FROM CO-OPERATIVE TO COERCIVE FEDERALISM AND BACK?

BY ROSS CRANSTON*

In this article Ross Cranston discusses the changing nature of Federalism, tracing its development and examining possible characterizations of its basis. After reviewing the elements of "co-operative" and "coercive" Federalism, the author turns to "New Federalism" and what that means in terms of the Fraser government. He concludes that disputes over financial and other intergovernmental agreements are best left to the political sphere with the High Court acting in a supplementary role because of the inherent untidiness of a Federal system of government.

A recent interpretation of Australian federalism is that there are roughly four phases reflecting the financial balance between the Australian and State governments.[1] A system of co-ordinate federalism operated for the first quarter of the century, where the Australian and State governments were each co-ordinate and independent in their respective spheres.[2] Then followed a period of co-operative federalism, best illustrated by reference to the Financial Agreement 1927; the co-operation between the Prime Minister and the State Premiers during the 1930s in formulating budgetary and economic policies in response to the Great Depression; and the establishment of bodies like the Agricultural Council comprising Australian and State representatives to achieve uniform action, to co-ordinate policies and to exchange information. Co-operative federalism was then succeeded by a period of coercive federalism, when the *Uniform Tax Case*[3] enabled the Australian government to dominate the States. Coercive federalism was characterised by bitter disputes over finance, and by the growing use of section 96 specific purpose grants which enabled the Australian government to influence State government spending. Co-ordinative federalism is the final phase identified and represents the attempt from 1975 by Australian governments to introduce co-operative planning, to reduce conditions attached to section 96 grants and to introduce tax sharing arrangements. Co-ordinative federalism seems in this view to be an advanced form of co-operative federalism.

This characterisation of Australian federalism cannot be accepted

---

* B.A., LL.B. (Qld), LL.M. (Harv.), D.Phil. (Oxon); Research Fellow (A.N.U.).
I wish to thank John Thornton for his assistance in the preparation of this article.

[1] Mathews, "Philosophical, Political and Economic Conflicts in Australian Federalism", Centre for Research on Federal Financial Relations (A.N.U.), Reprint Series No. 23; "The Changing Pattern of Australian Federalism", *ibid.* No. 17.

[2] Which recalls Wheare's well-known definition of federalism: Wheare, *Federal Government* (1946) 11.

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

without qualification.[4] The so-called "co-ordinate and independent" phase has to contend with the exercise in the first part of the century by both the Australian and State governments of concurrent powers under section 51 of the Constitution, which gave rise to litigation before the High Court on the reach of laws made under them.[5] Historians have described the co-operative federalism of this period so that it is not simply an inter-war phenomenon.[6] Indeed, there is an argument that the degree of co-operative federalism has been greater subsequent to, rather than prior to, World War II.[7] Coercion as a characterisation of Australian federalism after World War II is open to even more objections. The term "organic federalism" seems a less pejorative way of describing a situation where a dominant centre has fairly important control over the spending and policy priorities of the States.[8]

The purpose of this article is to examine in a rudimentary way the characterisation of Australian federalism outlined. A thorough examination demands extensive reference to historical and political matters. Although reference is made to non-legal materials in this article, the analysis is primarily legal. For example, when it is said that section 96 was an instrument of coercive federalism, can this be valid as a legal statement? In the course of the analysis some light is thrown on a number of areas of law relevant to federalism which have received little, if any, attention from constitutional writers. The main reason for the dearth of material on these matters is that the issues discussed, although important, have not been litigated to any extent before the High Court.

CO-OPERATIVE FEDERALISM

No longer can the different governments in Australia go their separate ways with the growth of the welfare state and the need for regulation of economic activity. Conservatives generally prefer co-operative federalism as a solution, although reformers tend to look more to initiatives by the Australian government. At the simplistic level of the editorial writers co-operative federalism is a favourite theme: if only Australian and State politicians would sink their differences and work together all would be well. The more sophisticated case for co-operative federalism begins with the premise that State governments are closest

---

[4] Professor Mathews is of course aware of the many qualifications.

[5] *E.g. D'Emden* v. *Pedder* (1904) 1 C.L.R. 91; *Federated Service Association* v. *New South Wales Railway Traffic Employees' Association* (1906) 4 C.L.R. 488; *Huddart, Parker and Co. Pty Ltd* v. *Moorehead* (1909) 8 C.L.R. 330.

[6] *E.g.* Wright, *Shadow of Dispute* (1970).

[7] Leach, *Interstate Relations in Australia* (1965); Provost, Inter-Governmental Co-operation in Australia (Ph.D. Thesis, University of Queensland, 1955); Coupland, "The Impact of Federalism on Public Administration" in Sawer (ed.) *Federalism: An Australian Jubilee Study* (1952) 135; Davis, "Co-operative Federalism in Retrospect" (1952) Historical Studies 212.

[8] Sawer, *Modern Federalism* (2nd ed. 1976) 104-107.

to the people and that their continued vitality divides power and guarantees freedom. When problems spill over State boundaries the conclusion follows that it is better to tackle them by co-operative action between governments than by the Australian government seeking to impose a solution. An ancillary argument sometimes advanced is that co-operative federalism is an alternative to legalism. The Royal Commission on the Constitution (1929) thought that the River Murray Waters Agreement 1914 settled a problem "which at the establishment of the Commonwealth seemed likely to lead to prolonged litigation between the states named".[9] The Offshore Petroleum Resources Agreement 1967 was supposed to avoid the conflict, cost and delay associated with High Court litigation. More recently a study for the Royal Commission on Australian Government Administration commended co-operative federalism as a means of handling "the maze of legalism", so characteristic of a federal system, which leads to impasse and inaction because of doubts about the power of one level of government to take action.[10]

The Constitution does not recognise inter-governmental co-operation in general terms, although there are a limited number of provisions which contemplate some type of co-operation between the Australian and State governments.[11] Students of Australian federalism have identified various forms of co-operative federalism.[12] There are the many Australia-State bodies for consultation on matters of common interest. In the inter-war years the Premiers' Conference and the Australian Agricultural Council led the way, and in more recent times they have been joined by many other bodies such as the Australian Forestry Council, the Australian Transport Advisory Council, the Australian Water Resources Council, the Fisheries Conference, the Australian Minerals Council and the Standing Committee of Commonwealth and State Attorneys-General.[13] Governments have enacted uniform legislation to achieve a common approach to problems of national significance; an example is the Uniform Companies legislation passed since 1961. Complementary legislation attempts to achieve co-operatively what governments do not think they can do by themselves. Marketing schemes for primary products are a case in point.[14] The arrangements on offshore petroleum resources and the River Murray Waters Agreement 1914 are referred to below. Another form of

---

[9] *Id.* 176.

[10] Appendix, vol. 2, 425.

[11] Richardson, *Patterns of Australian Federalism* (1973) 113.

[12] Anderson, "The States and Relations with the Commonwealth", in Else-Mitchell (ed.) *Essays on the Australian Constitution* (2nd ed. 1961) 108-111; Castles "Responsibility Sharing in a Federal System: Political and Legal Issues", in Mathews (ed.) *Fiscal Federalism: Retrospect and Prospect* (1974).

[13] For a recent list of such bodies: H.R. Deb. 1978, Vol. 109, 3364.

[14] *Deputy Commissioner of Taxation* v. *W.R. Moran Pty Ltd* (1939) 61 C.L.R. 735; *Clark King & Co. Pty Ltd* v. *Australian Wheat Board* (1978) 21 A.L.R. 1.

co-operative federalism of interest to lawyers is where different governments form a corporation jointly to carry out a particular task.[15]

Co-operative federalism represents a hope rather than an achievement in the Australian context. Cases of genuine co-operation are rare for "co-operative" ventures are often the outcome of a financially better-off national government offering the States assistance if they agree to participate in a joint enterprise. There are many meetings involving Australian and State officials but these have little political significance and are mainly to exchange information rather than to co-ordinate policies or to formulate a joint approach. Instances of uniform or complementary legislation are relatively uncommon. It seems inappropriate to categorise Australian federalism as co-operative when there are still firmly held differences of a political and policy nature and varying conceptions of the role of the respective levels of government. The notion that co-operative federalism insulates a matter from litigation takes a battering from *New South Wales* v. *Commonwealth*,[16] where the High Court undermined the basis of the offshore petroleum arrangements.[17]

Moreover, co-operative federalism has distinct disadvantages. It can delay necessary reform, nicely illustrated by the fact that a uniform consumer credit law was first reported on a decade ago but is still not on the statute books. Non-Labour governments used co-operative federalism as a banner to "gang-up" against the Whitlam government, and in early 1975 went so far as to fund a permanent secretariat in Canberra and to form a "Council of States". Changes introduced by the Australian government were opposed irrespective of their merits on the basis that they were unilateral rather than co-operative. The co-operative schemes which exist infringe the principle of Parliamentary responsibility. Agreement is reached between representatives of different

---

[15] *E.g.* Joint Coal Board (Coal Industry Act 1946) (Cth); Albury-Wodonga Development Corporation (Albury-Wodonga Development Act 1973) (Cth). *Cf.* bodies formed under State company law: Sawer, "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance" (1976) 10 Melbourne University Law Review 315, 325-326.

[16] *New South Wales* v. *Commonwealth* (1975) 135 C.L.R. 337. That co-operative federalism is hardly an apt description for Australia receives support from a survey of the attitudes of Australian and State public servants. They ranked co-operative federalism low as a means of improving intergovernmental relations in Australia. When asked to designate where on a continuum they would place intergovernmental relations, only six per cent of the State and twenty-two per cent of the Australian public servants chose the co-operative end. The public servants were also asked to indicate the utility of intergovernmental conferences and only about one-fifth of both groups saw them as providing an opportunity for joint policy making. Most of the remainder thought that such conferences were either a useful forum for discussing problems and issues or served to make governmental officials personally acquainted with one another thus making administrative co-operation easier. Leach, *Perceptions of Federalism by Canadian and Australian Public Servants: A Comparative Analysis* (1976) 61, 73, 74.

[17] *Senate Select Committee on Off-Shore Petroleum Resources* (1971), 192-193, 232-233.

governments and it then becomes almost impossible as a practical matter for these arrangements to be changed by the various Parliaments. Once the arrangements are adopted, Ministers can avoid responsibility by shifting to the co-operative institution or other governments blame for a decision.

While there is a substantial objection to intergovernmental arrangements falling outside political control, there are good policy reasons for supporting the High Court's view that such arrangements are not necessarily the subject of adjudication. As Sir Owen Dixon argued as counsel—a view he adhered to when appointed to the High Court—such arrangements are of a political nature, not cognisable by courts of law nor creating legal rights and duties, and depend for their performance on the constitutional relationship between governments and their good faith toward each other.[18] With the agreements associated with section 96 specific purpose grants to the States (described in the next section), the policy reason for denying the States a legal right to enforce them is that the Australian government must retain control over its public expenditure. The viability of a particular project may change, the overall economic situation may demand a reduction in government expenditure, and a change in government may produce a reversal of policy. Perhaps an even more important reason why the High Court should not regard intergovernmental agreements as enforceable is that it is desirable that it should abstain from interfering in any disputes if there is a good chance the matter can be settled in the political arena even though this may take some time.

The Financial Agreement Act 1927 (Cth) is the only inter-governmental agreement which the High Court has treated as being definitely enforceable, by virtue of section 105A of the Constitution. After the *Garnishee Cases*[19] it is strange to see the Financial Agreement 1927 described as a major element of co-operative federalism. Lang's descriptions of its use as "dragooning" and "dictatorship" seem more plausible, and even one of the more cautious Australian constitutional scholars recognises that section 105A of the Constitution gives the Australian government power so wide as to deprive people of the type of State government they want.[20] It will be remembered that the *Garnishee Cases* arose when the New South Wales Labor government under Lang deliberately defaulted on the payment of certain interest on

---

[18] *John Cooke & Co. Pty Ltd* v. *Commonwealth* (1922) 31 C.L.R. 394, 416; *Magennis* v. *Commonwealth* (1949) 80 C.L.R. 382, 409; *South Australia* v. *Commonwealth* (1962) 108 C.L.R. 130, 140.

[19] *New South Wales* v. *Commonwealth* (No. 1) (1932) 46 C.L.R. 155; *The Garnishee Cases* Nos. 2 and 3 are at (1932) 46 C.L.R. 235, 246. See Sawer, *Australian Federal Politics and Law 1929-1949* (1963) 65-66.

[20] Lang, *Why I Fight* (1934) 213-214; Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 361. *Cf.* Clark, "Was Lang Right?" in Radi and Spearritt (eds.) *Jack Lang* (1977) 144-148, 158-159.

its public debts. The Australian government enacted legislation which povided for seizure of State revenue along the lines of garnishee proceedings. New South Wales sought a declaration that the legislation was not authorised by section 105A which provides that the Australian Parliament can legislate for the carrying out by the parties of any agreement between Australia and the States with respect to the public debts of the States. The High Court held that "carrying out" included enforcement and that the Australian legislation did not violate the general constitutional principle that only State Parliaments can appropriate State revenues.[21] The approach of the majority was based on the terms of section 105A, in particular sub-section (5), which makes binding any agreement made pursuant to the sub-section notwithstanding Australian or State Constitutions or laws.

The Financial Agreement 1927 to one side, the High Court is reluctant to enforce other intergovernmental agreements. In the only High Court decision directly on the matter, *South Australia* v. *Commonwealth*,[22] South Australia asked for a declaration that the Australian Government was in breach of an agreement relating to the standardisation of certain railway lines in South Australia. The High Court held that the agreement was not enforceable and upheld the demurrer of the Australian Government. Most judges held that the Agreement gave rise to political obligations only and not to legal obligations enforceable by a court. Most also held that the Agreement was not enforceable on other grounds, either because no specific breach of the terms of the Agreement was made out, or because the Agreement was simply an agreement to enter further specific agreements at some future time. Nevertheless, the High Court acknowledged, as it had on a previous occasion,[23] that intergovernmental agreements could be enforceable, although it provided little guidance as to how these could be identified.

In interpreting *South Australia* v. *Commonwealth*, one approach might be to ask whether intergovernmental agreements have the necessary *animus contrahendi*.[24] The constitutional lawyer might invoke the general principle that Parliaments cannot limit the freedom of future Parliaments, to demonstrate that a particular intergovernmental agreement is not binding.[25] These approaches are not particularly conclusive. Principles of contract law seem out of place when the dominant strand in High Court judgments has been that intergovernmental agreements are covered by special rules. More importantly,

---

[21] *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319.

[22] (1962) 108 C.L.R. 130.

[23] *Magennis* v. *Commonwealth* (1949) 80 C.L.R. 382.

[24] Lücke, "Intention to Create Legal Relations" (1970) 3 Adelaide Law Review 419, 424-428.

[25] Moore, "The Federations and Suits between Governments" (1935) 17 Journal of Comparative Legislation and International Law (3rd series) 163, 182.

neither approach enables us to distinguish easily the binding from the non-binding agreement.

It seems that three factors are important in determining whether an intergovernmental agreement is legally binding.[26] First, the degree of specificity in the agreement is important—a major consideration in *South Australia* v. *Commonwealth*. Secondly, the circumstances in which an agreement is made may remove it from the regime of contract and establish it as an arrangement of a political nature.[27] Co-operative arrangements concluded informally will probably fall into this category. The circumstances surrounding those agreements concerning section 96 specific purpose grants would seem to stamp many as political. Despite the formal way in which such agreements are made, and their inclusion in legislation, they are hardly agreements freely entered in fact if not in law.[28]

Thirdly, what the parties say in any Agreement will be relevant in determining whether it is binding. The River Murray Waters Agreement 1914, between the Australian, New South Wales, Victorian and South Australian governments, establishes a Commission with power to make regulations in respect of its functions, provides for certain works and the sharing of financial and building responsibilities between the contracting governments, and sets a formula for the division of water. In the event of a contracting government failing to perform works or to contribute its share of the costs the other contracting governments may perform those works and they:

> may in any court of competent jurisdiction recover as a debt from the Contracting Government so refusing or neglecting the share of such cost to be provided by such Contracting Government in pursuance of this Agreement together with interest on any sums expended at a rate to be determined by the Commission. (§43)

By contrast the Offshore Petroleum Resources Agreement states (quite exceptionally for intergovernmental agreements):

> The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof. (§26)

---

[26] Renard, "Australian Inter-State Common Law" (1970) 4 F.L. Rev. 87, 105-109 seems to be the only discussion of the matter.

[27] *John Cooke & Co. Pty Ltd* v. *Commonwealth* (1922) 31 C.L.R. 394, 418.

[28] *Magennis* v. *Commonwealth* (1949) 80 C.L.R. 382 involved a scheme in which the Australian government made section 96 contributions—but unlike most specific purpose grants the States were expected to make substantial contributions: War Service Land Settlement Agreements Act 1945 (Cth). Note that the Courts are reluctant to find a binding contract in government offers of financial assistance to citizens: *Australian Woollen Mills Pty Ltd* v. *Commonwealth* (1954) 92 C.L.R. 424; (1956) 93 C.L.R. 546; *Milne* v. *A-G for Tasmania* (1956) 95 C.L.R. 460, 546; *Administrator of The Territory of Papua and New Guinea* v. *Leahy* (1961) 105 C.L.R. 6. *Cf. The Crown* v. *Clarke* (1927) 40 C.L.R. 227.

Far more common in intergovernmental agreements is a clause where each party agrees "to provide for and secure the performance . . . of the obligations . . . under this Agreement".[29] The implication of such a clause may be that it is the responsibility of the parties to implement the agreement to the exclusion of the courts.[30]

COERCIVE FEDERALISM

Coercive federalism is defined as a system which seeks to concentrate decision-making powers in the hands of the national government. Four factors have been identified as contributing to coercive federalism in Australia: the uniform tax legislation; Australian government control over the Loan Council; High Court decisions; and the use of specific purpose grants.[31] The first point recalls Latham C.J.'s remark in the *Uniform Tax Case* that the arrangements might be used to end the political independence of the States but that such a result could not be prevented by legal decision.[32] By itself the uniform tax legislation does not constitute coercion. It may enable the Australian government to determine the amount the States spend—would this be significantly different from what the States themselves would raise and spend?—but it does not necessarily determine how the money is spent if the Australian government makes payments to the States without attaching conditions. Indeed the uniform tax legislation continues under the "new federalism" policy with few modifications. Australian government control over the Loan Council follows from the financial domination consequent on the uniform tax legislation although there is evidence that this control is breaking down because of the size of the federal deficit in recent years.

High Court decisions have enhanced Australian government power, although a leading commentator characterises the development as following a sine curve rather than a straight line.[33] The *Uniform Tax Case*, coupled with decisions excluding the States from imposing many forms of indirect tax,[34] has ensured the Australian government's financial supremacy. The interpretation of the corporations power provides a firm basis for legislation like the Trade Practices Act 1974 (Cth).[35] Decisions also establish that the Australian government can regulate areas not expressly entrusted to it in the Constitution by imposing

---

[29] *E.g.* Housing Agreement Act 1973 (Cth), Schedule §3.

[30] A clause along these lines was present in the Agreement considered in *South Australia* v. *Commonwealth* (1962) 108 C.L.R. 130: Railway Standardization (South Australia) Agreement Act 1949 (Cth), Schedule §2(3).

[31] Mathews, "The Changing Pattern of Australian Federalism", *op. cit.* 31.

[32] *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, 429.

[33] Sawer, "Seventy Five Years of Australian Federalism" (1977) 36 Australian Journal of Public Administration 1, 6.

[34] *Dickenson's Arcade Pty Ltd* v. *Tasmania* (1974) 130 C.L.R. 177; *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353.

[35] *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468; *R.* v. *Australian Industrial Court: Ex parte C.L.M. Holdings Pty Ltd* (1977) 136 C.L.R. 235.

conditions on the exercise of its powers over matters like trade and commerce or taxation.[36] Yet none of this provides a basis for laws which would transform the States into mere administrative agencies of the federal government. The scope of the spending power (section 81) is as yet undetermined and there is every chance that it will be given a narrow construction.

Section 96 of the Constitution must therefore be the main instrument of coercive federalism—the Australian Parliament may grant financial assistance to any State on such terms and conditions as it thinks fit. By using specific purpose grants[37] under section 96, it is said, the Australian government has been able to determine policy in areas which under the Constitution are a matter of State responsibility. One prominent constitutional lawyer refers to the "devious use" of section 96 whereby the Australian government has deeply invaded State territory in areas like transport, housing, road building, hospitals and education. Conditions have been imposed on the use of grants such as under the Housing Agreement 1973, he says, "[y]et the electors in these States had voted for their kind of government which they had expected would be different from the central government".[38]

It is difficult to understand this charge about the use of section 96. Even at the height of what is alleged to be coercive federalism, specific purpose grants comprised only fifty-one per cent of payments to the States.[39] Certainly the founders failed to appreciate the implications of the clause which was adopted as a last minute compromise in 1899.[40] But how can it be said that the Australian government has no constitutional right whatever in areas like housing, education, water conservation, and roads when section 96 undoubtedly gives it a right to provide specific purpose grants for such matters? The argument must mean that certain parts of the Constitution, principally the limitations on Australian government power contained in section 51, are to be given precedence over another part, namely section 96, or

---

[36] *Murphyores Incorporated Pty Ltd* v. *Commonwealth* (1976) 136 C.L.R. 1; *Herald and Weekly Times Ltd* v. *Commonwealth* (1966) 115 C.L.R. 418; *Fairfax* v. *Commissioner of Taxation* (1965) 114 C.L.R. 1.

[37] Jay points out that the term "specific purpose grant" is preferable to "conditional grant" for conditions may be attached to general purpose grants. "General purpose grants are not subject to spending conditions but may be conditional on the recipient governments conforming to specified revenue-raising policies." Jay, "The Shift to Specific Purpose Grants: From Revenue Sharing to Cost Sharing", in Mathews (ed.) *Responsibility Sharing in a Federal System* (1975) 41.

[38] Lane, *An Introduction to the Australian Constitution* (2nd ed. 1977) 35-36. *Cf.* "It is on the letter of Section 96 that the spirit of federation has tottered. . . ." *West Australian*, 3 August 1973 (leader).

[39] Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers" in Evans (ed.) *Labor and the Constitution 1972-1975* (1977) 24. It was some thirty per cent in 1970-1971 when the Liberal Country Party was still in office.

[40] Davis, "A Vital Constitutional Compromise" (1948) 1 University of Western Australia Law Review 21.

that section 96 is to be limited by some notion of federal balance which is to be divined in the Constitution. Over the last fifty years the High Court has been unimpressed with such propositions and has consistently held that limitations cannot be placed on the plain wording of the section.[41] On the point that section 96 is coercive, Dixon C.J. said in the *Second Uniform Tax Case*:

> [I]n sec. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.[42]

In the result, the High Court has held the Australian government can require that financial assistance provided under section 96 be applied to a specific object, although the object is outside its powers.[43] The Australian government can even circumvent express limitations on its powers.[44] Payments can be left to the discretion of an Australian minister, a State can be obliged to contribute matching funds to receive assistance, and grants can be by way of repayable loan.

Various propositions are used to support the thesis that section 96 has contributed to coercive federalism. First, it is said that specific purpose grants substitute national priorities for State priorities.[45] Many would have no objection to this if as a result the States performed tasks of national importance which otherwise they might be unable or unwilling to perform. For instance, specific purpose grants for health and housing have been vital for ensuring some minimum of welfare service. Even if State governments had had direct access to finance most would have been without the vision or commitment necessary to institute a policy—to take one example—like Medibank. Not all specific purpose grants have been determined by national priorities, however, for a number of the national development projects so funded have lacked economic viability but have been politically advantageous. To try to ensure that specific purpose grants take national priorities into account and are not made *ad hoc* for political advantage, the Australian government has established independent commissions (like the Tertiary Education Commission) to guide it on a rational allocation of assistance. Moreover, some programs have been consolidated with a view to a

---

[41] *Victoria* v. *Commonwealth* (1926) 38 C.L.R. 399; *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W.R. Moran Pty Ltd* (1939) 61 C.L.R. 735, affirmed (1940) 63 C.L.R. 338; *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *Commonwealth* (1957) 99 C.L.R. 575.

[42] *Victoria* v. *Commonweatlh* (1957) 99 C.L.R. 575, 605.

[43] *Id.* at 606.

[44] *Pye* v. *Renshaw* (1951) 84 C.L.R. 58.

[45] Mathews, "The Changing Pattern of Australian Federalism" *op. cit.* 43-46. *Cf.* Wiltshire, "New Federalism—The State Perspectives" (1977) 12 Politics 76, 78, 80-81.

more rational approach marked by greater co-operative planning.[46] The idea is that the Australian government will set the broad guidelines, with the States being responsible for the less important decisions. In other words, there has been a move to project type grants when funding in a particular instance is subject to acceptance or rejection on a case by case basis by the Australian authorities.

Many States do not have firm overall goals and readily accept specific purpose grants.[47] Many specific purpose grants have been requested by the States so it ill-behoves them to accuse the Australian government of distorting their priorities.[48] The States have had it both ways: they have claimed the credit for projects funded by the Australian government but they have then blamed it for not assisting other projects and for intruding into its area. To counter the first point, the Australian government decided in 1977 that all Australian government funded projects should have a plaque erected indicating this![49] The following assessment of section 96 grants is still apposite:

> Their growth has been the result of persistent lobbying by State governments, frequently abetted by private pressure groups . . . [C]learly State governments are not so much concerned with sovereignty or fiscal autonomy as with the financial ability to satisfy the demands of their electors, and they look on grants as the rewards of successful bargaining.[50]

Even matching grants may not distort a State's priorities where it refrains from providing a service because of fear of the impact on its competitive position. "Provision of a federal grant serves to break the restraint and to remedy an existing distortion in state priorities."[51] Overall, specific purpose grants have strengthened the States because they have enabled the States to appear to be the provider of funds, have permitted them to carry out functions which they could not otherwise do, and have reinforced their administration and policy-making capacity.[52]

A second element of the coercive federalism thesis is that the conditions attached to section 96 grants are far too onerous. One suggestion

---

[46] *E.g.* Growth Centres (Financial Assistance) Act 1973 (Cth); Land Commission (Financial Assistance) Act 1973 (Cth); Mental Health and Related Services Assistance Act 1973 (Cth).

[47] Spann, "Comment" (1969) 28 Public Administration 117.

[48] *E.g. Financial Review*, 25 September 1968 (Dep. Premier, Qld); *id.* 20 August 1969 (Prem. S.A.).

[49] *Sun Herald*, 3 April 1977.

[50] May, "Intergovernmental Finance" (1969) 28 Public Administration 38, 45.

[51] Maxwell, *Specific Purpose Grants in the United States: Recent Developments* (1975) 86. If the States had firm priorities, however, even non-matching grants of a capital nature might distort because of the need to fund running costs. Note also that specific purpose grants might favour some States over others which have already provided a service.

[52] Rockefeller, *The Future of Federalism* (1962) 44; Elazar, *American Federalism: A View from the States* (1966) 58-59.

is that section 96 be amended to limit the conditions which can be imposed—conditions would specify the subject matter upon which expenditure should occur but would not go to matters of detail or compel matching contributions.[53] Conditions on section 96 grants are sometimes set out in the legislation, occasionally they are left to Ministerial discretion or regulation, but in the main they are contained in an agreement with the State or States concerned.[54] An Australian statute may approve the agreement (a Schedule to the Act) and make the necessary appropriation, or alternatively it may make the appropriation and authorise the Australian government to enter an agreement with the State or States substantially along the lines of the agreement in the Schedule. The legal nature of such Agreements has been discussed in the preceding section.

Most conditions attached to section 96 grants can hardly be said to be coercive. Naturally the States are obliged to provide for and secure the performance of their obligations under a grant.[55] Occasionally there may be a more specific condition to this effect, usually superfluous, stating how a particular project is to be used.[56] The lack of specificity in the conditions for most grants is sometimes surprising; for example, with development grants the States simply undertake to carry out the work efficiently and in conformity with sound engineering and financial practices.[57] A condition precedent in a few grants is that a State may have to satisfy the Australian government that the project is viable (*e.g.* export orders are placed) before an Agreement comes into force and the money becomes available.[58] With large grants, the States may have to obtain approval before incurring expenditure on a particular aspect (for example, one involving more than one million dollars).[59] Where the assistance takes the form of a loan, interest and repayment conditions will be set out in detail.

---

[53] *Proceedings of Australian Constitutional Convention, 3-7 September 1973* 142.

[54] *E.g.* Marginal Dairy Farms Agreements Act 1970 (Cth); Education Research Act 1970 (Cth), s. 4; Queensland Beef Cattle Roads Agreement Act 1962 (Cth).

[55] This is usually spelt out: *e.g.* "Subject to compliance by the State with the provisions of the agreement, the Commonwealth will provide financial assistance . . .": Brigalow Lands Agreement Act 1962 (Cth), Schedule §3(1). "The Treasurer may withhold the making of any advances under this agreement if he is satisfied that the State is not carrying out the work in accordance with this agreement: Railway Agreement (Queensland) Act 1961 (Cth), Schedule §5(2).

[56] *E.g.* "The state must make full use for irrigation of the water stored": Blowering Water Storage Works Agreement Act 1963 (Cth), Schedule §18; State to have consultants conduct a general investigation of Northern division of railways and to take all reasonable steps to implement it: Railway Agreement (Queensland) Act 1961 (Cth), Schedule §16.

[57] *E.g.* Coal Loading Works Agreement (Queensland) Act 1962 (Cth), Schedule §2. But *cf.* Railway Agreement (New South Wales and South Australia) Act 1968 (Cth), Schedule §8 (Works must generally be by public tender unless the Australian Minister approves otherwise).

[58] *E.g.* Gladstone Power Station Agreement Act 1970 (Cth), Schedule §3.

[59] *E.g.* Railway Agreement (Tasmania) Act 1971 (Cth), Schedule §16(2).

Major policy conditions determining expenditure of specific purpose grants are unusual, but because they are politically contentious they attract a good deal of publicity. Consequently the States can perpetrate the idea that the Australian government is forever forcing unacceptable conditions onto them. An illustration of major policy conditions are those relating to the sale of houses built under the various housing agreements. In brief, Labour governments have preferred the States to rent the houses while non-Labour governments have taken the view that their sale should be encouraged.[60] Another example is the way the States must allocate a fixed proportion of finance for road building to rural roads.[61]

The High Court has held that conditions imposed on section 96 grants must not constitute coercion *i.e.* demand obedience, but that there is no objection to their acting as a strong inducement to State action. In the *Uniform Tax Case* the High Court held that the Grants Act associated with the scheme was valid. The Act authorised payments to the States somewhat equivalent to the revenue they would lose by not imposing income tax provided they ceased to impose such income tax. The Court considered that the Act was valid because it did not make State income tax laws invalid nor did it purport to deprive the States of their powers to impose income tax. Latham C.J. drew the distinction between coercion and inducement:

> The Grants Act offers an inducement to the State Parliaments not to exercise a power the continued existence of which is recognised—the power to impose income tax. The States may or may not yield to this inducement, but there is no legal compulsion to yield. . . . The identification of a very attractive inducement with legal compulsion is not convincing. Action may be brought about by temptation—by offering a reward—or by compulsion. But temptation is not compulsion.[62]

It might be thought that the High Court has drawn a rather artificial line between coercion and inducement. Certainly the type of conditions which the law approves are very wide: that a State not exercise its powers, that it exercise its powers in a certain way and, it has been suggested, that a State refer a matter to the Australian parliament pursuant to section 51(xxxvii).[63] The fact is that in a political and economic sense the States have to accept specific purpose grants. Exceptions are that for relatively short periods South Australia and Tasmania were not parties to the Housing Agreement, and in recent

---

[60] Commonwealth and State Housing Agreement Act 1956 (Cth), Schedule §15. *Cf.* Housing Agreement Act 1973 (Cth), Schedule §19.

[61] Road Grants Act 1974 (Cth), s. 6.

[62] *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, 416-417. See also Rich J. at 436; McTiernan J. at 455-456; Williams J. at 464.

[63] Anderson, "Reference of Powers by the States to the Commonwealth" (1951) 2 University of Western Australia Law Review 1, 3.

times Queensland has rejected a number of specific purpose matching grants related to social welfare. Despite the artificiality of the distinction drawn between coercion and inducement, the High Court is justified in its approach for otherwise it would have to make factual enquiries of a political and economic nature for which it is hardly equipped. Once the High Court turned its back on a narrow interpretation of section 96,[64] it had little choice but to give the Australian government a virtual *carte blanche* as to the type of grants and their attendant conditions, and to leave the resolution of controversial matters to the political sphere.

From the legal point of view a stronger reason why specific purpose grants are not coercive is that it is very doubtful whether the Australian government could obtain judicial remedies requiring the States to observe any conditions. The strongest possibility is that the Australian government could obtain judgment for repayment of money spent in breach of condition, even it could not levy execution because of the constitutional principle that State expenditure requires Parliamentary approval.[65] The High Court might also grant a declaration, but it seems clear that it would not give specific performance or an injunction since it could not enforce either.[66]

By contrast in the United States judicial enforcement of conditions attached to grants to the States has occurred as a result of beneficiaries (or potential beneficiaries) seeking review of the decisions of federal departments to fund a State, because of their breach of federal conditions.[67] Cases have also arisen where beneficiaries have challenged a State over its failure to comply with federal conditions on the basis that this had deprived them of rights, privileges and immunities. The first type of litigation is facilitated by the broad concept of standing operating in the United States, and the second type has been based mainly on civil rights legislation. One illustration is that welfare recipients have successfully challenged rules imposed by State welfare departments, through which funds are channelled, as being in breach of the Constitution and the standards contained in federal legislation, after the responsible federal department failed to take effective action.[68] Similarly,

---

[64] Saunders, "The Development of the Commonwealth Spending Power" (1978) 11 Melbourne University Law Review 369, 387-389.

[65] In the *Second Uniform Tax Case* (1957) 99 C.L.R. 575, the High Court raised no objection to what is a fairly typical clause in agreements for specific purpose grants that the States would repay moneys on breach of condition. But the matter was not really considered: see at 622, 642-648. On execution: Howard, *Australian Constitutional Law* (2nd ed. 1972) 72-74.

[66] Campbell, "The Commonwealth Grants Power" (1969) 3 F.L. Rev. 221, 240; Myers, "The Grants Power. Key to Commonwealth-State Financial Relations" (1970) 4 Melbourne University Law Review 549, 558. *Contra* Sawer, *Australian Federalism in the Courts* (1967) 147. See also Judiciary Act 1903 (Cth), s. 65.

[67] Tomlinson and Mashaw, "The Enforcement of Federal Standards in Grant-In-Aid Programs" (1972) 58 Virginia Law Review 600.

[68] *E.g. Townsend* v. *Swank* (1971) 404 U.S. 282; *Lewis* v. *Martin* (1970) 397 U.S. 552; *King* v. *Smith* (1968) 392 U.S. 309.

the Courts have entertained cases brought by persons affected by non-compliance on the part of the States with conditions contained in the Federal-Aid Highways Acts (for example that public hearings be held about the route).[69] Quite apart from whether the High Court would ever entertain such cases, few specific purpose grants in Australia contain conditions which affect the rights of individuals. An exception might be the Housing Agreement, which at various times has required the States to fix rents at certain levels.

In Australia in practice the Auditors-General check whether the States observe the conditions attached to section 96 grants.[70] In addition, the States undertake to furnish to the Australian government any information which it may reasonably require in relation to compliance. The States must also furnish annual statements showing estimated expenditure on the works during the succeeding financial year and must also supply an annual progress report. If breach of any condition is detected through these procedures, the Australian government's remedy is extra-legal. There is the threat that with a continuing project the Australian government can refuse further money if conditions are not observed. The cut-off of funds is never really satisfactory because it defeats the object of the programme.[71] Moreover, the use or threatened use of such sanctions is politically unacceptable in the Australian context and is quickly condemned by the organs of public opinion.[72] Perhaps persuasion can best be achieved if those affected by a State's non-compliance with conditions can be mobilised. In other words, the Australian government publicises how non-compliance will affect the State's residents and they then put pressure on the State to comply.

---

[69] *E.g. Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402.

[70] A typical clause in an Agreement for a s. 96 grant is:

(1) The accounts, books, vouchers, plans, documents and other records of the State relating to cost of planting shall be subject to audit by the Auditor-General of the State.

(2) Until all amounts to be paid by the Commonwealth under this agreement are paid, and supporting evidence to the satisfaction of the Treasurer is furnished by the State in relation to all amounts making up cost of planting, a report on the audits and on the financial statements in respect of each financial year shall be furnished by the Auditor-General of the State to the Treasurer as soon as possible after the completion of the financial year, indicating inter alia—

(a) whether the financial statements are based on proper accounts and records and are in agreement with those accounts and records; and

(b) whether the expenditure of moneys was for the purpose of meeting cost of planting,

and including reference to such other matters arising out of the audits and financial statements as the Auditor-General of the State considers should be reported to the Treasurer.

Softwood Forestry Agreement Act 1972 (Cth), Schedule §13. In the U.S. federal "inspectors" visit State offices to check compliance: Elazar, *op. cit.* 149.

[71] MacMahon, *Administering Federalism in a Democracy* (1972) 94-95. In other jurisdictions central governments are authorised to discharge functions themselves at the expense of the offending authority: *Royal Commission on the Constitution* Cmnd. 5460, 263. Clearly there is no possibility of this in Australia.

[72] *E.g. Courier-Mail* (Brisbane) 23 February 1973 (leader).

THE "NEW FEDERALISM"

The Fraser Government, installed in November 1975, was pledged to restore an earlier era of federalism when the Australian government played a less prominent rôle in setting national priorities. The difference in emphasis between the "new federalism" policy and the approach of the Whitlam government (1972-1975) can be illustrated by reference to company law. Whereas Labour had introduced national companies legislation, the Corporations and Securities Industry Bill 1975, which if enacted and upheld by the High Court would have overridden important parts of the States' Uniform Companies legislation, the Fraser government has agreed with the States on what it describes as "a general framework for a co-operative Commonwealth/State scheme".[73] In addition to Australian legislation, which will embody the agreement of the participating States, the States will enact legislation to ensure that the Australian legislation has full force in a State.

The major element of the "new federalism" is the "handing back" to the States of a fixed share of the revenue derived from personal income tax,[74] coupled with a reduction of specific purpose grants under section 96. The federalism policy of the Liberal Party of September 1975 envisaged the eventual absorption of section 96 programs into the States' income tax revenues. In fact the crucial change produced by the "new federalism" policy in financial relations has been the cut-back in payments to the States rather than the changed form such relations now take.[75]

Apart from the financial aspects, the "new federalism" policy is said to aim at greater regional administration and more co-ordination with the States and local government. One example of what this might mean in practice has been considered by the Task Force on Co-Ordination in Welfare and Health, which has made various recommendations to consolidate programmes, to transfer functions to the States, and to devolve the administration and delivery of services to the States, local government and non-government bodies.[76] One specific Task Force recommendation is that State officers be appointed agents for the Australian government in relation to the supporting parent's benefit, which is available for unmarried mothers or fathers, parents who are the deserted partner of a *de facto* relationship, *de facto* spouses of prisoners or separated spouses. The States already provide assistance, subsidised by the Australian government under the State Grants (Deserted Wives) Act 1968 (Cth) for women during the six months

---

[73] H.R. Deb. 1978, Vol. 20, 3219. See also Commonwealth-State Scheme for Co-operative Companies and Securities Regulation, Formal Agreement.

[74] States (Personal Income Tax Sharing) Act 1976 (Cth).

[75] See Mathews, *Australian Federalism* (1978).

[76] *Proposals for Change in the Administration and Delivery of Programs and Services* First Report, 1977.

period before they are eligible for the supporting parent's benefit. The Task Force considered that the agency arrangement would eliminate the need for a fresh determination of eligibility when state assistance ceases after the six months and the supporting parent's benefit commences.[77]

Devolution of functions under the "new federalism" policy can be illustrated by reference to legal aid. The Australian Legal Aid Office is being dismantled and responsibility for furnishing legal assistance in respect of Australian government matters transferred to legal aid commissions established under State legislation. The present Attorney-General claims that the new arrangements represent a partnership between the Australian government, State governments and the legal profession.[78] The arrangements hardly constitute co-ordinative federalism, if this means policy and functional co-ordination by Australian and State governments; instead, it represents an abandonment of Australian government responsibilities. The Commonwealth Legal Aid Commission is certainly obliged to keep under review legal assistance for Australian matters.[79] But as regards State legal aid commissions the Commission can simply liaise and make recommendations on such matters as the manner in which, and the criteria, contributions and priorities attaching to the provision of such assistance.[80] If Western Australian legislation is any guide it seems that at least some State legal aid commissions will be dominated by the legal profession and obliged to maximise the amount of legal assistance provided by private practitioners as opposed to salaried lawyers.[81] Therefore in the provision of legal assistance in respect of Australian government matters, State commissions following the Western Australian route will effectively be precluded from implementing certain policies which the Australian Commission might recommend.

Various bodies in the past have commended the idea of arrangements whereby State officers administer Australian government powers under a particular program. The Royal Commission on the Constitution reported in 1929 that such arrangements had the advantage of administrative decentralisation and flexibility.[82] More recently the Royal Commission on Australian Government Administration justified the use of State officers and facilities in this way on the grounds of efficiency and the avoidance of an administratively confusing overlap of oper-

---

[77] *Id.* §§238-240, 248.

[78] Law News, vol. 13(2), May 1978, 3.

[79] Commonwealth Legal Aid Commission Act 1977 (Cth), ss. 6(a), (d).

[80] Ss. 6(b), (f).

[81] Legal Aid Commission Act 1976-1977 (W.A.), ss. 15(1), 51A. One of seven members of the State commission is nominated by the Australian government, s. 7.

[82] Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (1929) 186.

ations.[83] Experience rejects the contention, said the Royal Commission, that such arrangements detrimentally undermine uniformity or create the difficulty of officials working for two masters.[84] With such arrangements the Australian government should not abandon or qualify its right to establish programmes, to determine their principles or to evaluate their implementation, but varying with the nature of the programme it should allow administrative discretion and flexibility to State officials.[85]

It is doubtful that the administration of Australian programmes by State officials can contribute very much to our system of government. The experience of such arrangements in the past has been patchy. During the war, it was understandable that the Australian government should use the existing State administrative structures in view of the manpower shortages.[86] To ensure decentralised quarantine administration throughout the whole country, the Australian government has empowered State horticulture and veterinary experts to make inspections whenever necessary.[87] From the early nineteen fifties to 1966, the State education departments administered the Commonwealth Scholarship Scheme, but this was mainly because the Australian government had promised a reduction in the size of its public service.[88] More recently, partly in order to avoid a dual administrative system, and partly for political reasons, the Australian government decided that State mining officials should administer the Petroleum (Submerged Lands) Act 1967 (Cth). Arrangements such as those outlined have originated because of

---

[83] *Australian Government Administration. Report of the Royal Commission* (1977) (Chrm: H.C. Coombs) §7.4.3 [hereafter *Royal Commission*].

[84] *Id.* §7.4.2.

[85] *Id.* §§7.4.3, 7.4.4, 7.4.7, 7.4.9.

[86] *E.g.* National Security (Manpower) Regulations S.R. 1942 No. 34 §12 and National Security (War Damage to Property) Regulations S.R. 1942 No. 79 §56. Legislative powers were invested in State Premiers *e.g.* National Security (General) Regulations S.R. 1939 No. 87 Part III as amended by S.R. 1941 No. 289 S.R. 1942 No. 974. See Senex, "Imperium in Imperio? Powers of State Premiers under National Security Regulations" (1944) 18 A.L.J. 34. See generally Bailey, "The War Emergency Legislation of the Commonwealth" (1942) 4 Public Administration 11, 24-27; Mauldon, "Commonwealth-State Relations in Administration" (1949) 8 Public Administration 138, 140; Walker, *The Australian Economy in War and Reconstruction* (1947) 91-92; Parliament of New South Wales, *The State and the War Effort* Parliamentary Paper, Session 1942-1943, 1277.

[87] Quarantine Act 1908 (Cth), s. 11. State officials have also been designated as customs officers under Customs Act 1901 (Cth), s. 4. *See Royal Commission* Appendix, vol. 2, 433-443.

[88] Gardner, "Commonwealth-State Administrative Relations" in Spann, (ed.) *Public Administration in Australia* (1959) 252. Other examples where State officials have administered Australian law are: Fisheries Act 1952 (Cth), s. 6(1); Continental Shelf (Living Natural Resources) Act 1968 (Cth), ss. 6, 10; Matrimonial Causes Act 1959-1966 (Cth), s. 78(1) (mentioned without adverse comment in *Horne* v. *Horne* (1963) S.R. (N.S.W.) 121, 127). Note the reciprocal situation where a State appoints Australian officials to administer State laws: *e.g.* Meat Inspection Arrangements Act 1964 (Cth), s. 5(1); Queensland Meat Inspection Agreement Act 1932 (Cth).

peculiar circumstances (emergency, distance, politics). Although there is some scope for wider use of the technique, it seems that generally speaking the case for Australian public service administration will be stronger.

Moreover, the administration of Australian programmes by State officials is hedged with legal difficulties. Unlike the Indian Constitution,[89] the Constitutions of Australia, Canada and the United States are silent on the question of administrative delegation to the States. Since the decision of the Canadian Supreme Court in *PEI Potato Marketing Board* v. *Willis*[90] the Canadian Parliament can delegate administrative functions to provincial bodies. In the United States it is generally thought that the national government has no power to force State officials to perform federal administrative functions, although voluntary arrangements may not be open to the same objections.[91]

In Australia, as in Canada and the United States, little consideration has been given to the problem. In his *The Constitution of the Commonwealth of Australia*, Moore argued strongly that the Australian government could not require State governmental organs to act as its agent for, if this were allowed, the resultant dislocation in the States would transform them into subordinated bodies.[92] That voluntary arrangements are constitutional is implied by a number of High Court decisions. In *James* v. *Commonwealth*[93] one of the questions raised was whether the Commonwealth had power to invest State Dried Fruits Boards with power to issue licences to those wishing to transport dried fruits interstate. Higgins and Starke JJ., the only two judges to consider the matter, thought such delegation allowable, although Starke J. seems to have confined his remarks to agencies and instrumentalities incorporated under State laws without reference to State public servants. Section 78 of the Public Service Act 1922 (Cth) permits the Australian government to arrange with the States for the performance of federal tasks by State officials, and in a number of cases the High Court has assumed the

---

[89] Articles 256, 258.

[90] [1952] 4 D.L.R. 146. See also *Coughlin* v. *Ontario Highway Transport Board* (1968) 68 D.L.R. (2d) 384; *R.* v. *Smith* (1972) 21 D.L.R. 222. *Contra Attorney-General of Nova Scotia* v. *Attorney-General of Canada* [1950] 4 D.L.R. 309, which held legislative delegation to be invalid. See Hogg, *Constitutional Law of Canada* (1977) 226-227. A limitation in Canada may be that such delegation should not amount to an abandonment by the Canadian government of its responsibilities: see the remarks of Tweedy J. in the Prince Edward Island Supreme Court in *PEI Potato Marketing Board* v. *Willis* [1952] 2 D.L.R. 726; Ritchie J.'s dissent in *Coughlin* v. *Ontario Highway Transport Board* (1968) 68 D.L.R. (2d) 384; and Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Canadian Bar Review 409, 424.

[91] *Kentucky* v. *Denison* (1860) 24 How. 66, 107-110; *Prigg* v. *Pennsylvania* (1842) 16 Pet. 539, 615-616, see Willoughby, *The Constitutional Law of the United States* (2nd ed. 1929) vol. 1, 121.

[92] (2nd ed. 1910), 438. See also Warner, *An Introduction to Some Problems of Australian Federation* (1933) 36.

[93] (1928) 41 C.L.R. 442, 459-460, 463.

validity of such arrangements although the issue was not specifically raised.[94] As to the legal nature of such arrangements, the remarks of Latham C.J. in relation to the Income Tax Collection Act 1923-1940 (Cth) whereby State treasury officials in all States but Western Australia collected Commonwealth taxes, are no doubt apposite: "Probably they are political arrangements not creating legal obligations between the parties and are terminable at the will of either party."[95]

Thornton's Case,[96] a decision of the full bench of the High Court, is perhaps the strongest support for the constitutionality of administrative delegation. In that case attention was focused on section 28 of the Re-Establishment and Employment Act 1945-1952 (Cth) which provided, *inter alia*, that certain categories of persons (defined in the legislation) could "apply to a court of summary jurisdiction constituted by a Police, Stipendiary or Special Magistrate" for relief if they believed themselves to be denied the preference in employment to which they were entitled under the Act. The section, it was held, attempted to impose administrative duties on State courts which was not permissible under section 77(iii) of the Constitution. In the course of their joint judgment, however, the court made the following remarks:[97]

> It is to be noticed that s. 28(1) of the Re-establishment and Employment Act does not take any magistrate as a designate person or as a person who with his own consent and that of the State, may be detached from the court to which he belongs and used for particular purposes. . . . All that matters is that s. 28 attempts to invest the State court of summary jurisdiction, and not an individual, with non-judicial power.

The advice of the Australian Attorney-General's department was that, as a result of the judgment, Australian government administrative functions could only be conferred upon State officials with the consent of the State concerned.[98] Consequently, section 28 of the Act was amended to allow aggrieved persons to apply to a prescribed authority for an order under the section, and it was further provided that the Australian government could come to an arrangement with the States for the performance of the functions of the prescribed authority by police, Stipendiary, Resident or Special Magistrates in the States.[99]

Decided shortly after *Thornton's Case*, *Aston* v. *Irvine*.[1] suggests that

---

[94] *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481; *Bond* v. *Geo. A. Bond and Co. Ltd* (1930) 44 C.L.R. 11. Of course this in no way validates the section: *see Grace Bros Pty Ltd* v. *The Commonwealth* (1946) 72 C.L.R. 269, 289; *Attorney-General* v. *The Queen ex parte The Boilermaker's Society* (1956) 94 C.L.R. 254.

[95] *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373, 430.

[96] *Queen Victoria Memorial Hospital* v. *Thornton* (1953) 87 C.L.R. 144. *Cf.* earlier remarks in *Ex parte Coorey* (1945) 45 S.R. (N.S.W.) 287, 317, 318.

[97] *Id.* 152.

[98] *Commonwealth Parliamentary Debates* 2 December 1953, 183.

[99] Re-establishment and Employment Act 1953 (Cth), s. 3.

[1] (1955) 92 C.L.R. 353.

there may be an important limitation on administrative delegation to the States. Although left unresolved, the query was raised whether attempts to entrust State officers with the executive power of the Commonwealth is valid under Part II of the Constitution.[2] Essentially the argument is that Part II requires the executive power to be exercised by the Governor-General and persons under him, which excludes the use of State officials if no direct power of administration resides in the Governor-General. The policy rationale for such an interpretation of the Constitution is the maintenance of responsible government, which would be undermined if State officers were not answerable to the Governor-General.[3] The constitutional doubt surfaced with the Petroleum (Submerged Lands) Act 1967 (Cth), which empowers the Governor-General to make arrangements with the Governor of a State for the exercise by a State official of the powers and functions of the Designated Authority under the Act.[4] A Designated Authority has wide discretion under the Act; for example, it may exempt a licence from requirements of the statute without prior consultation with the Australian government.[5]

If this is a correct view of the law, the Australian government can only delegate administrative tasks to State officials if it retains a positive control over the performance of those tasks. In other words it must issue detailed instructions to State officials about the way tasks are to be performed, or if substantial discretion in administration is necessary it must oblige the States to consult with it about the exercise of that discretion. Because consultation takes time, which may not be available in certain types of situation, direct administration by Australian public servants of programmes may be the only approach which is both practical and constitutional.

CONCLUSION

It may be useful to describe Australian federalism in particular ways: as co-operative, coercive and so on. The difficulty is that such descriptions might be accurate or inaccurate at any particular time depending on which area of intergovernmental relations the writer is describing. If the focus is simply on financial relations, "coercive" is an arguable description, but it is hardly accurate when the continued vitality of the States in other respects is taken into account. Moreover, the terms have different implications for different people. Coercive federalism connotes a distortion of the federal system because of a

---

[2] At 364-365. *Cf. The Commonwealth and the Central Wool Committee* v. *Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 C.L.R. 421, 440 *per* Isaacs J.

[3] Richardson, "The Executive Power of the Commonwealth" in L. Zines (ed.) *Commentaries on the Australian Constitution* (1977) 81, 85, 86.

[4] Senate Select Committee on Off-Shore Petroleum Resources, *Off-Shore Petroleum Resources* (1971) 167-168.

[5] *E.g.* s. 57(4). *Cf.* s. 18(1).

centralisation of power. The contrary interpretation is that Australia needs national leadership. In this view, the form of the federal system is largely irrelevant and the central concern is whether government responds adequately to particular problems.

An underlying theme of the Article is that intergovernmental disputes are best settled in the political sphere. To have the High Court enforcing intergovernmental agreements or the conditions attached to section 96 grants would be too disruptive and an undue interference with the political process. The High Court is best suited to a supplementary role, for example, facilitating the delegation of administrative power to the States which does not violate the principle of accountable government. The legal mind may be unhappy, especially when the assertion of power by the Australian government engenders conflict and resistance by the States, but the simple fact is that politics is inherently "messy".