1973) 47 A.L.J. 5-10.

[64] (1949) 79 C.L.R. 201.

[65] *Id.*, 229-230.

> ceutical benefits may . . . provide for the conditions which are to be satisfied before such benefits are to be supplied.[66]

However, all members of the Court agreed,[67] *obiter*, that the power conferred by s. 51(xxiiiA) was limited to the provision of the specified benefits *by the Commonwealth itself*.[68] Dixon J. acknowledged that the wording of the section might support an argument that the power extends to legislation

> dealing directly and substantially and not merely incidentally, with provisions made by State Governments, public bodies, voluntary associations, trading companies and private persons for any of the purposes enumerated, however limited the application of the provision. It would follow that these governments, bodies and persons might, by legislation under the power, be compelled to make such provision in accordance with whatever obligations Parliament thought fit to impose on them.[69]

If this broad interpretation of s. 51(xxiiiA) were accepted, the Commonwealth's power would extend, for example, to requiring the States to provide allowances for needy families and to compelling private employers to provide medical services and other benefits to employees. Indeed on this interpretation doctors, dentists and chemists presumably could be directly regulated by the Commonwealth. Dixon J. rejected the broad construction of the section.

> The purpose of the constitutional amendment was to enable the Commonwealth to provide the pensions allowances endowments benefits and services which par. (xxiiiA) mentions. That is shown by the character of the things for the provision of which laws may be made, which are recognized social services the establishment of which is now considered to be within the province of government. The conclusion is confirmed by the history of the matter. . . .[70]

It therefore follows that, unless the Commonwealth acts under a head of power other than s. 51(xxiiiA), it cannot require the States or other bodies to provide social welfare benefits.

The one success enjoyed by the medical profession in *British Medical Association* v. *Commonwealth* arose out of the express limitation on Commonwealth power imposed by the words "but not so as to authorize any form of civil conscription" appearing in s. 51(xxiiiA).[71]

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[66] *Id.*, 240 *per* Latham C.J.
[67] Except Williams J. who offered no opinion on this point.
[68] (1949) 79 C.L.R. 201, 242-243 (Latham C.J.), 254 (Rich J.), 260 (Dixon J.), 279 (McTiernan J.), 292 (Webb J.).
[69] *Id.*, 260.
[70] *Ibid.*
[71] *Supra* n. 52.

Much of the argument in the case centred on the meaning of the phrase "any form of civil conscription", the majority view favouring a broad interpretation. The issue was raised by a challenge to s. 7A of the Pharmaceutical Benefits Act, which provided that a medical practitioner was not to write a prescription for certain medicines and appliances available under the scheme except on a prescribed form, unless requested by the patient not to use the form. All members of the Court (except McTiernan J.) accepted that s. 7A was invalid if it imposed a form of civil conscription on doctors.[72] A majority held that the section was invalid on the ground that the civil conscription prohibition was intended to prevent not only enrolment for compulsory full time civilian service, but compulsion to "engage in a particular occupation, perform particular work or perform work in a particular way".[73] On this analysis, s. 7A infringed the prohibition because, as the plaintiffs' statement of claim alleged, doctors had no option but to use Commonwealth prescription forms if they were to practise medicine. In short, doctors were compelled by the legislation to act in a particular way, not only under pain of criminal penalty, but, in effect, by the threat of being unable to earn a living. Williams J. reinforced the civil liberties flavour of the decision by likening the civil conscription prohibition to the other prohibitions on legislative power contained in ss. 92 and 116 of the Constitution. He went so far as to suggest that a law requiring medical practitioners to give certificates, keep records or provide information about the health of patients would authorize a form of civil conscription and thus would be invalid.[74]

It is very difficult to justify a broad interpretation of a constitutional prohibition that favours a particular professional group in the community, at least if a plausible alternative interpretation is available. Certainly the majority in the *B.M.A. Case* gave no indication that they were alive to the extraordinary constitutional immunity that their interpretation accorded to the medical and dental profession. On the

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[72] The Chief Justice interpreted the qualification as limiting all powers conferred on the Commonwealth by s. 51(xxiiiA). Thus, although he regarded s. 7A as a law with respect to the provision of pharmaceutical benefits (and not the provision of medical services), he considered the civil conscription prohibition applicable to the section. Dixon J. also regarded s. 7A as a law with respect to the provision of pharmaceutical benefits. He differed from the Chief Justice in holding that the prohibition qualified only the power to provide medical and dental services. Nevertheless, for reasons that are far from clear, he concluded that s. 7A would be unconstitutional if it imposed any form of civil conscription on the medical profession. McTiernan J. decided that s. 7A was a law with respect to the provision of pharmaceutical benefits and therefore was not subject to the civil conscription prohibition. Neither Webb J. nor Williams J. expressed a concluded view on this question. They apparently considered that whenever medical or dental services are rendered, whether or not in the course of providing pharmaceutical or other benefits, the law must not authorize any form of civil conscription of such services.

[73] (1949) 79 C.L.R. 201, 249 *per* Latham C.J.

[74] *Id.*, 290.

other hand, Dixon J. had no difficulty in concluding that the limited compulsion imposed by s. 7A did not amount to a "form of civil conscription".[75] He considered that compulsion, whether on a regular or intermittent basis, was inherent in the notion of civil conscription. Such an element of compulsion would be found, for example, in a law requiring doctors to give medical attention to outpatients one day per week. However,

> a wide distinction exists between on the one hand a regulation of the manner in which an incident of medical practice is carried out, if and when it is done, and on the other hand the compulsion to serve medically or to render medical services . . .[76]

Section 7A fell within the first category and was therefore not within the conception of civil conscription. There was no compulsion to attend patients, render medical services or act in any other medical capacity.

Whatever doubts may be expressed about the merits of the decision in the *B.M.A. Case*, there can be no question that doctors and dentists in Australia now enjoy a substantial measure of constitutional protection from government regulation. The Australian Government clearly lacks the power to introduce a national health scheme that compels doctors to enter salaried employment with the Commonwealth. Just as clearly, the Commonwealth cannot require medical practitioners to provide medical services for a prescribed fee. (In any event, this would not be a law with respect to the provision *by the Commonwealth* of medical services.) Of course the civil conscription prohibition does not prevent the Commonwealth attempting to induce medical practitioners to conform to the plan of a national health scheme. Thus, for example, the 1973 report of the Health Insurance Planning Committee suggests that doctors have the option of sending accounts to patients in the usual way or to the Commonwealth for payment at prescribed rates. Nevertheless, the constitutional limitations undoubtedly create serious impediments to national planning in the field of health services.

A further limitation on the scope of s. 51(xxiiiA) arises from the suggestion by Dixon J. in the *B.M.A. Case*[77] that the power to provide family allowances extends only to monetary payments and not to the provision of goods or services. If this view is accepted the Commonwealth may be hampered to some extent in making welfare services available directly to groups in the community. For example, it is doubtful whether the Commonwealth itself has the power to establish a nation-wide system of crèches for the children of working mothers (since this would not be a family allowance), although of course the

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[75] McTiernan J. expressed a similar opinion on this point: *id.*, 283-284.
[76] *Id.*, 278.
[77] *Id.*, 259.

same result could be accomplished through conditional grants to the States under s. 96. On the other hand, quite apart from the likelihood of a challenge, it would be very difficult to attack services such as counselling facilities provided to beneficiaries under Commonwealth income maintenance schemes. The provision of these services might well be regarded as sufficiently related to the payment of "widows' pensions" or "family allowances" to qualify as an incidental exercise of the primary legislative power. There might be a slightly stronger case for a challenge when the Commonwealth provides special services and benefits to particular categories of persons, as in the case of a training scheme for widow pensioners or a rehabilitation service for disabled and chronically ill persons. It could be argued that schemes of this nature established by the Commonwealth are not incidental to the payment of allowances and pensions. However, it is likely that a generous interpretation of affirmative Commonwealth powers would allow a rehabilitation service, for example, to be justified as the provision of a sickness benefit[78] and a retraining scheme to be regarded as an unemployment benefit.

Even a generous interpretation of s. 51(xxiiiA) may leave the Commonwealth without power to implement some desirable welfare schemes. The Commonwealth might decide, for example, to introduce a nation-wide system of neighbourhood legal offices as a means of providing full legal aid and advice services to local residents through a staff of salaried lawyers. There is little doubt that the Commonwealth could provide traditional forms of legal aid in litigation arising under federal legislation, such as the Matrimonial Causes Act or the Bankruptcy Act. But a full scale neighbourhood law office programme would not be supported in its entirety by s. 51(xxiiiA) or indeed any other head of federal power. Presumably, therefore, the scheme would be established only by means of conditional grants to the States and it is not inconceivable that a scheme funded through the States might encounter more political difficulties and consequently prove to be less effective than a scheme directly established and administered by the Commonwealth. If this is so, it indicates that constitutional limitations may yet hamper the Commonwealth in the social welfare field.

*Conclusion*

Despite the restrictions on the Commonwealth's appropriation power imposed by the High Court in the *Pharmaceutical Benefits Case*, the Federal Government clearly has broad powers to legislate in the social welfare field. Section 51(xxiii) and (xxiiiA) authorize the provision

[78] The service could be justified for certain beneficiaries by other Commonwealth powers. For example the defence power would authorize rehabilitation services for ex-servicemen and undoubtedly the Commonwealth could provide rehabilitation facilities for injured Commonwealth employees.

of a wide range of benefits and allowances to a variety of persons and groups in the community. Moreover, it is clear that the Commonwealth may provide for the detailed administration of any scheme it establishes. As an alternative to the direct distribution of benefits, the Commonwealth may make conditional grants to the State under s. 96 of the Constitution to ensure the establishment of welfare programmes otherwise beyond federal competence.

On the other hand, the wording of s. 51(xxiiiA), as interpreted by *dicta* of the High Court in the *B.M.A. Case*, suggests that there are significant limitations on the Commonwealth's power to provide certain kinds of benefits through its own agencies. In particular, difficulties may be encountered when it is sought to establish schemes that go beyond the payment of monetary pensions and allowances to prescribed classes of persons. Since 1946, when s. 51(xxiiiA) was inserted into the Constitution, there has been a willingness on the part of social planners to accept that the role of government in the social welfare field cannot be confined to the funding of income maintenance schemes. Increasingly discussion has centred on programmes that make available such facilities as rehabilitation, retraining and counselling services to families and individuals. It is likely that this trend will continue and that consideration will be given at a national level, for example, to the establishment of locally based community centres incorporating neighbourhood legal advice bureaux and other services. At present there must be grave doubt as to whether the Commonwealth itself has the constitutional competence to introduce and administer schemes of this nature, no matter how desirable they may be thought to be. Since only the Federal Government has the resources to plan and implement nation-wide welfare programmes, it is hardly reassuring that the success of such programmes may depend in the last resort on the disinclination of the States to challenge them.

The Australian constitutional structure has proved, in the past, relatively impervious to change, at least through direct amendment. It is possible, although perhaps not likely, that the Constitutional Convention, which commenced in Sydney in 1973, will mark the advent of an era in which even constitutional amendments can be discussed with some prospect of success. Be that as it may, there is a very strong case for an expansion of Commonwealth power to ensure that no federal scheme for the provision of welfare benefits and services to the community founders for want of constitutional authority.