Chapter Two

Money, Power and Pork-Barrelling: Expenditure of Public Money without Parliamentary Authorisation

Anne Twomey

One of the major problems with our federal system is that the Commonwealth Government regards the money that it raises through taxation and other means as it own money, to be spent for its own political advantage. Hence we have the unedifying spectacle of gross forms of electoral pork-barrelling, be it Ros Kelly's "sports rorts" worked out on a white board, John Howard's regional partnership program that was subject to a scathing report by the Auditor-General prior to the 2007 election[1] and, most recently, promises prior to the 2013 election to fund a multiplicity of surf clubs, aquatic centres and sports grounds, most seeming to need at least $10 million each and nearly all in marginal electorates.[2]

Almost none of this expenditure falls within Commonwealth heads of power. Where is the Commonwealth's responsibility for sport? What is its constitutional role in relation to the construction of surf clubs and community facilities? These matters are for the States and local government to deal with. The framers of the Constitution never allocated such powers to the Commonwealth.

There appear to be two reasons why the Commonwealth is involved in such matters today. First, the Commonwealth raises far more money than it needs in order to fulfil its constitutional responsibilities, so it has plenty of extra money to throw around on matters beyond its responsibilities. Secondly, the Commonwealth sees the funding of such projects as a good way of buying favour in communities and votes in elections.

The extent of the Commonwealth's power to engage in such pork-barrelling has been challenged in recent times. Two cases handed down by the High Court have put a dampener on its ability to do so. One of the Commonwealth's proposed responses, a constitutional referendum to allow it to fund such projects directly through local government bodies, was aborted due to significant criticism and lack of public support. The other band-aid, being legislation to authorise the Commonwealth to spend money on practically anything it wants, is currently under challenge before the High Court.

This paper addresses the constitutional limits on the Commonwealth's expenditure of public money and how a new government might address the question of future Commonwealth expenditure.

Constitutional History

The framers of the Constitution always anticipated that the Commonwealth would receive far more revenue than it needed to fulfil its constitutional functions. They envisaged a small national government of specific limited powers, with the States retaining responsibility for most functions, including the most expensive ones, such as health and education. Yet, at the same time, there was a grass-roots demand for free

trade across the nation and an end to the paying of duties on goods as they crossed State borders. The consequence was that the power to impose duties of excise and customs was given exclusively to the Commonwealth, but as this was the main form of taxation at the time, amounting to more than three-quarters of colonial tax revenue, it meant that the Commonwealth would receive far more revenue than it would ever need and the States would not have enough revenue to fulfil their functions.

The framers of the Constitution therefore included mechanisms in the Constitution for the transfer of money from the Commonwealth to the States. For the first few years, they imposed a book-keeping system. The Commonwealth would credit each State with the customs and excise revenue it collected within the State and then debit the proportion of the Commonwealth's expenditure attributable to the State (calculated by reference to the State's population). The Commonwealth then paid the balance to the State. This method balanced the two competing factors – where money was collected and the needs of the States based upon their populations.

As the framers could not predict the precise impact of these financial changes on the new States, they were less prescriptive about what had to happen after the book-keeping stage ended. Section 94 simply required that the Commonwealth distribute its surplus revenue to the States on such basis as the Commonwealth Parliament should deem fair. Although discretion was given to the Commonwealth about how the surplus was to be distributed – whether it was to be on a per capita basis, or whether it would take into account where the revenue had been collected – the requirement actually to distribute the surplus to the States was mandatory.[3]

There was then an argument about how to make sure that there was a surplus and that the Commonwealth did not just gobble up all the money for its own purposes. Delegates to the Constitutional Convention noted that a system that leaves a government with a large surplus inevitably leads to a "system of waste and extravagance"[4] and gives rise to a temptation that should be kept "out of the hands of the Federal Treasurer".[5] Charles Kingston aptly observed, "there is nothing which conduces more to the reverse of sound finance and good government than an overflowing Treasury".[6]

Others, such as Sir John Downer, thought it unnecessary to impose limits on Commonwealth expenditure because the Commonwealth had very limited powers and responsibilities and could not spend beyond them.[7] This was reflected in section 81 of the Constitution, which limited Commonwealth appropriations to "the purposes of the Commonwealth". As there was a risk that this would not cover the transfers to the States under section 94 and associated provisions, section 81 was altered to make it subject to the "charges and liabilities imposed by this Constitution", such as the obligation to pay the Commonwealth's surplus to the States.[8]

Some delegates were not convinced that this was enough to save the Commonwealth from the temptation of over-spending. A Tasmanian delegate, Edward Braddon, successfully proposed the inclusion of section 87 of the Constitution which stated that the Commonwealth could only spend one quarter of the revenue it received from customs and excise duties, with the rest having to be paid to the States. This guaranteed a surplus of at least three quarters of Commonwealth revenue from customs and excise duties. An attempt was made at the Melbourne session of the Constitutional Convention to limit the effect of the Braddon clause to five years, but this was voted down. It was intended to apply in perpetuity (unless the Constitution

was later amended).

The draft Constitution, as agreed upon at the 1897-98 Constitutional Convention, was then put to a referendum in the different colonies. It received support from a majority of voters in New South Wales[9] but did not reach the requisite minimum support of 80,000 voters (as there was no compulsory voting at that time). It was thus deemed to have failed. At a meeting of Colonial Premiers in January 1899, a number of compromises were reached in order to obtain subsequent agreement from the people to the draft Constitution. Two of those compromises related to Federal-State financial arrangements. The Premier of New South Wales, George Reid, had sought the deletion of the Braddon clause.[10] The compromise reached by the Premiers was to limit it to a minimum of ten years, and thereafter until the Commonwealth Parliament otherwise provided. This turned out to be a very short-sighted move on the part of New South Wales.

The second compromise was to insert section 96 in the Constitution, allowing the Commonwealth to make grants upon conditions to States where this was needed. Such a provision had previously been rejected at the Constitutional Convention in Melbourne in 1898.[11] There was a concern that the States would become supplicants to the "rich uncle" of the Commonwealth who would come to their aid in financial trouble. Richard O'Connor, later a Justice of the High Court, was concerned that this would lead to circumstances where one government could pressure or "exact terms" from the other, as this would produce "the germs of corruption and improper influence".[12] Dr John Cockburn thought that such a proposal would "certainly sap the independence of the states by placing the Federal Parliament as a sort of Lord Bountiful over the states". He was prescient in his warning that "we may as well strike out the provision that all taxation shall be uniform throughout the Commonwealth if we are to contemplate that after the taxation has been raised the proceeds may be handed over to any one colony".[13]

In 1899, the intention behind inserting section 96 was to avoid the necessity of imposing higher uniform Commonwealth taxes (affecting the more prosperous States, such as New South Wales) in order to provide per capita funding to the States at a sufficiently high level to support the more financially needy smaller States (such as Tasmania).[14] It was also seen as a concession to the smaller States, especially Tasmania, "as a *quid pro quo* for the concession made to New South Wales in the limitation of the Braddon clause".[15] It was certainly not intended that section 96 would become the primary means of transferring money to the States. This was the function of section 94, which it was anticipated would involve the distribution of the surplus on a per capita basis, after the transitional period was over. Nor was it intended that the provisions in the Constitution that carefully prescribe that the Commonwealth may not discriminate between the States in imposing taxation were to be undermined by the discriminatory return of the proceeds of taxation to particular States under section 96.[16]

Section 96 was, according to the colonial Premiers, only intended to allow the Commonwealth Parliament "to deal with any *exceptional circumstances* which may from time to time arise in the financial position of any of the States" [17] [emphasis added]. It was thought that such problems would only be likely to arise in the transitional period after federation, while State economies were adjusting to the loss of customs and excise duties. Hence, section 96 was stated to apply "during a period of ten years after the establishment of the Commonwealth and thereafter until the

Parliament otherwise provides". It was intended to be a temporary measure to deal with financial emergencies.

The financial scheme in practice

This careful balancing of the financial system, intended to ensure that the vast bulk of Commonwealth revenue was returned to the States, was swiftly undermined and overturned by the Commonwealth. After the book-keeping period was over, the Commonwealth moved in 1908 to undermine section 94 by ensuring that it had no surplus to transfer to the States. It did this by appropriating all left-over money at the end of each financial year into various trust accounts for future use. This was upheld by the High Court.[18] The Commonwealth has never had a surplus since.

Once the minimum 10 years of the Braddon clause was up, Parliament then "otherwise provided" by getting rid of it.[19] This meant that it could use all of its tax revenue from customs and excise duties for its own spending and did not have to transfer three-quarters of it to the States.

This left section 96 as the sole standing method of transferring money to the States. Critically, it is a completely discretionary provision and it can be made subject to conditions. The High Court has held that as long as the grant itself is consensual, the conditions imposed upon it may relate not only to how the money is used but to any other matters of State policy.[20] This has significantly expanded the Commonwealth's power and made the States subservient to the will of the Commonwealth.

However, section 96 also plays another indicative role in the Constitution. Its inclusion would not have been necessary if the Commonwealth was otherwise able to spend money on grants to States or other matters outside the Commonwealth's specified constitutional powers.[21] There are clearly wide areas of activity that lie outside the Commonwealth's spending power and which may only be dealt with by the Commonwealth through conditions attached to section 96 grants.[22] As Justice Starke noted in the *Pharmaceutical Benefits* case, section 96 would be superfluous if the Commonwealth had the power to appropriate money with respect to any subject matter.[23] These points have most recently been reiterated by the High Court in the *Williams* case.[24]

Purposes of the Commonwealth

The Commonwealth has constantly bridled against this restriction on its power to appropriate and spend public money. It began, particularly in the 1970s, to spend money directly on subjects that were not within its legislative or executive powers. In doing so, it sought to exert pressure on the High Court by establishing a long-standing practice of such expenditure in order to raise the stakes involved in striking it down. It relied on the circular argument that the mere fact that the Commonwealth Parliament had decided to appropriate funds for a purpose was enough to make it a "purpose of the Commonwealth". If this argument were correct, then the phrase, "purposes of the Commonwealth," in section 81, would be meaningless, because all appropriations made by the Commonwealth Parliament would be, by virtue of that very fact, purposes of the Commonwealth.

The question of the meaning of "purposes of the Commonwealth" divided the High Court in the *Pharmaceutical Benefits* case[25] in 1945 and the *AAP* case[26] in 1975, in such a way that there was no majority support for either the broad view (that purposes of

the Commonwealth meant any purposes for which the Commonwealth Parliament decided to appropriate money) or the narrow view (that the Commonwealth could only appropriate money for purposes within the Commonwealth's powers). Those judges that took the broader view were influenced both by the concern that, otherwise, many past appropriations would be invalid;[27] and also by the need for the Commonwealth to fund worthy causes such as exploration and scientific research.[28]

Despite the inconclusive nature of these cases, the Commonwealth took the view that it could spend money on whatever it wanted until such time as it was told by the Court that it was unconstitutional. It, therefore, proceeded, particularly during the Howard era, to start funding schools and local government bodies directly, avoiding the use of section 96 grants to the States. The intention was to use Commonwealth money to buy influence and potentially votes at the local level, by-passing the role of the States, so that the Commonwealth could be seen to be the benefactor and the hero in local communities. There was also an underlying intention to create an even bigger edifice of such payments so that it would be too substantial to be struck down.

The *Pape* case

The Commonwealth's edifice has since been subject to two major hits by the High Court. First, in the *Pape* case, the Court held that section 81 only goes to support appropriation, not expenditure. The Commonwealth needs an additional power to authorise the expenditure of appropriated money.[29] In *Pape,* the legislation granting tax-payers bonus payments was saved by reliance upon the nationhood power, on the basis that it was a response to a national "emergency" arising from the global financial crisis.[30] Such a power, however, is limited in scope and cannot save the many Commonwealth programs, such as its chaplaincy program, which do not fall within the category of a national emergency.

The Commonwealth had contended that its long-standing practice of appropriating money for purposes beyond its powers supported the view that such expenditure was for the "purposes of the Commonwealth" and within its evolving powers. Justice Heydon skewered this argument as follows:

> The other fallacy is the Panglossian belief that what is said to have evolved over time as a matter of governmental practice corresponds with the Constitution. It holds, not only that everything which exists is for the best in the best of all possible worlds, but also that what exists in that world is constitutionally valid. It fails to face up to the fact that, magnificent though the framers' achievement was, the Constitution is not consistent with every human desire. If it is to be changed, section 128 is the means, and the sole means, of doing so.[31]

Heydon J rejected the idea that a "living tree" form of constitutional interpretation can be used to give constitutional support to government practices that move outside the scope of its legislative power. He described such an approach as "a theory of continuous constitutional revolution, in which successive usurpations would be constantly seeking to legitimise themselves by claiming de jure status from their de facto position".[32] He concluded that the "Court decides what the Constitution means in the light of its words. It does not infer what the Constitution means from the way the Executive and the legislature have behaved".[33] Justice Heydon added for good measure that "executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional" and that "practice must conform with the Constitution,

not the Constitution with practice".[34] This was a lesson to which the Commonwealth turned a deaf ear.

The fact that the Commonwealth's legislation was ultimately saved in the *Pape* case perhaps led the Commonwealth into a false sense of security that ultimately the Court would not knock down any of its expenditure. The Commonwealth appears to have assumed that its broad executive power, combined when necessary with its incidental legislative power in section 51(xxxix), would be enough to authorise its expenditure when there was no express head of legislative power.

As a consequence, the Commonwealth took no action to review its expenditure and put it all on a firm footing – either under express legislative power or section 96 grants. Its chickens came home to roost in the *Williams* case.

The *Williams* case

Mr Williams complained that the Commonwealth scheme that paid for a chaplain in his children's school was invalid. The scheme was not authorised by any legislation. It relied upon executive power, plus the appropriation of funds for a fairly vague purpose.

The Commonwealth had argued that the expenditure was supported by its executive power, either under the broad view, that the Commonwealth executive has the capacity of a legal person to spend on any matter it chooses, or, on the narrow view, that the executive can spend public money on subjects that fall within the scope of legislative power, even when no such legislation has been enacted.

In the *Williams* case, a majority of the High Court rejected both the broad and narrow views, deciding that because this involved the expenditure of "public money", parliamentary authorisation was needed and that the chaplaincy funding program was therefore invalid.

Different themes flowed through the Court's judgments. One of the most notable was the renewed concern about "federalism considerations". In the *WorkChoices* case,[35] as Greg Craven so memorably put it, Federalism had been discarded like a used tissue. In *Williams,* however, Federalism became an important consideration again,[36] at least in ascertaining the scope of the Commonwealth's executive powers, if not its legislative powers.

The Court also related this to section 96 of the Constitution, expressing concern about the Commonwealth by-passing section 96 in favour of expenditure based on executive power.[37] Justices Hayne and Kiefel both pointed out that section 96 would be rendered redundant if the Commonwealth executive had power to spend money on whatever subjects it wished and then to legislate to enforce conditions on its expenditure.[38] Section 96 would have no work to do at all, as everything could be done under the executive power and the incidental legislative power. Justices Crennan and Kiefel added that the very presence of section 96 in the Constitution was evidence that the Commonwealth's executive power did not extend so far and that there are large areas beyond the scope of the Commonwealth's executive power.[39]

The High Court also stressed the importance of the accountability of the executive to Parliament, and particularly to the Senate, in relation to expenditure.[40] It noted that the Senate's powers are limited with respect to the appropriation bills for "the ordinary annual services of the Government", but not in relation to legislation that authorises expenditure, rather than appropriation. Interestingly, the High Court appears to be

back-tracking a bit from its acceptance in the *Combet* case that the Commonwealth can appropriate money for purposes that are described in relatively meaningless generality.[41] In the *Williams* case, the money for the chaplaincy program was appropriated for the purpose of achieving the "outcome" that "individuals achieve high quality foundation skills and learning outcomes from schools and other providers".[42] It is incomprehensible to me, and perhaps to the Justices of the High Court, how Parliament could have been expected to know from this description that it was actually appropriating money for a chaplaincy program. Given that the appropriation system now no longer provides an appropriate level of accountability, the High Court is attempting to impose this at the expenditure stage.

The upshot of the *Williams* case was that unless Commonwealth expenditure falls within a defined class of exceptions, being expenditure –

directly authorised by the Constitution;
made under a prerogative power;
made in the ordinary administration of the functions of government; or
(possibly) made under the nationhood power,

then it has to be authorised by a law that is supported by a head of Commonwealth legislative power.[43] As the chaplaincy program did not fall within any of the above exceptions and was not supported by legislation, it was therefore held to be invalid.

The *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth)

A week after the *Williams* decision was handed down by the High Court, the Commonwealth Parliament passed, almost without any scrutiny, the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth).

It inserted section 32B into the *Financial Management and Accountability Act,* which purports to provide parliamentary authorisation for the expenditure of public money on any of the programs or objects listed in regulations. In the days after the *Williams* case, the public servants had been asked to "bring out their dead", listing any programs which were not supported by legislation. Some gave very specific lists. Others, who either did not know or were unprepared to reveal, the nature and extent of their executive spending programs, simply offered up categories such as "Public Information Services", "Regulatory Policy", "Diversity and Social Cohesion", "Domestic Policy" and "Regional Development". The former Chief Justice of New South Wales, James Spigelman, described some of these programs as being "identified in such a general language that they could not withstand constitutional scrutiny".[44]

Not only does section 32B purport to authorise existing expenditure programs that come within these descriptions, but it also seeks to authorise any future Commonwealth programs that can be shoe-horned into one or other of the 400-odd existing categories in the regulations. In such a case, the new expenditure program will have no legislative scrutiny at all. If a change to the regulations is needed, however, this can be done by executive action but will at least run the gauntlet of potential disallowance by either House.

An example arose recently in relation to the proposed spending upon the local government referendum. The *Financial Management and Accountability Amendment Regulation* 2013 (No 3) authorised expenditure by the Executive on a national civics education campaign and a communications campaign by those for and against the then proposed local government referendum.[45] Interestingly, it was not disallowed,

despite the controversy concerning the differential funding for the Yes and No cases. It is not clear, in the wake of the failure of the referendum to proceed, how much of this money was spent and how much returned to the government.

Section 32B is currently under challenge by Mr Williams, who still has Commonwealth-funded chaplains in his children's school. He is arguing that section 32B and the Division in which it is contained are not supported by a head of legislative power.[46] He also contends that there is implied in the Constitution "a limit upon the Commonwealth Executive's power to implement policies and spend money without engagement of the Senate beyond the appropriation process".[47]

At the very least, the authorisation of expenditure by section 32B on those programs that do not fall under a Commonwealth head of power (including the nationhood power) must be invalid.[48] The outcome of *Williams No 2* will most likely turn on whether section 32B is completely invalid or whether it can be read down so that it only applies to expenditure on those programs and grants that fall within Commonwealth legislative power.

In the last parliamentary sitting days of the Gillard Government, an entirely new financial system for the Commonwealth was guillotined through the Senate – the *Public Governance, Performance and Accountability Act* 2013 (Cth). This Act, when it comes into force, will replace the *Financial Management and Accountability Act* 1997 (Cth) and take over the governance of the Commonwealth's financial operations. It is based upon the dubious model of inserting "principles" in the legislation and leaving the detail to rules made by ministers. Accordingly, it is quite opaque and difficult to understand what it actually authorizes, as is presumably intended. It is clear that the Commonwealth has not taken to heart the High Court's call for greater parliamentary scrutiny of the expenditure of public money, as it is doing its best to provide even less.

This Act has been dropped on the doorstep of the new Abbott Government. While passed by Parliament when the last Government was still in office, it has not yet come into force, but will do so automatically if not proclaimed by 1 July 2014. Despite its opacity, it appears that it does not contain an equivalent to section 32B (unless it is proposed to provide such authorization for government programs by way of rules made by the minister). This leaves the Abbott Government with the dilemma of whether or not to enact an equivalent provision to section 32B, knowing that section 32B may well be found invalid by the High Court some time in 2014, or to take some other course.

Options for the Commonwealth

There are a number of alternatives that the Commonwealth could contemplate. First, it could consider enacting special appropriation legislation (as opposed to laws for the "ordinary annual services of the Government") that deals with the funding of particular projects or programs or capital acquisitions. Relying on heads of power other than section 81, such legislation could authorise the terms of the particular project, program or acquisition as well as authorising the expenditure.

Alternatively, it could, where it has a legislative head of power, enact legislation to authorise specific programs or relevant groups of programs (for example, an Act to authorise all foreign aid expenditure) as well as the expenditure under those programs, but leave the appropriations for authorisation in the ordinary annual budget

and supply bills.

The objection would no doubt be made that such action would take too much effort and be a drain on parliamentary time. However, the benefits of having properly organised and set out programs, rather than expenditure based upon back of the envelope or white-board assessments, are likely to be immense. There is a much greater discipline in having a program enacted into legislation. Details need to be worked out and justified. Frolics, thought-bubbles and whims are likely to be abandoned well before a bill is introduced into Parliament. Decisions made under the Act will be subject to judicial review and therefore must be fair, reasonable and able to withstand scrutiny. Money is likely to be saved. Programs are likely to be administered in a more efficient and disciplined way. This is also the preferable course from a democratic point of view, as it allows proper parliamentary scrutiny of, as well as amendment to, new programs involving the expenditure of public money. As Hayne J noted: "Sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in [*Williams*] by legislation".[49]

Where the Commonwealth does not have the legislative power to authorise particular forms of expenditure, it can still negotiate section 96 grants with the States to meet agreed aims. Better still, it could simply decide to cut Commonwealth expenditure in relation to matters that do not fall under its legislative power and pass the relevant money to the States so that they can adequately deal with such subjects, as the framers of the Constitution intended. After all, it is *public* money, not Commonwealth money, and it should be used to fulfil public needs, not just the needs of those who live in marginal seats and the need of the party in government at the Commonwealth level to be re-elected.

This would be far more consistent with the federal system created by the Constitution as well as being far more economically efficient, as it would reduce the size of the Commonwealth bureaucracy and the unnecessary cost involved in administering programs through two levels of government. It would also give the States greater control over expenditure in their areas of jurisdiction, resulting in better planned and managed programs and services.

Governments often bleat about the need for budget savings and the improvement of productivity. One simple way of achieving this within the public sector would be for the Commonwealth to stop spending public money on matters beyond its areas of constitutional responsibility in a vain attempt to buy public favour and, instead, transfer this surplus public money to the States so that they can fulfil their responsibilities in a more efficient and effective manner. Such an idea ought to be attractive to a Liberal Government, but whether it can wean itself from the Commonwealth's addiction to gratuitous spending and vote buying remains to be seen.

Endnotes

1. ANAO, *Performance Audit of the Regional Partnerships Programme,* 2007: http://www.anao.gov.au/Publications/Audit-Reports/2007-2008/Performance-Audit-of-the-Regional-Partnerships-Programme/Audit-brochure.

2. See further: Judith Sloan, "Both parties roll out the pork barrel for marginals", *The*

Australian, 31 August 2013.

3. See: J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 865; R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation,* Nelson, 1972, 52; and *Victoria v Commonwealth and Hayden* (*AAP Case*) (1975) 134 CLR 338, 358 (Barwick CJ).

4. Constitutional Convention, Sydney, 1891, 805 (Mr Bray); and Sydney, 1897, 150 (Mr Hackett).

5. Constitutional Convention, Adelaide, 1897, 45 (Sir George Turner).

6. Constitutional Convention, Melbourne, 1898, 864 (Mr Kingston).

7. Constitutional Convention, Melbourne, 1898, 898 (Sir John Downer).

8. J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 811.

9. 71,595 people voted in favour of the Constitution with 66,228 voting against it: R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 37.

10. J A La Nauze, *The Making of the Australian Constitution*, MUP, 1972, 241.

11. Constitutional Convention, Melbourne, 1898, 1122.

12. Constitutional Convention, Melbourne, 1898, 1109 (Mr O'Connor).

13. Constitutional Convention, Melbourne, 1898, 1119 (Dr Cockburn).

14. R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 49.

15. Cheryl Saunders, "The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution" in G Craven (ed), *The Convention Debates 1891-1989: Commentaries, Indices and Guide*, Legal Books, 1986, 171. La Nauze described the insertion of section 96 as a "sop to Braddon": J A La Nauze, *The Making of the Australian Constitution*, MUP, 1972, 246.

16. R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, Nelson, 1972, 50.

17. J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 219; R L Mathews and W R C Jay, *Federal Finance –*

Intergovernmental Financial Relations in Australia Since Federation, Nelson, 1972, 38.

18. *New South Wales v Commonwealth* (1908) 7 CLR 179.

19. *Surplus Revenue Act* 1910 (Cth), s 3.

20. *Victoria v Commonwealth* (1926) 38 CLR 399.

21. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 282 (Williams J).

22. *AAP* (1975) 134 CLR 338, 398 (Mason J).

23. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 266 (Starke J).

24. *Williams v Commonwealth* (2012) 248 CLR 156, [243] and [247] (Hayne J); [501]-[503] (Crennan J); [592]-[593] (Kiefel J).

25. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237.

26. *AAP* (1975) 134 CLR 338.

27. *AAP* (1975) 134 CLR 338, 418 (Murphy J).

28. *AAP* (1975) 134 CLR 338, 394 (Mason J).

29. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [8] and [111] (French CJ); [178]-[183] (Gummow, Crennan and Bell JJ); [320] (Hayne and Kiefel JJ) and [601]-[602] (Heydon J).

30. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [112] (French CJ); [213] and [241] (Gummow, Crennan and Bell JJ).

31. *Pape* (2009) 238 CLR 1, [435] (Heydon J). Note that Heydon J was in dissent, but this does not detract from the force of these comments, as no one in the majority argued to the contrary.

32. *Pape* (2009) 238 CLR 1, [534] (Heydon J).

33. *Pape* (2009) 238 CLR 1, [598] (Heydon J).

34. *Pape* (2009) 238 CLR 1, [598] (Heydon J).

35. *New South Wales v Commonwealth* (2006) 229 CLR 1, [54] and [194]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36. *Williams* (2012) 248 CLR 156, [54] (French CJ); [143] and [155] (Gummow and Bell JJ); [192]-[199] and [248] (Hayne J); and [395] (Heydon J).

37. *Williams* (2012) 248 CLR 156, [143] (Gummow and Bell JJ); [503] (Crennan J).

38. *Williams* (2012) 248 CLR 156, [243] and [247] (Hayne J); and [593] (Kiefel J).

39. *Williams* (2012) 248 CLR 156, [501] (Crennan J) and [592] (Kiefel J).

40. *Williams* (2012) 248 CLR 156, [60] (French CJ); [145] (Gummow and Bell JJ); [174] and [222] (Hayne J).

41. *Combet v Commonwealth* (2005) 224 CLR 494.

42. *Williams* (2012) 248 CLR 156, [227] (Hayne J).

43. For a close analysis of these categories of exception, see: Anne Twomey, "Post-*Williams* expenditure – When can the Commonwealth and States spend public money without parliamentary authorisation?", 2014, *University of Queensland Law Journal*.

44. The Hon James Spigelman, AC, "Constitutional Recognition of Local Government", Address to the Local Government Association of Queensland, 24 October 2012, 10.

45. See program 421.002A in *Financial Management and Accountability Regulations* 1997 (Cth).

46. *Williams v Commonwealth (No 2),* Statement of Claim, Filed 8 August 2013, para 57.

47. *Williams v Commonwealth (No 2),* Statement of Claim, Filed 8 August 2013, para 58.

48. Note the view of Sir Owen Dixon that it may be competent for Parliament to pass a General Contracts Act *unless* it is desired "to confer a greater contractual power upon the executive than subjects of legislative power at present permit Parliament to give": Commonwealth of Australia, *Royal Commission on the Constitution – Minutes of Evidence,* (Cth Gov Printer, 1929) Vol 3, 13 December 1927, 781.

49. *Williams* (2012) 248 CLR 156, [288] (Hayne J).