

## ON THE ORIGIN OF SECTION 96 OF THE *CONSTITUTION*

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### I INTRODUCTION

In so many ways Australian federalism has been a study in unintended consequences – never more so, perhaps, than in relation to section 96 of the federal *Constitution*. In *Victoria v Commonwealth* (*‘Second Uniform Tax Case’*), Dixon CJ postulated

that the true scope and purpose of the power which s 96 confers upon the Parliament of granting money and imposing terms and conditions [should] not admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief of assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power.<sup>1</sup>

His Honour necessarily expressed himself in such cautious terms because section 96, unlike virtually all the rest of the federal *Constitution*, was not publicly hammered into shape at the Conventions. Rather, it was added at the last minute, at the Premiers’ Conference of February 1899<sup>2</sup> (the so-called ‘secret’

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1 (1957) 99 CLR 575, 609. A modern-day originalist who accepted this account of s 96 might presumably conclude that these matters determined the present interpretation of s 96 as well. Dixon CJ clearly had s 96’s interpretation in mind in the passage quoted but does not say that for him the suppositions made about the Founders’ intentions would constitute the end of the enquiry even were it not for the prior case law; nor should we expect him to do so. See also Jonathan Crowe and Peta Stephenson, ‘Reimagining Fiscal Federalism: Section 96 as a Transitional Provision’ (2014) 33 *University of Queensland Law Journal* 221; Helen Irving, ‘The Dixon Court’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 179, 191–4. The words ‘relief of assistance’ are as shown in the *Commonwealth Law Reports*; ‘of’ may be an error for ‘or’.

2 The resolutions of the Conference were officially published in New South Wales, *Australasian National Convention, 1897–8*, Parl Paper No 391–A (1905) (‘Parl Paper No 391–A’), with draft s 96 at 2, but also in many newspapers immediately after the end of the Conference (eg, ‘Federation: Conference of Premiers’, *The Argus* (Melbourne), 3 February 1899, 5 ff). Curiously, they may be found first officially published in ‘The Commonwealth Bill: Memorandum Setting Out the Amendments in the Draft of the

Premiers' Conference) that followed the rejection of the first Bill by the voters of New South Wales in the previous year – or rather their deemed rejection of it given that the voters were statutorily declared to have rejected the Bill if the majority of them in favour of it numbered less than 80 000,<sup>3</sup> as it did.

This article will consider, and affirm, the newly discovered claim by the Premier of Queensland at the time, (Sir) James Dickson, that he was the champion of section 96 as he was responsible for having the section accepted at that Conference. Until now, information on the genesis of section 96 did not go far beyond the bare historical fact that it was inserted at the Premiers' Conference in 1899 coupled with what may be deduced from its wording.<sup>4</sup> Thus, Professor Cheryl Saunders has recorded the 'unsatisfactory'<sup>5</sup> nature of many of the participants' accounts of the origins of section 96 in her work: all accounts are either extremely brief or second-hand, and there are several accounts of the decisions of the Premiers' Conference which do not mention section 96 at all. In short, little if anything was known about the origins of section 96.<sup>6</sup>

Furthermore, section 96's appearance at the conclusion of the Premiers' Conference was very much overshadowed at the time by other matters also settled at the Conference – the location of the federal capital, whether a three-fifths or an absolute majority would be required at a joint sitting under section 57 and the limitation to 10 years of the 'Braddon clause' (section 87) were the three issues settled at the Premiers' Conference that were most critical to ensuring that New South Wales was brought on board. The agenda for the Conference had been set by resolutions of both Houses of the Parliament of New South Wales in which those three issues had pride of place; only as an afterthought was a vague request for 'further inquiry into, and a more thorough consideration of, the financial clauses'<sup>7</sup> appended. Moreover, section 96 appeared almost without explanation or debate.<sup>8</sup> In their published explanation of section 96,<sup>9</sup> the premiers

Bill Agreed to at the Conference of Premiers in February, 1899' (Appendix to the Journals of the House of Representatives of New Zealand No A-4A, 1899).

- 3 *Australasian Federation Enabling Act 1895* (NSW) s 35, as amended by *Australasian Federation Enabling Act Amendment Act 1897* (NSW) s 2.
- 4 J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 246, refers to s 96 as 'a sop to Braddon', but this is based on nothing more than that s 87, the 'Braddon clause', was limited to 10 years at the same time as s 96 was inserted.
- 5 Cheryl Saunders, 'Towards a Theory for Section 96' (Pt 1) (1987) 16 *Melbourne University Law Review* 1, 3. See also Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in Gregory Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books, 1986) 149, 171-2.
- 6 The best historical treatments of s 96 in isolation are, perhaps, those of S R Davis, 'A Vital Constitutional Compromise' (1948) 1 *University of Western Australia Annual Law Review* 21; R L Mathews and W R C Jay, *Federal Finance: Australian Fiscal Federalism from Federation to McMahon* (Centre for Strategic Economic Studies, 1997) 49-56.
- 7 The resolutions in the form in which they passed the Legislative Assembly are reprinted in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 1149, but the original sources are New South Wales, *Minutes*, Legislative Council, 13 December 1898, 93 ff; New South Wales, *Votes and Proceedings*, Legislative Assembly, 3 November 1898, 171 ff.
- 8 It is true that there was some debate at the 1898 Convention when, as we shall see below, the clause was debated and rejected by the Convention. That debate, however, included much discussion of whether the power now expressly granted in s 96 was implied in the *Constitution* anyway, and that discussion was of

who had met in the Conference of 1899 referred to it merely as a power ‘to deal with any exceptional circumstances which may from time to time arise in the financial position of any of the States’; it merely permitted action under unspecified circumstances rather than firmly mandated it; and it was far vaguer than the precise provisions for the location of the capital or the exact formula for the sharing of customs revenue in the near future. It is therefore no wonder that it attracted comparatively little attention.

Indeed, section 96 stands out like a sore thumb among the laboriously agreed and expressed detail of the other financial provisions dealing with sharing of revenue before the imposition of uniform customs duties, for five years immediately thereafter and then beyond, along with the Commonwealth power to take over State debts (sections 87, 89, 93, 94 and 105). Cheryl Saunders has already provided a comprehensive analysis of the long and exceedingly complicated debate about the shape of the financial provisions in general.<sup>10</sup> In brief, the scheme finally adopted was that section 89 continued the States’ tariffs until the imposition of uniform duties of customs, which under section 88 had to happen within two years of Federation, but the Commonwealth was to administer the various colonial customs laws from the first day of Federation pursuant to sections 69 and 86. As is well known, when uniform duties were imposed (which occurred on Tuesday 8 October 1901 at 4.00pm Victorian time)<sup>11</sup> the States lost the power to impose customs duties under section 90 (with an exception for Western Australia in section 95). Then, for the first five years of uniform customs, section 93 guaranteed a share in customs revenue to the States, on essentially the same basis as before their imposition: in short, each State was to receive the customs duties on goods consumed in it after a deduction from that revenue of the proportionate expenditure of the Commonwealth on the State.

This arrangement, while it continued, obviously – and importantly – made the States’ income dependent, in large part, on the shape of the future uniform federal tariff; if it was low and federal expenditure high, a State might experience a shortfall. Under section 93, this revenue sharing was to continue beyond five years until Parliament otherwise provided – it need hardly be said that the Commonwealth extinguished this requirement early.<sup>12</sup> Section 87, the ‘Braddon clause’, required the Commonwealth to return at least three-quarters of its income from customs and excise to the States under provisions such as sections 89 and 93, and accordingly went some way towards ensuring that there was actually some revenue left to return under section 93. Until the last minute section 87 was to exist in perpetuity, but another amendment made by the premiers in 1899 limited the requirement to 10 years and provided that federal

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little use once it had been expressly inserted; nor was much else of great moment or insight stated. For an overview, see Davis, above n 6, 22–5; Saunders, ‘The Hardest Nut to Crack’, above n 5, 169–71.

9 Parl Paper No 391–A, above n 2, 2.

10 Saunders, ‘The Hardest Nut to Crack’, above n 5; see also Mathews and Jay, above n 6, 49 ff.

11 *Customs Tariff 1902* (Cth) s 4; *Excise Tariff 1902* (Cth) s 4. On the retrospectivity involved, see Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1910) 529. The second paragraph of s 92, now long spent, also had a role here; it is usefully described in *Tasmania v Commonwealth* (1904) 1 CLR 329, 353 (Barton J).

12 *Surplus Revenue Act 1908* (Cth) s 3.

Parliament could thereafter terminate it; again, ὡς γὰρ ἐπετρόπευσε τάχιστα, μετέστησε τὰ νόμιμα πάντα.<sup>13</sup> Section 105, as originally enacted, allowed the Commonwealth to take over the States' debts as existing at the establishment of the Commonwealth, either wholly or in proportion to their population, and deduct the payments on interest from the surplus revenue due to the States. Finally, section 94 allowed the Commonwealth to distribute to the States any surplus revenue after uniform duties had existed for five years 'on such basis as it deems fair'.

Section 96 does not really fit into this elaborate scheme, and this is partly for the reason already given, namely, that it was a late addition. This article shows, however, that section 96 emerged not only as a result of general apprehensions about the States' finances after Federation, but also as a result of the inability of the premiers to come up with a comprehensive scheme for the regulation of federal–state financial relations; they were defeated by the uncertainties of the future and the fact that the federal tariff was unknown and could not be known until after the first federal elections. For it was on it that much of the States' income in the first few years after Federation would depend under the detailed constitutional provisions just mentioned. The premiers were not even agreed among themselves about the purpose of section 96; indeed, several premiers contradicted themselves on these points, as we shall see.

Accordingly, there is an obvious lack of coherence between section 96 and, most obviously, the provision for distributing the surplus revenue of the Commonwealth to the States on a 'fair' basis under section 94, which commenced five years after the uniform tariff was imposed: even the simplest and most basic of questions is left unanswered – whether revenue that is granted under section 96 is to be counted as part of the surplus under section 94 (as well as its predecessor provisions sections 89 and 93) or, for that matter, as having been paid to the States within the meaning of section 87. This necessitated a special consideration of such points by Quick and Garran.<sup>14</sup> Nowhere in the materials I have found before Federation is any attempt made to reconcile the distribution on a 'fair' basis of the surplus under section 94 and the grants power in section 96, although a single dictum of Higgins J from 1908 in *New South Wales v Commonwealth* ('*Surplus Revenue Act Case*')<sup>15</sup> suggests that expenditure under section 96 would not be counted as part of the federal surplus distributable under section 94. No-one at all thought to ask, going outside the financial provisions, whether 'terms and conditions' under section 96 would need to be justified by a head of power in section 51.<sup>16</sup>

13 'As soon as [the Commonwealth] was in charge, [it] changed all the rules': Herodotus, *Histories* (Christine Ley-Hutton trans, Reclam, revised ed, 2002) Book 1, 80 [1.65.5]. The 'Braddon clause' was eliminated by the *Surplus Revenue Act 1910* (Cth) s 3. An outline of federal–state financial relations in the first decade after Federation and a sketch of the proposal to replace s 87 contained in the Constitution Alteration (Finance) 1909 (Cth) that was rejected at a constitutional referendum in 1910 is in Mathews and Jay, above n 6, 65–71, 92–6, 123–5; Moore, above n 11, ch 3.

14 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 871.

15 (1908) 7 CLR 179, 203.

16 However, see below n 69.

I discovered (Sir) James Dickson's claim to be the protagonist of section 96<sup>17</sup> in a speech by Sir Samuel Griffith CJ delivered to the members of the Queensland Federation League, of which he was president, on Friday 26 May 1899:

In order to guard against the possible risk to the solvency of the several States, an amendment was made in the Bill at the Prime Ministers' Conference in February, at the instance, I believe, of the Prime Minister of Queensland, which I regard as of great importance. By this provision the Commonwealth may – and, as the solvency of every State will be the concern of all, I think this means that in case of necessity or urgent need they must – grant financial assistance to any State on such terms and conditions as the federal Parliament may think fit. This provision, I think, practically ensures that the solvency of no State will be allowed to be affected by reason of its entering the Federation.<sup>18</sup>

And Dickson himself confirmed this attribution in an interview with *The Brisbane Courier* immediately upon his return from the Conference:

I was glad to be able to introduce an amendment which at first was not considered favourably, but subsequently, with a slightly different phrasing, was adopted. It was that the federal Treasurer might assist the States – in case of any financial disarrangement through withdrawing from them revenue for federal purposes – as far as he could conveniently do so. An apprehension is felt that the establishment of the federal Parliament and Government will withdraw from the States a larger amount of their revenue from Customs and excise than they can spare without financial embarrassment – such amount being defined by the 87<sup>th</sup> clause as one-fourth – but with the provision which has been introduced the federal Treasurer would endeavour to work with the Treasurers of the States, and grant them such assistance as would prevent their finances being disturbed until a uniform tariff has been established.<sup>19</sup>

For Dickson too, however, the chief item on the agenda at the Premiers' Conference was not section 96, but the special concession to Queensland embodied in section 7 of the *Constitution* that was also added at the Conference – namely that, until otherwise provided by the federal Parliament, the State might divide itself into regions for the purposes of electing senators. Indeed, Alfred Deakin tells us that

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- 17 Although not necessarily the drafter of the words used. On this see La Nauze, *The Making of the Australian Constitution*, above n 4, 243 n \*, suggesting that one Cullen might have been the drafter. Although no awareness is shown of the fact in that source, this Cullen is the later (Sir) William Cullen CJ. His future Honour may be seen speaking on our topic, although not very informatively, in Cullen, 'The Federal Bill: As Amended', *The Evening News* (Sydney), 20 April 1899, 8. On (Sir) William Cullen's part in the Federation movement, see J M Bennett, 'Sir William Portus Cullen – Scholar and Judge' [1977] (September) *Canberra Historical Journal* 78, 80–4. There is also obviously an affinity with the drafting of the clause rejected in 1898, of which more shortly.
- 18 Sir Samuel Walker Griffith, 'Australian Federation and the Draft Commonwealth Bill' (Paper presented at Queensland Federation League, 26 May 1899) 20; Queensland, Parl Paper No CA-40 (1899), 11; Sir S W Griffith, 'Federation and the Commonwealth Bill', *The Brisbane Courier* (Brisbane), 27 May 1899, 9.
- 19 'The Premier's Return', *The Brisbane Courier* (Brisbane), 9 February 1899, 5. He also claimed that s 96 was carried 'on my initiation' in a manifesto to his electors: James R Dickson, 'The General Elections: The Premier's Manifesto', *The Telegraph* (Brisbane), 16 February 1899, 3. I take the reference at the end of the quotation to there being an 'established' federal tariff as being not merely to its enactment, but also to the settling down of the fiscal system after the disruption caused by the change. After all, State laws continued until the uniform tariff was established, although they were administered by the Commonwealth (ss 69, 86, 89, 90), and thus there could be no significant disruption to State finances until that occurred.

[w]hen asked his requirements at the very outset [of the Conference] Dickson contented himself with the power to subdivide his colony for the Senatorial elections and this being promptly conceded, declared himself satisfied with whatever else his fellow-Premiers might agree.<sup>20</sup>

However, Deakin was not one of them and was not giving firsthand testimony. Indeed, he makes no mention of section 96 at all, a provision which he considered unnecessary as such a power was, in his view, implied even without section 96 in the *Constitution*<sup>21</sup> – but one of the six premiers must have been responsible for the insertion of section 96. Nevertheless, for Dickson, the permission to subdivide Queensland for the purposes of Senate elections was certainly the greater prize; it is again an unintended consequence that it has never been used and now cannot be,<sup>22</sup> while section 96 is a central part of our constitutional arrangements.

Section 96 was, moreover, so inconspicuous in the eyes of at least one major Founder in the early years that Barton J in *Tasmania v Commonwealth* rather startlingly, from the point of view of the present discussion, stated that ‘so far as the financial arrangements are concerned’ the pre-Premiers-Conference Bill was ‘identical in terms with the *Constitution* itself’ – as if section 96 did not exist, or was not a financial provision.<sup>23</sup> Indeed, although untied grants to the States commenced in 1910<sup>24</sup> there were no cases directly on the interpretation of section 96 until the famous case of *Victoria v Commonwealth* (‘*Federal Roads Case*’)<sup>25</sup> of 1926 dealing with the first instances of tied grants.

This article will provide as much background as can be obtained to Dickson’s claim to be the champion of section 96 and to the speech in which it was made. The article will assess and affirm its plausibility. It will also summarise the public debate on this new clause in 1899 (in Western Australia until 1900, when their referendum was held) – a task which has become suddenly much easier as a result of the digitisation of newspapers, and which gives some insight into what the people who voted for the *Constitution* might have thought section 96 was for. That was certainly not the purpose which it has come to be used for, as we shall see. While there were a few variant ideas about the purpose of the new clause, hardly anyone thought that it would be used as it actually has been.

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20 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880–1900* (Melbourne University Press, 2<sup>nd</sup> ed, 1963) 103.

21 See *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1060 (Alfred Deakin).

22 *Commonwealth Electoral Act 1918* (Cth) s 39; the first such provision was the *Senate Elections (Queensland) Act 1982* (Cth) s 2.

23 (1904) 1 CLR 329, 350. See also at 351: ‘a conference of the Premiers of the States met [and] alterations were made in the draft, not even in a remote degree affecting the provisions we are now discussing’.

24 See Anne Twomey, ‘The Knox Court’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 98, 108 ff.

25 (1926) 38 CLR 399.

## II GRIFFITH CJ'S SPEECH AND MEANS OF KNOWLEDGE

The newspapers reported Griffith CJ's speech of 26 May 1899 widely and tell us that, despite his earlier political life, his Honour (who was never an outstanding orator anyway)<sup>26</sup> spoke rather differently from the politicians:

The address, it need scarcely be said, is of a very different kind from those of Mr Barton and Mr Deakin. These gentlemen had before them a packed popular audience in the largest hall in Brisbane, and rightly addressed themselves directly to the people. Sir Samuel spoke in one of our smaller halls, and spoke with characteristic restfulness.<sup>27</sup>

Despite these differences, and indeed necessarily ignorant of them given that he did so a few hours in advance of the speech itself, William Kidston MP gave notice of motion in the Legislative Assembly asking whether it was 'expedient or desirable that Judges of the Supreme Court should thus come down from the bench and take part in the public discussion on a question while that question is actually under discussion in this House'.<sup>28</sup> Mr Kidston was a Labour member and indeed was to acquire the historic distinction of becoming a member of the world's first Labour government later that same year.

It certainly does cause us some surprise today to see a Chief Justice taking sides in a question to be the subject of an imminent referendum – even a judge as obviously qualified as Griffith CJ by his earlier very prominent involvement, when a practising politician, in the Federation movement, the Conventions and the drafting of the *Constitution*. Indeed, Mr Kidston was able to raise the point because the colonial Parliament was then sitting in special session called solely to debate the draft *Constitution* and what became the *Australasian Federation Enabling Act 1899* (Qld) providing for its submission to the people. The questions with which Griffith CJ dealt in his address were therefore very politically lively ones.

No doubt his Honour justified this course to himself, perhaps on the ground that his speech was mostly explanatory of the Bill and useful for informing voters of any stripe about the detail of the proposal. But the speech, despite its greater degree of 'restfulness', was not merely legal analysis and neutral explanation but contained a considerable helping of politically controversial arguments that were not merely pro-federal, but also pro-Bill. Many of the arguments were also unrelated to any topic which a judge might have any particular expertise on – such as that common Australian action in foreign affairs would be beneficial or

26 Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 186.

27 'Sir S W Griffith on the Commonwealth Bill', *The Brisbane Courier* (Brisbane), 27 May 1899, 6.

28 The text of his motion is known only from the newspapers (see, eg, 'Is It a Joke?', *The Brisbane Courier* (Brisbane), 27 May 1899, 8), for the Speaker deemed such an attack on a sitting Judge too indecent even for the notices of motion and deleted it from the official record. Mr Kidston raised this action as a question of privilege on 30 May 1899 on the floor of the chamber itself, but Hansard, no doubt for the same reason, also left out the words of the motion from its usually more or less verbatim record: Queensland, *Parliamentary Debates*, Legislative Assembly, 30 May 1899, 155. That was despite the Brisbane newspaper *The Worker's* view that Mr Kidston had 'very clever[ly]' repeated his notice of motion in the privilege debate in order to have the words recorded in the official source: Plebian, 'Political Palaver: Tuesday, May 30', *The Worker* (Brisbane), 3 June 1899, 10. But there was again nothing to prevent the newspapers from reprinting the motion.

that some people professed to be in favour of federation but were always found opposing the actual proposals for it.<sup>29</sup> The Queensland Federation League was also hardly a neutral forum in which to give the speech. Indeed, Griffith CJ's biographer claims that it may well have been this very speech which convinced the government of Queensland to hold what was to be the successful referendum on federation in September 1899.<sup>30</sup> Even on purely factual matters there is a record of one anti-federationist solicitor taking public issue with the Chief Justice's financial analyses in the Queensland referendum campaign.<sup>31</sup> The speech therefore differed greatly in both tone and context from Griffith CJ's written and very technical comments on the 1897 draft Bill, distributed publicly but also long before any referendum on the Bill in Queensland was even scheduled,<sup>32</sup> and from the 'semi-public'<sup>33</sup> role his Honour took on in the later controversy about Privy Council appeals.

However that may be, Griffith CJ certainly had ample opportunity of learning from Dickson himself what had happened at the Premiers' Conference. Griffith CJ had so arranged his travels that he just happened to be personally present in Melbourne while Dickson and the other premiers attended the Premiers' Conference there which added section 96.<sup>34</sup> The two men also certainly still ran into each other from time to time afterwards in the small city of Brisbane. Indeed, Griffith CJ had presided at the event at which Messrs Barton and Deakin spoke that was referred to briefly earlier, while Premier Dickson was also present and proposed the vote of thanks at it. That occurred on Friday 12 May 1899, two weeks before Griffith CJ's own speech. If they had not done so earlier, the two men might well have spoken about Dickson's role in the insertion of section 96 at that meeting. The two men had enjoyed good relations as political colleagues and indeed friends since the mid-1870s, although the stress of political life sometimes put a strain on the friendship.<sup>35</sup>

The conclusion that Griffith CJ had his information directly from Dickson is further supported by the fact that, at the final meeting of the Federal Council of Australasia also held in Melbourne a mere few days before the Premiers' Conference, Dickson presented to the world<sup>36</sup> the following draft clause to be added to the *Constitution* that had just been conveyed to him by Griffith CJ. His

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29 Griffith, 'Australian Federation and the Draft Commonwealth Bill', above n 18, 4.

30 Joyce, above n 26, 208.

31 A Mr T Unmack: 'Federation: Anti-convention Bill Meeting at the Forrester's Hall, Valley: Speeches by Messrs Groom and Unmack', *The Brisbane Courier* (Brisbane), 7 June 1899, 5.

32 Joyce, above n 26, 205; Williams, above n 7, 614–65; see also below n 37 and accompanying text. In addition, Griffith CJ published other short works on the federal question, which are listed in Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 115. These were more general and scholarly and did not contain the sort of advocacy of federation, however general, found in the 1899 speech.

33 Williams, above n 7, 1168.

34 Joyce, above n 26, 207.

35 *Ibid* 43 ff, 88, 124, 142.

36 It also appeared in newspaper reports of the proceedings of the Council, beginning with 'The Federal Council: Next Step towards Federation: Opening Ceremony', *The Argus* (Melbourne), 26 January 1899, 9.



Honour declared it in an accompanying letter addressed to Dickson to be ‘the only justifiable solution capable of formulation in advance’:

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

Such provision may be made by the assumption by the Commonwealth of the burden of the whole or part of the public debt of a state, or by the annual payment by the Commonwealth to a state of a fixed or variable sum of money, or by granting to a state permission to levy a surtax upon goods imported into the state by sea, or in any other mode whatsoever that the Parliament may think fit. And such provision may be made in one mode in the case of one state or some states, and in another mode in the case of another state or other states.

In the event of any provision made for the purpose aforesaid proving inadequate in the case of any state, such further or better provision shall be made from time to time as may be necessary and adequate.<sup>37</sup>

Clearly the financial disruption to the States consequent upon Federation was at the forefront of both men’s minds as the Premiers’ Conference started. It is extremely likely that they discussed, either in Melbourne during the intervals of the Conference or after it finished, the fate of this suggestion and its supersession by section 96 – which, while far simpler and less wordy, and shorn of unenforceable appeals to make ‘adequate provision’ before the uniform tariff even came into operation, covered a good deal of the same ground. It might even be Griffith CJ’s draft clause which Dickson, perhaps employing a degree of understatement, meant by stating that he had originally proposed to his colleagues a new clause ‘which at first was not considered favourably, but subsequently, with a slightly different phrasing, was adopted’.<sup>38</sup> At any rate, clearly the need for greater flexibility in the financial provisions was high on the agenda for the two men as the Premiers’ Conference started, and we may safely conclude that Griffith CJ’s information about the genesis of section 96 came from Dickson personally.

### III BACKGROUND AND ASSESSMENT

(Sir) James Dickson lacks a biographer of his own and the historian is therefore reduced to looking at his entry in the *Australian Dictionary of Biography* and general works on the history of Queensland. One of his claims to fame is collapsing at the Federation celebrations on 1 January 1901 and dying a few days later, as a result of which he remains the shortest-serving federal

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37 *Official Record of the Debates of the Federal Council of Australasia*, Melbourne, 25 January 1899, 19 (James Dickson).

38 See ‘The Premier’s Return’, above n 19, 5. However, s 96 clearly bears rather greater similarities to John Henry’s proposal in the earlier year: see *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1100 (John Henry). It also seems clear that we can at least rule out the idea that s 96 was actually conceived by Griffith CJ using a politician only as cover – when his Honour had a suggestion to make, he made it publicly.

minister ever.<sup>39</sup> More positively, he was the man who perhaps did more than anyone else – including Griffith CJ who, whatever else he felt able to do without impropriety, could not appear in Parliament and secure the passage of Bills – to ensure that Federation included Queensland from the start even though it had not been represented at the Conventions of 1897 and 1898. At the Premiers' Conference of January and February 1899 he was the new boy: he had taken over as premier unexpectedly after the sudden death of his own predecessor in September of the previous year. (How might Australian federalism look today if Dickson's predecessor, Thomas Byrnes, a barrister who was less enthusiastic about federation and had died of pneumonia aged only 37, had lived a few more months?)<sup>40</sup>

Although he had been long in politics, Dickson had also had an extensive career as a businessman. He had also twice been the colony's treasurer. In 1900, in the negotiations with the Secretary of State for the Colonies on the role of the Privy Council in judicial appeals, he mentioned especially the experience of 'commerce and finance'<sup>41</sup> he brought to the task of securing federation. The States' finances were therefore naturally at the centre of his interests at the Premiers' Conference, even aside from the prodding on the question he had received from Griffith CJ.

Nevertheless, it should be noted at this point also that the idea of section 96 itself did not originate with Dickson, although it can now be said that it was he who succeeded in having it accepted. Indeed, at the 1898 Melbourne session of the Convention, John Henry MHA of Tasmania, who, like Dickson, had not merely been a successful businessman but his State's Treasurer, had proposed the insertion of a clause which was to read: 'The Parliament may, upon such terms and conditions and in such manner as it thinks fit, render financial aid to any state'.<sup>42</sup> The argument he presented was, as he put it, that 'there is the risk of several state Treasuries being very seriously deranged and embarrassed'<sup>43</sup> so that it was necessary for the federal Parliament to have the power stated, and that the *Constitution* did not expressly provide it.

Henry's proposal was the occasion for an interesting debate, of which much more use could be made on the topic of the drawing of implications generally, about whether any federal power to render financial aid to the States was implied in the draft *Constitution* even without section 96. Alfred Deakin thought that 'the *Constitution* contains already, and must contain to fulfil the merest requirements of good faith, an implied guarantee that the Commonwealth will see that during that [initial] period the solvency of the several states shall not be imperilled'.<sup>44</sup> On the other hand, Richard O'Connor QC thought that no such power was

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39 That is assuming that one does not count Senator Glen Shiel, who, as I understand it, was appointed to the Federal Executive Council in anticipation of his becoming a minister but never actually became one.

40 In relation to s 96 this thought experiment is conducted by Crowe and Stephenson, above n 1, 228–30.

41 Williams, above n 7, 1205.

42 *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1100 (John Henry). See also Saunders, 'The Hardest Nut to Crack', above n 5, 169–71.

43 *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1078 (John Henry).

44 *Ibid* 1060 (Alfred Deakin).

implied, that the Commonwealth would be held strictly to its constitutional powers and that 'it would be a very bad thing for the finances of the states themselves to find that a kind of rich uncle was created in the Commonwealth, who would always come to their assistance if they got into any real financial trouble'.<sup>45</sup> (Sir) Isaac Isaacs, the then Victorian Attorney-General, essentially agreed with him.<sup>46</sup> But this particular issue necessarily became moot after an express power was adopted anyway.

The proposed clause was negated without a division, but the Convention Debates show clearly that concern about the effect of federation on the States' finances was widely shared. The question was what to do about it, and some delegates hoped that some type of formula would be developed which would put the matter beyond doubt in advance of federation. Thus Sir George Turner,<sup>47</sup> the Victorian Premier, opposed Henry's clause, thinking that he had a superior proposal for guaranteeing the finances of the States and not wishing the States to be seen to go cap in hand and reveal their financial problems to the world.

The 1898 Convention Debates also allow us to exclude certain persons as progenitors of section 96, mostly obviously (Sir) Edmund Barton who was strongly against it,<sup>48</sup> while indicating that two premiers, Sir John Forrest and Sir Edward Braddon, supported the idea. They may be assumed to have continued to support it at the Premiers' Conference of the following year. On the other hand, (Sir) George Reid<sup>49</sup> along with Turner opposed it. The South Australian Premier, C C Kingston, was the fifth of the premiers present at this debate who would meet early in the following year and approve section 96, but he spoke only very briefly in the debate and did not reveal his view. Queensland, as already noted, was not represented at all at this Convention.

It is certainly remarkable that no source other than Griffith CJ gives the credit (if that is the right word) for the introduction of section 96 to Dickson – in particular, as far as I can tell no other participant at the Premiers' Conference referred to him in public as its protagonist. It can however be said that there is at least no contradiction of the claim that I can find on the public record; some premiers commented upon the proceedings at the Conference or section 96 but made no claim to being the 'brains' behind section 96;<sup>50</sup> and Griffith CJ's

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45 Ibid 1108 ff (Richard O'Connor).

46 Ibid 1110 ff (Isaac Isaacs).

47 Ibid 1103 (Sir George Turner). See also La Nauze, *The Making of the Australian Constitution*, above n 4, 156, 212.

48 *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1062 ff, 1116 (Edmund Barton). However, after the Premiers' Conference the unofficial leader of the federal movement, by then Leader of the Opposition in New South Wales, changed his mind, stating that 'I have no objection to the placing of this power in black and white, however little probability I may think exists of its ever being exercised': 'Federation: The Premiers' Conference: Interview with Mr Barton', *The Evening News* (Sydney), 3 February 1899, 5.

49 *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1116–18. Reid expressed support for s 96 in the following year in line with his commitment to give the product of the Premiers' Conference his unequivocal support: New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 February 1899, 48. See also Twomey, above n 24, 108 ff; Joyce, above n 26, 207; below n 51.

50 See, eg, below nn 59, 62, 88.

endorsement of Dickson's claim is powerful evidence given his Honour's own obvious concern about the question. Furthermore, as was pointed out in the Introduction of this article, section 96 was overshadowed in the public debate by the other more pressing issues decided at the Premiers' Conference. Given the intercolonial jealousies of the period and the general uncertainty about financial matters after Federation, of which its enemies made as much use as they could, it is also easy to understand that there was no great desire in other colonies to expatiate on the subject of which other colonies might need to put their hands into the federal fund. If it had been generally trumpeted abroad that the insertion was made at the instance of Queensland, it might then have been misrepresented as in the particular interests of Queensland. That colony might then be accused of wanting to put its hand in the common federal pot – just as Griffith CJ, perhaps, mentioned the topic in his speech as reassurance that the interests of Queensland had been carefully attended to by its representative at the Conference and its voters therefore had nothing to fear, despite the fact that its representative was the new boy.

Any reluctance to sabotage federation by conjuring up all sorts of disastrous financial possibilities, special deals for Queensland and new taxes does not apply, however, to the accounts by the participants published after the *Constitution* had been approved by the people. Some, perhaps all, of the Federation generation did not appreciate the place that section 96 would later come to occupy in Australian constitutional life and the consequent need for its historical origins to be recorded.<sup>51</sup> Dickson himself was dead even before Queen Victoria, who herself did not last out the first month of Federation, and unable to say any more about his own role.

Whether Queensland would actually need extra assistance in the first few years of the uniform tariff would, in the end, depend on how high the tariff was, for on that would depend the size of its share of the three-quarters of customs revenue that the Commonwealth would have to return to the States under section 87, the 'Braddon clause'. At the Premiers' Conference section 87 had been limited so that the federal Parliament could remove the restriction on its expenditure after 10 years, giving further impetus for a flexible power to make subventions such as section 96, but the immediate future for Queensland was problematic unless a high federal tariff was adopted. Queensland's high tariff made its finances more vulnerable to federal tariff reductions on the adoption of a uniform federal tariff than was the free-trade colony of New South Wales. Dickson himself pointed out publicly that New South Wales raised only £1/3/1 per head from the customs and Queensland £2/14/7 per head, which was the highest in Australia except for Western Australia<sup>52</sup> (which had got a special deal in section 95). The possibility that Queensland might need special help after the introduction of the uniform tariff must therefore surely have been present to

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51 See Davis, above n 6, 28, who points out that (Sir) George Reid at first forgot to mention s 96 in speaking to Parliament (see also above n 49; below n 72) and that probably none of the premiers realised its future constitutional importance. At the same time as s 87 was terminated, grants under s 96 began, but these were not subject to terms and conditions: *Surplus Revenue Act 1910* (Cth).

52 'The Premier's Return', above n 19, 5.

Dickson's mind, although the federal Parliament could not be compelled to provide it under section 96. Queensland's vulnerability to financial loss if the federal tariff were lower than its own is also an indirect confirmation of Dickson's claimed role, for he was, of all colonial premiers, the most likely to feel that there might be a need for financial help in the future. This also causes us to reflect that the financial debates before Federation were not just a matter of large against small colonies, or rich against poor, but also involved disputes between colonies with high and those with relatively low reliance on customs revenue.<sup>53</sup>

Cheryl Saunders directs attention to the fact that Dickson, in Parliament, expressed 'the rather unusual view'<sup>54</sup> that section 96 constituted a 'statutory appropriation'.<sup>55</sup> Such a misunderstanding would indeed suggest a lack of familiarity with the clause of which he was supposedly champion, but if the quotation is read in context it is clear that the Premier was referring to a constitutional power to make grants to the States. The context shows clearly enough that Dickson, who was not a lawyer, meant to say that section 96 constituted a statutory authority to legislate in order to appropriate for grant-making rather than a direct statutory appropriation for that purpose in the strict sense of those words. He was clearly of the view that, without some such provision as section 96, the Commonwealth would have no power to make grants to the States. Although he made no claim in Parliament to being the protagonist of the provision, this view certainly does nothing to refute that suggestion; in the debate he also said, 'I hope it will not be required; at the same time it is a wise provision', and stated that section 96 existed in order to remove any apprehension that the States might be ruined by federation.<sup>56</sup>

Significantly, Dickson also tells us that section 96 had been inserted almost despairingly. It had not been possible, he said, to find the magic formula:

It is almost a futile task, trying to fix any set rules upon which to act, because there are no data upon which it is safe to predict the condition of the colonies or the Commonwealth even a few years hence. Changes take place so rapidly in these lands that it is highly probabl[e] the most perfect scheme that could be formulated today would be completely out of date in less than five years.

In this matter I am inclined to trust the members of the federal Parliament. Why should we anticipate that they will either be rogues or fools? What right has anyone to suppose that the members of the federal Parliament will not be as just and fair for the whole of the Commonwealth as the members of our local Parliaments are to the whole of their respective colonies?<sup>57</sup>

He might have added that they were to be trusted to set the tariff, after all. Its shape was unknown, and on it would depend so many of the financial questions they were discussing. That point – that all talk about financial arrangements was idle until the tariff was known – had indeed been made by Griffith CJ in his

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53 Cf Twomey, above n 24, 108 ff.

54 Saunders, 'Towards a Theory for Section 96', above n 5, 3.

55 Queensland, *Parliamentary Debates*, Legislative Assembly, 23 May 1899, 64 (James Dickson).

56 Ibid.

57 'Federation: Conference of Premiers', above n 2, 6.

memorandum on the draft Bill of 1897,<sup>58</sup> in which his Honour suggested leaving the whole topic to the federal Parliament with powers to assume any part of the States' debts and 'to make such provision as may be necessary for preserving the equilibrium of State finances from any disturbance caused by the establishment of the Commonwealth or the operations of its laws'.<sup>59</sup> Clearly that was the background to his Honour's own proposed clause, as his accompanying letter also presented to the Federal Council of Australasia stated.

According to Sir George Turner, the Premier of Victoria, the other premiers came to share this view during the 'secret' Conference in early 1899:

We debated hour after hour, and day after day, to see if we could devise some scheme which would protect the revenue of the states, while removing this particular provision. Many schemes were suggested for consideration, but, after thinking them over as well as our abilities would allow, we came to the conclusion that there was none of them better than, if as good as, the one we had in the Bill. They would be better, probably, for some of us, but less acceptable to the people of New South Wales, and that was the point which we had to keep in our consideration, that while not injuring any of the other colonies, we should make this Bill as acceptable as possible to the people of New South Wales. Therefore, we have limited that particular clause, which provides that only one-fourth of the duties of customs and excise should be applied to the Commonwealth expenditure to a period of ten years, and we have added a new clause providing that during that period of ten years it will be in the power of the federal Parliament, if they so desire, to give financial assistance to any state. We think this alteration may fairly be agreed to; because, after a period of ten years, we feel perfectly certain that all the members in the federal Parliament, although they may be elected by different states or constituencies in different states, will have forgotten all about our existing boundaries and lines of demarcation, and will work unquestionably for the good of the whole of Australasia, leaving out the idea of doing benefit or ill to any particular colony.<sup>60</sup>

It is extraordinary that Turner, like so many practising politicians, apparently did not see that the Commonwealth, once established, would become a centre of power in its own right and would inevitably attempt to maximise its own power and authority, as it did, for example, not only under section 96 but also by terminating the constitutional revenue-sharing arrangements at almost the earliest possible opportunity.<sup>61</sup> But clearly Sir George Turner had been converted to the camp of those who, making a virtue of necessity, were driven by the uncertainties of the future to put their trust in the federal Parliament. This realisation also dawned on other leading federationists.<sup>62</sup> Even (Sir) George Reid was prevailed upon to agree to section 96, although he had opposed it earlier, after the premiers had at their Conference 'tried ... desperately hard ... to get a substitute [financial

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58 See above n 32.

59 Williams, above n 7, 629. This passage is in quotation marks in the original and was perhaps intended as part of a draft clause, as is shown by a further development of the same idea quoted in the text accompanying above n 37.

60 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 June 1899, 97 ff (Sir George Turner). Perhaps the last part of this quotation is a reference to the federal obligation under s 94 to distribute its surplus revenue to the States 'on such basis as it deems fair'.

61 *Surplus Revenue Act 1908* (Cth) s 3; *Surplus Revenue Act 1910* (Cth) s 3; *Surplus Revenue Act Case* (1908) 7 CLR 179.

62 Saunders, 'The Hardest Nut to Crack', above n 5, 149, 165–6.

plan] that would give the smaller populations financial security in some other form', but found none of the alternative plans suggested 'acceptable'.<sup>63</sup>

Perhaps *The Bulletin* put its finger on another reason for this difficulty in working out how to satisfy New South Wales just before the Conference by observing, with a reference to the agenda for the Premiers' Conference that had been set by the resolutions of the Legislative Assembly of New South Wales, that:

The government of New South Wales appeals to the other provinces to hold 'further inquiry into, and a more thorough consideration of, the financial clauses'. It doesn't say what it wants done to them; in fact, it evidently doesn't know what it wants, only it wants it immediately, whatever it is. In this matter Premier Reid approaches the conference as a weary, wandering bagman without credentials of any kind.<sup>64</sup>

No doubt that was a fair criticism, but it was above all the difficulty of designing any fiscal scheme in the absence of any information about what the future tariff would look like that was to blame for the inability to come up with firm decisions.

But all along it was clear that some colonies were far more vulnerable than others. Soon after Federation, with Dickson already dead, Queensland introduced income tax on most wage earners – there was an exemption for men under 21 and all women earning under £150 per annum<sup>65</sup> – the State Treasurer justifying this new tax with the following complaint:

The Commonwealth Parliament, in considering a uniform tariff which to them appears most suitable for the Australian States in general, have so far decided on one much lower than was at the time of federation in force in Queensland, with the result that our revenue has been greatly lessened, and it therefore becomes necessary that we should arrange new modes of increasing our revenue from the sources yet left at our disposal.<sup>66</sup>

Thus, as was to be expected and as Dickson himself probably foresaw, Queensland had indeed been worst affected of all the States by its loss of revenue as a result of the lower federal tariff. But as the State Treasurer pointed out, the lower federal tariff meant that more money was left in the pockets of the people of Queensland, and the new income tax was just a way of extracting it again. At least Queensland was big and wealthy enough to be able to deal with its financial difficulties by the simple expedient of raising taxes. Two smaller States, Western Australia and Tasmania, enjoyed no such luxury and became the first mendicant States in federation history, receiving the first special (although yet still untied) federal grants in 1910 and 1912 respectively.<sup>67</sup>

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63 Sir George Reid, *My Reminiscences* (Cassell, 1917) 177.

64 *The Bulletin* (Sydney), 7 January 1899, 6. The internal quotation is the resolutions of the New South Wales Parliament referred to at above n 7.

65 *Income Tax Act 1902* (Qld) s 8.

66 Queensland, *Parliamentary Debates*, Legislative Assembly, 14 August 1902, 314 (T B Cribb). Further details about the loss to Queensland, the effect of the new income tax and the drought may be found in Queensland, *Parliamentary Debates*, Legislative Assembly, 11 August 1903, 276–8 (T B Cribb); Mathews and Jay, above n 6, 57, 66 ff.

67 *Surplus Revenue Act 1910* (Cth) s 5(1); *Tasmania Grant Act 1912* (Cth).

## IV PUBLIC EXPLANATIONS AND RECEPTION OF SECTION 96

### A Everyone Got It Wrong

Section 96 was available for public debate for only a few months in most States – between the end of the Premiers’ Conference at the start of February 1899 and the constitutional referenda, which, except in Western Australia, took place from as early as April 1899 (in South Australia – to coincide with a general election) to September 1899. And section 96 naturally did not take a very prominent role in the debate; not only had the voters again to consider the general question of federation, but the premiers had dealt at their Conference with the location of the capital and the majority needed at a joint sitting under section 57 as well as the temporal limitation of the Braddon clause; these amendments by the premiers claimed the public attention more easily than a vague new clause about undefined financial assistance at some unspecified time in the future to meet some as-yet-unknown contingency. Even so, it is worth investigating how the proposed new section appeared in public debate – for the *Constitution* as a whole was to be endorsed by the public, whose understanding of its meaning was that of the true enactors of the Bill and might be thought to trump that of mere politicians to the extent that we care about original intent at all.

Perhaps the most extraordinary thing about the debate from the present-day perspective is that, even having regard to the greater scope of the search conducted for this article – not merely official sources such as parliamentary and Convention debates, but also the public press – it remains true to say, as Cheryl Saunders did in 1987,<sup>68</sup> that the potential for the vast expansion of federal power achieved via the capacity to attach terms and conditions to grants was not perceived by anyone. Mostly the ‘terms and conditions’ clause was ignored; when it was mentioned, it was sometimes assumed to be a means by which temporary loans to the States would be secured, as in this question, asked in a public meeting in Port Macquarie, New South Wales:

Mr J Healey – In the event of monetary assistance being granted to any State, what security would be required?

Hon J H Young MP – I can’t say for certain, but I expect the federal Parliament would see that proper and ample security is given.<sup>69</sup>

The concept of security for loans was also to be unsuccessfully put forward by A J Hannan for South Australia as the key to understanding what the *Constitution* meant by ‘terms and conditions’ in the *Federal Roads Case*<sup>70</sup> – with its famously brief judgment affirming the breadth of the federal grants power,

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68 Saunders, ‘Towards a Theory for Section 96’, above n 5, 7.

69 ‘Hon J H Young at Port Macquarie’, *The Port Macquarie News and Hastings River Advocate* (Port Macquarie), 17 June 1899, 2. ‘Federation: The Premier in the North’, *The Sydney Morning Herald* (Sydney), 5 June 1899, 7, also assumed that the federal Parliament would require security, and pointed out that it could be provided by the money to be paid to the States by the federal government for transferred property under s 85(iii).

70 (1926) 38 CLR 399, 405. As the report in the *Commonwealth Law Reports* shows, counsel for Victoria, one R G Menzies, argued that conditions under s 96 must be justifiable under s 51: at 404–5.



which followed the making of the first tied grants and constituted the first consideration by the High Court of Australia of the interpretation of section 96.<sup>71</sup> Such a restriction on section 96 would at least make sense alongside the surplus revenue clause, section 94, because the one would be about loans only while the other would involve permanent disposal of funds. However, as was noted in the Introduction, too much coherence should not be expected between section 96 and the other financial provisions of the *Constitution* given that section 96 was inserted on the assumption that they might not turn out to be a completely satisfactory scheme and might need correction by a *deus ex machina*.

In the Legislative Assembly of New South Wales, a similar question to that of Mr J Healey was asked of (Sir) George Reid, who did nothing to calm any fears, despite his pledge to give whole-hearted support to the Bill as amended at the Premiers' Conference, by replying simply that 'I must refer the hon member to the federal treasurer. Until federation, the questions cannot be answered except as a matter of speculative opinion'.<sup>72</sup> Even the questioner, however, had assumed that the main point would be the money and the conditions would be ancillary to them; no-one's imagination went far enough to encompass the idea that the federal government might use section 96 primarily to supplement its apparently limited constitutional powers and the money as little more than bait.

## B Prominent Voices

Perhaps the most historically important view of all was that of (Sir) James Dickson, who, shortly after the Premiers' Conference, gave two lengthy explanations, quoted earlier,<sup>73</sup> of the reasoning behind the clause he had succeeded in having accepted. Three further commentaries on section 96 stand out because of the eminence of their authors. The first is that of (Sir) Isaac Isaacs, the Victorian Attorney-General, and (Sir) John Mackey in *The Age* of 10 July 1899.<sup>74</sup> The latter is largely forgotten nowadays, although prominent in his day,<sup>75</sup> but the former is not. No student of Australian constitutional law could forget that Isaacs J was on the Bench that decided the *Federal Roads Case*<sup>76</sup> just mentioned. Although the piece in *The Age* was jointly published, an educated guess may nevertheless be made at whose style the opening paragraph represents:

The amendments of the Commonwealth Bill which were agreed to at the Premiers' Conference, and have since received the approval of the people of New South Wales and South Australia, are so important in their character and their relation to the other provisions of the *Constitution*, and to one another, that they demand far more than passing consideration at the present juncture. Liberal as was

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71 As was pointed out in the text accompanying above n 67, untied grants had earlier been made under s 96; the roads grants were the first tied grants. There is a useful overview of this development in Bureau of Transport Economics, 'Road Grants Legislation in Australia: Commonwealth Government Involvement, 1900–1981' (AGPS, 1981) ch 3.

72 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 March 1899, 883 (George Reid).

73 See text accompanying above nn 2, 19.

74 I A Isaacs and J E Mackey, 'The Federal Amendments', *The Age* (Melbourne), 10 July 1899, 6.

75 I provide some brief biographical details in Greg Taylor, 'The Victorian *Criminal Code*' (2004) 23 *University of Queensland Law Journal* 170, 172 ff.

76 (1926) 38 CLR 399.

the *Constitution* before, manifest as were its tendencies towards democracy, an impartial examination of the terms of the amendments, and a comparison with corresponding provisions of even the most advanced of existing constitutions, must satisfy us that the popular element in the general government has been immensely strengthened, in some directions beyond precedent, and that whatever previously rested on mere opinion, however strong, as to the future course of our political development, is now placed beyond the reach of controversy.<sup>77</sup>

The author(s) went on to depict section 96 as a means by which the Commonwealth might, if the need arose, 'preserve intact the honor and solvency of the States, or [use] to temporarily meet their convenience'.<sup>78</sup> He or they thought it unlikely that the clause would be much needed, but it was

a standing assurance to the world that, in the future, as in the past, the public honor of every part of Australia will, in all circumstances, be maintained unsullied. It is not unworthy of remark that the House of Representatives, or, in other words, the larger States, will control the operation of the clause.<sup>79</sup>

This is rather like the view of Griffith CJ himself about the purpose of section 96, as quoted at the outset, although expressed in the more florid and absolutist language that was characteristic of one of the joint authors of the article.<sup>80</sup>

Another notable contributor to the referendum debate in Victoria was Dr John Quick, who wrote, in *The Argus* of 15 July 1899 and perhaps with Griffith CJ's three-paragraph draft clause in mind:

Some federalists were of opinion that a constitutional mandate to the Parliament in general terms to indemnify the states against loss sustained by surrender of those sources of revenue would have been sufficient; the Parliament could have been trusted to work out a financial scheme to give effect, where required, to the mandate. The new section now proposed helps to give effect to the principle of indemnification, but in objectionable words. It says that for a period of 10 years after the establishment of the Commonwealth the Parliament may grant financial assistance to any state on such terms and conditions as it thinks fit. This mode of expression is suggestive of eleemosynary aid, instead of just and legal indemnity for loss suffered in the interest of the Commonwealth, but it will serve the object in view.<sup>81</sup>

These two opinions are almost diametrically opposed, although we can see that they are alike in being utterly, utterly wrong as far as the actual functioning of the system is concerned.

Finally, mention should be made of the contribution of Mr Justice A I Clark, another politician-turned-judge who felt able to comment extra-judicially – although he expressed his views in the interval between the approval of the *Constitution* by the people and the inauguration of the Commonwealth on 1 January 1901, when such comments could perhaps be made most safely as there were neither referendum electors nor federal politicians to influence. Commenting on an analysis of the future financial position of the States after

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77 Isaacs and Mackey, above n 74, 6.

78 Ibid.

79 Ibid.

80 See text accompanying above n 18.

81 John Quick, 'The Amendments in the Commonwealth Bill', *The Argus* (Melbourne), 15 July 1899, 9.

Federation by the Tasmanian Government Statistician, his Honour stated that that gentleman's conclusion was

that if the surplus revenue derived by the Commonwealth from duties of Customs and Excise is distributed among the several states, either in proportion to the amount of such duties collected in each state or upon the basis of population, the result will be financially disastrous to those states which have hitherto derived a much larger portion of their total revenue from Customs and Excise than the portion derived from similar sources by the other states. The three states which are in this position are Queensland, Tasmania, and Western Australia.<sup>82</sup>

Again we see that the usual 'large versus small colonies' dichotomy has given way to one between high-tariff and low-tariff colonies that cuts across that more familiar division. His Honour's solution was to mobilise section 96 to remove the unfairness, stating that through it 'the *Constitution* has expressly provided the Parliament with the necessary authority to remedy and obviate the injustice'.<sup>83</sup> This is rather like the view of Dr Quick and even made special mention of Queensland, from whose Premier we now know that section 96 had originated, although his Honour gave no indication of any knowledge of that fact.

The quotation, however, gives the game away as far as the pre-Federation debates on section 96 were concerned: it was impossible to know for certain what the effect of the new federal tariff would be before it was fixed. That was necessarily independent of and logically prior to any method of dividing its proceeds. A guess could be made at whether the division of the cake would favour one State or the other, but not even a government statistician could say anything about the size of the States' slices unless the size of the cake was known.

### C Avoidance of Unnecessarily Heavy Customs Duties

One reason frequently given for the insertion of section 96, including by (Sir) James Dickson himself, was the need to avoid too great an increase in customs duties. Although section 87, the 'Braddon clause', provided that three-quarters of all federal customs revenue would be returned to the States until 1910 at least,<sup>84</sup> the very variety among the colonial customs rates made it possible that some States (above all, as we have seen, Queensland) would end up with much less revenue from customs and excise than they had previously obtained. Furthermore, section 92 ensured that the federal customs revenue would not include any revenue from intercolonial trade such as had enriched the colonies' treasuries, but only revenue from overseas transactions.<sup>85</sup>

Given that, under the 'Braddon clause', the Commonwealth would lose three-quarters of all revenue it raised from this source for at least the first 10 years of federation, one possible option for it was a very high tariff, both to ensure sufficient revenue for the federal government itself and as a means of supporting

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82 N J Brown, 'Federal Finance', *The Examiner* (Launceston), 26 October 1900, 3.

83 Tasmania, *The Federal Finance Problem: Further Observations by R M Johnston, FSS, Government Statistician, Tasmania, with an Introductory Note by His Honour Mr Justice Clark*, Parl Paper No 56 (1900) 3, 6.

84 In fact it was terminated on almost the earliest possible day: see above n 13 and accompanying text.

85 An exception is noted in the text accompanying above n 11.

those State governments that had previously raised a large proportion of their revenue from this source. In the end this would mean a large increase in prices of overseas goods in States that had previously imposed lower customs rates – most obviously in New South Wales, where opposition to Federation was at its strongest and customs rates at their lowest. Had this problem eventuated, the people of New South Wales would have been paying both income tax (introduced there in the mid-1890s)<sup>86</sup> as well as a much higher amount of indirect tax.<sup>87</sup> Such an outcome would have represented the reverse of the problem that did actually ensue, under which Queensland, with its high revenue from customs and excise, was forced to introduce an income tax in order to make up the deficiency arising from its share of the lower federal customs yield.

Under section 93(ii), the extra customs revenue would, at least for most of the first decade of federation, be returned to the Treasury of New South Wales, but it would be gone from the pockets of its citizens who were already paying income tax. It is no coincidence, then, that it was particularly in free-trade New South Wales that section 96 was explained as a means of ensuring that the federal tariff would not need to be unnecessarily high simply in order to support small States such as Tasmania. If they had any difficulties adjusting to the new fiscal order and reduced income from the customs, they could be smoothed over using section 96, as the Premier, (Sir) George Reid, and numerous newspapers declared.<sup>88</sup> This also explained why the clause was limited to 10 years:

it is only inserted for a temporary purpose: to meet a difficulty that might arise between the time of the transfer of powers to the Commonwealth and the complete readjustment of State finances. ... An Australian Commonwealth is not created every day, and it is right that the coming changes should be safeguarded in every direction.<sup>89</sup>

## D Federal Guarantee of State Solvency

An explanation for section 96 that appears to have been more evenly distributed across Australia is that it amounted to a federal guarantee of State solvency. We have already encountered prominent voices such as Victorian Attorney-General Isaacs stating this as its aim; indeed, Griffith CJ himself made

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86 *Income Tax Act 1895* (NSW); *Land and Income Tax Assessment Act 1895* (NSW).

87 Mathews and Jay, above n 6, 53; Moore, above n 11, 530.

88 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 February 1899, 48 ((Sir) George Reid); 'Federation', *The Sydney Morning Herald* (Sydney), 18 May 1899, 7; 'Federation', *The Sydney Morning Herald* (Sydney), 5 June 1899, 7; 'Federation of Australia: The Referendum', *The Sydney Morning Herald* (Sydney), 6 June 1899, 7 (but this last was reprinted in 'The Federal Constitution', *The Brisbane Courier* (Brisbane), 13 July 1899, 3); 'Federation', *The Evening News* (Sydney), 3 February 1899, 4; 'Anti-federation', *The Evening News* (Sydney), 16 February 1899, 4; 'Federation', *The Bathurst Daily Free Press and Mining Journal* (Bathurst), 6 May 1899, 2; 'Our Federal Column', *The Bathurst Daily Free Press and Mining Journal* (Bathurst), 12 May 1899, 3; 'Our Federal Column', *The Bathurst Daily Free Press and Mining Journal* (Bathurst), 15 June 1899, 2; 'The Coming Commonwealth', *The Brisbane Courier* (Brisbane), 11 August 1899, 4.

89 'Federation', *The Sydney Morning Herald* (Sydney), 5 June 1899, 7. In Parliament, (Sir) George Reid referred to s 96 as applicable for a 'transitional period': New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 February 1899, 48 (George Reid).

this argument in the speech which was quoted at the outset. As (Sir) Winthrop Hackett, MLC, said in Perth a fortnight before the referendum there:

There was no financier in London or in any part of the globe that did not take [s 96] to mean that if any State fell into difficulties with regard to its debt or interest on its debt, the Commonwealth was bound to step forward and take the burden of seeing its solvency maintained on its own shoulders. (Applause.)<sup>90</sup>

He did not say whether he had actually asked any financiers or how they had otherwise heard of section 96, and as far as I can tell the English newspapers studiously ignored section 96. How this interpretation was extracted from section 96 is a bit of a mystery given that it clearly used the word ‘may’; this is not necessarily decisive, as the famous words uttered by Lord Cairns LC in *Julius v Bishop of Oxford* (‘*Julius*’)<sup>91</sup> show, but here there was no mechanism for determining things such as when an emergency existed and how much exactly should be provided. In *Julius* there had been no such problems, but still mandamus did not go. It would be hard to conceive of an enforceable legal obligation, at least, under circumstances in which the law specified neither the occasion for the exercise of the supposed duty nor its extent.

However, this argument was often put forward, particularly in Western Australia.<sup>92</sup> Perhaps an appeal to the Commonwealth’s moral duty was intended, although this was never made clear, no doubt advisedly as far as those who put forward this hypothesis were concerned – and indeed sometimes the language, without being completely clear on the point, is distinctly suggestive of the idea of a legal obligation such as one would expect to find in a constitution, as in Hackett’s speech just quoted.

The argument was also made by Sir Edward Braddon in the Tasmanian House of Assembly who referred to a ‘duty’<sup>93</sup> of the federal Parliament to prevent State insolvency. A similar argument was put forward, if somewhat more weakly, in the Tasmanian Legislative Council by the minister in charge of the Bill for what became the *Australasian Federation Enabling Act 1899* (Tas): section 96 ‘would meet the case of a smaller State getting into financial difficulties’.<sup>94</sup>

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90 ‘Federation’, *West Australian* (Perth), 16 July 1900, 6. The speaker is famous for his prediction that ‘either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government’: *Official Report of the National Australasian Convention Debates*, Sydney, 12 March 1891, 280 (Winthrop Hackett).

91 (1880) 5 App Cas 214, 222 ff:

there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

92 Alec Matheson, *Federation as It Affects Western Australia: A Paper Read before the Fremantle Literary Institute on 17 March 1899* (Perth Printing Works, 1899) 22 ff; ‘Federal Finance and Trade’, *The Kalgoorlie Miner* (Kalgoorlie), 8 March 1899, 4; ‘Federal Finance and Trade’, *The Kalgoorlie Western Argus* (Kalgoorlie), 16 March 1899, 19; ‘Federation’, *The Inquirer and Commercial News* (Perth), 13 July 1900, 11. See also ‘Topics of the Day’, *The Daily News* (Perth), 20 February 1899, 2.

93 ‘Parliament of Tasmania: House of Assembly’, *The Mercury* (Hobart), 22 June 1899, 3.

94 ‘Parliament of Tasmania: Legislative Council’, *The Mercury* (Hobart), 7 July 1899, 3.

Even in New South Wales, the *Newcastle Morning Herald and Miners' Advocate*<sup>95</sup> declared that '[a] free translation of that clause [section 96] is: – "The Federation, which will be jealous of its own credit, will never allow any of its members, through weakness or otherwise, to imperil the credit of the Federation"'. That certainly was a free translation.

### E The Bill's Enemies

For the enemies of the Bill, largely in New South Wales, section 96, if it did mean something like that 'free translation', was merely another way of other States getting their hands on the colony's money, having even perhaps spent their own revenue extravagantly. The other States would, furthermore, be unable to repay loans made to them under section 96, and the (supposed) guarantee of their debts meant that the taxpayers of New South Wales would have to cough up and the money would be gone for good.

A New South Wales country newspaper stated that section 96 was 'an acknowledgement by those who inserted it of the rottenness of the financial clauses of the Bill' and was 'certain to cause jealousy, provincialism [and] log-rolling and [to] debase federal politics'.<sup>96</sup> In Sydney, the great anti-federal organ *The Daily Telegraph* made similar points<sup>97</sup> and added: '[n]o Federation has ever stood, nor can ever stand, upon such foundations';<sup>98</sup> '[t]o repay what is obtained to render them [the other states] solvent would itself mean insolvency'.<sup>99</sup> One possible and correct response to this type of thing was to point out that, whatever some people said, section 96 did no such thing as guarantee anyone's solvency: it said nothing of the sort.<sup>100</sup> Nor could it be assumed that the smaller States would be able to get legislation for granting them aid as a result of their own misadventures through the federal Parliament, or even that the poor would wish to live on charity.<sup>101</sup>

Not everyone postulated a positive duty on the Federation to rescue the improvident, but even so it was still asked why New South Wales should help the other States. With the exception of the reference to borrowing money, this comment comes close to the sort of criticisms that the wealthier States make today of the GST distribution:

We all know that there will be no surplus funds except that [*sic*] belonging to New South Wales, and was it fair that they should be handed over to some necessitous State without us having any say in the matter? Was it not a gross injustice? A State likely to want such assistance should not be included in the federation, for they

95 'Federation and Mr Reid's Position', *Newcastle Morning Herald and Miners' Advocate* (Newcastle), 8 February 1899, 4.

96 'Federation', *Bowral Free Press and Berrima District Intelligencer* (Bowral), 17 June 1899, 1. A similar criticism may be found in S A Rosa, *The Federal Bill Analyzed, Being an Examination of the Federal Bill as Amended by the Secret Conference of Premiers* (Colonists' Anti-convention Bill League, 1899) 15.

97 'Referendum Notes', *The Daily Telegraph* (Sydney), 19 June 1899, 7.

98 'We Should Reject the Convention Bill', *The Daily Telegraph* (Sydney), 28 May 1898, 5.

99 'Finances of the Coming Commonwealth: the Problem Unsolved', *The Daily Telegraph* (Sydney), 10 February 1899, 5.

100 'The Coming Commonwealth', *The Brisbane Courier* (Brisbane), 11 August 1899, 4.

101 Cullen, above n 17, 8.

had a poor chance of repaying money so borrowed. That clause should never have been inserted. The other colonies might grow in time and make up a lot of the present handicap, but Tasmania could not hope to be any more than what she was today, consequently it was an anomaly to admit her into the Federation on equal terms with the other colonies.<sup>102</sup>

Similar arguments were made in Queensland also, albeit by a visiting solicitor from Sydney who had also been a Minister earlier in the decade, one T M Slattery, who showed a polite confidence in Queensland's prospects.

[I]t was practically offering a premium to States to be extravagant in their local expenditure, because they knew that if they got into financial difficulties they could appeal to the Commonwealth Parliament to put them on their feet, and the Commonwealth Parliament would be bound to come forward and pay whatever they demanded. Of course, it would be absurd to think that Queensland would ever require financial assistance from any State, and if she joined in the federation she would be an excellent financial milch cow for the necessitous States to draw on whenever they got into financial difficulties.<sup>103</sup>

Another Queenslander referred specifically to Griffith CJ's speech and, after stating that '[i]f he joins in the fray he must expect knocks', asked: '[w]here is the money to come from? Under federation is Queensland to keep all her "poor relations"? Not a pleasant job in private life'.<sup>104</sup> (As we have seen, these criticisms would be proved wide of the mark as far as Queensland's position was concerned.) Others wondered what would become of the States when, after 10 years, Parliament was able to delete section 96.<sup>105</sup>

Even in some of the smaller and poorer States a trick was suspected. In Perth the promising young radical Frederick Vosper declared that the scheme was one to impoverish Western Australia and then lend money to it by 'send[ing] a requisition home to England to ask the pawnbrokers and Jews of Downing-street to lend the amount'.<sup>106</sup> An equally raffish character also in Western Australia, Thomas Walker, anticipated some remarks of Alfred Deakin's<sup>107</sup> and thought he knew how things would really work.

Not a federation – not an alliance – but a powerful government and its dependencies! The States are to surrender all they have from Customs and excise, and for ten years they will get back 15s from every pound that has been taken, after the expenses of taking and giving back are deducted. The States are to be so

102 'The Campaign: Hon F Jago Smith MLC, against the Bill', *The Molong Argus* (Molong), 16 June 1899, 7. See also the remarks of Louis Heydon MLC in 'Federation', *The Liverpool Herald* (Sydney), 10 June 1899, 8.

103 'Anti-convention Work', *The Telegraph* (Brisbane), 14 July 1899, 6. See also Mr Slattery's long articles: T M Slattery, 'Federation: Reasons in Favour of Federation', *The Sydney Morning Herald* (Sydney), 1 May 1899, 8; T M Slattery, 'Federation: To the Electors of Burrowa', *The Burrowa News* (Burrowa), 16 June 1899, 1.

104 'Sir Samuel Griffith on Federation', *The Telegraph* (Brisbane), 3 June 1899, 5.

105 'Worse and Worse', *The Telegraph* (Brisbane), 8 August 1899, 6.

106 'Federation: The Enabling Bill', *The Inquirer and Commercial News* (Perth), 30 June 1899, 9. A similar view was expressed in Tasmania: Charles Russen, 'Correspondence: Federation', *Launceston Examiner* (Launceston), 21 July 1899, 8.

107 See J A La Nauze (ed), *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (Melbourne University Press, 1968) 103 ff. A little-known note by a master of the craft on the much-cited prophecy is J A La Nauze, "'The Chariot Wheels of the Central Government": Deakin's Prophecy of 1902' (1952) 28 *Economic Record* 237; see also J A La Nauze, *Alfred Deakin: Two Lectures* (University of Queensland Press, 1960) 22 ff.

many children sitting round the family table, and the Commonwealth has the role of paterfamilias ladling the porridge from the common bowl on the plates of the hungry urchins! And when they have reached the age of ten the greedy sop-server can tell them to ‘scatter’ and earn their own livings, while he enjoys the wealth he has robbed them of.<sup>108</sup>

## V CONCLUSION

Although proof beyond reasonable doubt is not available, it is probable, for a number of reasons, that the initiative which saw section 96 accepted in 1899 by the premiers after its defeat in 1898 in convention came from Queensland’s Premier (Sir) James Dickson, as he claimed and Griffith CJ stated. Although Sir John Forrest and Sir Edward Braddon who had supported the clause in 1898 were no doubt at Dickson’s side in 1899, neither they nor any of the other three premiers claims the leading role, despite ample opportunities; the independent confirmation of Dickson’s leading role by Griffith CJ (with whom Dickson was clearly discussing the matter at the time) adds weight to this conclusion in the face of the abandonment of his own prolix draft clause for securing the States’ finances; and Dickson supported the clause in public. Dickson’s motive is also clear, and supports this conclusion: it was the apprehension – completely justified as it turned out – that Queensland would be one of the big losers from the fiscal reshuffling that would immediately follow the imposition of the uniform tariff, and as a former businessman and treasurer of the colony that was likely to be something which would concern him. Dickson also despaired of any attempt to prescribe federal financial relations in the *Constitution* exhaustively given the unforeseeability of the future, and for those reasons thought of section 96 as a ‘wise’<sup>109</sup> addition to the *Constitution*. Finally, it must have been one of the six premiers who took the lead in introducing section 96 to the Premiers’ Conference, and it stands to reason that it would be a new premier from a colony that did not participate in recent debates on the shape of the Federation who would be most likely to propose a new clause and help to break the impasse which had developed. Having hesitated about federation, but being neither remote nor unviable alone as Western Australia and Tasmania respectively were, Queensland was also, of the three colonies most likely to be affected by a lower federal tariff, the ideal proponent of section 96.

What can be concluded for present-day purposes about section 96 on the basis of this history? Perhaps the most remarkable and currently relevant point is that virtually everyone – from Griffith CJ to (Sir) James Dickson down to the humblest country newspaper – assumed that section 96 would be about money and solvency. There is no sign of any expectation that the ‘terms and conditions’ which it authorises would be anything other than ancillary to the grant of money,

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108 Thomas Walker, ‘Federation: From the Standpoint of the West’, *The Inquirer and Commercial News* (Perth), 4 August 1899, 14.

109 See above n 55 and accompanying text.



rather than, as with some tied grants since 1901,<sup>110</sup> of equal or even greater importance. Some sources in the discussion of section 96 before Federation even refer to ‘terms and conditions’ as meaning the provision of security for a loan.<sup>111</sup> At all events, if we could reinvent the jurisprudence on section 96 there would, at first sight, be good historical reasons for treating it as a power to grant financial assistance with a subsidiary, incidental power to set terms and conditions ‘relevant to the situation which called for special relief [or] assistance from the Commonwealth’.<sup>112</sup>

One thing on which contemporaries were, however, divided, is whether section 96 was to be merely a temporary measure for dealing with the disruptions to State finances expected as a result of Federation and the uniform tariff or rather, as Victorian Attorney-General Isaacs and (Sir) John Mackey<sup>113</sup> along with some others thought, was to be a permanent provision, perhaps even a perpetual guarantee of State solvency that would survive the end of the Braddon regime in section 87. (Sir) James Dickson was himself equivocal – at some points he suggested that section 96 was merely a temporary measure to deal with the transition to Federation,<sup>114</sup> while at others he speaks far more broadly of the difficulty of foreseeing changes in the young, fast-moving Australian economy over a period of even five years<sup>115</sup> – which would suggest that section 96 would be likely to become more, not less important with the passage of time. Of the other premiers who agreed to insert section 96 (Sir) George Reid stated in so many words that the measure was a temporary one,<sup>116</sup> whereas Sir John Forrest thought that it would be needed for ‘a time further ahead than we can see now’.<sup>117</sup> In his pro-federation speech in Brisbane, Griffith CJ also had two bob each way, referring both to the need to ensure the states’ solvency in general and to the possible endangerment of it as a result of the immediate effects of federation;<sup>118</sup> so did his draft clause presented to the Federal Council of Australasia, which required ‘adequate provision’ for compensation to affected States before the uniform tariff was even operational but went on to leave open the possibility of future adjustments as circumstances changed. In their published explanation of section 96, the premiers who had met in the Conference of 1899 referred to it merely as a power ‘to deal with any exceptional circumstances which may from time to time arise in the financial position of the States’<sup>119</sup> with no mention of any

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110 These are now made under pts 3, 3A and 4 of the *Federal Financial Relations Act 2009* (Cth).

111 See text accompanying above n 69. This may be a reminiscence of the possible prototype for Henry’s original suggestion at the Convention, a clause suggested by the Tasmanian Parliament which allowed the Commonwealth to lend money it had borrowed to the States on ‘terms and conditions’ (Williams, above n 7, 697) – although both Henry’s proposal and s 96 went further than this proposal for what appears to have been a sort of federal loan agency.

112 Above n 1 and accompanying text.

113 Above n 74 and accompanying text.

114 Above n 19 and accompanying text.

115 See text accompanying above n 57.

116 Above n 84; above n 13 and accompanying text.

117 *Official Report of the National Australasian Convention Debates*, Melbourne, 17 February 1898, 1122.

118 Above n 18 and accompanying text.

119 Above n 9 and accompanying text.

transitional or evanescent character – but the text made it possible for federal Parliament to limit its operation to 10 years.

Quick and Garran had, perhaps, no special insight into the reasons for the insertion of section 96, but for what it is worth they also had two bob each way in their famous commentary, stating that section 96 existed

partly as a compensation to the smaller States for the amendment in the Braddon clause, but chiefly to meet the difficulties that might be caused, in the first few years of the uniform tariff, by the unyielding requirements of the distribution clauses, and to remove any possible necessity for an excessive tariff.<sup>120</sup>

The amendment in the Braddon clause was its restriction to the first 10 years after the imposition of the uniform tariff, which would suggest (as turned out to be the case) that section 96 would come into its own only thereafter,<sup>121</sup> while the second reason given refers to the period before rather than after the Braddon clause's expiry. There is thus a cacophony of voices on the intention behind section 96 – but none envisaged the role it actually has taken.

This confusion and in particular the fact that section 96 was superimposed at the last minute as a general escape clause on top of the already painstakingly conceived financial clauses, without any developed relationship with them or place in the overall scheme, suggest that the historical materials do not permit definite conclusions about its place in the constitutional system. It was inserted to a considerable extent as a surrender to the uncertainties of the future, and the future has worked out its place in Australian federalism. On reflection, then, the quotation from Dixon CJ which introduced this article, if adopted as the ruling view of section 96, would not do justice to historical complexity and the uncertainty and confusion that lie behind it.

If we thought we could see the answer to such questions in the opening words of section 96, we would be mistaken, for section 96's introductory words are just as equivocal on this point also. They allow the power to continue not merely for a period of 10 years, but for an indefinite period thereafter until Parliament otherwise provides. It is not necessarily the case, either, that the Commonwealth's obligation to distribute its surplus revenue to the States on a fair basis after five years from the imposition of the uniform tariff (section 94) provides the answer and suggests that section 96 would become redundant when that obligation commenced, for section 94 did not authorise the attaching of any 'terms and conditions' and it would necessarily commence at least three years before section 96 could be deleted.

Having now reviewed the manifold purposes which section 96 was suggested by contemporaries as serving, it is not surprising that there was never a settled view on its relationship to the other financial provisions. If section 96 was a power merely to lend money and attach conditions about repayment, it would barely conflict with the outright transfers which section 94 foresaw. On the other hand, if section 96 was a federal guarantee of solvency it would usually not be needed at all and when it was used, in an emergency, it would be based on need

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120 Quick and Garran, above n 14, 869. Shortly afterwards the authors speculate that the premiers might have intended s 96 to perish with s 87, but it is really all just speculation.

121 See especially above n 51 and accompanying text.

rather than fairness and would not conflict with section 94. However, if section 96 was a power to grant money to the States to tide them over during the transition from colonial customs duties to possibly lower federal ones, it would probably not be needed for long after section 94 came into operation, but if it was there was no obvious way of determining whether fairness under section 94 or the naked power under section 96 would prevail. Only the more developed view of Mr Justice A I Clark and Dr Quick permitted any sensible harmonisation of all the financial provisions of the *Constitution*: section 96 should be used to ensure that there was no unfairness to the more tariff-dependent States under the specific revenue-sharing provisions before section 94 came into operation, whereupon it might be assumed that the express mandate for fairness in section 94 would take over.<sup>122</sup> But if one adopted the radically sceptical attitude about predictions of future federal–state financial relations that Griffith CJ and Dickson sometimes expressed, then section 96 would remain forever as a means of doing an end run, as the Americans say, around the other, rigid financial provisions of the *Constitution* as circumstances dictated, and indeed it would presumably grow rather than decline in importance as the future unfolded and became ever more different from the past.

The strong impression gained from accounts of the proceedings at the Premiers' Conference is that the premiers tried hard to do justice to the demand from New South Wales for a better set of financial clauses but the challenges and uncertainties of the future defeated them. Essentially the premiers gave up and, as Dickson advocated and Griffith CJ had suggested in his memorandum of 1897, remitted the adjustment of financial arrangements to the federal Parliament – just as they also did not attempt to fix the federal tariff in advance of Federation. It was, after all, logical not to try to deal, in any unalterable way, with the fiscal consequences of a tariff that had not yet been fixed or even drafted, and which was dependent upon the shape of elections yet to be held. Even in the decade after Federation and the fixing of the tariff, essentially the same cast as in the 1890s (although without Dickson) – some now acting for the new federal government – continued their search for a constitutional settlement of federal financial relations. This was ultimately to culminate in the introduction of section 105A after a referendum in 1928 but in 1910 received a serious setback when the first attempt at constitutional settlement was rejected at referendum.<sup>123</sup>

At the Premiers' Conference in 1899, perhaps the embrace of uncertainty was by Sir George Turner, the Premier of Victoria, in particular. Conceivably, after Dickson's proposal, it was he who swung the Conference in favour of section 96, which Dickson says 'at first was not considered favourably, but subsequently, with a slightly different phrasing, was adopted'.<sup>124</sup> Sir George Turner, it will be recalled, had originally opposed section 96 at the Melbourne Convention of February 1898, claiming that he had a better scheme of his own,<sup>125</sup> but by June 1899 he was referring in Parliament to the acceptability of section 96 owing to

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122 Saunders, 'The Hardest Nut to Crack', above n 5, 172.

123 See above n 13 and accompanying text.

124 Above n 19 and accompanying text.

125 Above n 47 and accompanying text.

the impossibility of finding any better scheme along with the need to trust the future federal Parliament.<sup>126</sup> As the gods of history would have it, he became the first federal treasurer; but whether the federal Parliament has always deserved the trust thus placed in it since 1901 would be another question entirely.

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126 Above n 60 and accompanying text.