

# MAKING SENSE OF S 96: TIED GRANTS, CONTEXTUALISM AND THE LIMITS OF FEDERAL FISCAL POWER

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*This paper continues a wider debate about the interpretation and operationalisation of s 96 of the Australian Constitution. That debate began in this journal over 30 years ago with the critical analysis of the orthodox interpretation of the section by Cheryl Saunders. Despite this, and recent political controversies about the use of s 96 by the Commonwealth, there is yet to be a direct constitutional assault on the orthodox interpretation of the provision. However, there has been increasing incidental consideration of the section as a result of greater scrutiny on the financial provisions of ch IV of the Australian Constitution. This jurisprudence significantly advances our understanding of the role and function of s 96 and assists us to resolve many of the outstanding questions first raised here. This paper will explore that jurisprudence and suggest an approach to the section that ensures it can operate within the constitutional system of federal fiscalism, rather than outside of it.*

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## I INTRODUCTION

The *Australian Constitution* (the ‘*Constitution*’) is renowned for its stability and, for some, its tenacious resistance to change; a metaphorical ‘frozen continent’.<sup>1</sup> Yet, that only represents part of the picture, one which defines reform in hard terms.<sup>2</sup> Australia’s constitutional landscape has been dramatically altered by soft power influences since federation,<sup>3</sup> not least by judicial means. Indeed, High Court jurisprudence has produced tectonic shifts in the constitutional landscape since federation.<sup>4</sup> The Court’s

<sup>1</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

<sup>2</sup> That is, the formal referendum process envisioned by s 128 of the *Constitution*.

<sup>3</sup> For instance, through: the exercise of financial and tax powers; the ratification of treaties by the Commonwealth to extend its powers; executive federalism; cooperative governance and intergovernmental relations; and consequential structural interdependence alongside the increasingly national focus of press and party politics as part of Australia’s development as a nation within the international community: see Kenneth Wiltshire, ‘Reforming Australian Governance: Old States, No States or New States?’ in AJ Brown and JA Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANU Press, 2007) 185, 188–93. For a discussion about the ways in which the constitutional arrangements have changed since 1901, see Andrew Lynch and George Williams, ‘Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?’ (2008) 31(2) *University of New South Wales Law Journal* 395.

<sup>4</sup> See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘*Engineers’ Case*’); *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’); *Mabo v Queensland [No 2]* (1992) 175 CLR; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *New South Wales v Commonwealth* (2006) 229 CLR 1 (‘*Work Choices Case*’).

early interpretation of s 96 of the *Constitution* is a particularly striking example of this.<sup>5</sup>

Section 96 was a last-minute addition to the *Constitution*, subject to little debate or consideration.<sup>6</sup> While apparently intended to be a transitional provision, the Commonwealth quickly seized upon it as a source of financial influence over the states, something that has continued to this day.<sup>7</sup> That is the result of early High Court formalism, which ignored the provision's history, purpose and constitutional context.<sup>8</sup> The result of this orthodoxy was to metaphorically cut the provision adrift from the remainder of the constitutional continent. Practically, it contributed to a federal fiscal imbalance in favour of the Commonwealth, from which the states have never recovered.

Constitutional scholars have argued for some decades now that the early interpretation of s 96 as a largely unbounded provision 'unaffected by ... any other provision of the *Constitution*'<sup>9</sup> (commonly described as the 'orthodox interpretation') is erroneous and cannot be sustained.<sup>10</sup> Most notable is the work of Cheryl Saunders, who wrote a two-part treatise on the section in this journal some 30 years ago.<sup>11</sup> The first of those papers highlighted 'flaws in the form and conception of s 96' and 'uncertainty and confusion in the case law' arising from ambiguities in its wording,<sup>12</sup> as well as 'discrepancies between it and the scheme of the rest of the *Constitution*'.<sup>13</sup> Saunders highlighted a series of fundamental problems and questions that arose from the orthodoxy

<sup>5</sup> See below nn 32–40 and accompanying text.

<sup>6</sup> Greg Taylor, 'On the Origin of Section 96 of the *Constitution*' (2016) 39(4) *University of New South Wales Law Journal* 1438, 1438–9.

<sup>7</sup> See Jonathan Crowe and Peta Stephenson, 'Reimagining Fiscal Federalism: Section 96 as a Transitional Provision' (2014) 33(1) *University of Queensland Law Journal* 221, 221–2.

<sup>8</sup> See, eg, *Victoria v Commonwealth* (1926) 38 CLR 399 ('*Federal Roads Case*'). See also below nn 35–7 and accompanying text.

<sup>9</sup> *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 771 ('*Flour Tax Case*').

<sup>10</sup> See, eg, David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41(1) *Federal Law Review* 71; Taylor (n 6).

<sup>11</sup> Cheryl Saunders, 'Towards a Theory for Section 96' (Pt 1) (1987) 16(1) *Melbourne University Law Review* 1 ('Part 1'); Cheryl Saunders, 'Towards a Theory for Section 96' (Pt 2) (1988) 16(4) *Melbourne University Law Review* 699 ('Part 2').

<sup>12</sup> Saunders, 'Part 1' (n 11) 31.

<sup>13</sup> *Ibid* 5.

surrounding s 96 which ‘have not yet directly been considered by the High Court’, arguing that the ‘situation is unlikely to last’.<sup>14</sup>

Despite others echoing Saunders’ dissatisfaction with the orthodox interpretation of s 96,<sup>15</sup> there has been no direct constitutional assault on the section nor systematic review of it by the Court in subsequent decades. The vacuum has allowed the Commonwealth to construct increasingly liberal s 96 schemes, which treat the states largely as conduits of Commonwealth spending on matters lying outside the limits of its legislative power.<sup>16</sup>

That said, while s 96 has remained (directly) untouched, the Court has been busily reconstructing the constitutional landscape around it. This change, and particularly the new understanding of the federal financial arrangements of ch IV — in which s 96 is found — give us a much better understanding of the role, place and function of the provision within the *Constitution*. The result is that we are better able to answer the questions raised by Saunders three decades ago.

This paper tracks that jurisprudence to consider the proper interpretation of the section. It does so as follows:

- Part II will provide an historic overview of the section and the orthodoxy which developed around it;
- Part III will discuss how the Court has worked to restructure ch IV through the federal fiscal cases, which has resulted in s 96 being reintegrated into the constitutional landscape. The result is a new understanding of the purpose and function of the section;
- Part IV will consider the implications of that newly (re)discovered purpose and function for the orthodox interpretation; and

<sup>14</sup> Ibid 14.

<sup>15</sup> Stephen McLeish, ‘Federal Implications under the Australian Constitution’ (2012) 25(3) *Public Law Review* 172, 183–4; Shipra Chordia, ‘Section 96 of the Constitution: Developments in Methodology and Interpretation’ (2015) 34(2) *University of Tasmania Law Review* 54.

<sup>16</sup> See, eg, *Northern Australia Infrastructure Facility Act 2016* (Cth) (‘NAIF Act’), discussed below Part II(B); the funding scheme under the *Schools Assistance Act 2008* (Cth) and *Australian Education Act 2013* (Cth), discussed in *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 310 FLR 193; *National Water Commission Act 2004* (Cth), discussed in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (‘*ICM Agriculture*’). See also Senator Leyonhjelm’s motion concerning the delegation of s 96 grants authority to Ministers in annual appropriations: Commonwealth, *Parliamentary Debates*, Senate, 23 June 2015, 4265–7; Commonwealth, *Parliamentary Debates*, Senate, 17 March 2016, 2709.

- Part V turns the analysis to remapping the proper function of the section as an essential part of ch IV and a fundamental fixture of the constitutional landscape, rather than something cut adrift from it.

In sum, interpreting s 96 contextually within, rather than outside, the constitutional framework brings into sharp relief two fundamental flaws with the orthodox interpretation of the provision. The first is that the section has been incorrectly treated as a legislative power to spend. The second, consequential, assumption is that the section is unbounded and capable of executive delegation. Such assumptions cannot be sustained in a federal system underpinned by representative and responsible government and the rule of law.

Section 96 is essentially a conduit through which cooperative federal fiscalism is to be achieved; specifically, by describing the process by which public monies are to be transferred from one constitutional polity to another. Both of those polities are established by the *Constitution*,<sup>17</sup> and both are limited by its essential imperatives and conventions.<sup>18</sup> These include the fundamental rule of representative and responsible government that public income and expenditure is supervised by Parliament, and not used for unauthorised purposes.<sup>19</sup> In the case of tied grants, this necessarily means that Parliaments of both polities authorise not only the transfer of public monies, but more essentially the purposes to which they are put, to ensure they are limited to constitutional boundaries. This is also evident when the provision is read within the context of the financial chapter in which it is found; namely, in a way which strengthens, rather than weakens, its free trade and anti-preference guarantees. While the role of the Senate as the state's House may be 'vestigial',<sup>20</sup> it was designed to act as a check and balance on the misuse of central power to preference some regions over others. Thus, Senate oversight is an essential feature, and condition precedent, to the authorisation of individual tied grants, and the terms and conditions to which they are put. As will be seen, this is evident in the wording of the provision, its context within

<sup>17</sup> *Constitution* ss 1, 107.

<sup>18</sup> See, eg, *ibid* ss 2, 5, 28, 61–70, 75. In respect of the reception of constitutional conventions into the colonies, and later into the states and the Commonwealth, see *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

<sup>19</sup> See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* ('Cemetery Reserve Case') (1993) 176 CLR 555, 572 (Mason CJ, Deane, Toohey and Gaudron JJ), 593 (Dawson J), 599 (McHugh J).

<sup>20</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 205 [61] (French CJ) ('*Williams [No 1]*').

the *Constitution*, and the wider principles of federal fiscalism, the rule of law and representative and responsible government that underpin it.

## II A SHORT HISTORY OF S 96

Section 96 of the *Constitution* states as follows:

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

The history of this provision, both in respect of its drafting and its interpretation by the High Court, has been dealt with comprehensively elsewhere.<sup>21</sup> Most notably, in Cheryl Saunders' two-part study<sup>22</sup> and, more recently, in Greg Taylor's historical investigations into the rather nebulous origins of the section<sup>23</sup> and in Shipra Chordia's review of the shifting approaches to its interpretation.<sup>24</sup> This paper will draw on those works, rather than repeat them in any detail. Suffice to say, it is now well accepted that s 96 was added at the last minute to the constitutional draft as a 'political compromise', designed to ensure federation by allaying concerns of the states that the restructuring of fiscal relations might make the smaller ones vulnerable to insolvency.<sup>25</sup>

As Quick and Garran explained in 1901, the understanding of the State Premiers immediately prior to federation was that (the then proposed) s 96 was 'not intended to be used, and ought not to be used, except in cases of emergency'.<sup>26</sup> Such emergencies were understood to be limited to the uncertain period of national financial restructuring that followed federation.

<sup>21</sup> See, eg, Saunders, 'Part 1' (n 11); Saunders, 'Part 2' (n 11); Taylor (n 6); Crowe and Stephenson (n 7); Chordia (n 15). See also Brendan Gogarty, 'Australia's \$1 Billion Loan to Adani is Ripe for a High Court Challenge', *The Conversation* (online, 4 October 2017) <<https://theconversation.com/australias-1-billion-loan-to-adani-is-ripe-for-a-high-court-challenge-85077>>, archived at <<https://perma.cc/WT6C-Q8SZ>>.

<sup>22</sup> Saunders, 'Part 1' (n 11); Saunders, 'Part 2' (n 11).

<sup>23</sup> Taylor (n 6).

<sup>24</sup> Chordia (n 15).

<sup>25</sup> Saunders, 'Part 1' (n 11) 4. See also Taylor (n 6) 1442.

<sup>26</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 870.

Hence, Sir James Dickson, the ‘protagonist’ behind the drafting and inclusion of s 96 in the *Constitution*,<sup>27</sup> summarised its purpose as follows:

Before the coming into operation of uniform duties of customs and excise, adequate provision shall be made by a law, or laws, of the Commonwealth for indemnifying the states against any loss that they may severally sustain by reason of the establishment of the Commonwealth, and the coming into operation of such uniform duties.<sup>28</sup>

As with other transitional provisions, it was assumed that s 96 would diminish in importance, if not fall into desuetude, once federal restructuring was complete.<sup>29</sup> Consequently, little attention was given to it or how it might interact with the other parts of the *Constitution*.<sup>30</sup>

The drafting history of the section was forgotten — or, perhaps more appropriately, *ignored* — by the formalist High Court after *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘*Engineers’ Case*’).<sup>31</sup> In *Victoria v Commonwealth* (‘*Federal Roads Case*’),<sup>32</sup> the Court gave short shrift to contextual and originalist arguments about the section. The legislation in contest involved a tied funding scheme authorising the construction and maintenance of roads. In a three-line judgment, the High Court determined that the *Federal Aid Roads Act 1926* (Cth) was valid, stating:

The Court is of opinion that the [impugned] *Federal Aid Roads Act* No 46 of 1926 is a valid enactment.

It is plainly warranted by the provisions of [s] 96 of the *Constitution*, and not affected by those of [s] 99 or any other provisions of the *Constitution*, so that exposition is unnecessary.

The action is dismissed.<sup>33</sup>

<sup>27</sup> Taylor (n 6) 1442.

<sup>28</sup> *Official Record of the Debates of the Federal Council of Australasia*, Melbourne, 25 January 1899, 19 (Sir James Dickson).

<sup>29</sup> Crowe and Stephenson (n 7) 222–4. Even post-*Engineers’ Case* (n 4) judges like Evatt J recognised that the provision was not intended to last. As Evatt J stated: ‘The words in [s] 96 are verbatim the same as those in [s] 87, and perhaps the court should take judicial notice of the fact that the two sections were closely associated with each other and may well have been intended to stand together and terminate together’: *Flour Tax Case* (n 9) 803.

<sup>30</sup> Saunders, ‘Part 2’ (n 11) 699.

<sup>31</sup> *Engineers’ Case* (n 4).

<sup>32</sup> *Federal Roads Case* (n 8).

<sup>33</sup> *Ibid* 406 (Knox CJ).

That is the entirety of the *per curiam* judgment. Indeed, it is arguably a decision *per incuriam*, insofar as it lacks any articulated description or reasoning. Despite this, it was relied upon by the post-*Engineers' Case* Court as an apparent source of precedential authority. Indeed, just over a decade later, in the 1939 case *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* ('*Flour Tax Case*'),<sup>34</sup> Latham CJ cited the *Federal Roads Case* as authority for the fact that s 96 was 'unaffected by [s] 99 or any other provision of the *Constitution*',<sup>35</sup> not in relation to any *one* piece of legislation, but *generally*.<sup>36</sup> His Honour further concluded that

Parliament has the fullest power of fixing the terms and conditions of any grant made under the section. Parliament does fix the terms and conditions of the grant if, by legislation, it authorizes a Minister to determine such terms and conditions.<sup>37</sup>

As will be discussed below, this dictum is now questionable; arguably, it always was. Nevertheless, Latham CJ's statement became the basis of an accepted orthodoxy which treated s 96 as an unreviewable island of Commonwealth spending power. Hence, in *Victoria v Commonwealth* ('*Second Uniform Tax Case*'), Dixon CJ noted that

while others asked where the limits of what could be done in virtue of the power the section conferred were to be drawn, the Court has said that none are drawn; that any enactment is valid if it can be brought within the literal meaning of the words of the section and as to the words 'financial assistance' even that is unnecessary. For it may be said that a very extended meaning has been given to the words 'grant financial assistance to any State' and that they have received an application beyond that suggested by a literal interpretation.<sup>38</sup>

Indeed, while the orthodoxy has often been described as the product of literalism, his Honour was quite correct to point out that the orthodox

<sup>34</sup> This case related to a cooperative scheme to federally regulate the national wheat market. Flour millers were taxed by the Commonwealth, with the proceeds paid to wheat growers in each state through the conduit of a s 96 tied grant to each state government. Given no wheat was grown in Tasmania at the time, special provisions had to be made to reimburse Tasmanian millers in a different manner than provided in the other states. This was done by a separate s 96 tied grant to the Tasmanian Government. The plaintiff argued that this discriminated between states (under *Constitution* ss 51(ii)–(iii)): *Flour Tax Case* (n 9).

<sup>35</sup> *Ibid* 771.

<sup>36</sup> *Ibid* 758.

<sup>37</sup> *Ibid* 763.

<sup>38</sup> (1957) 99 CLR 575, 611 ('*Second Uniform Tax Case*').

interpretation goes beyond literalism to apparently ignore the plain meaning of the words. This will be discussed further below.<sup>39</sup> Suffice to say, it is probably better to ascribe the orthodoxy to the formalistic tendency of the post-*Engineers' Case* Court to ignore originalist or contextual considerations in their interpretation of the *Constitution*. This was accepted by Dixon CJ, who concluded:

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 of 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 any such limited interpretation of s 96 out of consideration.<sup>40</sup>

Thus, the Chief Justice reluctantly joined the majority in embedding the orthodox view of s 96, although on the narrow point of state consent to the terms and conditions of the grant. The consequence was to make the section seem like it has 'no judicially enforceable limits'.<sup>41</sup>

That said, some caution should be exercised regarding just how much *South Australia v Commonwealth* ('*First Uniform Tax Case*')<sup>42</sup> and the *Second Uniform Tax Case* actually amount to a true enlargement of the orthodoxy. While they are often viewed as s 96 cases, they only deal with the provision in a narrow, incidental way — so their precedential value is limited.<sup>43</sup> The

<sup>39</sup> See below Part IV.

<sup>40</sup> *Second Uniform Tax Case* (n 38) 609.

<sup>41</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5<sup>th</sup> ed, 2010) 1085.

<sup>42</sup> (1942) 65 CLR 373 ('*First Uniform Tax Case*').

<sup>43</sup> These cases — which are related to nearly identical legislation made during and shortly after World War II — are commonly viewed as s 96 cases, even though the actual dispute related to the amount of income tax the Commonwealth can collect. In most federal constitutional frameworks, income tax is collected in relatively equal measure by state and federal governments. This was the case in Australia until World War II, when the Commonwealth doubled its income tax to support the war effort (ibid) and continued to do this after the war had finished (*Second Uniform Tax Case* (n 38)). No state could politically afford to continue to tax its citizens on top of the Commonwealth tax. Instead, the Commonwealth agreed to pay the amount of income tax it did not use back to the states, but on the condition (under s 96) that the recipient states did not levy their own income tax. The states challenged the framework on the grounds that it functionally placed them in a position where they were

primary question in those cases was, in fact, whether the Commonwealth could levy an unequal share of income tax to the states. The secondary question was whether it could use this unequal share to pressure the states into agreeing to the terms and conditions of s 96 grants. The majority considered the answer to both questions to be in the affirmative, albeit with the caveat that the state had to legally agree to the terms and conditions. However, the Court, believing itself bound to the earlier orthodox decisions and still firmly gripped by post-*Engineers' Case* formalism, refused to look behind the question of technical legal consent. The result is that the Commonwealth can use its financial and political supremacy to 'induce' state compliance.<sup>44</sup> It can also set terms and conditions that effectively extend the Commonwealth's influence beyond its enumerated heads of legislative power.<sup>45</sup> This was entirely beyond what the section was intended for. As Taylor concludes in his historical review of the drafting of the section:

Perhaps the most remarkable and currently relevant point is that virtually everyone — from Griffith CJ to (Sir) James Dickson down to the humblest country newspaper — assumed that section 96 would be about money and solvency. There is no sign of any expectation that the 'terms and conditions' which it authorises would be anything other than ancillary to the grant of money, rather than, as with some tied grants since 1901, of equal or even greater importance.<sup>46</sup>

Nor was there much expectation about the profound distortions to the federal balance that would ensue from the wide ranging and near unfettered use of s 96. This has served as one of the primary catalysts of a federal vertical fiscal imbalance, in which the states have been placed at the financial mercy of the Commonwealth.<sup>47</sup> The more financially vulnerable the states became, the

forced, under economic duress, to agree to the terms of the tied grants under s 96. The Court rejected this argument in both cases.

<sup>44</sup> *First Uniform Tax Case* (n 42) 417 (Latham CJ).

<sup>45</sup> The Commonwealth 'may properly induce a State to exercise its powers ... by offering a money grant': *ibid.*

<sup>46</sup> Taylor (n 6) 1461–2 (citations omitted).

<sup>47</sup> As French CJ observed in *Williams [No 1]* (n 20): 'The financial dominance of the Commonwealth Government in relation to the States was no doubt anticipated by some delegates, although almost certainly not to the degree which has eventuated, particularly in the field of taxation [and] the use of conditional grants under s 96': at 204 [59]. See also Gabrielle Appleby, 'There Must Be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93.

more they were susceptible to pressure to accept s 96 tied grant conditions that reduced their jurisdictional autonomy.

The orthodox interpretation of s 96 has been the source of increasing caution and criticism as the Court — and indeed legal scholars — has moved away (although never *too* far away) from the strict formalism of the *Engineers' Case* towards a more holistic and contextual one.<sup>48</sup> Many have called for a reconsideration, if not reform, of the section.<sup>49</sup> As will be seen, those calls and the criticisms they are based on remain relevant today.

### A *The (Outstanding) Fundamental Problems with s 96*

In 1988, Saunders argued that s 96 is ‘conceptually flawed, and therefore sits uneasily with the constitutional principles on which the *Constitution* is based and with other provisions of the *Constitution* itself.’<sup>50</sup> While accepting that the early High Court had apparently sought to resolve these conceptual flaws, its formalism created a range of outstanding questions and ‘fundamental problems.’<sup>51</sup> These include uncertainties about the following aspects of the provision.

#### 1 *Termination Clause*

Saunders pointed out that there had been a lack of genuine judicial scrutiny of the continued use of the section, despite the apparent intention that it be limited to 10 years ‘and thereafter until the Parliament otherwise provides,’<sup>52</sup> to allow for federal fiscal restructuring.<sup>53</sup> While this may seem like a trite issue — insofar as the High Court is extremely unlikely to compel Parliament to exercise its discretion to terminate the provision — accepting that it must not do this has consequences. Foremost is the fact that, if the section is never to be terminated, it must be considered to be a permanent constitutional fixture, with implications for how it is interpreted within the overall constitutional framework.

<sup>48</sup> See Chordia (n 15).

<sup>49</sup> See, eg, McLeish (n 15) 183; Chordia (n 15) 90.

<sup>50</sup> Saunders, ‘Part 2’ (n 11) 699.

<sup>51</sup> Saunders, ‘Part 1’ (n 11) 14.

<sup>52</sup> *Constitution* s 96.

<sup>53</sup> Saunders, ‘Part 1’ (n 11) 8–10.

## 2 *Parliamentary Involvement*

Saunders accepted the orthodox interpretation of the provision as ‘presumably’ being ‘legislative in character’ because it is conferred upon Parliament.<sup>54</sup> She therefore accepted the orthodox view that ‘[l]ike other legislative powers it may be delegated to the executive.’<sup>55</sup> However, Saunders noted that various unexplored implications arose from the way it is conferred. Specifically, Parliament is:

- 1 first, conferred with the power to grant aid; and
- 2 second, conferred with the power to determine the terms and conditions of that grant.<sup>56</sup>

This will be referred to herein as a ‘double conferral’ of power upon Parliament. In respect of this double conferral of power, Saunders argued that

[c]onferral on the Parliament of power to grant financial assistance to the States ... is consistent with the constitutional scheme for parliamentary control of finance ... The power to determine the terms and conditions attached to the grant, however, is of greater substance, being, at least potentially, regulatory in nature ...

... [And] might have been considered to fall within the scope of executive power had it not been conferred on the Parliament under section 96.<sup>57</sup>

Saunders noted that the double conferral thus raised significant and unexplored ‘implications both for the powers exercisable by the respective arms of government at the Commonwealth level and for the absolute scope of Commonwealth legislative power.’<sup>58</sup> She also noted that it created ‘genuine uncertainty about the extent to which the executive is constrained in imposing conditions by the limits of authority granted by Parliament or by the absence of any authority at all.’<sup>59</sup> As will be discussed at length below, Saunders’ concern about the role of the executive in exercising unconstrained financial powers has subsequently received broader attention by the High

<sup>54</sup> *Ibid* 11.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* 10.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> Saunders, ‘Part 2’ (n 11) 700.

Court, with important implications for our understanding of the constitutive character of s 96.<sup>60</sup>

### 3 *The Meaning of 'State'*

Saunders further highlighted uncertainty about what the section means when it describes the recipient of financial assistance as being 'any State'.<sup>61</sup> That is, whether 'state' means Parliament, the executive, polity or otherwise. Furthermore, Saunders questioned whether the terms and conditions of a grant could require the state to act as a mere agent to transfer the aid to a non-state entity. Saunders noted (quite presciently) that 'the Court has not yet considered an arrangement in which the involvement of a State was completely nominal, although such arrangements exist and are likely to become more frequent'.<sup>62</sup>

### 4 *Restrictions and Limitations*

Finally, Saunders raised questions about the lack of internal limitations within the provision,<sup>63</sup> and the assumption that meant that the terms and conditions of a grant under s 96 were not limited by constitutional guarantees more generally.<sup>64</sup> Even 30 years ago, when Saunders was writing, a series of incidental cases suggested such a view could not be supported.<sup>65</sup> Saunders argued that

[f]undamental as these problems are, they have not yet directly been considered by the High Court. While the questions to which they give rise can be canvassed, therefore, no final, authoritative answers can be given. The situation is unlikely to last.<sup>66</sup>

<sup>60</sup> As will be discussed, this contemporary jurisprudence questions the assumption that the provision is at all legislative and capable of delegation, marking a departure from the conclusions Saunders reached at the time: see below Part IV(B).

<sup>61</sup> Saunders, 'Part 1' (n 11) 13–14.

<sup>62</sup> *Ibid* 30.

<sup>63</sup> *Ibid* 27–9.

<sup>64</sup> *Ibid* 12.

<sup>65</sup> *Ibid* 12, 23–4.

<sup>66</sup> *Ibid* 14.

Hence, she warned

it might be unwise to assume that [all s 96] schemes would automatically succeed, particularly in view of the greater preparedness of the more recent High Court to consider the substance of challenged laws.<sup>67</sup>

### B *Thirty Years on, the Situation Lasts*

As will be discussed in the following sections, while the High Court has signalled ‘some readiness to depart from the orthodox [s 96] cases’,<sup>68</sup> this has been limited to obiter or incidental discussions of the section (albeit increasingly in majority).<sup>69</sup> In fact, the Court has not directly dealt with the section for almost 80 years.<sup>70</sup> In the Court’s defence, that is not entirely its fault. The adversarial process is reactive and is generally reliant on litigants who have standing, capacity and dissatisfaction with the current state of play to bring matters before the Court. Section 96 is ultimately about grants of money and, as the old adage goes, recipients of those monies are unlikely to bite the hand that feeds them. Indeed, those organisations have a vested interest in sustaining such exercises of power, whether they are within constitutional limits or not.

The result is that, while the Court might have indicated a tacit agreement with the scholars who have criticised the orthodox approach, it has not overruled or reinterpreted it. In the absence of judicial supervision, the Commonwealth has been free to enact ever more liberally constructed regimes that increase its sphere of financial, if not legislative, influence.

While concern about the use of s 96 by the Commonwealth has historically been relegated to scholarly and professional journals, that is shifting. Most notable perhaps was the recent proposal to grant over AUD1 billion in Commonwealth monies to multinational firm Adani Pty Ltd in aid of its

<sup>67</sup> Ibid 26.

<sup>68</sup> Chordia (n 15) 76.

<sup>69</sup> The two most notable examples are *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 (*‘DOGS Case’*) and *ICM Agriculture* (n 16), in which the majority accepted that s 96 could not be used to establish any religion or acquire property other than on just terms, due to the express limitations in s 116 and s 51(xxxi) of the *Constitution*, respectively. However, the Court found that the impugned legislation did not amount to the establishment of a religion in the former, or the acquisition of property in the latter.

<sup>70</sup> It was last dealt with directly in the *Flour Tax Case* (n 9).

construction of Australia's largest coal mine in Queensland's Galilee Basin.<sup>71</sup> This was to occur pursuant to a s 96 tied grant made under the *Northern Australia Infrastructure Facility Act 2016* (Cth) ('NAIF Act').<sup>72</sup> That proposal drew the ire of environmental campaigners — who threatened to challenge it in the High Court<sup>73</sup> — and served to bring s 96 into the national spotlight.<sup>74</sup> All the questions raised by Saunders 30 years before were brought into the public domain, not least because the Northern Australia Infrastructure Facility ('NAIF') regime is solely reliant upon s 96 for its constitutional validity, reinforcing the treatment of the provision as a permanent constitutional fixture. More pertinently, the question of parliamentary involvement was brought into relief by the debate. Bar passing the *NAIF Act*, the Commonwealth Parliament has no role in determining individual grants,<sup>75</sup> nor their terms and conditions,<sup>76</sup> which is solely the responsibility of the NAIF, a statutory corporation.<sup>77</sup> The NAIF is legislatively empowered to

<sup>71</sup> See generally John Hewson, 'The Queensland Election Outcome is a Death Knell for Adani's Coal Mine', *The Conversation* (online, 28 November 2017) <<https://theconversation.com/the-queensland-election-outcome-is-a-death-knell-for-adanis-coal-mine-88148>>, archived at <<https://perma.cc/563X-5T9X>>.

<sup>72</sup> The proposal has been the source of sharp national controversy, especially around its potential social, environmental and cultural impacts. Campaigners have described it as the most significant national environmental issue since the controversy that led to the *Tasmanian Dam Case* (n 4): Bob Brown, 'The Adani Mine is This Generation's Franklin River. People Power Can Stop It', *The Guardian* (online, 24 March 2017) <<https://www.theguardian.com/commentisfree/2017/mar/24/the-adani-mine-is-this-generations-franklin-river-people-power-can-stop-it>>, archived at <<https://perma.cc/A53K-GDCN>>.

<sup>73</sup> See generally Gogarty (n 21).

<sup>74</sup> See, eg, 'Adani: Premier Anastacia Palaszczuk Withdraws Government Involvement in Mine Funding', *ABC News* (online, 4 November 2017) <<http://www.abc.net.au/news/2017-11-03/premier-annastacia-palaszczuk-veto-qld-government-adani-brisbane/9117594>>, archived at <<https://perma.cc/KG38-PDEE>>.

<sup>75</sup> The responsible Minister is precluded from directing the Northern Australia Infrastructure Facility ('NAIF') in the making of the grant or the terms and conditions of that aid and may only veto a decision of the NAIF on narrow policy, security or international relations considerations. Rather, the Minister may issue broad legislative instruments, entitled 'Investment Mandates', which direct the general conduct of the NAIF and its Board: *NAIF Act* (n 16) ss 9(4), 11(5), 14; *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (Cth) ('*Investment Mandate*').

<sup>76</sup> *NAIF Act* (n 16) s 7(1)(b).

<sup>77</sup> The NAIF is established as a body corporate and is overseen by a CEO and a Board of experts in economics, finance, national and related infrastructure developments: *NAIF Act* (n 16) ss 6, 14–15, 28.

administer AUD5 billion in Commonwealth monies on northern Australian infrastructure projects.<sup>78</sup>

The NAIF–Adani debate also reinforced Saunders’ prediction that future regimes would establish ‘arrangement[s] in which the involvement of a State was completely nominal’.<sup>79</sup> Much of the controversy appeared to focus on the bypassing of state Parliaments through ‘pass through’ agreements made by state and Commonwealth executives and the NAIF. Under the agreements, state executives are committed to acting as a conduit for the granting of Commonwealth monies, by the NAIF to (ordinarily corporate, non-state) recipients. These financial arrangements mean Commonwealth money is not received by the state into its consolidated revenue fund, nor its expenditure approved by its Parliament.<sup>80</sup> The state executive is empowered to provide ‘written notification that financial assistance should not be provided to a Project’, but neither it, nor its Parliament, has an active decision-making or endorsement role on behalf of the proponent.<sup>81</sup> Critics also argued that the loan constituted preferential treatment to one company over others facing similar conditions,<sup>82</sup> raising questions about whether the regime was truly in harmony with the free trade guarantees and restrictions found within ch IV of the *Constitution*.

This paper is not about the NAIF, nor does it seek to directly question the validity or constitutionality of the loans proposed to be made under it. However, the public debate about those questions serves to highlight that, despite warnings that the ‘situation is unlikely to last’ in relation to the

<sup>78</sup> *Ibid* s 41.

<sup>79</sup> Saunders, ‘Part 1’ (n 11) 30.

<sup>80</sup> The agreement, described as a ‘Master Facility Agreement’, is a tripartite one between the relevant state, Commonwealth and NAIF. As a result of the agreement, the ‘Commonwealth’s borrowings for the NAIF project will remain on the Commonwealth balance sheet and not on Queensland’s’: Queensland, *Parliamentary Debates*, Legislative Assembly, 29 November 2016, 4630 (Curtis Pitt). This effectively means the money is not treated as state income, incorporated into its consolidated revenue or supervised by its Parliament.

<sup>81</sup> If that jurisdiction provides a ‘written notification that financial assistance should not be provided to a Project’, the NAIF ‘must not make an Investment Decision’: *Investment Mandate* (n 75) s 13(4).

<sup>82</sup> Australian Conservation Foundation, ‘A Fistful of Dollars: Adani’s Preferential Treatment by Federal, State and Local Australian Governments’ (Research Brief, October 2017) 8 <<https://www.acf.org.au/reports>>, archived at <<https://perma.cc/93QN-49EZ>>. See also Julien Vincent, ‘Bailing out Adani is the Definition of Absurd’, *The Sydney Morning Herald* (online, 4 October 2017) <<https://www.smh.com.au/business/companies/adani-could-be-derailed-if-900m-loan-denied-20171004-gyu4iv.html>>.

orthodox interpretation of s 96, the status quo has been maintained.<sup>83</sup> The controversy also indicates an increased public awareness and concern about the use of tied grants, especially by public interest campaigners. Whether this continues is uncertain but, in the short term, it is likely to make NAIF loans,<sup>84</sup> and indeed other infrastructure grant loans made under s 96, more susceptible to scrutiny and challenge.<sup>85</sup> If that was to occur, regimes like those established under the *NAIF Act* may find themselves on shaky legal ground. That is because, while the regulatory operationalisation of s 96 has changed little over the last 30 years, the constitutional landscape has shifted markedly around it. The potential impacts of such a change and what it means for s 96 regimes will be discussed below.

### III PAPE, WILLIAMS AND THE REINTEGRATION OF S 96

The issues of standing and financial self-interest that have stymied direct review of s 96 by the High Court have, historically, had a broader impact on the review of ch IV more generally. Indeed, it took well over a century for the Commonwealth financial powers truly to be subject to constitutional

<sup>83</sup> Saunders, 'Part 1' (n 11) 14; see above nn 14, 66 and accompanying text. Indeed, it is likely to continue into the near future. Following public backlash to the Adani loan proposal, the embattled Queensland Government promised to 'veto' it should the Government be returned to power, arguably swinging the November 2017 election in its favour. The subsequent veto of the pass-through by the Premier of Queensland in November 2017 appears to have been resolved by political, rather than legal, means. Once again, s 96 had eluded direct scrutiny by the High Court: see 'Adani: Premier Anastacia Palaszczuk Withdraws Government Involvement in Mine Funding', *ABC News* (online, 4 Nov 2017) <<http://www.abc.net.au/news/2017-11-03/premier-annastacia-palaszczuk-veto-qld-government-adani-brisbane/9117594>>, archived at <<https://perma.cc/KG38-PDEE>>.

<sup>84</sup> Following revelations that Adani had applied for a NAIF loan, it was later reported that Queensland state-owned companies also applied for NAIF funding to build infrastructure that would assist in Adani's proposed mining operations: Matthew Stevens, 'Aurizon Returns to the Galilee Basin with Northern Infrastructure Fund Plan', *Australian Financial Review* (online, 15 March 2017) <<http://www.afr.com/business/energy/aurizon-returns-to-the-galilee-basin-with-northern-infrastructure-fund-plan-20170315-guys3y>>, archived at <<https://perma.cc/BJF6-ZZLZ>>.

<sup>85</sup> Hence, the declaration of the first tied grant of Commonwealth monies under the *NAIF Act* (n 16) to a Western Australian mining company has already stirred opposition amongst environmental campaigners there, notwithstanding that the appropriate legal mechanisms apparently required by the Act to transfer the money have not been put in place: see Michael Slezak, 'Western Australia Port to Get \$16.8m Government Loan to Support Oil and Gas', *The Guardian* (online, 10 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/10/western-australia-port-set-to-get-get-16m-loan>>, archived at <<https://perma.cc/7UNR-3K79>>.

challenge. Even then, it only occurred due to a combination of unique circumstances — in the form of the global financial crisis — and an even more unique litigant in the form of Bryan Pape, who was willing to contest the payment of money the Commonwealth had given him (and over a third of Australians) to obviate the economic impacts of the crisis.<sup>86</sup>

In *Pape v Federal Commissioner of Taxation* ('Pape'), the majority found the source of authority for Commonwealth spending to be in the implied nationhood power, seated in the intersection of s 61 and s 51(xxxix).<sup>87</sup> Despite his ostensible loss, Mr Pape struck a larger blow against unfettered Commonwealth spending powers when the High Court concluded that, in the absence of that legislative power, the appropriation power in s 81 would not, of itself, authorise the Commonwealth's stimulus package.<sup>88</sup> Mr Pape had opened a fault line beneath the previously unassailable bedrock of Canberra, which would rupture in *Williams v Commonwealth* ('Williams [No 1]') and create aftershocks that may finally unsettle the orthodoxy of s 96.<sup>89</sup>

The relevance of the *Pape* decision to s 96 was hinted at a year later in *ICM Agriculture Pty Ltd v Commonwealth* ('*ICM Agriculture*').<sup>90</sup> The special case involved a challenge to an intergovernmental agreement partly supported by s 96, which regulated agricultural water supply. The plaintiffs argued this amounted to an acquisition of property other than on just terms, as required by s 51(xxxi) of the *Constitution*. The majority (6:1) determined that the regulation of such licenses did not constitute an acquisition of property, and thus the s 96 question did not fall for consideration.<sup>91</sup> Indeed, half the majority chose not to address it at all.<sup>92</sup> However, those who did (French CJ, Gummow and Crennan JJ) accepted that the terms and conditions of a s 96 grant must conform to the limits of s 51(xxxi).<sup>93</sup> That is, such terms and

<sup>86</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('Pape'). As George Williams has rightly summarised: 'It takes a brave person to stand between the Commonwealth and an offer of cash to nearly 9 million taxpayers, let alone in the midst of a global economic recession': George Williams, 'Brian Pape and His Legacy to the Law' (2015) 34(1) *University of Queensland Law Journal* 29, 38.

<sup>87</sup> *Pape* (n 86) 64 [136] (French CJ), 83 [212]–[213] (Gummow, Crennan and Bell JJ).

<sup>88</sup> *Ibid* 36 [53], 45 [81], 55 [111], 55–6 [113] (French CJ), 82–3 [210] (Gummow, Crennan and Bell JJ), 103 [290], 113 [320] (Hayne and Kiefel JJ).

<sup>89</sup> *Williams [No 1]* (n 20).

<sup>90</sup> See *ICM Agriculture* (n 16) 169 [41] (French CJ, Gummow and Crennan JJ).

<sup>91</sup> *Ibid* 181 [89] (French CJ, Gummow and Crennan JJ), 203 [155] (Hayne, Kiefel and Bell JJ).

<sup>92</sup> *Ibid* 199 [141] (Hayne, Kiefel and Bell JJ).

<sup>93</sup> *Ibid* 166 [32]. In doing so, their Honours upheld the earlier authority of *P J Magennis Pty Ltd v Commonwealth*, which 'rejected the proposition that a federal statute giving financial

conditions cannot be used to allow the Commonwealth to acquire property other than on just terms. That view was formed in light of ‘developments in interpretation of the *Constitution*’, specifically an approach which looks ‘beyond matters of legal form and to the practical effect of the law in question.’<sup>94</sup>

Three years after *Pape* was decided, an equally principled Mr Williams sought to challenge unconstrained Commonwealth expenditure. In *Williams [No 1]*, the spending related to Commonwealth funding of a not-for-profit religious corporation to deliver chaplaincy services in Queensland state schools.<sup>95</sup> In an inversion of the *Pape* decision, Mr Williams lost his primary argument — that the payments were prohibited by s 116 of the *Constitution* — but ultimately succeeded in challenging the Commonwealth’s spending power. Specifically, the High Court found that the financial power to appropriate monies under s 81 is not, of itself, a power to spend monies for any purpose. In the constitutional state, possessing money does not authorise the spending of that money. Rather, that expenditure must be consistent with the constitutional limits of representative government and federalism.<sup>96</sup> As will be seen, this has significant implications for our understanding of the financial decision-making powers conferred by s 96.

Whether s 96 could have been relied upon to legitimately fund school chaplains was not addressed in *Williams [No 1]*.<sup>97</sup> However, the fact that it *had not* been used was considered relevant to the legitimacy of those payments.<sup>98</sup> Hence, Gummow and Bell JJ considered that

while the engagement of the legislative branch of government marked off *Pape* from cases where there is, by reason of the absence of such engagement, a deficit in the system of representative government, there remains in common

assistance to States was for that reason not a law with respect to the acquisition of property’: (1949) 80 CLR 382, 403 (Latham CJ).

<sup>94</sup> Ibid 169 [40], [44] (French CJ, Gummow and Crennan JJ).

<sup>95</sup> *Williams [No 1]* (n 20).

<sup>96</sup> See *ibid* 217–18 [88]–[90] (Gummow and Bell JJ), 248 [191]–[192] (Hayne J), 351–2 [516] (Crennan J).

<sup>97</sup> See *Williams [No 1]* (n 20) 179–80 [4] (French CJ), 217 [88] (Gummow and Bell JJ), 240–1 [172] (Hayne J), 336 [451] (Crennan J), 361 [556]–[557] (Kiefel J).

<sup>98</sup> See *ibid* 179–80 [4], 204–5 [59] (French CJ), 217–18 [88]–[91], 234–6 [143]–[148] (Gummow and Bell JJ), 246 [189], 259 [219], 267–71 [243]–[253] (Hayne J), 347 [501], 351 [514]–[515], 354 [532] (Crennan J), 361 [556], 363 [563], 373 [592]–[593] (Kiefel J).

with any assessment of the [impugned legislation] the considerations of federalism, stimulated by the by-passing by the Executive of s 96.<sup>99</sup>

Similarly, Hayne J stated that the

Commonwealth expenditure that is under consideration would not only give s 96 of the *Constitution* a place in the constitutional framework very different from the place it has hitherto been understood to occupy but also render it otiose.<sup>100</sup>

These views would be endorsed by the entire majority when Mr Williams returned to the High Court some two years later, this time to challenge the Commonwealth's attempt to legislatively validate the chaplaincy program (and others made by executive contract) under s 51(xxiiiA) and s 51(xx) of the *Constitution* in *Williams v Commonwealth* ('*Williams [No 2]*').<sup>101</sup>

In *Williams [No 2]*, the High Court concluded that merely granting money to a subject is not the same as *making a law* about a subject.<sup>102</sup> Consequently, neither of the purported powers the Commonwealth had relied upon to justify its grants had been truly enlivened. As will be discussed, this is especially relevant to the constitutive characterisation of s 96 of the *Constitution*. Equally important was that the High Court rejected the Commonwealth's argument that the legislation was supported by the implied nationhood power, because 'the States had been consulted about and had supported the extension of the chaplaincy program'.<sup>103</sup> Rather, the Court held that the cooperative mechanisms within the *Constitution*, such as s 96, must be properly engaged with.<sup>104</sup> Hence, the plurality (with whom Crennan J agreed in a separate judgment) asserted that if the Commonwealth and states were to join together in 'achieving common ends', they may only do so by, and within, the limits of a specific constitutional provision providing for such cooperative governance, namely s 96.<sup>105</sup>

<sup>99</sup> Ibid 234 [143].

<sup>100</sup> Ibid 267 [243].

<sup>101</sup> (2014) 252 CLR 416 ('*Williams [No 2]*').

<sup>102</sup> Ibid 460 [47]–[48] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>103</sup> Ibid 467 [73] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>104</sup> See ibid 467 [74] (French CJ, Hayne, Kiefel, Bell and Keane JJ, Crennan J agreeing at 471 [99]).

<sup>105</sup> Ibid. The Court noted: "The *Constitution* contains several provisions by which the States and the Commonwealth may join in achieving common ends. *It is enough to mention ... s 96 (about grants on condition)*": at 467 [74] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

The entire Court consequently confirmed and reinforced what had been variously asserted in *Williams [No 1]*, specifically that s 96 has a formal and legal role within the *Constitution* as a conduit through which cooperative federal fiscalism is to be achieved.<sup>106</sup> The exact dimensions of this conduit are to be defined with reference to that federal system rather than ignoring it. Thus, the majority in *Williams [No 2]* stated:

The history of British constitutional practice is important ... But it says nothing at all about any of the other provisions of Ch IV of the *Constitution* ... [including s] 96 (about payments to States). And questions about the ambit of the Executive's power to spend [in relation to those financial provisions] *must be decided in light of all of the relevant provisions of the Constitution*.<sup>107</sup>

While the Court did not go on to explain what this meant for s 96 specifically — nor explain which provisions were relevant and which were not — the plurality in *Williams [No 2]* appears to have put to rest any assumptions that s 96 is an island of Commonwealth spending power, much less one defined by reference to any one organ of government. While the *Constitution* may have created a new form of fiscal power in s 96, it is not axiomatic that a new power is independent or unbounded.

Like all fiscal powers, s 96 is constrained and limited. In the case of s 96, these constraints and limitations are determined not by historic convention, but *contextually* with reference to the system of federal fiscalism established by ch IV. As Gummow and Bell JJ warned in *Williams [No 1]*, defining financial powers otherwise

not only alters what may be called the financial federalism of the *Constitution* but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the *Constitution* to the State.<sup>108</sup>

#### IV THE IMPLICATIONS OF A REINTEGRATED S 96

The process of reintegrating s 96 into the constitutional framework has largely been incidental to the High Court's more specific focus on other

<sup>106</sup> See above nn 99, 100.

<sup>107</sup> *Williams [No 2]* (n 101) 468–9 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

<sup>108</sup> *Williams [No 1]* (n 20) 236 [148], quoting *Victoria v Commonwealth* (1975) 134 CLR 338, 358 (Barwick CJ) ('AAP Case').

constitutional provisions, such as s 61 and s 81 of the *Constitution*. The Court has not given similarly direct attention to the words of s 96 itself, but its attention to the surrounding provisions have greatly informed our understanding of it. The result is that, while a number of questions highlighted by Saunders remain unanswered, we are better able to predict what the answers to them would be if the Court completes its exegesis of ch IV by considering s 96 directly.

#### *A Termination Clause*

It is a somewhat trite observation that the Commonwealth Parliament is unlikely to voluntarily terminate s 96. Notwithstanding the section was apparently intended to be transitional,<sup>109</sup> the early High Court interpreted it in such a way that ensured the very body empowered to provide for its termination has a vested interest in allowing it to continue to operate in perpetuity.

So too has the recent Court endorsed the treatment of the provision as continuing in perpetuity, albeit for different reasons. That is, the provision is now viewed as one of the proper constitutional conduits for transfers to the states,<sup>110</sup> suggesting both essentiality and permanence. It therefore now seems settled that the section has no (judicially enforceable) temporal limits.

#### *B Parliamentary Involvement*

While questions about the temporal limits to the section might have been settled, the opposite is true of its double conferral of power upon Parliament — notably, the section's constitutionally unique reference to Parliament both *granting* monies and determining the terms and conditions for which they are to be granted. This is especially the case now that s 96 must be read '*in light of all of the relevant provisions of the Constitution*'.<sup>111</sup> That is, the provisions which it interfaces with, its placement in the *Constitution* and

<sup>109</sup> See above Part II.

<sup>110</sup> See, eg, *Williams [No 1]* (n 20) 235 [147] (Gummow and Bell JJ), 347 [501] (Crennan J), 373 [592] (Kiefel J); *ICM Agriculture* (n 16) 170 [46] (French CJ, Gummow and Crennan JJ), 199 [140]–[141] (Hayne, Kiefel and Bell JJ).

<sup>111</sup> *Williams [No 2]* (n 101) 469 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

the constitutive nature of its power. The result of this contextual reading of s 96 suggests that

- 1 s 96 is not a legislative power;
- 2 financial powers are exclusive to Parliament;
- 3 federal fiscal supervision is a condition precedent to legislating; and, consequently,
- 4 the orthodox allowance of executive delegation of terms and conditions is now incorrect.

This line of reasoning and its ultimate conclusion will be discussed in detail below.

### 1 *Section 96 is Not a Legislative Power*

Read contextually, s 96 is a financial, not legislative, power. Indeed, this was recognised by those in the orthodox Court who took the time to consider the constitutive nature of the provision. In particular, Dixon CJ accepted in the *Second Uniform Tax Case* that

s 96 does not deal with a legislative subject matter; it does not make some interim provision with respect thereto. It confers a bare power of appropriating money to a purpose and of imposing conditions. ...

... [I]t must be borne in mind that the power conferred by s 96 is confined to granting money and moreover to granting money to governments. It is not a power to make laws with respect to a general subject matter.<sup>112</sup>

In fact, the practical effect of the majority judgment in both that case and its predecessor — that the Commonwealth can induce but not *coerce* state compliance to a grant's terms and conditions — necessarily leads to that conclusion. If the provision was, in fact, legislative, state consent to its terms and conditions would not be necessary, because the state would be bound by the unilateral exercise of Commonwealth legislative power under the provisions of s 109. However, the remainder of the majority of the orthodox Court did not dedicate so many energies to the constitutive nature of s 96. Instead, it tended to treat the section as a standalone head of legislative power, simply because it was invested in the legislature.<sup>113</sup> As noted, Saunders

<sup>112</sup> *Second Uniform Tax Case* (n 38) 604, 609.

<sup>113</sup> Indeed, Saunders writing in 1987 still presumed that was the case: Saunders, 'Part 1' (n 11) 11.

accepted this aspect of the orthodoxy in the first of her papers.<sup>114</sup> It is on this point that this paper deviates.

In *Pape*, the Court emphasised that a power to spend is not a power to legislate, simply because it is conferred upon the legislature.<sup>115</sup> As potentially shocking as that may have seemed at the time, it was simply a reminder that not all powers vested in, or exercised by, Parliament are legislative in nature. Indeed, in the earlier case of *Egan v Willis*, McHugh J emphasised that Parliament has constitutive ‘legislative, financial [and] critical’ functions.<sup>116</sup> While such functions inevitably overlap in their exercise, they are legally distinct, and give rise to different forms of derivative power. We must therefore *first* ask what the nature of the power is before determining what the body it is invested in can do with it (including whether it can delegate the power to other bodies).

If s 96 is to be read contextually as an integral part of ch IV, two of its features are relevant to its constitutive characterisation. The first and most obvious is that it is found in the financial, not legislative chapter of the *Constitution*. The second is that, unlike the actual legislative powers in s 51 and s 52, s 96 confers no express power upon Parliament to ‘make laws ... with respect to’ grants. Rather, it merely states that Parliament ‘may grant’, indicating an authorisation, but not lawmaking, function. Critically, the section then goes on to mention Parliament a second time — a constitutionally unique double conferral of power upon that body<sup>117</sup> — in respect of its responsibility to determine the terms and conditions of the grant. This is a complete vesting of financial power in Parliament, not only to determine the subject to which monies are to be put, but also *how* the monies

<sup>114</sup> Ibid.

<sup>115</sup> *Pape* (n 86) 23 [8] (French CJ), 75 [185] (Gummow, Crennan and Bell JJ), 102 [289] (Hayne and Kiefel JJ), 213 [607] (Heydon J).

<sup>116</sup> *Egan v Willis* (n 18) 475 [100], quoting Sir Courtenay Ilbert, ‘Preface’, in Josef Redlich, *The Procedure of the House of Commons: A Study of its History and Present Form*, tr A Ernest Steinthal (Archibald Constable & Co, 1908) vol 1, vi.

<sup>117</sup> When read as a whole, there is quite a clear distinction in ch IV between the ‘Commonwealth’ in the sense of a polity, and ‘Parliament’ or ‘Parliament of the Commonwealth’ as a specific organ of that polity. Indeed, even beyond that chapter, s 1 of the *Constitution* states that ‘[t]he legislative power of the Commonwealth shall be vested a Federal Parliament ... hereinafter called *The Parliament*, or *The Parliament of the Commonwealth*’ (emphasis added). Indeed, s 96 may be contrasted with other finance and trade provisions, including s 81, s 82, s 99 and s 100, which refer to the Commonwealth as a polity.

in respect of that subject are to be used — suggesting a financial power containing regulatory and supervisory aspects, not a legislative power of lawmaking.<sup>118</sup>

Modern judgments considering the constitutive character of s 96 support Dixon CJ's original conclusion that s 96 'does not deal with a legislative subject matter' but is instead a 'bare' financial power.<sup>119</sup> Hence, in *Attorney-General (Vic) ex rel Black v Commonwealth* ('DOGS Case'), Mason J accepted that the character of s 96 as 'financial, not regulative'.<sup>120</sup> Similarly, French CJ, Gummow and Crennan JJ concluded in *ICM Agriculture* that 'the legislative power of the Commonwealth [is] conferred by ss 96 and 51(xxxvi)' operating together;<sup>121</sup> indicating the latter was the source of legislative power. Finally, in *Pape*, Hayne and Kiefel JJ summarised:

It is necessary to construe each provision of the *Constitution* as part of the whole. There is no little danger in taking one of its provisions (eg, s 81), construing it in isolation, and then taking that construction as a premise for further conclusions about the ambit of other powers ...

... [I]n the case of a number of other provisions of Ch IV of the *Constitution* (eg, ss 87, 93 and 96) the relevant head of legislative power is not to be found in Ch IV but rather in s 51(xxxvi).<sup>122</sup>

This suggests that, of the three parliamentary functions identified in *Egan v Willis* by McHugh J,<sup>123</sup> s 96 is fundamentally a financial one. While it may intersect or enliven a power to legislate, such a legislative power must be found elsewhere in the *Constitution* (namely within the *actual* legislative chapter).

<sup>118</sup> On the other hand, *Constitution* ss 51–2 are silent on Parliament's role in regulating the topic (ie the terms and conditions), leaving the legislature the option of prescribing the terms and conditions through legislation, or to delegate this power in the executive branch: see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101 (Dixon J) ('*Dignan*').

<sup>119</sup> *Second Uniform Tax Case* (n 38) 604.

<sup>120</sup> *DOGS Case* (n 69) 618, quoting *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 224 (Isaacs and Rich JJ). See also *Williams [No 2]* (n 101) where the plurality described *Constitution* ss 93–6 as provisions for 'payments to states': at 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>121</sup> *ICM Agriculture* (n 16) 170 [46].

<sup>122</sup> *Pape* (n 86) 102 [288]–[289] (emphasis added).

<sup>123</sup> See above n 116 and accompanying text.

## 2 *Financial Powers are Exclusive to Parliament*

Different categories of parliamentary power give rise to different implications for their interface with the executive. That is not least because, unlike legislative power, financial and critical powers are supervisory.<sup>124</sup> Indeed, as Hayne J explained in *Williams [No 1]*:

Ch IV (particularly ss ... 96 and 97) ... provide[s] for parliamentary control over the raising and expenditure of public moneys ... [including] supervision of what is actually received and outlaid ('the receipt of revenue and the expenditure of money on account of the Commonwealth' (s 97)).<sup>125</sup>

As a financial and supervisory power, s 96 cannot be delegated to those it controls and supervises. Rather, it must remain, along with the rest of ch IV, part of the 'comprehensive and continuous guardianship' of the Houses of Parliament.<sup>126</sup> This is especially the case as it will have a financial and regulative impact on the states, whose interests are represented in the Senate.

## 3 *Federal Fiscal Supervision is a Condition Precedent to Legislating*

Like *Pape*, *Williams [No 1]* and *Williams [No 2]* indicated that we must avoid conflating constitutional powers. *Williams [No 2]* highlighted that, when read together, the *Constitution* may envision a conditional order in which powers are to be exercised. Relatedly, it emphasised that, in the constitutional state, possessing money does not, of itself, authorise the spending of that money. The executive possesses no power of disbursement, and no power to spend absent parliamentary authority.<sup>127</sup> Hence, the power to spend is only enlivened *after* legislation has been validly passed with respect to a head of power, not before. The same is true of s 96, albeit in the opposite direction; namely it acts as a condition precedent to legislating.

Practically, s 96 serves to direct the flow of public monies between two constitutional polities established by a single constitution and subject by the

<sup>124</sup> *Egan v Willis* (n 18) 451 [42] (Gaudron, Gummow and Hayne JJ), cited in *Williams [No 1]* (n 20) 349–50 [509] (Crennan J).

<sup>125</sup> *Williams [No 1]* (n 20) 259 [219].

<sup>126</sup> *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160] (Gummow, Hayne, Callinan and Heydon JJ) ('*Combet*'). But see Appleby (n 47) 102.

<sup>127</sup> *AAP Case* (n 108) 353 (Barwick CJ).

rule of law to the same popular sovereign. Indeed, as O'Connor J stated of the surplus revenue provisions of ch IV (specifically s 94):

In ascertaining the real meaning of the obligation imposed on the Commonwealth to distribute [monies] amongst the States ... regard must be had to the nature, incidents and usual methods of dealing with public revenue and public expenditure under a system of parliamentary government, the annual accounting to Parliament ... the necessity of obtaining *in advance* parliamentary sanction for expenditure ... Such are the conditions under which the obligations of the Commonwealth to the States must under our Parliamentary system necessarily be performed.<sup>128</sup>

Like s 94, s 96 involves disbursement of federal monies by the Commonwealth Parliament and resultant distribution of monies to the states. Like s 94, its placement in the financial chapter of the *Constitution* denotes the fundamental role of the Senate in parliamentary supervision of federal finances. That is particularly the case where those monies serve to 'regulate activity in the community in the course of implementing government policy',<sup>129</sup> and influencing 'matters covered by the residue of governmental power assigned by the *Constitution* to the State'.<sup>130</sup>

Saunders was thus quite right to point out that the express conferral of the power to determine terms and conditions of a grant 'might [ordinarily] have been considered to fall within the scope of executive power had it not been conferred on the Parliament under section 96'.<sup>131</sup> What is now clearer is why such an express conferral is necessary, and why it should not be treated as a mere accident of last-minute drafting. The executive is so deprived because both the power to determine a grant and to set its terms and conditions are aspects of a financial power, which must be exercised by Parliament as conditions precedent to the enlivenment of legislative authority under s 51(xxxvi).<sup>132</sup> That is especially the case because it is the terms and

<sup>128</sup> *New South Wales v Commonwealth* (1908) 7 CLR 179, 198 (emphasis added).

<sup>129</sup> *Williams [No 1]* (n 20) 352 [521] (Crennan J).

<sup>130</sup> *Ibid* 236 [148] (Gummow and Bell JJ), quoting *AAP Case* (n 108) 357–8 (Barwick CJ).

<sup>131</sup> Saunders, 'Part 1' (n 11) 10.

<sup>132</sup> Namely, Parliament must have considered and agreed: (a) what the financial assistance will be; (b) to which state or states it will be granted; and (c) the terms and conditions it will impose upon the grant. Only once this is done does a constitutional fact arise to authorise the legislative power under s 51(xxxvi). The question of whether the incident itself could be delegated in a general sense is uncertain. One would suspect not, given each incidental power is reliant upon the existence of a primary power to operate. It is more likely that once the primary source of power or authority has been enlivened, and a constitutional fact upon

conditions, as much as the making of the grant, which interfere with the federal fiscal balance, by binding and benefiting some states over others in the federation. As Mason J noted in *Victoria v Commonwealth*, neither convenience nor implication justify creating a standalone head of national spending power for the Commonwealth executive.<sup>133</sup> Indeed, as his Honour pointed out, s 96 supports the notion that the opposite is true, that ‘there is a very large area of activity which lies outside the executive power of the Commonwealth’ and solely within the province of the states.<sup>134</sup> This is a limitation that can only be altered through the proper exercise of parliamentary authority under s 96.

Underlying both *Williams [No 1]* and *Williams [No 2]* was a concern that *not* using s 96 to financially influence matters outside of the core heads of legislative power would ‘undermine parliamentary control of the executive branch and weaken the role of the Senate’ as the states’ House.<sup>135</sup> Yet, that logically means that s 96 itself cannot be used to undermine the constitutional function of Parliament or the Senate because, according to the Court, the section exists to guarantee that payments to the states will be approved by the Senate.<sup>136</sup>

While it is true that the Senate may not always fulfil its intended role as the states’ House, it does not alter the fact that, when the *Constitution* was being drafted, that is how it was meant to operate. As French CJ noted in *Williams [No 1]*:

The function of the Senate as a chamber designed to protect the interests of the States may now be vestigial ... [but] it has not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the ‘truly federal government’ of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the *Constitution*.<sup>137</sup>

Thus, s 96 cannot, of itself, authorise unfettered executive spending. In fact, for *Williams [No 1]* and *Williams [No 2]* to have practical and genuine constitutional meaning, the opposite must be true. By requiring

which the incident is reliant comes into existence, then Parliament must still legislate to establish the regulatory framework within which the executive may be delegated power to apply that law: *Dignan* (n 118) 119–23 (Evatt J).

<sup>133</sup> *AAP Case* (n 108) 398.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Williams [No 1]* (n 20) 205 [60] (French CJ).

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid* 205–6 [61].

parliamentary scrutiny of both a grant and its conditions, any discriminatory aspects of the proposed grant may be responded to by affected states (nominally at least) through the Senate. The result is to bring into serious doubt the other dangerous assumption about s 96: the ability of it to be delegated to the executive.

#### 4 *The Orthodox Allowance of Executive Delegation of Terms and Conditions is Now Incorrect*

All of what is set out above in relation to fiscal federalism leads to a conclusion that s 96 is a power and duty solely invested in Parliament. This appears to contradict orthodox assumptions about the capacity of Parliament to delegate the powers in s 96 to the executive. The source, strength and continued relevance of that orthodox authority is now in question and needs to be revisited.

The assumption that Parliament can delegate its s 96 powers arises out of Latham CJ's judgment in the *Flour Tax Case* — and has been relied on ever since<sup>138</sup> — where his Honour concluded:

Parliament does fix the terms and conditions of the grant if, by legislation, it authorizes a Minister to determine such terms and conditions. It is too late now to argue that terms and conditions determined by a Minister under such [delegated] legislation are not determined by the Parliament.<sup>139</sup>

Latham CJ justified this conclusion on two grounds:

- the apparent decision of the High Court to reject arguments that s 96 could not be delegated to the executive in the *Federal Roads Case*;<sup>140</sup> and
- a stream of authority — culminating in *Victoria Stevedoring and General Contracting Co Pty Ltd v Dignan* ('*Dignan*') — supporting executive delegation as a necessary incident of legislative power.<sup>141</sup>

The first of Latham CJ's grounds for concluding the delegable nature of s 96 is most easily dismissed. As already noted, the *Federal Roads Case* was expressed

<sup>138</sup> For example, in the *First Uniform Tax Case*, Latham CJ and Williams J both cited Latham CJ's dicta in the *Flour Tax Case* to discount the plaintiff's objection to delegation of some powers to the Treasurer of the Commonwealth: *First Uniform Tax Case* (n 42) 415–16 (Latham CJ), 464 (Williams J), citing *Flour Tax Case* (n 9) 763 (Latham CJ). The delegation of s 96 powers was not raised or addressed by the Court at all in the *Second Uniform Tax Case* (n 38).

<sup>139</sup> *Flour Tax Case* (n 9) 763.

<sup>140</sup> *Ibid*, discussing *Federal Roads Case* (n 8) 405.

<sup>141</sup> *Flour Tax Case* (n 9) 763.

in a three-sentence judgment that lacked any reasoning or ratio. Indeed, no reference was made to delegation of s 96 in that case at all. Instead, Latham CJ drew his conclusions from what he understood the parties to the matter had argued before the Court — and therefore what the Court had tacitly rejected. Implying a stream of authority from extra-judicial sources, rather than from the recorded judgment itself, is highly questionable, especially as it occurred during the height of *Engineers' Case* formalism. To the extent that the *Flour Tax Case* relies on the *Federal Roads Case*, it should not be seen as amounting to any more reliable authority than its predecessor.

While Latham CJ's second ground is ostensibly justified by a stream of authority, the modern view of the constitutive character of s 96 denies the legitimacy of that authority,<sup>142</sup> as does contemporary jurisprudence that highlights the mistake of assuming a power is legislative simply because it is conferred upon Parliament.<sup>143</sup> Every one of the authorities relied upon by Latham CJ in the *Flour Tax Case*, including the most prominent, *Dignan*,<sup>144</sup> were addressed to *legislative* powers under s 51 and s 52. This is a different category of power than the financial power in s 96, whose exercise may establish the conditions precedent to legislating, but is not itself a power to legislate.

It is only once the conditions of s 96 have been met that a constitutional fact arises sufficient to enliven s 51(xxxvi) ('matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides'), or the incidental power of s 51(xxxix). Even then, Parliament must pass laws *with respect to* the constitutional fact so enlivened — specifically, a defined exercise of authority to make a grant of aid, on specified terms and conditions — that the legislative power may be delegated. To do otherwise would invert the constitutional order established by the interrelationship between s 96 and s 51(xxxvi). It would also provide the executive with the power to determine the subject matter of a law under s 51(xxxvi),<sup>145</sup> and invest it with the power

<sup>142</sup> *Second Uniform Tax Case* (n 38) 604 (Dixon J); *DOGS Case* (n 69) 618 (Mason J); *ICM Agriculture* (n 16) 170 [46] (French CJ, Gummow and Crennan JJ); *Pape* (n 86) 102 [288]–[289] (Hayne and Kiefel JJ).

<sup>143</sup> *Williams [No 2]* (n 101) 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>144</sup> See *Dignan* (n 118) 119–23 (Evatt J).

<sup>145</sup> *Ibid.* Evatt J noted: '[A] law with respect to the legislative power to deal with the subject ... would not be truly described as being a law with respect to [a constitutional head of power]'; at 120. See also *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 373 (Barwick CJ).

to actually *make* law.<sup>146</sup> As the plurality noted in *Western Australia v Commonwealth*:

The content of any such law is one which the Parliament must itself consider although a delegation to the Executive Government to make a law of a regulatory kind to implement an Act of the Parliament can find support in that paragraph.<sup>147</sup>

As discussed, s 96 establishes conditions precedent to legislating by incident of s 51(xxxvi); specifically, that Parliament consider and approve each grant of aid and its terms and conditions. Only once such consideration has properly occurred, the purpose and content of legislation determined, and monies appropriated to that purpose — however broadly described in the sense of *Combet v Commonwealth*<sup>148</sup> or *Wilkie v Commonwealth*<sup>149</sup> — can the executive be delegated powers to regulate it. The difference between s 81 (to which those decisions relate) and s 96 is, as confirmed in *Pape*, that the former relies on the existence of a valid head of power to establish the subject and purpose to which the monies are directed, while the latter creates the subject and purpose (by describing the recipient, and the terms and conditions) to which money can later be appropriated to.<sup>150</sup> Similarly, only once the conditions precedent to legislating have been met is Parliament's power to create legislative instruments with respect to the resultant legislative power

<sup>146</sup> In *Baxter v Ah Way*, Griffith CJ, quoting the Privy Council, considered a purported delegation of legislative authority as

incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *a fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

*Baxter v Ah Way* (1909) 8 CLR 626, 633, quoting *R v Burah* (1878) 3 App Cas 889, 904 (Lord Selborne). See also *Dignan* (n 118) 120–1 (Evatt J).

<sup>147</sup> (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>148</sup> *Combet* (n 126).

<sup>149</sup> (2017) 91 AJLR 1035.

<sup>150</sup> As Isaacs J concluded in *New South Wales v Commonwealth* (n 128) 200:

'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the *Constitution* has itself declared, or Parliament has lawfully determined, shall be carried out. So long as that purpose remains unfulfilled but still existent and awaiting performance, it appears to me a hopeless contention that money ... stands 'appropriated' for that purpose.

enlivened. This does not mean that the executive cannot be vested with powers under legislative instrument to administer a regime, once it has been determined in its entirety by Parliament. For instance, the executive may be lawfully empowered to regulate annual sums according to a prescribed legislative formula agreed to by states and the Commonwealth, such as occurred in the *Flour Tax Case* regime.<sup>151</sup> Nevertheless, such a delegation by legislative instrument would appear to be restricted to truly regulating that grant, rather than amounting to a power to establish or require new terms and conditions upon that grant.

In sum, this indicates that Parliament must be directly involved in determining the scope and nature of each agreement to grant aid to a state. Interestingly, despite the orthodox assumption that Parliament could delegate the powers described in s 96, the legislation considered by the courts in those cases involved a much more minimal form of delegation than found today. Namely they were premised on a negotiated intergovernmental agreement followed by complementary state and Commonwealth legislation to support it.<sup>152</sup> Over time, the practice has shifted to more arms-length regimes which

<sup>151</sup> *Wheat Industry Assistance Act 1938* (Cth) s 14, discussed in *Flour Tax Case* (n 9).

<sup>152</sup> For example, in the *Federal Roads Case* (n 8), the impugned legislation specifically referred to its cooperative purposes, being '[a]n Act to authorize the execution by the Commonwealth of agreements between the Commonwealth and the States in relation to the Construction and Reconstruction of Federal Aid Roads, and to make provision for the carrying out thereof: at 400. Under the cooperative agreement, incorporated into legislation at both the state and Commonwealth level, the states and Commonwealth agreed that the agreement would have 'no force or effect and shall not be binding on either party unless and until it is approved adopted authorized or ratified by the Parliaments of the Commonwealth and of the state': *Federal Aid Roads Act 1926* (Cth) sch 1 cl 1 (emphasis added). See also *Federal Aid Roads Act 1927* (NSW) sch 1 cl 1 (the Parliament of New South Wales had originally refused to endorse the agreement, but eventually capitulated); *Federal Aid Roads Agreement Approval Act 1926* (Qld) sch 1 cl 1; *Federal Aid Roads Agreement Act 1926* (SA) sch 1 cl 1; *Commonwealth and State Roads Agreement Act 1926* (Tas) sch 1 cl 1; *Federal Aid Roads Act 1926* (Vic) sch 1 cl 1; *Federal Aid Roads Agreement Act 1926* (WA) sch 1 cl 1. States then passed further legislation authorising works under the grant: see, eg, *Public Works (Federal Aid Roads) Execution Act 1927* (Tas); *Federal Aid Roads Agreement Approval Act 1926* (Qld); *Federal Aid Roads and Works Act 1937* (NSW). In respect of the *Flour Tax Case* (n 9), the regime was accepted by all parties as a cooperative involving complementary Commonwealth and state legislation 'passed to give effect to a scheme which had been agreed between the Prime Minister of the Commonwealth and the Premiers of the six States after a conference at Canberra ... [which] was carried out by six Commonwealth Acts and by certain State Acts passed by the various States': *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338, 340–2 (Viscount Maugham for the Court) (*'Flour Tax Case (Privy Council)'*). Hence, Tasmania enacted *Tasmania Grant (Flour Tax) Act 1935* (Tas) to complement the Commonwealth *Flour Tax (Wheat Industry Assistance) Assessment Act 1938* (Cth) and the *Flour Tax (Stocks) Act 1938* (Cth). In the *First Uniform Tax Case* (n 42) and *Second Uniform*

significantly minimise the role of Parliament in making and determining the scope of individual grants.<sup>153</sup> This deprives states affected by such grants (either positively or negatively) from the ability to review and debate the impacts of those grants in the Senate.<sup>154</sup> In a wider setting, Parliament as a whole loses its capacity to truly review and authorise the various purposes to which Commonwealth monies are expended. Such unfettered and unsupervised spending appears contrary to the structure and purpose of ch IV, as revealed by *Pape* and both *Williams [No 1]* and *Williams [No 2]*.

### C The Meaning of 'State'

Unlike the clear reference to the *Parliament* of the Commonwealth in s 96, the power to grant financial assistance 'to any *State*' is somewhat more obscure. On the one hand, 'state' might refer to the entire polity,<sup>155</sup> arms of its government, or simply leave the matter to the internal constitutional arrangements in each state.<sup>156</sup>

While the High Court has never clearly defined 'state' for the purposes of s 96, the orthodox cases seem to support the view that the mode and manner of acceptance of the monies is entirely a question of state, rather than Commonwealth, constitutional law. This also seems to be supported by a contextual reading of the *Constitution*, which consistently delineates between 'states' *simpliciter*, and more specific arms of government of those states.<sup>157</sup>

*Tax Case* (n 38), the issue did not arise, but there was already a wide-ranging set of complementary state and Commonwealth Financial Agreement Acts passed, which allowed for the transfer of funds between the two polities, as well as administrative legislation to allow for its collection and distribution: see, eg, *Income Tax (Commonwealth) Collection Act 1923* (NSW).

<sup>153</sup> Even at the time Saunders wrote, this was becoming evident: see Saunders, 'Part 1' (n 11).

<sup>154</sup> See *AAP Case* (n 108) 358 (Barwick CJ).

<sup>155</sup> Notably, s 96 does not contain the extra words 'to one State or any part thereof' found in s 99 of the *Constitution* (emphasis added). Those additional words describe the geographical aspects of the state, as opposed to the state as a governmental polity: see *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 591 [70] (Hayne, Bell and Keane JJ).

<sup>156</sup> Saunders, 'Part 1' (n 11). Saunders' view was that that the reference to the polity meant that 'section 96 should not be interpreted to compel the involvement of State Parliaments in the absence of an express requirement to that effect', but should rather be left to 'each State, in its *Constitution* or elsewhere, to prescribe how and by whom grants from the Commonwealth were to be accepted': at 13.

<sup>157</sup> Indeed, s 7 of the *Constitution* refers to the 'Parliament of the State of Queensland, if that State be an Original State' and s 10 refers to 'Parliament', 'Parliament of the State' and 'State' as three constitutionally distinct entities. See also *Constitution* ss 25, 30–1 (which distinguish between the 'Parliament of the State' and the Commonwealth 'Parliament'), s 95 (which

Indeed, the fact that s 96 so carefully specifies the Commonwealth Parliament, but does not do the same for the state, strengthens this view. That said, there seemed to be an early assumption, at least by the Privy Council, that on the state side:

The [s 96] scheme admittedly could not have been carried out by the Commonwealth Parliament alone ... [it relies upon] power ... of the *Tasmanian Parliament* to distribute the financial assistance obtained from the Commonwealth in giving relief to persons within the State.<sup>158</sup>

As explained above, much in that appeal could be so presumed, given the existence of a cooperative intergovernmental legislative regime to distribute grant monies.<sup>159</sup> Neither the High Court nor the Privy Council therefore needed to consider the implications of grant monies not flowing through state consolidated revenue, much less the Commonwealth expressly or implicitly requiring them to do so. Nevertheless, some in the Court recognised that there must be limits on the use of Commonwealth power pursuant to s 96. Hence, in the *Second Uniform Tax Case*, Fullagar J reasoned that the terms and conditions of a tied grant could only demand ‘action of which the State is constitutionally capable’.<sup>160</sup> Dixon CJ went further, concluding that the terms and conditions could not constitute a ‘special attempt to control the exercise of the constitutional powers of the States’.<sup>161</sup>

Other members of the Court concluded that the voluntary nature of the impugned grants — the actual question the Court was asked to consider — were such that the state Parliament was not being directly controlled by the Commonwealth.<sup>162</sup> Again, this leaves the question of whether ‘state’ in s 96 envisions a full polity, or merely an arm of it, very much open to debate. While it is not a debate which has been answered by more recent

distinguishes between ‘Parliament of the State of Western Australia’, ‘State’ and ‘Commonwealth’, ss 106–8 (which distinguish variously between ‘State’, ‘Parliament of the Commonwealth’ and ‘Parliament of the State’). *Constitution* s 109 describes ‘law of a State’, rather than law of the Parliament of a state, recognising that assent by the executive is necessary for valid enactment. *Constitution* ss 110, 119 refer separately to ‘state’ and ‘government of the State’ or ‘Executive Government of the State’ respectively.

<sup>158</sup> *Flour Tax Case (Privy Council)* (n 152) 341, 346 (Viscount Maugham for the Court) (emphasis added).

<sup>159</sup> See above n 152.

<sup>160</sup> *Second Uniform Tax Case* (n 38) 656.

<sup>161</sup> *Ibid* 609.

<sup>162</sup> *Ibid* 623 (McTiernan J), 636 (Williams J).

jurisprudence, echoes of the concerns raised by Fullagar J and Dixon CJ have continued. Hence, in the *DOGS Case*, Wilson J stated in obiter:

The [s 96] legislation provides a striking contrast in the discretion that is accorded to the States in the administration of the grants for government schools and the virtually total disregard of the States, save only for the barest acknowledgement of the formalities required by s 96, in the administration of the grants for non-government schools. The contrast is all the more remarkable in the context of a constitution which in the distribution of power within the federation does not confer on the Commonwealth Parliament a specific legislative power with respect to education.<sup>163</sup>

The issue was once again noted, but not dealt with directly, by the Court in *ICM Agriculture*. That case involved a regime in which states passed the money to recipients pursuant to a comprehensive legislative arrangement underpinned by a formal intergovernmental agreement.<sup>164</sup> The complementary state and Commonwealth legislative regime, intergovernmental agreement and support for the regime by the New South Wales Government, was considered to impute sufficient consent by the State.<sup>165</sup> However, French CJ, Gummow and Crennan JJ noted that, in those circumstances, the correctness of less formal intergovernmental arrangements between state and Commonwealth governments pursuant to s 96 was ‘unnecessary to consider’.<sup>166</sup> This suggests that the level of formality in

<sup>163</sup> *DOGS Case* (n 69) 659. According to Gibbs J, the orthodox interpretation was taken to mean that the states can be ‘no more than passive instruments by which the Commonwealth transmitted its moneys to the persons whom it had decided to assist’: at 590. In fact, the High Court appeared to have completely ignored (or possibly not considered) the existence of a pass-through agreement similar to that apparently used in the NAIF regime, albeit supported by a formal legislative framework at the state level. That is, perhaps, because the Court in that instance was not actually asked to revisit the question of states being used as financial conduits.

<sup>164</sup> See the explanation of the relationship between the *Water Management Act 2000* (NSW) and the Commonwealth legislation by French CJ, Gummow and Crennan JJ: *ICM Agriculture* (n 16) 160–3 [10]–[20].

<sup>165</sup> However, their Honours highlighted in obiter the use of ‘informal arrangement (in the form say of an exchange of letters) between governments setting out the conditions to be observed’ in some s 96 regimes: *ICM Agriculture* (n 16) 168 [37] (French CJ, Gummow and Crennan JJ), quoting *Gilbert v Western Australia* (1962) 107 CLR 494, 505 (Dixon CJ, Kitto and Windeyer JJ), quoting Letter from Prime Minister Robert Menzies to the Premier of Western Australia, 19 December 1951.

<sup>166</sup> *ICM Agriculture* (n 16) 168 [38]. Hayne, Kiefel and Bell JJ considered the conduit and contract questions unnecessary to address at all: at 187 [106].

intergovernmental agreements, particularly where they lack legislative support, remains open.

The lack of clarity about the degree of state involvement required under s 96 has given rise to regimes like the NAIF, in which the Commonwealth contracts with state executives to act as a conduit of Commonwealth monies directly to private entities.<sup>167</sup> Not only does this practically deny the character of the grant as one ‘to any State’, it also erodes the state Parliament’s supervisory role over state finances.

It was a ‘basal assumption of legislative predominance inherited from the United Kingdom’<sup>168</sup> that ‘the collection and expenditure of all revenue’<sup>169</sup> by the executive of the colonies could only be done by ‘Grant of Parliament’<sup>170</sup> and ‘subject to law’.<sup>171</sup> Hence, the constitutional principle in the colonies, which was carried into the law of the states, was that ‘it is essential to a complete parliamentary control of the public money that no portion of it should be arrested in its progress to the consolidated fund, from which alone it can be issued and applied with parliamentary sanction.’<sup>172</sup> This includes grant income paid to the executive,<sup>173</sup> not least because historically Crown borrowings were ‘often pledged against taxation revenues,’<sup>174</sup> but also because

<sup>167</sup> See, eg, *NAIF Act* (n 16); *Investment Mandate* (n 75).

<sup>168</sup> *Williams [No 1]* (n 20) 232 [136] (Gummow and Bell JJ).

<sup>169</sup> *Luton v Lessels* (2002) 210 CLR 333, 367 [100] (Kirby J).

<sup>170</sup> *Ibid* 366 [99] (Kirby J).

<sup>171</sup> *Ibid* 367 [100] (Kirby J). It is certainly not reserved to the sphere of the Commonwealth but is guaranteed by the *Constitution* in its establishment of the states and their Parliaments under ss 106–7. As the High Court explained in *Egan v Willis* (n 18), the principles of responsible government were embedded into the constitutional frameworks of the colonies prior to federation, and were reinforced as essential after their federation as states: at 453 [46] (Gaudron, Gummow and Hayne JJ), 472–4 [94]–[97] (McHugh J). McHugh J further explained: ‘[W]hether or not the colonies demanded that they be given responsible government, no one now denies that [they received it]’: *Egan v Willis* (n 18) 473 [94].

<sup>172</sup> *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 447 (Isaacs J), citing Arthur James Vavasor Durell, *The Principles and Practice of the System of Control over Parliamentary Grants* (Gieves, 1917) 11.

<sup>173</sup> While some questions arose as to whether loan monies necessarily had to be included in the consolidated revenues of the colonies, it is questionable whether that survived federation. It is also unlikely that financial transfer of aid to a state under the *Constitution* is technically the same as a ‘loan’, which might be taken by a state executive from a lender being expressed as a ‘grant of financial assistance’. Ultimately, however, these technical questions do not alter the fact that all monies paid into a state — whatever their source — must constitutionally be accounted for, and subject to parliamentary control: Enid Campbell, ‘Parliamentary Appropriations’ (1971) 4(1) *Adelaide Law Review* 145, 148.

<sup>174</sup> *Cemetery Reserve Case* (n 19) 597 (McHugh J).

allowing the Crown to receive and spend monies from unsupervised sources would allow it to exercise unconstrained financial powers.<sup>175</sup>

The same constitutional principle that indicates that the Commonwealth Parliament must be involved in the granting of aid under s 96 also suggests that the state Parliaments must be involved in approving its incorporation into state revenue and expenditure to the purpose for which it is granted.<sup>176</sup> However, this is more than just a concern of state constitutional law. The Commonwealth cannot dispense with the law, including state law.<sup>177</sup> Nor can it use its otherwise legitimate powers to interfere with the exercise of core state constitutional functions for which s 106 of the *Constitution* provides.<sup>178</sup> Thus, in *Australian Railways Union v Victorian Railways Commissioners*, Starke J concluded that

the Constitutions of the States ... prohibit moneys being taken out of the Consolidated Fund of the States (into which the revenues of the States are paid), except under a distinct authorization from the Parliaments of the States ... It would require ... the clearest words in the *Constitution* to [allow the Commonwealth to] interfere with or impair this constitutional principle, embedded in the Constitution of the States ... in the absence of any such provision in the *Constitution*, [s] 106 is conclusive.<sup>179</sup>

In *New South Wales v Commonwealth [No 1]*, Rich and Dixon JJ took this principle to mean that, absent express constitutional mandate, the Commonwealth cannot ‘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’.<sup>180</sup> Consequently, it probably remains correct to say that s 96 refers to state as a polity, for contextual reasons alone, but also practical ones, insofar as it permits the Crown of each polity to reach cooperative agreements to transfer s 96 grant monies.

<sup>175</sup> See *Williams [No 1]* (n 20) 232–3 [134]–[136] (Gummow and Bell JJ), 349–50 [509] (Crennan J).

<sup>176</sup> See, eg, *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155, 176 (Rich and Dixon JJ) (‘NSW [No 1]’).

<sup>177</sup> *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J). This would undermine the separation of powers, as reflected by the ‘settled constitutional principle’ prohibiting executive dispensation of laws: *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348, 359 [13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also *Pape* (n 86) 87 [227] (Gummow, Crennan and Bell JJ).

<sup>178</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 75 (Starke J).

<sup>179</sup> (1930) 44 CLR 319, 389.

<sup>180</sup> NSW [No 1] (n 176) 176.

However, is a different thing altogether to say that s 96 permits the Commonwealth to set conditions or enter into agreements which are designed to bypass state parliamentary supervision of the grant monies once they are transferred to the state.

That is especially the case, given that the source of Commonwealth power to enter into such agreements is now recognised to be found within s 51 (operating incidentally to s 96) of the *Constitution* and arguably only once Parliament has approved the specific grant. That section must be read 'subject to' the requirement to maintain the constitutions of the states,<sup>181</sup> which undeniably include the convention of responsible government and parliamentary supervision of public income and expenditure.

#### D *Restrictions and Limitations*

Possibly the least justified but most problematic aspect of the orthodox interpretation of s 96 is its treatment as an island of power, unaffected by any other constitutional provisions. This historic view was also articulated by Starke J in the *Flour Tax Case*, in which his Honour asserted:

This court has decided that grants of financial assistance to the States may be made on such terms and conditions as the Parliament thinks fit and are therefore *unaffected by [s] 99 or any other provision of the Constitution*.<sup>182</sup>

Of course, to state that s 96 is not bound by a specific provision of the *Constitution*, and 'any other provision of the Constitution' at the same time, is both tautological and redundant. Again, this appears to be the result of a misinterpretation of the *Federal Roads Case* by the later Court. Properly read, the High Court in the *Federal Roads Case* was clearly directing its conclusions to *impugned legislation* — finding that the *Federal Aid Roads Act 1926* (Cth) itself was not restricted by s 99 or any other provision of the *Constitution*.<sup>183</sup> That is entirely different from saying s 96 is at sea from the larger constitutional text. In fact, when properly scrutinised, it is clear that neither proposition is correct. Each will be discussed below.

<sup>181</sup> *Constitution* s 106.

<sup>182</sup> *Flour Tax Case* (n 9) 771 (emphasis added), citing *Federal Roads Case* (n 8).

<sup>183</sup> *Federal Roads Case* (n 8).

## E Section 96 is Not Unbounded

Dealing with the broader of Starke J's propositions first (that s 96 is unbound by 'any other provision of the *Constitution*'),<sup>184</sup> the High Court has, in fact, subsequently accepted that s 96 is limited by other constitutional provisions. The two most notable examples are the 1981 *DOGS Case* and the 2009 case of *ICM Agriculture*. In both cases, the majority accepted that s 96 could not be used to establish any religion or acquire property other than on just terms, due to the express limitations in s 116 and s 51(xxxi) of the *Constitution* respectively. Given the Court found in both cases that the impugned legislation did not breach those constitutional provisions, there was no reason for the Court to direct its attention to how its acceptance of these restrictions on s 96 aligned or conflicted with Starke J's orthodox interpretation. On the other hand, nothing in the conclusions reached in either case indicates that those two constitutional freedoms are exceptions to a general rule that s 96 is not bound by other provisions of the *Constitution*.<sup>185</sup>

Indeed, the conclusion about the scope and limitations of s 96 reached in *Williams [No 2]* — that it must 'be decided in light of all of the relevant provisions of the *Constitution*'<sup>186</sup> — necessarily requires that it conform to the general limitations on Commonwealth spending powers. However, the reintegration of s 96 goes further than that, especially in recognising that it is a financial, rather than legislative, power. This means it is reliant upon the incidental power — probably s 51(xxxvi) — to properly legislate.

As French CJ stated in the majority in *Rowe v Electoral Commissioner*, s 51(xxxvi) is the same as 'every power conferred by s 51', insofar as it must necessarily be read 'subject to the limitations imposed by the *Constitution*'.<sup>187</sup> Hayne J (in dissent) agreed, accepting that the legislative power granted by s 51(xxxvi) is valid '[u]ntil the Parliament otherwise provides, but *subject to this Constitution*'.<sup>188</sup> When considered specifically in relation to s 96, it is therefore clear that the Commonwealth has power to make tied grants, but

<sup>184</sup> *Flour Tax Case* (n 9) 771.

<sup>185</sup> There would seem little doubt, for instance, that tied grants could not be used to support schemes that undermined state or federal courts in breach of ch III of the *Constitution* or which breach the implied freedom of political communication. That is most obvious because both of those freedoms apply to state and Commonwealth alike, but it is also inherent in the characterisation of the power under s 96 itself.

<sup>186</sup> *Williams [No 2]* (n 101) 469 [82] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis altered).

<sup>187</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 14 [8].

<sup>188</sup> *Ibid* 65 [183], quoting *Constitution* ss 10, 31.

this power is subject to the *Constitution*, not free of it. All of this strongly suggests that any assumption that s 96 is unbound by ‘any other provision of the *Constitution*’<sup>189</sup> is an unconvincing and untenable position.

### 1 Section 99 Does Not Create a Positive Prohibition or Restriction on s 96

If it is incorrect to assume that s 96 is free of constitutional limitations and constraints generally, then all that remains of this aspect of the orthodoxy is Latham CJ’s primary assertion — that the provision is not ‘*affected by ... [s] 99*’ specifically.<sup>190</sup> That provision states:

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.<sup>191</sup>

The orthodox interpretation of s 96 assumes that the restrictions found in s 99 are addressed to the same category of Commonwealth activity that s 96 permits.<sup>192</sup> Thus, the reasoning goes, the former could not have been intended to apply to the latter because it would render the tied grants power inoperative. This was explained by Latham CJ in the *Flour Tax Case* — in reliance on the earlier judgment of the *Federal Roads Case* — as follows:

[Section] 96 is a means provided by the *Constitution* which enables the Commonwealth Parliament, when it thinks proper, to adjust inequalities between States which may arise from the application of uniform non-discriminating Federal laws to States which vary in development and wealth. ... [T]hese ‘equal’ laws may produce very unequal results in different parts of Australia. A uniform law may confer benefits upon some States, but it may so operate as to amount to what is called ‘a Federal disability’ in other States.

<sup>189</sup> *Flour Tax Case* (n 9) 771 (Starke J), citing *Federal Roads Case* (n 8).

<sup>190</sup> *Flour Tax Case* (n 9) 763 (emphasis added), quoting *Federal Roads Case* (n 8) 406 (Knox CJ for the Court).

<sup>191</sup> *Constitution* s 99.

<sup>192</sup> In *Morgan v Commonwealth* (1947) 74 CLR 421 (*‘Morgan’*), the post-*Engineers’ Case* (n 4) Court, in a strangely constructivist reading of the *Constitution*, determined that s 99 is limited to laws made pursuant to s 51(i), despite the section not actually saying that. However, this restriction appears to have been rejected by the High Court in *Permanent Trustee v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, which accepted the submission that ‘the prohibition in s 99 is not limited to laws supported by s 51(ii) of the *Constitution*’: at 422 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); and that ‘there is no reason to restrict s 99 in such a fashion as would deny [a law] the character of a law of “revenue” by reason of its source in s 52(i) rather than s 51(ii) of the *Constitution*’: at 422 [84] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) (*‘Mirror Tax Case’*).

[Section] 96 provides means for adjusting such inequalities in accordance with the judgment of Parliament.<sup>193</sup>

It is worth noting that this interpretation accords with historical scholarship about the original intention for the section.<sup>194</sup> Specifically, that it was designed to allay concerns about the ‘financial disruption to the States consequent upon Federation’,<sup>195</sup> by ensuring that the Commonwealth had the capacity to indemnify them against the impact of the ‘operation of uniform duties of customs and excise’.<sup>196</sup> Of course, the orthodoxy reinterprets that purpose as being one which applies beyond the period of financial restructuring following federation, but that accords to the modern view of s 96 as a permanent constitutional fixture. To that extent, the orthodox interpretation remains correct. Where it is less compelling is in its conflation of the topic and purpose of s 96 and s 99. While this is not made evident by recent federal fiscal case law, it is revealed by recent law that revives dissenting views on the roles of both these provisions, especially that of Evatt J in both *Elliott v Commonwealth* (*‘Elliott’*)<sup>197</sup> and the *Flour Tax Case* itself.

As Dixon J noted in dissent in *Elliott*, it is a mistake to treat ‘discrimination’ and ‘preference’ as being ‘identical in meaning’.<sup>198</sup> Evatt J, also in dissent in that case, agreed, and after a textual exegesis of s 99 concluded:

To prove infringement of [s] 99 it is not sufficient to show discrimination based on mere locality; it must also be shown that, as a consequence of the discrimination, tangible benefits, advantages, facilities or immunities are given to persons or corporations ...

... [F]or the purpose of determining two distinct questions: first, whether, solely as a result of their operation, tangible benefits, advantages, facilities or immunities accrue to any persons or class of persons; second, whether such accrual is a consequence of geographical situation ... *regardless of all other circumstances*.<sup>199</sup>

<sup>193</sup> *Flour Tax Case* (n 9) 763–4.

<sup>194</sup> See Taylor (n 6) 1462–3.

<sup>195</sup> *Ibid* 1446.

<sup>196</sup> *Official Record of the Debates of the Federal Council of Australasia*, Melbourne, 25 January 1899, 19 (Sir James Dickson), quoting Letter from Sir Samuel Griffith to Sir James Dickson, 23 January 1899.

<sup>197</sup> *Elliott v Commonwealth* (1936) 54 CLR 657.

<sup>198</sup> *Ibid* 683.

<sup>199</sup> *Ibid* 693 (emphasis added) (citations omitted).

This test, and the reasoning which supported it, was revived and approved by the majority of the High Court in the 2004 case of *Permanent Trustee v Commissioner of State Revenue (Vic)*,<sup>200</sup> indicating that it is now the correct test. The acceptance of Evatt J's reasoning by the modern Court — especially his Honour's exegesis of the meaning and purpose of s 99 — is particularly relevant to its interaction with s 96, given his Honour would go on to cite his reasoning in *Elliott* to justify his dissent about how those two powers interacted in the *Flour Tax Case*. In the *Flour Tax Case*, his Honour concluded that

[s] 96 cannot be employed for the very purpose of nullifying constitutional guarantees contained elsewhere in the *Constitution* ... [It] could not be contended that ... in face of [s] 99, which precludes the Commonwealth from enacting commercial laws which give a preference to one State over another, the Commonwealth could grant moneys to one State for the express purpose of enabling that State to subsidise traders engaged in inter-State trade on condition that they resided in such a State ...<sup>201</sup>

As Evatt J observed, any apparent orthodoxy surrounding s 96 and s 99 was based on obiter at best.<sup>202</sup> More to the point, his Honour's judgment highlighted that the two sections are directed to different forms of discrimination:

- s 96 permits the Commonwealth to *correct* an inequality; and
- s 99 prohibits the Commonwealth from *creating* an inequality.<sup>203</sup>

That is, the former allows the raising of a benchmark; the latter prohibits creating differential benchmarks. They operate on similar subjects in dissimilar forms such that, while s 99 might constrain the scope of s 96, it does not create a positive prohibition or restriction on its ordinary operation that would serve to nullify it completely.<sup>204</sup> On appeal, the Privy Council

<sup>200</sup> *Mirror Tax Case* (n 192) 423 [87]–[88] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), 446 [155] (McHugh J), 465 [224] (Kirby J).

<sup>201</sup> *Flour Tax Case* (n 9) 802.

<sup>202</sup> See *ibid* 802–5. This was amplified by the fact that the early s 96 regimes were supported by cooperative federalism and mirror legislation at both state and Commonwealth levels: at 767–70 (Starke J).

<sup>203</sup> *Ibid* 801–2. In many ways, this dissenting judgment is written in a way that complements, rather than directly contradicts, the majority view of the purpose of s 96 of the *Constitution*; see also at 763–4 (Latham CJ).

<sup>204</sup> See *Work Choices Case* (n 4) 127 [219] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

agreed with Evatt J's dissent in law — in contradistinction to the majority and especially Latham CJ — but not in its application to the specific facts of that case, upholding the majority's decision 'using the language of caution' in relation to its interpretation of s 96 generally.<sup>205</sup> That caution (about the assumption s 96 may be used to discriminate generally), along with the endorsement of Evatt J's views when combined with the contemporary acceptance of his Honour's dissenting views on the role and purpose of s 99 more generally, strongly suggest that his views on the intersection of the two provisions is the proper one.<sup>206</sup> By consequence, the entirety of the orthodoxy which treats the section as an unassailable island of spending power must be incorrect.

## V REMAPPING S 96

What is set out above suggests that the treatment of s 96 as having 'no judicially enforceable limits'<sup>207</sup> is unjustified and contrary to our contemporary understanding of the *Constitution* and its interpretation. Indeed, each of the specific conclusions that have been reached as a consequence of that broader orthodox view also appear incorrect. Namely, that the Parliaments play a nominal role; that the power may be delegated; or that the subject of the grant and its terms and conditions are unaffected by other constitutional limitations. However, it is worth pausing to recognise the disconnect between identifying errors on principle — even the most

<sup>205</sup> *Flour Tax Case (Privy Council)* (n 152) 350 (Viscount Maugham for the Court). Their Lordships warned:

It is difficult to see any ground for an attack on the scheme, or on the various Acts which carry it into effect, in so far as that attack is really based on the exercise by the Commonwealth Parliament of its powers under [s] 96. Those powers are plainly being used for the purpose of preventing an unfairness or injustice to the State of Tasmania ... [However,] [t]heir Lordships are using the language of caution ... They will add only that, in the view they take of the matter some of the legislative expedients — objected to as *ultra vires* by Mr Justice Evatt in his forcible dissenting judgment — may well be colourable, and such Acts are not receiving the approval of their Lordships. In the present case there seems to be no valid ground for suggesting that the sums payable to the Government of Tasmania ... are not in the nature of genuine financial assistance to the State, paid for the purpose of equalizing the burden on the inhabitants of Tasmania ...

*Flour Tax Case (Privy Council)* (n 152) 349–50 (Viscount Maugham for the Court).

<sup>206</sup> This is especially the case now that the relevant head of legislative power for s 96 has been confirmed to be found not in ch IV of the *Constitution*, but rather in s 51(xxxvi): *Pape* (n 86) 102 [289] (Hayne and Kiefel JJ); and because s 99 is no longer restricted to s 51(i): see above n 192.

<sup>207</sup> Blackshield and Williams (n 41) 1085.

fundamental principles — and predicting the correction of those errors by the High Court.<sup>208</sup> As French CJ summarised in *Wurridjal v Commonwealth*:

In many cases of interpretation of the *Constitution*, constructional choices are presented. To say that, upon a consideration of text, context, history and attributed purpose, one choice is to be preferred to another, is not necessarily to say that the choice rejected is wrong. Reasonable minds may differ on a point of constitutional interpretation.<sup>209</sup>

It might be added that when presented with alternative constructional choices, the decision to maintain the status quo is not wrong either. In fact, there is much to be said about maintaining a consistent line of interpretative precedent. While the doctrine of *stare decisis* may not strictly apply to the *Constitution*, the High Court prefers to maintain a stable and consistent line of interpretative authority, and views overturning earlier decisions as a ‘serious step, not lightly to be undertaken.’<sup>210</sup> This is not to say we should ignore questionable precedent, or suggest how the Court might correct it, but it does suggest that these questions should be approached with some degree of conservatism, objectivity and balance.

The fact that the s 96 orthodoxy has remained untouched for close to a century could mean that the Court is cautious about destabilising such a longstanding (perceived or actual) precedent. That is especially the case given how central the orthodoxy has become to the Commonwealth’s oversight of national economic affairs, infrastructure, public and community projects.<sup>211</sup> The existence of these regimes and the rights they confer on citizens and states militates against overturning the decisions that they ostensibly rely upon for their validity.<sup>212</sup>

On the other hand, a range of indicia suggest the Court might be willing to overturn the orthodoxy.<sup>213</sup> Notable is the fact that, properly considered, the orthodoxy does not appear to be based on ‘a principle carefully worked out in

<sup>208</sup> See, eg, Stephen Gageler and Brendan Lim, ‘Collective Irrationality and the Doctrine of Precedent’ (2014) 38(2) *Melbourne University Law Review* 525.

<sup>209</sup> (2009) 237 CLR 309, 353 [71] (*‘Wurridjal’*).

<sup>210</sup> *Queensland v Commonwealth* (1977) 139 CLR 585, 630 (Aickin J).

<sup>211</sup> See Alan Fenna, ‘Commonwealth Fiscal Power and Australian Federalism’ (2008) 31(2) *University of New South Wales Law Journal* 509.

<sup>212</sup> *Queensland v Commonwealth* (n 210) 604 (Stephen J).

<sup>213</sup> *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (*‘John’*), discussing *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 56–8 (Gibbs CJ).

a significant succession of cases.<sup>214</sup> While it is true that there are four cases (three cases if the *First Uniform Tax Case* and the *Second Uniform Tax Case* are viewed together in respect of s 96 of the *Constitution*) that could be said to form the basis of the orthodoxy,<sup>215</sup> only the *First Uniform Tax Case* actually dealt with s 96 directly; the latter cases considered a narrow point, and in doing so reinforced that there was a limit to s 96, rather than denying it (the need for state consent).<sup>216</sup> The second of the cases, the *Flour Tax Case*, admittedly did deal with s 96 directly, but included a ‘forcible dissenting judgment’ by Evatt J, which was expressly endorsed by the Privy Council and appears to have been further endorsed by modern courts — albeit indirectly.<sup>217</sup> More problematic though was the fact that the majority in the *Flour Tax Case* justified their conclusions based on a highly questionable (mis)interpretation of the first *Federal Roads Case* as being of general relevance, or indeed any relevance at all. The fact that the whole structure of the orthodoxy is founded on such an insubstantial, and arguably *per incuriam* judgment as the *Federal Roads Case* is, of itself, a justification for revisiting it.<sup>218</sup> The stability of the orthodoxy is in fact much further “weakened” by subsequent decisions [and] in the light of experience’, which is itself indicia for overturning (perceived or actual) precedent.<sup>219</sup> Indeed, the Court has already begun to tear down the orthodoxy, admittedly by incident, but in significant ways. Most notable is the acceptance that the provision *is* subject to constitutional limitations.<sup>220</sup> It has also asserted that the section sits within, rather than outside of, ch IV as a financial, rather than legislative, power.<sup>221</sup> In doing so, the orthodoxy has been revealed to be out of step with our evolving understanding of the *Constitution* and ‘incompatible with the ongoing development of constitutional jurisprudence’ relating to fiscal federalism.<sup>222</sup>

<sup>214</sup> *John* (n 213) 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also *Queensland v Commonwealth* (n 210) 599 (Gibbs J).

<sup>215</sup> *Federal Roads Case* (n 8); *First Uniform Tax Case* (n 42); *Second Uniform Tax Case* (n 38); *Flour Tax Case* (n 9).

<sup>216</sup> *Second Uniform Tax Case* (n 38).

<sup>217</sup> See above nn 205–6 and accompanying text.

<sup>218</sup> As Gibbs J noted in *Queensland v Commonwealth* (n 210) 599: ‘[A] judgment which had been given *per incuriam*, and was in conflict with some other decision of the Court, or with some well-established principle, might be readily reviewed.’

<sup>219</sup> *Wurridjal* (n 209) 353 [71] (French CJ), quoting *A-G v Schmidt* (1961) 105 CLR 361, 370 (Dixon CJ).

<sup>220</sup> See above Part IV(E).

<sup>221</sup> See above Part IV(B)(1).

<sup>222</sup> *Wurridjal* (n 209) 353 [71] (French CJ).

The Court has pointed to these indicia as justification for overturning (real or perceived) precedent.<sup>223</sup> The quantum of them suggest the Court is likely to be receptive to a challenge against s 96 orthodoxy.<sup>224</sup> Indeed, if either *Williams [No 1]* or *Williams [No 2]* is anything to go by, the fact that the s 96 orthodoxy has remained untouched for close to a century may not engender caution and conservatism in the Court at all. Section 96 very much seems to be the final island of financial power to be unexplored by the modern Court in its exegesis of ch IV. Reflections on the progressive enlargement of the Commonwealth's executive power by consequence of the absence of any challenge for almost a century are self-evident. Indeed, it should be remembered that much of what has been considered to be part of the apparent orthodoxy does not arise out of the Court's actual ratio, but through increasingly liberal interpretations of it and obiter dicta by the Commonwealth.<sup>225</sup> The Court might consider that it does not so much have to overturn historic precedent as to distinguish it and confirm the applicability of its more recent incidental decisions to the provision specifically.

#### A What Would a Remapped s 96 Look Like?

While it is not entirely possible to say what the Court might replace the orthodoxy with, or how far it might go to limit the provision to its constitutional confines and original purpose, there are several incidental indicators that the role of the Parliaments might take a more prominent place in its interpretation. What is relatively clear is that, if the Court is to finalise its restructuring of ch IV in relation to the rest of the *Constitution*, s 96 will need to be provided a meaningful and functional role within it; assuming that it is not a 'spent provision' and will not be terminated as it was intended.<sup>226</sup> Both *Williams [No 1]* and *Williams [No 2]*, in particular, indicate that such a meaningful reintegration will involve further clarifying its role as the proper conduit of public monies between each of the federal polities. That seems to demand much greater involvement of the Parliaments of each polity. For the

<sup>223</sup> Ibid. See also *John* (n 213) 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

<sup>224</sup> Harding and Malkin identify several criteria which may induce the Court to overrule a prior decision: Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34(2) *Melbourne University Law Review* 519, 526–8, discussing JW Harris, 'Towards Principles of Overruling — When Should a Final Court of Appeal Second Guess?' (1990) 10(2) *Oxford Journal of Legal Studies* 135.

<sup>225</sup> See above n 202 and accompanying text.

<sup>226</sup> Crowe and Stephenson (n 7) 231.

reasons set out it also brings into serious question the ability of the bare spending power in s 96 to be delegated to the executive to determine the nature, recipient, terms and conditions of grants.

As the Parliaments have no juristic personality, it may be necessarily implied that their respective Crowns must conduct negotiations pursuant to s 96. If it is to be further assumed that the purpose of s 96 is to correct disabilities resulting from uniform Commonwealth laws, it might be expected that the state executive leads this process via a formal request of grant monies, rather than the other way around.

It would also seem that any negotiated intergovernmental agreement cannot be constructed in such a way that requires the state to bypass fundamental constitutional protections — especially the supervisory role of its Parliament. It is also a necessary conclusion that an agreement negotiated by executives cannot bind the Parliaments of the states or the Commonwealth, until they have properly consented to it. Simply, the executives of each polity may negotiate s 96 intergovernmental agreements, but not give them the force of law without Parliamentary endorsement. Analogously, the Commonwealth executive is the only body capable of negotiating treaties,<sup>227</sup> the conclusion of which gives rise to the factum necessary to enliven the legislative power under s 51(xxix). Yet, the existence and scope of any delegated power to administer that agreement domestically is contingent upon Parliament selecting and legislating the terms and conditions of that external agreement it wishes to put into effect.<sup>228</sup>

In fact, it was the understanding of the founders that the Commonwealth and states would each, ‘within the ambit of its authority, [be] a sovereign State.’<sup>229</sup> While it has subsequently become clear that neither are technically sovereign, the procedure envisioned by s 96 appears to retain the view of each as autonomous entities negotiating a treaty of financial aid. It also accords with the early procedure for s 96 tied grants (including the regimes in the *Federal Roads Case* and *Flour Tax Case*), which involved the scheduling and incorporation of intergovernmental agreements into legislation by Parliament. The abandonment of such a procedure in contemporary regimes — in which the Commonwealth unilaterally legislates to vest power in an executive body to conclude such agreements with binding force — is constitutionally questionable. The equivalent with respect to the treaties power would be for

<sup>227</sup> See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 215 (Stephen J).

<sup>228</sup> *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).

<sup>229</sup> *D’Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ for the Court).

legislation, made ostensibly under s 51(xxix), to automatically incorporate any international agreement negotiated by the executive into domestic law. That cannot be the case in a dualist system, where Parliament is responsible for making the law, just as it is responsible for approving the expenditure of money on grants to the states.

A further two points need to be made about any legislation authorising and incorporating an intergovernmental agreement to establish a s 96 tied grant. The first is that, as discussed, a state executive cannot, by agreement or otherwise, bind its Parliament to exercise its constitutional powers of financial supervision or control.<sup>230</sup> Thus, Commonwealth s 96 legislation that incorporates an intergovernmental agreement cannot rely on that agreement as state consent *per se*. Rather, Commonwealth legislation would seem to require an external trigger to commence: namely, the enactment of complementary legislation by the state. After that time, however, the state becomes bound as a matter of Commonwealth administrative law, rather than contract law — resolving at least part of the uncertainty as to whether the state executive can bind its own legislature by contract.

The second point depends on whether it is assumed that s 96 remains directed only to correcting federal disabilities. Neither the Court in *Pape* nor *Williams [No 1]* nor *Williams [No 2]* suggested that should be the case. On the other hand, that was clearly the intention of the drafters and, perhaps surprisingly, confirmed as the true character and purpose of the section by the orthodox Court.<sup>231</sup> If that is the case, a question arises as to whether either an intergovernmental s 96 agreement or incorporating legislation needs to actually identify the federal disability it is designed to correct — and, incidentally, whether that should be a justiciable issue at all. Both questions can, in fact, be resolved in a political, if not legal, sense, so long as the intergovernmental agreement is placed before the Houses and approved through the ordinary legislative process. Doing so ensures that any potential that the resultant legislation creates unjustified discrimination or preference is considered by state senators. Ultimately, this reinforces the need for s 96 agreements to be negotiated and approved in a treaty-like process.

<sup>230</sup> See above nn 205–7 and accompanying text.

<sup>231</sup> *Flour Tax Case* (n 9) 763–4 (Latham CJ).

## VI CONCLUSION

On appeal from the High Court's decision in the *Flour Tax Case*, the Privy Council observed: 'The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine.'<sup>232</sup> This aspect of the Privy Council's judgment was restricted to the cooperative state and Commonwealth legislative regime before them. Their Lordships' rejection of arguments that did not take into account the 'organic whole' of the regime.<sup>233</sup> While the statement could well have been an indictment on the High Court's failure to directly consider the regime's ostensible reliance upon s 96, the Privy Council did not go so far. That was, in part, because of the narrow legal questions placed before it, and their Lordships' 'caution' about 'dealing with constitutional matters to decide no more than their duty requires'.<sup>234</sup> The result was to leave undisturbed an interpretation of s 96 that was made without reference to the organic whole of the *Constitution*, nor the specific function it was supposed to discharge. The result, most agree,<sup>235</sup> is that the section is not operating as it was intended: indeed, it is arguable that its operation is undermining, rather than contributing to, the efficient operation of the federal fiscal machinery of the *Constitution*. If a machine's components are not operating as they are supposed to, they need to be repaired or replaced.

Contemporary High Court federal fiscal jurisprudence reveals that the orthodoxy's singular and myopic interpretative approach is the source of the 'fundamental problems' with s 96.<sup>236</sup> It led to the assumption that it is a legislative power to spend, without any restrictions, on any subject matter the Commonwealth Parliament — or bodies it has delegated its authority to — determines. The grant could then be awarded to non-state entities with nominal involvement of the states and their Parliaments. That is a surprising conclusion in a federal system, underpinned by representative and responsible government and bound by the rule of law. Perhaps this is because it is a conclusion that can only be reached by ignoring that system altogether. The modern Court has warned against doing that and expanded the Privy Council's contextual interpretation beyond financial statutes to the

<sup>232</sup> *Flour Tax Case (Privy Council)* (n 152) 341 (Viscount Maugham for the Court).

<sup>233</sup> *Ibid* 349 (Viscount Maugham for the Court).

<sup>234</sup> *Ibid* 350 (Viscount Maugham for the Court).

<sup>235</sup> Taylor (n 6); Hume, Lynch and Williams (n 10); Saunders, 'Part 1' (n 11); McLeish (n 15) 183; Chordia (n 15).

<sup>236</sup> Saunders, 'Part 1' (n 11) 14.

constitutional provisions they rely upon. In fact, in *ICM Agriculture*, the Court urged us to take account of ‘developments in interpretation of the *Constitution*’<sup>237</sup> and look ‘beyond matters of legal form’ in our understanding of the role and functions of the various provisions of ch IV.<sup>238</sup>

Interpreting s 96 in light of the wider constitutional framework, and the financial machinery in which it is found, indicates that Parliament must have a much more dominant role in granting aid to states than it has to date. This is not a role that can be delegated until the decision to make a grant and a decision to set the terms and conditions has been made by Parliament. This is, in part, because the provision is properly seen as a bare financial power, but especially because the High Court has asserted that its function is one which guarantees legislative control of financial transfers to the states. To an extent, the High Court has bound itself to that position by asserting in *Williams [No 1]* and *Williams [No 2]* that Commonwealth spending outside of its heads of power must occur via the conduit of s 96, *because* that provision guarantees Senate oversight. Allowing the executive to determine individual grants and their terms and conditions without effective parliamentary oversight under the very same provision would, to use the words of Hayne J, render s 96 ‘otiose’.<sup>239</sup>

While the relevance of the federal fiscal cases for state constitutions is less than clear, the contextual reading of ch IV suggests that there is a similar obligation for state parliamentary involvement in the receipt and approval of s 96 grants. This may have some impacts on the Commonwealth’s ability to spend on anything it chooses, but it is unlikely to bring our national financial system grinding to a halt. There is no little irony that the early s 96 tied grant regimes, which led to the orthodoxy, were actually premised on complementary and cooperative state and commonwealth legislative regimes, showing that it is possible for the section to function in that way. Equally pertinent is the fact that none of the predicted national financial disasters arising from the *Williams [No 1]* and *Williams [No 2]* limitation on unrestrained Commonwealth spending eventuated. Our constitutional system is robust and capable of dealing with national contingencies, especially when cooperative governance is utilised as it was designed to be. More to the point, meaningfully reintegrating a provision cast adrift from the constitutional continent would continue the Court’s ongoing efforts to clarify the text and

<sup>237</sup> *ICM Agriculture* (n 16) 169 [40] (French CJ, Gummow and Crennan JJ).

<sup>238</sup> *Ibid* 169 [44] (French CJ, Gummow and Crennan JJ).

<sup>239</sup> *Williams [No 1]* (n 20) 267 [243].

structure of the *Constitution*, the rule of law that underpins it, and the federal arrangements that it establishes.<sup>240</sup>

It is true that the critique and questions of Saunders and others have gone unanswered for too long. However, it is important to note that the pause has allowed the Court to significantly advance our understanding of the *Constitution*, including the chapter in which s 96 is found. It has also allowed the dissatisfaction with the provision to migrate from journals such as this into the public domain, where it is more likely to give rise to a direct assault on the orthodoxy that has developed around it. While the rate of change to the interpretation of s 96 may seem glacial to some, it should not be assumed that it is frozen. Glaciers may take time to shift continents, but when they do, the effects can be dramatic.

<sup>240</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ), 399–400 [132] (Kirby J).