

FINANCE POWERS

S 96 - GRANTS

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- **S 96** - *During a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit*
 - Cth gives a grant to a State

STEP 1 - INTRODUCTION

s 96 gives the Cth Parliament the ability to make grants to States “on any terms and conditions the Parliament sees fit”. **S 96** is only relevant here as Cth Parliament is purporting to give financial assistance to the [state]. The States are dependent on the Cth for money, with the court upholding the power in the **Second Uniform Tax Case** for the Cth to give grants to the State condition on them not collecting income tax.

[Party B] may argue that [Law (N/B: must be a Cth Act)] is invalid for lack of Cth HoP, with Y arguing that [Law] is made pursuant to **s 96** as it grants financial assistance to [State], namely a [insert type of grant]:

Types of Grants:

- General revenue grants/GST Revenue Grants – compensating states for losing income tax
 - **A New Tax System (Tax Administration) Act 1999 (Cth)**
 - **Intergovernmental Agreement of the Reform to Cth-State Relations** of 28 May 1999
- Special Assistance Grants – adjusting financial inequalities between states
- Specific Purpose Grants – stipulating for a particular purpose of granted funds [i.e. insert purpose here; usually on key topics (healthcare, schools, skills and workforce development, disability services, housing and Indigenous reform)]

Conversely, [party A] would argue that [LAW] was not validly created pursuant to **s 96**.

STEP 2 - DOES THE LAW FALL WITHIN THE SCOPE OF S 96 POWER?

S 96 has been **broadly** interpreted (**Second Uniform Tax Case**, per Dixon CJ at 610).

S 96 permits the Cth to grant financial assistance to the States, who can only spend the funds in accordance with the terms and conditions prescribed by the Cth, thereby enabling the Cth to influence State legislative activities even if lacking a HOP in the area (**Federal Roads**)

[Party B] would thus argue that the terms and conditions of expenditure that [optional - insert terms and conditions] of [LAW] in providing the grant is valid, despite not falling within a specific Cth HoP (**Federal Roads**). [Party B] will argue that once Cth has established that [LAW] is a law made pursuant to **s 96**, then the Cth is able to attach any conditions whatsoever to the grant, so long as it does not legally compel the States to accept nor require them to abdicate power (**Federal Roads Case**, affirmed in **First Uniform Tax Case** and **Second Uniform Tax case**)

- N/B: if multiple statutes, they are to be read separately (in evaluating their validity) (*Moran*)

COUNTERARGUMENT: Grant requires funds to be passed to private individuals/third party/States are conduits for money [FAIL]

[Party A] may attempt to counter that the grant is outside the scope of s 96 because the terms and conditions stipulate that [State] is to pass the funds onto [individuals/third party e.g. schools].

However, [Party B] would counter that the Cth is permitted to require funds to be channelled to private individuals within States (*Moran*; confirmed in *DOGS case*)

- Analogue to *DOGS* case for schools

COUNTERARGUMENT: Grant discriminates between the States [FAIL]

[party A] may attempt to counter that the grant is outside the scope because it discriminates between States, as [State] received preference in receiving greater financial assistance.

However, [party B] would counter that the grant can permissibly discriminate between States (*Moran*, per Latham CJ at 763; *First Uniform Tax Case*, per Latham CJ at 423), as laws under s 96 fall outside the scope of s 99 as a grant of financial assistance is not capable of constituting preferential treatment for a State (*Moran*, per Starke J at 775, cf. Evatt J; cf. *ICM*).

COUNTERARGUMENT: Grant prevents States from exercising their powers [FAIL]

[Party A] may attempt to counter that the grant is outside the scope of s 96 because acceptance of the grant requires States to relinquish exercising their legislative powers over [subject matter e.g. levying income tax].

However, [Party B] would counter that this is permissible as the Cth has not compelled or coerced [State] to abandon their legislative powers as [reason] (*First Uniform Tax Case*, per Latham CJ at 417; *Second Uniform Tax Case*, per Dixon CJ at 610).

ALTERNATIVE RESPONSE: Compulsion or coercion forced abandonment of powers
[SUCCEED IF PROVEN → see below]

COUNTERARGUMENT: Grant reduces State legislative power [FAIL]

[Party A] may attempt to counter that the grant is outside the scope of s 96 because acceptance of the grant 'weakens or destroy some State capacity' of [State's] legislative powers regarding [subject matter] by [insert how it reduces State's power].

However, [party B] would counter that this is permissible (*First Uniform Tax Case*, per Latham CJ at 423).

COUNTERARGUMENT: Cth Minister determines the payments/has discretion [FAIL]

[party A] may attempt to counter that the grant is outside the scope of s 96 because the scheme for which the funds is to be used is determined by the Cth [and a Cth Minister determines the payments], given that [evidence].

However, [party B] would analogise with *Federal Roads* counter that this is irrelevant

COUNTERARGUMENT: Cth contributes to same funds as States [FAIL]

[Party A] may attempt to counter that the grant is outside the scope of s 96 because the State is obliged to contribute to the same fund as the Cth, [insert fund name].

However, [party B] would analogise with *Federal Roads* where despite having to put up a sign saying it is a Cth road and had to follow detailed instructions about where the road were to be constructed, the court held that that this is irrelevant

COUNTERARGUMENT: States are bound to apply the money to an object (e.g. roads) that is intrastate [FAIL]

[Party A] may attempt to counter that the grant is outside the scope of s 96 because it applies to [object e.g. roads] which are intrastate and thus a breach of s 51(i) - trade and commerce powers which covers interstate/international but NOT intrastate

However, [party B] would analogise with *Federal Roads* counter that this is irrelevant

STEP 3 - ARE THERE ANY LIMITATIONS?

Generally, there are very weak limits on s 96 – difficult to find limitations

COUNTERARGUMENT: States are not constitutionally capable of fulfilling conditions [SUCCEED]

[party A] may counter that the grant is outside the scope of s 96 because the States are not constitutionally capable of fulfilling the conditions of the grant to [conditions], as they do not have the power to [power] (*Second Uniform Tax Case*).

COUNTERARGUMENT: Conditions attached to Grant → Breach of Constitution [SUCCEED]

However, grants cannot involve a breach of the *Constitution* (*Second Uniform Tax Case*). The breaches conditions attached to the grant would involve a breach of the [IFPC/FITCI] and may therefore be invalid.

COUNTERARGUMENT: Grant overrides s 51 limitations of powers [SUCCEED]

[party A] may counter that the grant is outside the scope of s 96 because the grant overrides limitations to Cth power under s 51, as Cth is compelling the States to [exercise of power], which the Cth is constitutionally prohibited from doing themselves per [section] (*ICM - s 96* can't be used to evade just terms requirement for acquisition of property per s 51(xxxi); *DOGS - s 96* can be used to evade s 116 freedom of religion)

- **N/B:** s 96 – discrimination between States will not be a limitation (see above)

COUNTERARGUMENT: Compulsion or coercion forced abandonment of powers [SUCCEED IF PROVEN]

However, [Party A] may counter that the Cth did compel/coerce the [State] to abandon their legislative power over [subject matter] by [insert relevant fact here], and hence the Cth has not validly used the grants power in [LAW].

On balance, the court would likely conclude that there is/is not compulsion or coercion OTF.

- **N/B:** political/economic coercion is acceptable but **legal coercion** will not be too readily found (Latham CJ at 417 in *First Uniform Tax Case*)


STEP 4 - CONCLUSION

Therefore, on balance, the [GRANT] granting financial assistance from the Cth to [State] is valid/invalid under s 96 of the Constitution

S 81 AND S 83 - POWER TO APPROPRIATE AND SPEND

Appropriations power

- **S 81** - 'All revenues or moneys raised or received by the Executive Government of the Cth shall form one Consolidated Revenue Fund, to be **appropriated for the purposes of the Cth** in the manner and subject to the charges and liabilities imposed by this Constitution.'
- **S 83** - 'No money shall be drawn from the Treasury of the Cth except under appropriation made by law.'
- **S 61** - 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and the laws of the Commonwealth'

 **RED FLAG:** Direct spending of money (NOT given to the states)

STEP 1 - INTRODUCTION

The Cth will be able to spend money if it has validly exercised its power to appropriate and spend under s 81 and s 83 of the Constitution. Although s 81 and s 83 authorise appropriations, which can be used for any purpose (*Australian Assistance Plan Case*), **they do not authorise spending.**

- The words 'for the purposes of the Cth' in s 81 are not words of limitation (*Pape*).
- Any spending by the Executive must be authorised by legislation **under a valid HoP** (*Williams 2*).

STEP 2 - HAVE THE FUNDS BEEN VALIDLY APPROPRIATED?

[Party B] would argue that the funds have been validly appropriated by law per s 83, through [Cth law].

COUNTERARGUMENT: Purpose of appropriation is not specific enough [FAIL]

[party A] may attempt to argue that the appropriation is not valid because the purpose for it is not specific enough, only purportedly being to [purpose]. However, [party B] would counter that the purposes for appropriation only require minimal specification, which is the case here, as [reason]

(Australian Assistance Plan Case)

Ultimately, it is unlikely that an appropriation will be judicially challengeable (*Pape*). Hence, the court would likely conclude that the appropriation [is/is not] valid.

However, valid appropriation only renders the money available for expenditure, but does not confer a power to spend (*Pape; Williams*)

STEP 3 - DOES THE CTH EXECUTIVE HAVE THE POWER TO SPEND THE FUNDS?

Neither *s 81* nor *s 83* expressly authorise the Cth to spend appropriated money (French CJ in *Pape*) Therefore, Cth spending is challengeable on the basis that it has not been made WRT a valid Cth HOP

- *Williams 1* rejected autonomous Executive spending power, highlighting the need for authorisation by legislation which is under a valid HoP (*Williams 2*)

1. Is there a specific legislative authority?

[party B] would argue that the Cth Executive has been granted the power to spend the appropriated funds through [Cth law], which was validly created under a federal HOP, namely [HOP] (*Williams*).

COUNTERARGUMENT: Not created under a valid HOP [SUCCEED]

[party A] may counter that [Cth law] was not validly created under a HOP, as [reason], and hence, the Executive does not have a statutory power to spend the funds (*Williams*).

If there is no valid HoP, it may fall under the implied nationhood power

2. Is there an implied nationhood power?

Power to spend may be an element or incident of Cth Executive Power derived from *s 51(39)* and *s 61*.

[party B] would argue that the Cth Executive has been granted the power to spend the appropriated funds per *s 61* and the implied nationhood power in *s 51(xxxix)*, as [matter] is of national significance (*Pape; Williams 1*), which can be interpreted broadly (*Pape*). The implied nationhood power permits the Cth Executive to engage ‘enterprises and activities peculiarly adapted to the Government of a nation’ (*AAP*, per Mason J), which [party 2] would argue is the case, as the Executive is responding to a national crisis which requires extensive and urgent action, rather than invalidly exercising a “general power” to manage [manage – eg. “national economy”] (*Pape*, per French CJ at 63-64). French CJ in *Williams 1* suggested that Stat Authority may not be needed for such spending

Examples of nationally significant matters:

- *Invasion*
- *Relations with other countries*
- *Emergencies requiring a coordinated response*

ANALOGY: Pape - Financial crisis

[party B] may analogise with *Pape* and argue that the power to spend should similarly be found valid, as [matter – eg. Global Financial Crisis – mitigating a national economic downturn – NOT a “general power to manage the national economy”] is a national emergency to which only the Cth can

adequately respond through ensuring a coordinated national response and substantial [investment/action] in [action or investment – eg. economic initiatives – stimulus package].

COUNTERARGUMENT: Not a national matter [SUCCEED]

[party A] may counter that the Executive does not have a power to spend per *s 61* because [matter] is not of a national nature (*Pape; Williams*), but rather resembles a State matter like Williams [eg: Schools, hospitals etc]

ANALOGY: Williams - Schools is a State matter

[party A] may analogise with *Williams* and argue that the Executive's spending on [matter – eg. school chaplaincy programs] involves [implications – eg. provision of ordinary services usually administered by the State], which is hence similar to the school chaplaincy program in *Williams* as [reason].

COUNTERARGUMENT: Interferes with distribution of power and/or SOP [SUCCEED]

[party A] may counter that the Executive does not have a power to spend per *s 61* because their expenditure purportedly to serve “proper purposes of a national government” impermissibly interferes with the constitutionally prescribed [distribution of powers/separation of powers] by [reason] (*Pape*, per French CJ at 60).

COUNTERARGUMENT: Situation could be responded to in other constitutional ways [CONTENTIOUS]

[party A] may refer to the dissent of Hayne and Kiefel JJ in *Pape* and argue that the mere fact that [matter] is labelled [“crisis” or “emergency”] does not mean that unfettered Executive expenditure in this area is constitutionally valid.

[party A] would argue that instead, the Executive could respond to the situation by constitutionally [action].

STEP 4 - CONCLUSION

There [LAW] to appropriate money under *s 81* is valid and to spend money under *83* [is/is not] valid