

COMMONWEALTH LAW

THE GRANTS POWER

s96 of the Constitution provides that;

96 Financial assistance to States

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.

STRUCTURE

(1) Is the grant a valid exercise of s96?

(2) Do the conditions attached to the grant infringe on any constitutional limitation?

- The conditions which may be attached are unlimited: *Federal Roads Case*
- The grants cannot be coercive in the sense that the States cannot be placed under any legal compulsion to accept the grant: *2nd Uniform Tax Case*

Federal Roads Case (1926)

FACTS: Cth attached conditions to a grant that required the States to use the money for the construction of roads nominated by the Cth.

- The conditions attached to the financial assistance Parliament may grant to a State are not tied to any of the Cth's enumerated heads of power in s51 (Knox CJ)

SA v Commonwealth (First Uniform Tax Case)

FACTS: a suite of taxation legislation was passed which gave, in practical effect, the Commonwealth exclusive control over income tax. The States argued the laws, when taken together, placed the States under 'practical compulsion' to give up their control over income tax.

- The High Court rejected this argument and held that each of the laws construed separately were valid.
- Latham CJ held that the 'action may be brought about by temptation—by offering a reward—or by compulsion. But temptation is not compulsion...' That is, the States argument that although in practical effect the States may have no other option than to receive the money (due to VFI), so long as the States are not legally coerced to accept the grants, the grants will be valid.
 - That is because this interpretation flows from the plain and ordinary meaning of the words 'on such terms and conditions as the Parliament thinks fit':
Engineer's Case
- If there are grievances with the scheme (i.e. financial subservience of the States to the Cth), because Parliament is accountable to the electorate, any grievance with the Cth should be resolved at the ballot box. The desirability of the scheme is not a matter for the Courts.

Moran's Case (1939)

FACTS: grants were given to the States in proportion of their share in the production of wheat. It was argued that the conditions on the grants, in practical effect, did not give financial assistance to a state as a body politic but used the state as a conduit by which the money would be distributed.

- The grant and the conditions were held to be constitutionally valid because there was no legal compulsion i.e. the States could opt-out of the scheme
 - The grants amounted to financial assistance notwithstanding that the State was bound to distribute the money it received to the wheat grower for purposes which lay outside of the Cth's direct heads of power
 - Cth can attach conditions to s96 grants to implement policy objectives and can condition a grant on the states exercising or refraining from exercising its powers

Victoria v Cth (Second Uniform Tax Case)

FACTS: Cth could no longer rely on the defence power to support its income tax legislation.

- Dixon CJ held that **there are two limitations** on the grants power;
 - **(1) grants must be made to the State governments;**
 - **(2) the grants cannot be coercive** ('carrot and stick'; States cannot be legally compelled to receive the money, must be free to take or not to take the grant).

A-G (Vic) (Ex rel Black) v Cth (DOGS Case)

FACTS: Cth grants were given to States on condition the funding was given directly to private schools.

- The grants and conditions were valid given there is no coercion or compulsion: *'the freedom of each State to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme, and its existence as a matter of law cannot be denied.'* (Wilson J)
- No requirement that the State has to be the instigator or that the funds benefit the state treasury.
 - The fact that the conditions were with respect to powers outside Cth ambit and gave the States no discretion were questions of policy and not law.

APPROPRIATIONS POWER

ss81 and 83 of the Constitution provide;

81 Consolidated Revenue Fund

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

83 Money to be appropriated by law

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

STRUCTURE

(1) Is the appropriation valid?

- Gummow, Hayne, Callinan and Heydon JJ held that ‘it is for Parliament to identify the degree of specificity with which the purpose of an appropriation is identified’: *Combet*

(2) Is there a spending power?

- The Commonwealth must find legislative authorisation to permit spending of money which has been appropriated: *Williams (No 2)*

(3) Is the law supported by s81?

- The appropriations power is not a substantive power to legislate or to spend money, this authorisation must be found elsewhere in the Constitution: *Pape*.

Victoria v Commonwealth (AAP Case)

FACTS: Victoria challenged the Australian Assistance Plan; a scheme of the Commonwealth to establish Regional Councils for social development (Cth was using the appropriations power to circumvent giving the money to the States through s96 grants). It was a ‘bare appropriation’ in the sense that no legislation had been enacted to support the AAP.

- FINDING: the challenge was unsuccessful; 3:7 in favour of the Commonwealth, with Stephen J finding that Victoria did not have standing to challenge the law.
- Barwick CJ adopted the narrow view of s81: the purposes of the Commonwealth is confined to pursuing a purpose for which the Commonwealth Parliament may make valid laws under s51.
 - Barwick CJ struck down the law as it was not for a purpose of the Cth.
- Mason J (**preferred approach after *Pape* re: spending power**) disagreed in reasoning: argued that s81 should not be limited by the mere fact that s96 provides an avenue for implementing the scheme. The Commonwealth Parliament has a discretion to determine such a purpose as it sees fit: *Pharmaceutical Benefits Case*

- Mason J also argued that, although the Commonwealth may appropriate money for whatever purpose it so desires, this does not extend to a power to spend that money. Therefore, although the appropriation as valid, as the implementation of the AAP was not supported by legislation it was outside the executive power (the nationhood power).

Combet (2005)

FACTS: the government sought to implement various workplace reforms, and for this purported purpose, engaged in an advertising campaign to promote the reforms. The validity of the expenditure for the advertising campaign was challenged on the basis that the spending was not for the intended purpose of the appropriation.

- HELD: a majority upheld the validity of the expenditure.
 - Gummow, Hayne, Callinan and Heydon JJ held that **‘it is for Parliament to identify the degree of specificity with which the purpose of an appropriation is identified.’**
 - McHugh and Kirby JJ dissented and argued that a link must be established as per responsible government and the rule of law. It is for the executive to demonstrate this link between the purpose of the appropriation and the spending.
 - Gleeson CJ held that although a link must be established, a link was found because the terms were vague and Parliament was not obligated to frame the terms of the appropriation in specific language.

Pape v Federal Commissioner of Taxation (2009)

FACTS: Commonwealth enacted legislation which appropriated money to use a tax refund in response to the GFC.

- HELD: the entire court endorsed the wide view in the *Pharmaceutical Benefits Case* and found that there are no limits for which the Parliament may appropriate money in respect of s81.
 - **Appropriations powers in s81 and s83 are not a source of power to authorise executive spending powers. The substantive power to spend money which has been appropriated from Consolidated Revenue must be found elsewhere in the Constitution and in statute authorising the expenditure.** Therefore, the legislation was not supported by s81 (although it was validated on other grounds).
 - ***i.e. the appropriations power is not a substantive power and cannot be used other than for the purpose of appropriating money from the CRF***
 - French CJ disagreed with the majority and declined to accept the broad view taken by Mason J in the *AAP Case*; ‘the purposes of the Commonwealth are the purposes otherwise authorised by the Constitution or by statutes made under it.’