

Constitutional
Responsibility for
Education
in Australia

I.K.F. Birch

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Constitutional Responsibility for Education in Australia

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To Gisela

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Canberra, 1974

I.K.F.B.

Introduction

On 16 June 1971, the Minister for Education and Science, David Fairbairn, when addressing the South Australian Institute of Teachers, directed attention to the question of the constitutional responsibilities for education in Australia. 'Where does the responsibility for educating this ever increasing number of pupils lie?' asked the Minister. His own answer was:

So far as the taxpayer is concerned, Australia is a Federation under which certain powers have been given to the Federal Government and the remainder have been left with the State governments. The responsibility for education was a power exercised by the States ever since they took over responsible government in Australia and a power which they retained after Federation. The Commonwealth has no constitutional power in this field except in the A.C.T. and the Northern Territory . . . The States have the constitutional power for education, and in the foreseeable future they are likely to continue to have it.¹

The Minister's opinion echoed an attitude which had become entrenched in political debate and academic comment.² In 1958, for example, a Labor Member of Parliament, Gordon Bryant, in introducing an urgency debate in the House of Representatives, said:

I realize that the Constitution mentions education not at all . . . if I had to choose between the Constitution and the children I would support the needs of the children. The dead hand of the 'nineties should no longer be allowed to strangle the education systems of this country.³

In reply, Prime Minister Menzies, himself a noted constitutional authority, stated:

I should like to say to the honourable member that I rather envy the easy way in which he sets the Constitution on one side on the ground that it is out of date. The fact is that it still exists.

The fact is that education, except in Commonwealth territories, remains a function of the States . . . Therefore we are dealing with a problem in which the Commonwealth does not have power over, or responsibility for education in the States or by the States.⁴

A third person prominent in this debate was Dr H. V. Evatt, Leader of the Opposition and a former judge of the High Court of Australia. Evatt drew attention to the amendment to the Constitution in 1946 which gave the Commonwealth Parliament a social services power and, in particular, the power to make provision for benefits to students. 'The whole purpose of the constitutional amendment', said Dr Evatt, 'was to give this Parliament power . . . to make educational grants'. He went on to say, 'it is not, therefore, a question of divided legislative power and responsibility; direct power and responsibility reside in this Parliament'.⁵

This study attempts to resolve the problem raised by these conflicting assertions and, in view of the increasing involvement of the Commonwealth Government in education, to arrive at some conclusion on the question whether that government has constitutional power with respect to education. In order to do this, three aspects of Australia's constitutional history are discussed, namely the framing of the Constitution, the amendments to that document, and the interpretation placed on it by the High Court of Australia.

Had education been included as a Commonwealth power in the Constitution by members of the Conventions primarily responsible for that document, the issue raised by the politicians might have been speedily resolved. But it was not. Education was mentioned on a few occasions at the Conventions but it was not a subject either mutually acceptable to the delegates as an inclusion or so politically sensitive as to call for a decision on whose responsibility it should be. Education was so out of character as a power for transfer to the Commonwealth and so accepted as an undertaking for the colonies that it remained a state responsibility in the newly established Federation.⁶

Although education was not included as a Commonwealth power in 1901 agitation for a national involvement in education slowly mounted. Submissions to the Royal Commissions on the Constitution and Child Endowment late in the 1920s set the tone. The advent of Labor to power in 1941 marked several attempts at

constitutional alteration, culminating in success in 1946 with the Australian people agreeing to the inclusion of the social services amendment in the Constitution. Before that date, some members of Parliament, a few key public servants, certain political pressure groups and some members of Cabinet were convinced that the national government should accept some responsibility in education. But 'education' did not appear in the constitutional amendment. The term 'benefits to students' was preferred and the question as to how far it was a power related to education passes from the political to the judicial arm of government.

As the High Court of Australia ultimately decides what the Constitution means its judgments on the question as to where the constitutional responsibility for education lies are of decisive importance. The Court would not seem to support contentions like 'education is a States right' and has implied that in the exercise of its powers, such as the external affairs power, the grants power or the defence power, the Commonwealth Parliament may validly pass laws with an education component. The question came to the fore in 1943 in the Drummond Case when the Court declared invalid regulations to control entrance to certain university faculties.

The main question of interest is, however, what is the scope of the 'benefits to students' provision? The High Court has not decided this issue specifically but some guidelines can be drawn from its judgment on other aspects of the social services amendment.

The reason for pursuing this quest into the meaning of the 'benefits to students' provision results from its use by both non-Labor and Labor Governments. The Liberal-Country Party made some use, albeit little, of this power up to 1972. A useful summary of that use is provided in the response of the then Minister for Education and Science, Malcolm Fraser, to a set of questions put to him in 1971. The questions were:

- 1) What legislation has been enacted by the Commonwealth under its powers in section 51 of the Constitution, placitum xxiiiA – benefits to students?
- 2) Is it the intention of the Government to enter the field of primary education under this power?
- 3) Why has this power not been used to remedy the lack of educational opportunity throughout Australia?

The Minister replied:

- 1) The Scholarships Act 1969. (The Education Act 1945-66, under which the Commonwealth Scholarships and Awards Regulations have been drawn up is also in accordance with the powers vested in the Commonwealth under section 51, placitum xxiiiA.)
- 2) This calls for a statement on future Government policy which it is not possible to provide.
- 3) Under this power the Commonwealth has introduced a wide programme of assistance to students in the form of scholarships and similar benefits. Expenditure on this programme has risen rapidly. In 1960-61 \$5.1 m was spent under two Commonwealth scholarship schemes. There are now five major Commonwealth scholarships schemes. Expenditure on them in 1970-71 was \$38.4 m and is expected to be \$43.5 m in 1971-72.⁷

Since 1972, the Labor Government has made use of this power both in developing the direct provisions for students and in a new initiative — the establishment of a Schools Commission. The principal functions of this Commission are:

- a) to consult and cooperate with State and Territory representatives as well as those from the independent sector of education on education matters; and
- b) to enquire into and furnish information and advice to the Minister for Education on a number of matters related to the provisions of education in Australia taking into account certain stipulated factors.⁸

At the initial meeting of the Interim Committee for the Australian Schools Commission held on 21 December 1972 the Minister for Education, Kim Beazley, said that section 96 grants to the states would be the form in which many programs would be implemented. 'The Government will also be taking measures', he said, 'within its direct constitutional power to provide additional support for students in schools, including, for example, isolated children. This form of action will be an exercise of the power to grant benefits to students'.⁹

With this declared intention of the government in view it serves some purpose to examine the 'benefits to students provision' not only to establish whether what has been done is within power but also to suggest what might yet be undertaken.

I The Federal Convention Debates

Education was not a power handed over to the Commonwealth Government at Federation. It was left to the states. This conclusion is drawn from a reading of the Constitution of the Commonwealth of Australia as enacted in 1900.¹ The omission was intentional and caused no concern to those who brought the Federation into being. No mention was made of education in the debates in the House of Commons on the Bill to establish the Commonwealth.² Nor was it discussed in the House of Lords. This was not unexpected since the British Parliament was more concerned with matters in the proposed Constitution which might impinge on Imperial rights rather than purely domestic matters.

There was no politico-legal reason why education should have been included among the powers given to the Federal Government. Section 7 of the Commonwealth Act required the new government to give force to extant enactments of the Federal Council of Australasia. That Council had met for the first time in 1885. It lacked political strength since, after showing early interest, both New South Wales and New Zealand refused to be part of it and Fiji withdrew after the first meeting. However, it retained a legal existence until Federation. The Council was given particular areas of oversight but education was not one of them. Nor was that subject ever raised as a matter of 'general Australian interest' as the Act which set up the Council allowed.³ Hence, there was no carry-over of education from the Council into the Constitution of the Commonwealth of Australia.

The reasons why education was not designated a federal power in 1900 are not found, therefore, in the deliberations either of those who enacted the legislation establishing the Commonwealth or of the members of the body which alone had federal legal standing before 1900. The decisions to include or exclude powers were largely made at the Federal Conferences and Conventions which were held in the 1890s,⁴ although some alterations were made after the final Convention in 1898. The Premiers' Conference of 1899, for example, resolved some of the difficulties raised by New South Wales by inserting the ten year time qualification in

s.87, known as the Braddon clause. The Premiers also added, as a complement to that provision, s.96, the Grants Power.

The British Colonial Office also had a hand in the final wording of the Constitution. Section 74 owes its present form including the phrase 'inter se'⁵ to its intervention. But the bulk of the decisions, including the allocation of all the powers in ss. 51 and 52, were made at the Conventions. Those meetings should, therefore, provide the clue as to why education was left to the states.

In his thesis *Federalism and Education in Australia*, A. M. Badcock asserts that 'education was so far from being considered a likely Commonwealth power that it was not even mentioned in any of the Conventions which drafted, debated and amended the clauses'.⁶ Badcock is right in suggesting that there was no proposal to include education as a federal power and, therefore, no vote was taken on that possibility. Education was, however, mentioned at the Conventions. Admittedly it was referred to on only a few occasions and was not the subject of any sustained debate. But the references made to education may be expected to provide some indication as to why that subject was not included as a Commonwealth power in s.51 of the Constitution.

None of the references to education at the Convention debates was in any sense critical of the existing systems. Two were positively complimentary. In his opening address to the Planning Conference in Melbourne in 1890, Henry Parkes mentioned that systems of education in New South Wales 'practically embrace the children of all the families which live under our form of government'.⁷ He went on to say that the example set in his state was being emulated by other colonies. It was true that by 1890, 89 per cent of the possible school population in New South Wales was enrolled. However, the average school attendance was only 60 per cent of the enrolment figure.⁸

The second favourable observation was made a year later at the Sydney Convention by George Dibbs, Leader of the Opposition in New South Wales. He pointed out that education in his state was practically free. He expressed the opinion that free education should be available throughout the continent.⁹ At this time, public education cost parents in New South Wales 3d. per week per child to a maximum of 1s. The government received £71,827 per annum in fees – about one-tenth of its total budget for education.¹⁰

The stamp of approval given by Parkes and Dibbs was not

unexpected. As A. G. Austin has commented, 'it was not, in fact, until the end of the century that any colony awoke to the fraud which the educationists had been practising upon the Australian public'.¹¹ Austin records that the first major attack on public education was launched by Alfred Deakin in December 1898.¹² By that time the Conventions were over and the draft Constitution was in all but final form. It comes as no surprise, therefore, to find that education was not regarded as a contentious matter. At the Convention in Adelaide in 1897, Simon Fraser observed that the school systems had created problems for those framing the Constitution for his native Canada.¹³ He made no suggestion at all that education was a problem confronting the makers of the Australian Constitution.

Satisfaction with public education implied contentment with the colonial administration of schools. The accepted view was that education belonged to local and not national government. Samuel Griffith, for example, leader of the 1891 Convention in Sydney, included education in the list of state powers which he presented to that Convention.¹⁴ George Turner informed the 1897 Adelaide Convention that he had heard a proposal that education should become a national responsibility.¹⁵ He went on to express concern that States rights might be infringed by indirect methods.¹⁶ He was afraid that the Federal Government might gain control of various state departments, not by decision of the Conventions, but through the exercise of other powers. Turner would surely have spoken out against Commonwealth intervention in education by virtue of its exercise of power under s. 96 of the Constitution, the Grants power.

The most constant reference to education was made in the debate on John Howe's proposal put to the Melbourne Convention of 1898, that pensions should become a Commonwealth Government responsibility.¹⁷ Amongst the opponents of Howe's amendment were Alexander Peacock and Josiah Symon. Peacock, who was Minister for Public Instruction in Victoria, claimed that if the proposal to include pensions was accepted 'would it not be a debatable question as to whether we should not consider the whole question of allowing the Federal Parliament to determine the best form of education for our young children?'.¹⁸ Symon, for his part, maintained that there was no more rationale to introducing the question of pensions 'than we have to introduce the control of education which we all agree should be left to the local Parliaments'.¹⁹

On these occasions education was mentioned in the context of social services. This connection was not uncommon at this time. The *Victorian Year Book*, for example, included its review of education under the heading 'Social Conditions'. It was not out of character, therefore, for Peacock to have introduced the matter of public education for purposes of comparison in this particular debate.

The few references to public education made by members of the Conventions indicate that it was regarded as a firmly entrenched colonial responsibility. It deserved no more than the passing attention it was given. But other matters which were placed under Commonwealth responsibility received comparatively little consideration. It is necessary to probe further to see why education remained with the states in 1901.

2 The Powers of the Commonwealth Parliament

Education was not one of the thirty-five subjects specifically mentioned in s.51 of the Constitution. As it was not a matter 'in respect of which this constitution makes provision until the Parliament otherwise provides' (pl. xxxvi), it was not a Commonwealth power under that provision. Since it was also not a power which could be exercised only by the British Parliament or the Federal Council of Australasia at the time of Federation, pl. xxxviii had no application to education.

Education could have been referred 'to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States' as provided for in pl. xxxvii, but this has not been done. Placitum xxxix in s.51 was also a power under which the Commonwealth might have exercised responsibility in education. In the Constitutional Table in Commonwealth Acts, 1968, the 1945-66 Education Act is placed under this head of constitutional power.¹ Sawyer has pointed out that Commonwealth expenditure on research could be supported under the incidental power.² But legislation such as the Scholarship Act of 1969, which repealed the Education Act, seems to be on less safe ground if appeal is made to pl. xxxix.³

The specific subject matters making up s.51 fall into two distinct categories. On the one hand there are several heads of power which may be characterised as mutually acceptable inclusions in this section. These comprise defence (pl. vi), lighthouses and related items (pl. vii), astronomical and meteorological observations (pl. viii), quarantine (pl. ix), fisheries in certain limits (pl. x), census and statistics (pl. xi), currency, coinage and legal tender (pl. xii), weights and measures (pl. xv), bills of exchange and promissory notes (pl. xvi), bankruptcy and insolvency (pl. xvii) and copyrights and related matters (pl. xviii). Two placita which also come under this heading are those concerned with the service and execution throughout the Commonwealth of the process and judgments of the courts of the states (pl. xxiv) and the recognition throughout the Commonwealth of the laws, acts, records and judicial proceedings of the states (pl. xxv).

Powers in respect to the influx of criminals (pl. xxviii), external

affairs (pl. xxix) and the relations of the Commonwealth with the islands of the Pacific (pl. xxx) are included under the mutually acceptable heading although they border on the second category, which comprises matters which were politically sensitive issues at that time. The placita not mentioned embrace subjects which were problems either from external sources as in the case of immigration (pl. xxvii) or from internal dissension for which there is no better example than the commerce power (pl. i). Education was not added to s. 51 because it was neither a mutually acceptable inclusion nor was it in any sense a politically sensitive matter. Each of these categories merits further analysis.

One of the factors which led to the almost automatic inclusions of several items in s. 51 was that they had been discussed at inter-colonial conferences before the Conventions.⁴ If basic agreement had been reached on them, as was the case with lighthouses, for example, and the subject matter had not subsequently engendered alarm or friction, little more was required except formal acceptance.⁵

Two factors which led to the mutual acceptance of some powers were constitutional precedent and uniformity of operation. Since copyrights (pl. xviii) was a federal power in both the American and the Canadian Constitutions and it posed no problems in the colonies, it was a mutually acceptable inclusion in s. 51. Placitum viii (astronomical and meteorological observations) was also an automatic inclusion. As Sir Joseph Abbott argued, there were benefits to the nation in having uniform systems for these undertakings.⁶

Three heads of power in s. 51 are classified as mutually acceptable inclusions in that they were matters in respect of which the Federal Council of Australasia had passed laws. In other words, all the states except New South Wales had previously agreed to them and it was thought desirable that they should be controlled nationally. There is little doubt that this accounts for the fact that pl. x (the fisheries power) and pl. xxiv and xxv, which were concerned with the execution and recognition throughout the Commonwealth of political and legal decisions made by the states, were included as powers to be exercised by the Commonwealth Parliament.

To the question 'why was education not a mutually acceptable inclusion in Section 51?', the simple answer is that none of the

factors which contributed to making any of the above-mentioned subjects automatic choices in s. 51 applied to education. It had not appeared on any of the agenda of inter-colonial conferences nor was it ever suggested for consideration. Education was clearly not among the powers given to the federal authorities in any of the foreign constitutions mentioned at the Conventions, nor was it suggested that uniformity for national interest applied to schooling. Prior legal enactments affecting education had all been passed in the colonies and never at the federal level. As was mentioned earlier, education had no place in the thinking of the Federal Council and it was not considered at the 1890-1 debates in such a way as to make it an obvious inclusion at the second round of discussions in 1897-8. It was conclusively not a mutually acceptable claimant to a place in s. 51 since it did not have common to it any of the factors which separately, or together, earmarked other subjects as mutually acceptable inclusions.

Many of the powers included in s. 51 of the Constitution were raised at the Conventions because they were matters of concern or disagreement. It was decided that Commonwealth management of these items was the appropriate way of resolving the difficulties being encountered. These powers fall into three categories, namely, general matters, financial considerations and social responsibilities.

Some of the problems facing the members of the Conventions were basically external in origin. The influx of foreigners, for example, spurred the colonies to concerted action and resulted in the control of immigration. By 1888, all the states had tightened up their immigration laws and so halted the flow of Asian immigrants. This did not, of course, solve the internal problems which the presence of the migrants had precipitated. The attempt to meet this situation coupled with a desire for a composite attitude on immigration in the future led to the subject coming before the first Convention. The debate in 1891 centred on the possible confusion which would be caused between the states and the Commonwealth if the matter were handed over to the federal authority.⁷ Despite Victoria's objection to immigration in any shape or form, and her desire to maintain her freedom of decision in this matter,⁸ the pressure from Queensland — only too willing to hand over its own black labour problem — won the day and immigration passed out of federal control.⁹

Characterised as a national problem, it followed that immigration

was held to be a national responsibility and this led to the inclusion of Commonwealth powers with regard to people of any race, except Aborigines under State control, 'for whom it is deemed necessary to make special laws' (pl. xxvi). It also included immigration and emigration (pl. xxvii), and the influx of criminals (pl. xxviii).

The Conventions were also faced with a number of matters which were internal in nature and of concern to the colonies. The previous two decades had seen the rise of the trade union movement and the Labor Federation. Although Symon argued that the strikes which wracked the nation in the early 1890s were a state concern,¹⁰ the majority of the members of the Conventions supported the views advanced by Charles Kingston in 1891, and Henry Higgins in 1897, who said that the strikes which affected primary and secondary industry, mining and transport were held to be of national importance.¹¹ Moreover, no colony had formulated its own legislation in the field of conciliation and arbitration. The first effective piece of legislation was not enacted in New South Wales until after Federation.¹² Had the states had the machinery to cope with the problem, the conciliation and arbitration power (pl. xxxv) might not have been included in the Constitution.

Public education had nothing in common with any of these general problems. It was not a matter for concern either as a result of inter-state rivalry or as a matter of joint state concern resulting from internal or external pressure. Education was a field for which state legislation had been enacted and it was being administered quite competently at this level.

Playford intimated to the 1890 Planning Conference in Melbourne that 'the most important question calculated to drive us into Federation is undoubtedly the fiscal question'.¹³ A considerable amount of time at the Conventions was given in debate to financial matters and a number of paragraphs in s. 51 gave some fiscal authority to the Commonwealth Government. Several of the items, such as the control of currency (pl. xii), were motivated by the need for uniformity and are not discussed further. Others concerned with banking and insurance (pl. xiii and xiv respectively), were included in an attempt to safeguard the future against the banking collapse of the depression years in the 1890s and are akin to the national problem discussed earlier. The powers granted with respect to trade and commerce, taxation and bounties (pl. i, ii and iii) were handed over after a great deal of controversy. There was

some consternation amongst the delegates at the loss of revenue which would inevitably follow for the states. Against these heads of powers were set the several provisions in Part IV of the Constitution which required the Commonwealth to make repayments to the states. Without going into the debates on financial matters it is possible to assert that many of the items in s. 51, involving commerce, were politically sensitive.

In reaching a satisfactory financial arrangement the question of state debts had to be resolved. John Macrossan, addressing the 1891 Convention in Sydney, noted that two-thirds of the public debt was due to railway and telegraph services.¹⁴ Several years later, in 1897, William McMillan pointed out that the railway debt stood at approximately £110 million, just under one-third of the national debt.¹⁵ Figures published in 1895 revealed that New South Wales, Queensland, Tasmania and Western Australia all showed deficits in the operation of post and telegraph services and, although in credit in that undertaking, Victoria lost heavily in the operation of her railways.¹⁶ Although a national problem was being created by these services, the states would not agree to handing over their railways and by that action indicated their determination to retain a major capital asset. Nevertheless, some power with respect to the control, acquisition and construction of railways was given to the Commonwealth Parliament under pl. xxxii to xxxiv. It was, however, granted plenary power in the field of posts and telegraph (pl.v).

Education was not included in the discussion on financial problems at the Conventions because it was not a major item of government spending. Gross expenditure on primary education in New South Wales in 1898 was £730,000.¹⁷ This was 7.6 per cent of the government appropriation for that year. In Western Australia, where the private sector of education catered for 37 per cent of the school population, the government spent 1.6 per cent of its appropriation on education.¹⁸ These two examples indicate the size of the educational budgets in the colonies.

Powers with respect to marriage, divorce and matrimonial causes, and invalid and old-age pensions (pl. xxi to xxiii) were included in s. 51 so as to provide national oversight of these social matters. The limited consideration given to social services at the Conventions was criticised in some quarters. Arthur Rae, a member of the New South Wales Legislative Assembly, charged, for example, that Federation would 'do nothing to meet those social and industrial

problems so urgently pressing for solution.¹⁹

One item of power accorded the Commonwealth in the draft constitutions of 1891 and 1897 was 'marriage and divorce'. This social matter was included with little debate since it had an earlier history of discussion and decision. When Parkes made his plea for uniformity in marriage laws at the first Convention in Sydney,²⁰ he reflected a concern of the 1887 Colonial Conference in which unanimity was sought between the Home government and the colonies on the question of marriage to one's deceased wife's sister.²¹ It was argued at the Conventions that marriage should be included as a Commonwealth power for reasons of uniformity. Yet it was on these very grounds that South Australia sought the deletion of the clause, at the Convention in Sydney in 1897.²² It was feared that the ease with which divorces were obtainable in New South Wales and Victoria might spread to the rest of Australia, and that this could only create social mischief. The majority held, however, that marriage and divorce should be controlled at the national level.

The power 'parental rights, and the custody and guardianship of infants' was included as a matter for the Commonwealth at the Adelaide Convention in 1897. New South Wales, South Australia and Tasmania sought its deletion at the next Convention in Sydney later that year.²³ Carruthers, for example, argued that this federal power impinged on basic family rights.²⁴ This view was echoed by others who saw dangers both in the familial intrusion and in the inference that the Commonwealth could take over all institutions connected with children. The argument came to an end when Edmund Barton, leader of the Convention, amended the clause to relate it only to divorce.²⁵

The power with respect to invalid and old-age pensions was the only inclusion in s. 51 which might be described as a private member's proposal. James Howe did not put his amendment to the 1897 Convention in Sydney as he had intended.²⁶ He moved it early at the next Convention in Melbourne the following year. It was rejected by a small margin.²⁷ However, having received some encouragement from several members, he re-introduced his amendment. On this occasion it was carried by twenty votes to four.²⁸ Howe's basic contention was that the movement of population made it impossible for the states to be held responsible for pension schemes. Only a national government could make adequate pro-

vision for the care of the people involved.²⁹ If the matter were to be left to the states it would be a case of leaving 'the suffering and deserving poor to parish relief'.³⁰ Howe might have expected the rebuff which came from such representatives as McMillan, Deputy-Leader of the Free Trade Party in New South Wales, who said that the rich could not be held responsible for the poor.³¹

Opposition also came from that segment of the Convention which advanced a strong States rights view. This position had been held as early as 1891 by Captain Russell, one of two New Zealand representatives, who claimed that all social questions would be jealously guarded by the local authorities which were competent to solve them.³² Support for Howe varied somewhat. Frederick Holder advocated handing over the power to the Commonwealth immediately.³³ Sir John Forrest agreed with Isaac Isaacs and William Trenwith, who regarded the problem as one to be vested in the national government at some future time.³⁴

George Reid claimed in his *Reminiscences*, that the change of heart on Howe's proposal came about 'in the hope that it would improve the prospect of the Bill'.³⁵ The evidence from the debates is that members found themselves in an invidious position. On the one hand, as the first vote made clear, pensions and other social services were regarded as matters for state control. On the other hand, a vote against a proposal on pensions would have appeared callous to the public which had elected the members of the Convention. The second vote appears, therefore, to be one of political expedience.

This examination of these placita has been undertaken since the field of social service was the one with which education seemed most likely to be connected. The suggested inclusion of the clause on the custody and guardianship of infants was the closest the Conventions came to making a decision which would have implied a federal interest in the running of elementary educational institutions. But members did not warm to the idea of such control. Indeed, they seemed determined to avoid including social matters in the Constitution as the first vote on the pension amendment made clear. The Sydney Convention in 1897, too, rejected the proposal to include health, another form of social service, as a power in s.51.³⁶ There was therefore little likelihood that education could be included in the Constitution.

3 Attitudes of and Pressures on Members of the Conventions

It would be misleading to suggest that the members of the Conventions arrived at their decisions solely on cognitive grounds. In the course of the debates members expressed their views on such matters as their approach to the task of preparing a constitution and the perspectives from which they approached the basic issues of Federation and States rights. The little discussion on education belied the involvement of many members in education either professionally or politically.

The members of the Conventions were also liable to external pressure when making their decisions. Three sources of pressure were the colonial parliaments of which many participants at the Conventions were members, the press which gave varying degrees of coverage to the deliberations, and the public which elected members to the later Conventions. The place of education in the thinking of these groups also deserves attention.

Whether appointed or elected, the members of the Conventions were primarily politicians, professional men, business men, members of the militia and pastoralists. Some, such as Parkes, were self-made men, but only one, Bill Trenwith, President of the Melbourne Trades Hall Council, could be said to have represented the growing labour movement.

The proceedings of the Conventions were dominated by the legal profession. The *Bulletin's* tally was that of the twenty-two members who spoke the most, sixteen were lawyers.¹ Bearing in mind that the Leaders of the Conventions, Griffith and Barton, were also legal men, there is no doubt that the task of moulding the Constitution fell mainly to this profession.

In 1890, Deakin expressed the view that 'the prospect of external flux in a Constitution is not to be wished. But a Constitution lives for and from the people, and except in so far as it coincides with their character is a dead burden'.² John Cockburn and Bolton Bird supported Deakin. They said that a constitution needed to evolve from the people.³ Cockburn continued in the same vein at the Sydney Convention in 1891, when he contended that constitutions should be related to actual situations. They should be utilitarian to

the point of being something 'to which no sort of superstitious reverence ought to attach itself'.⁴

Viability was another theme which was evident at the Conventions. On one occasion, William McMillan said that he hoped that the citizens of the Commonwealth would not complain that the members of the Conventions '“stopped short in the very essential element of national union; by a wretched travesty of a constitution they actually crystallised those differences which are now the great bane of these communities”'.⁵ The plea for a constitution which could be easily amended was made in the early debates by Sir Earl Grey and Andrew Thynne, to mention but two.⁶ In the second round of debates, such familiar figures as Carruthers and Higgins were among those who expressed opposition to an over-rigid constitution.⁷ As the Conventions progressed some firming of opinion took place. William Lyne, for example, pleaded for elasticity for the future yet denied the right of secession to any dissident states.⁸

It was decided that provision had to be made to enable the Constitution to be adapted to meet changing conditions. The procedure to be followed was agreed upon and was incorporated as s. 128 of the Constitution. This inclusion was important since it has made possible the addition, in 1946, of the Social Service amendment (pl. xxiiiA) with its 'benefits to students' provision, although it has in fact led to little change in the Constitution.

As far as the work of the Conventions is concerned none was given the bald task of conjuring up a constitution. On the one hand all the members were aware of the main areas of interest and concern. On the other hand, specific matters were presented for debate. Although Parkes put certain proposals to the first Convention in 1891 in Sydney, the agenda was decided upon by the sub-committees which drafted a constitution for consideration.⁹ In essence, the later Conventions were a continuation of the process of amendment and refinement. The basic subject matter varied little from beginning to end and totally new material, such as Howe's amendment on pensions, was rare.

The drafting committees and the Conventions as a whole took note in their deliberations of other constitutions. Most reference was made to the federating legislation of Canada and the United States of America, although several other constitutions were also mentioned. An early stand was taken against the form of the Canadian Federation — favoured at one time by Parkes — which

nominated state powers and reserved the remainder to the federal authority either specifically or as residual power.¹⁰ State powers were referred to from time to time in the debates as, for example, by Griffith,¹¹ but only rarely were attempts made to specify a state power.¹² The Constitution of the United States provided the basic model although the members of the Conventions omitted matters of civil rights and added some items such as insurance, which was not a federal power in the American Constitution.

Although there was a strong movement toward Federation, the States rights concept dominated the debates. This term had two distinct applications in the Convention debates. On the one hand it referred to the attitude of the states *vis-à-vis* the Commonwealth Government. In its second use the term applied to the right of an individual state in its relationship with other states.

States rights, in the first sense, referred to particular functions which were being undertaken by the state and which the states in concert believed they should retain. Among these interests were land laws, noxious weeds acts, railways, mines and taxation, as one State Parliament was told.¹³ Associated with this view were arguments not to surrender interests unless it was absolutely necessary to do so,¹⁴ to protect local government against a centralised army of civil servants,¹⁵ and to insist that the local population alone could cope with domestic problems.¹⁶ Holder put a moderate States rights view to the Adelaide Convention in 1897. 'To the State', he said, 'everything that is local and relating to one state, to the Federal power everything that is national and of interstate importance'.¹⁷ The opinion at the Conventions as a whole on the division of powers can be summed up in the Adelaide decision 'that the powers, privileges and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern'.¹⁸

The second meaning which States rights assumed during the Conventions is not of immediate concern to this discussion. Both the larger and smaller states feared the possibility of being swamped by coalitions of the other states. To this end, States rights was the right claimed by a state to make its decisions independent of other states.

In reviewing the possible interest of the Convention members in education, it is interesting to note that several members were

acquainted with the teaching profession. Service, Holder and Isaacs all began their working lives as teachers. Several others, including Griffith, Reid and Bird, had been ministers of Public Instruction, and Cockburn was one who held the office of Minister for Education at the time of the later Conventions. Although he was described as an 'enthusiast for educational advancement and legislative reforms',¹⁹ he was heard at the Conventions more for his view on ticks (he was also Minister for Agriculture) than schools.²⁰

If education had been a matter of concern it might have been raised whether there were members directly involved in it or not. After all there were no lighthouse keepers on the Conventions' rolls and lighthouses became a Commonwealth concern. But that subject had a pre-Convention history of common interest as did many others. Education had none and as the pension example suggests, without being championed, a subject would have little chance of success. At the same time, as the case of O'Connor and his health amendment makes clear, to have a champion was no guarantee of success.

A further point to note is that the procedure adopted at the Conventions militated against a discussion of education. It had no ancestry of pre-Convention discussion. Furthermore, it was clearly not a federal power in the constitutions of Canada or the United States of America. The conclusion is that education would have had to be introduced 'cold' as it were and this, coupled with the fact that it would have flown in the face of the provisions in other constitutions, meant that it would have required extraordinarily strong support to have gained acceptance as a Commonwealth power. It would have had to be shown that the federal authority could do the job better or that local administration could not cope, if the prevailing mood was applied. Basic to the whole discussion was the fact that although rarely mentioned in lists of state power, it was unquestionably within the ambit of state activities.

As well as the pressures within the Conventions' walls external influences were also possible. The Colonial Parliaments, for example, were given every opportunity to appraise the work of the Conventions and to suggest amendments. Debates on Federation were held in the Parliaments and some of them suggested amendments to the draft constitutions. In the ensuing Convention debates the amendments were generally unsuccessful. Only three resolutions to s.51 were approved, two at the Sydney Convention in 1897, and

one at the Convention in Melbourne in 1898. On occasions the representations were quite forceful as in the instance of the opposition by three colonies to the proposed parental rights power.²¹

Edmund Barton told the 1897 Adelaide Convention that its decisions would undergo 'a searching investigation by the press'.²² A little later, Henry Dobson affirmed that the press would be more influential in bringing about Federation, as far as the public was concerned, than delegates to the Convention or the various state legislatures could hope to be.²³ These two opinions reflected some expectations held of the media at this time.

The press certainly tried to influence the public vote and undoubtedly succeeded in some instances. Positions were taken for or against the proposals in the draft constitution. Regrettably there was little evidence of the sort of scrutiny expected by Barton. The papers tended to adopt attitudes for or against Federation and assail their respective publics accordingly.²⁴

One paper of interest was the *Bulletin*, which did not merely comment on the given decisions but advanced a policy of its own. It expressed strong opposition to the move to increase the required referendum majority by 30,000.²⁵ Premier Reid's claim for Sydney as the capital was regarded as insolent.²⁶ It pressed for the inclusion of railways as a federal responsibility and denounced as fiction the assertion that the questions of representation and finance were almost insuperable.²⁷ But it is the *Bulletin's* own proposals which were of particular interest.

Contrary to the position adopted at the Conventions, the *Bulletin* proposed a scheme of federation along the lines of the Canadian pattern. It suggested on 28 May 1897, that the federal powers should comprise all those not allocated to the states. Since this position gained no general support, the *Bulletin* pressed a secondary position and advocated as much power to the central authority as possible. In an editorial on 2 November 1895, and again in the platform offered on its how-to-vote card prior to the referendum in 1898, the paper in its issue of 30 April 1898 presented its list of federal powers. In neither of these cases was 'education' mentioned. On two other occasions it was. Shortly before the Adelaide Convention in 1897, the *Bulletin* suggested that among the matters which should be Commonwealth controlled was 'the entire public education system'.²⁸ A little less than a year

later, and before the final Convention in Melbourne in 1898, it was again suggested, in the issue of the *Bulletin* of 15 January 1898, that education should be made a federal responsibility.

Apart from the *Statist*, a London financial paper, which suggested that a number of items including education would be considered by the 1891 Convention, the view that education should become a federal power was not a common one in the press.²⁹ What was more interesting in the *Bulletin's* case was that although it adopted the Canadian idea for Federation it did not accept it in detail. In the Canadian Constitution education was clearly a States right. Unfortunately, no explanation was given in the paper for its position on education.

As well as parliaments and press the public was given several direct opportunities to express its views on the Federation proposal. It elected members to the later round of Convention debates in 1897 and 1898, and the referendum vote gave the people a power of veto. Less directly, members of the Conventions could be lobbied individually or collectively.

The voting for Convention delegates did not give a clear picture of public interest in Federation. Higgins may have been right in suggesting that Deakin overestimated the extent to which the outside public had read the debates of 1891.³⁰ Nevertheless, considerable interest was shown in New South Wales when the election for the delegates was held. Fifty-seven per cent of the electorate went to the polls. This figure compared favourably with the 64 per cent poll at the previous election.³¹

Tasmania, by contrast, presented a very dismal showing. Only 25 per cent turned out for the election of delegates and of the votes cast 22 per cent were informal.³² There was considerable improvement at the referendum poll when some 46.5 per cent of the electorate voted, the second highest figure of the four colonies involved. In New South Wales, just half of those eligible voted.³³ Although the public response was varied, there was a real interest in the outcome of the Federation question. Griffith had argued, in 1891, that public opinion was most concerned with the degree to which the self-governing states would be required to surrender their autonomy.³⁴ Admittedly people held positions for and against Federation, and had to vote on the matter as a whole. But in the approaches made by the public to the Conventions, usually by means of petitions, interests were concentrated at the particular

point at which something was required or feared.³⁵ Church groups, for example, sought to have reference to God included in the Constitution.³⁶ One of the earliest petitions, received by the 1891 Convention in Sydney, contained a request from the Chamber of Commerce of Warnambool, Victoria, to have that city declared the Federal capital.³⁷ But no petition came before any Convention asking that public education be made a Commonwealth responsibility.

Several matters were also opposed by particular groups. Several petitions denounced any limitation on appeals to the Privy Council. Some were outspoken in their opposition to a national religion. Not all opposition was addressed to the Convention members directly. In New South Wales, for example, the importers ranged themselves with the forces opposed to Federation and fought their battle as a pressure group in that way.³⁸ The *Bulletin* noted, on 23 November 1895, a fear expressed by public servants that Federation would mean lighter pay packets but there was no mention of an influence group being formed.

Public interest was aroused as sectional groups claimed the right to be heard. There were also, however, pro-Federation groups such as the Federation League which Barton headed in Sydney. The most forceful established group was the Australian Natives Association. It was influenced by John Quick who suggested the idea of an elected convention to deliberate on Federation, and whose views were largely responsible for the form the second round of debates took.

The success of the lobbyists is not easy to assess. It would be an over-simplification to suggest that the 'Yes' groups were successful and the others failed. Clearly there was lobbying and with some success in several instances. The Commonwealth was prohibited from establishing any religion yet required not to prevent the free exercise of any religion by s.116 – a point of satisfaction for some groups. For others, the assertion, in the preamble to the Constitution, that the decision to unite was agreed to 'humbly relying on the blessing of Almighty God' would have been regarded as a victory. The altogether unsuccessful lobbyists were those making representations about the siting of the capital for the new Commonwealth.

The members of the Convention did not receive any petitions concerning education. No public group formed itself into a lobby

to have education included as a power under the Commonwealth. There is no evidence to suggest that members of the public thought of, far less supported, such a proposal. There was not even a 'crank' amongst newspaper correspondents suggesting that education be taken from the states. The public was as little stirred as were the members of the Conventions to bring public education into the Federation debates.

4 The Background to the 'Benefits to Students' Provision

The Australian Constitution was amended in 1946 by the addition of placitum xxiiiA to Section 51. Coming as it did in the flush of enthusiasm for post-war reconstruction, the decision to give the Commonwealth power in several areas of social service was not unexpected. There was extant legislation covering most of these fields but there was considerable doubt as to its validity.

The 1946 constitutional amendment made provision for the Commonwealth Government, subject to the Constitution, to 'have power to make laws for the peace, order and good government of the Commonwealth with respect to:— . . . The provision of . . . benefits to students . . .'. Whereas the members of the Conventions had entertained no thought of education as a Commonwealth responsibility, a constitutional power which was connected with formal education was included in s. 51 in 1946. It is proposed to try to establish what the intentions of those who added this power were, beginning with the proposals on constitutional reform put to the Royal Commission on the Constitution in 1927.

The Royal Commission on the Constitution, which began its hearings on 19 September 1927,¹ was appointed by the Bruce-Page Government. It was given the dual task of evaluating the working of the Constitution and of recommending changes particularly in connection with ten areas of concern.² Education was not declared a Commonwealth power at Federation and it was not mentioned as a possible addition in any of the Constitution Alteration Bills presented to Parliament before 1927.³ Nor was education one of the ten items listed for particular consideration by the Commission. Nevertheless, it was mentioned both in the findings of the Commission and in the evidence put before it.

The findings of the Royal Commission with regard to education were brief. The majority opinion held that:

the Commonwealth has no power under the Constitution to make laws with respect to education but it may make laws for education in a territory, and it is interested in the education of students for service in the Territories and for other purposes.⁴

Education, except in the Territories, was left to the states at Federation and this was the situation in 1929 as the Commission stated. No alteration of this state of affairs was recommended.

The minority report advocated local control of education. It did not do this on the basis of the existing Constitution but as the desirable arrangement in a new system of government which it propounded, namely, a unitary system. Thus, although the Commissioners differed widely on the appropriate form of government in the Commonwealth, they were agreed that education should be left to states or delegated to a provincial authority.⁵

The brief comments of the Commissioners on education and the basic agreement of the views expressed belie the diversity of opinion on the matter of the control of education which the Commission heard. On the one hand there was strong support for the view that education was properly a matter for the states. James Drummond, Minister of Education in New South Wales, pleaded for state control of education. Giving evidence as a representative of the Farmers' and Settlers' Association, Drummond declared his opposition 'to any suggestion that the Commonwealth should have the control of education'.⁶ This view was a fair representation of that held by the educational establishment of the day, and was common to the non-Labor parties, including the Country Party of which Drummond was a member.

A similar position was taken by a former Labor Premier of New South Wales, William Holman. Although he was critical of the impoverished condition of education, Holman declared his opposition both to federal control of education and local domination of the school board variety.⁷

Another political viewpoint of that time was represented by the New State movement. In advocating the writing into the Constitution of state powers, the Northern New State Movement submitted that states must control education.⁸ A variation on this theme was provided by Richard Windeyer, formerly a member of a New State movement. He advocated that education should be retained as a state power whilst transferring all matters of social legislation to a national government.⁹ The basis for this distinction was his division of subjects into legislative and administrative categories. Education was one of the latter and these belonged to the states. A theoretically based division was also propounded by a Melbourne lawyer, Philip Phillips. He divided responsibility between the Common-

wealth and the states on the grounds that some matters were national problems and should belong to the former, while all other subjects came under state jurisdiction. Education was not a national problem as far as he was concerned and should, therefore, be declared a state responsibility.¹⁰

Although the views represented in these submissions were unanimous in their opinion that education should belong to the states, there were clear hints that the Commonwealth should have more powers. These were given by several witnesses who tended towards a centralist position. Notable among these was George Moir, spokesman for the Federal Council of the Australian Natives Association. He indicated the change which had occurred in his organisation since Federation. The Association had adopted a thoroughly centralist position. Its representative argued for the handing of all powers to the Commonwealth Government which would have the right to delegate responsibilities to the states.¹¹ When questioned by the Chairman, Senator Abbott, Moir indicated that education should be one of the delegated powers on the grounds that local interest and involvement were imperative to its future success.

Albert Piddington, who was the Industrial Commissioner for New South Wales, advocated a unitary system of government along South African lines. Although he had first thought education should be a federal responsibility, Piddington held that it should be left to the states.¹² He based this decision on the opinion that education was going through a revolution and a hard and fast system of Commonwealth control was undesirable at this time. Like Windeyer, Piddington separated education from other social matters which were, for him, a federal matter.

Dr James Watson, a medical practitioner and editor of *Historical Records of Australia* was also a centralist. He numbered primary education amongst the powers which should be delegated to the provincial authorities. He said that 'secondary education, of course, would be a function of the Commonwealth'.¹³ Further questioning elicited the information that 'secondary' meant all education for those over fifteen years of age.

A similar view to that of Watson was held by Edith Jones, Vice-President of the Women Citizen Movement in Victoria. Although she advocated that education should be included as a Commonwealth power in the Constitution, Mrs Jones shifted ground under

examination. Whereas the co-ordination of the 'higher branches of learning' was appropriate to the Commonwealth, primary education should remain within the province of the States.¹⁴ A similar viewpoint was advanced by Betty Rischbieth, Vice-President of the Women's Service Guild. She asserted that education was a state and not a national problem and suggested it should be financed from federal sources while continuing to be administered by the states.¹⁵

In his detailed submission, Francis Bland, Lecturer in Public Administration in the University of Sydney, divided governmental powers into three groups.¹⁶ Education was one of the items included in his second category which comprised functions which were Commonwealth-wide in application but which needed to be tempered by local needs. Bland urged greater Commonwealth involvement in higher education and research — a theme taken up by Percival Cole, Vice-Principal of the Sydney Teachers College. Cole submitted that the Commonwealth should be given 'the power of investigating and reporting upon educational problems in Australia and abroad, and to assist the states in such matters as may be mutually agreed upon'.¹⁷ Yet Cole stopped short at taking education from the states since even his proposed new power was to be implemented so as not to infringe their existing rights with respect to education.

The strongest submission for a complete Commonwealth take-over of education was made by Edward McTiernan, a former Attorney-General in New South Wales.¹⁸ He was a member of the Labor Party and put to the Commission the view, not yet accepted by the Federal Conference of the Party, that education was the responsibility of the Federal Government. McTiernan argued that the Commonwealth was in a position to pay for education in Australia and should do so. He claimed that if federal support was not given to public education it would soon be in the same desperate plight in which public health departments found themselves. As an alternative proposition McTiernan suggested that if the Commonwealth would not exercise power with respect to education, the states should be given the authority to obtain more revenue so that they could provide adequate education systems.

Education was clearly an important subject in several submissions made to the Royal Commission. There was, however, no sustained argument that the Constitution should be altered to include education as a power in s. 51. After almost thirty years of Federation,

therefore, education was still not an important constitutional issue.

The Royal Commission of 1927-9 heard evidence of the Commonwealth's involvement in education particularly in connection with health programs. Despite the lack of a constitutional power the national government's participation in education continued and increased until 1946. It is not proposed to attempt to survey the range of activity in this study. Since Chown¹⁹ completed his thesis in 1960, others such as Semple,²⁰ who concentrated on the period to 1942, and Tannock,²¹ who has completed a most analytical study of Commonwealth involvement in education, have given evidence of the growing interest of Australian scholars in the history of education in this country since Federation. It is suggested, however, that two areas of interest have not yet been adequately explored. The first of these is the potential power for intervention in education in Australia possessed by the Commonwealth under s. 51(xxix) of the Constitution, the External Affairs power. The second field is one of actual involvement through the agency of Child Endowment.

Following the defeat of the referendum proposals in August 1944, rumours were spread that the government would attempt to obtain the powers sought by other means. Arthur Fadden asked Dr Evatt during question time in Parliament in November 1944 whether it was the case, as the *Daily Telegraph* alleged, that the government intended using its power to implement international agreements as a means for overcoming constitutional difficulties.²² Evatt denied that the government had any such intentions. Since he gave the broadest interpretation to the External Affairs power in the Burgess Case in 1936,²³ when on the High Court bench, it is likely that Evatt had considered this course of action. It may be unlikely that any thought had been given to taking over education on this basis. Yet the Commonwealth had undertaken international obligations with respect to education.

A major link between the Commonwealth of Australia and other nations as far as education was concerned arose out of its membership in the International Labour Organization.²⁴ Australia had been party to other *ad hoc* conventions, such as that on the International Circulation of Films of an educational character.²⁵ However, her major, even leading, role had been with the former. According to the delegates to the 1945 I.L.O. Convention, for example, the Australian representatives, along with those from Canada, took the

lead in preparing the submissions which were adopted by the Convention as principles governing the 'Social Protection of Children and Young Persons'.²⁶ Amongst the principles to which Australia was committed as a signatory, were

1. Free education for all,
2. Non-compulsory pre-school education,
3. Minimum school leaving age, and, hence, minimum employment age of 16,
4. Provision of a variety of education courses,
5. Education for young workers to the age of 18,
6. Full and part-time technical education courses.²⁷

In signing such declarations, the Government's representatives had made it clear that their government was acting as a 'middle man' between the international agency and the state governments which had power in this and other fields. The I.L.O. had been advised of this position by the Commonwealth Government in 1939 and the whole question of the role of federal governments and the I.L.O. was put on the agenda for 1943 but not discussed.²⁸ The Commonwealth Government's statement did not, however, overrule the potential power allowed it by the decision of the High Court in the Burgess Case. Maurice Blackburn, the Labor member for Bourke, took up this point in the House of Representatives in 1937. When discussing the Commonwealth's power with respect to industry, Blackburn advocated the use of the external affairs power as interpreted in the Burgess Case. He used an aspect of education in his example of how that power might be used. He claimed that if the Federal Government had been a signatory to an international convention on teaching European history, it would have the constitutional power to legislate to effect the decision of that convention 'although that legislation might impinge on state or provincial educational powers'.²⁹ Although education would not automatically have come within the scope of the 1936 decision, it was clear that from that time and until 1946 the Federal Government had a head of power under which it might have legislated with respect to aspects of education.

Although the passing of the Child Endowment legislation in 1941 was hailed as an important gain in social legislation, little seems to have been made of the fact that the payment of child endowment was, in part, regarded as a direct educational grant to parents, and was, obviously, the first allowance of this kind. The

connection between education and child endowment began to show itself in the 1929 Royal Commission on Child Endowment and was clearly evident in the Act of 1941.

The majority report of the Royal Commission, which was subsequently adopted by the government, asserted that a scheme of child endowment should not be adopted.³⁰ This decision was based on the opinion that such a proposal would have been injurious both to the economy and in the exercise of parental control. Should the government, however, decide to introduce an endowment scheme, this report argued that the Commonwealth exercise complete and exclusive powers in the field.³¹ Little mention was made of education although note was taken of the submissions which urged that children in educational courses should be allowed endowment to the age of sixteen, two years beyond the existing limit in the New South Wales scheme.³² More attention was given by the majority commissioners to the problem of health and the development of pre-school work.³³

John Curtin and Mrs F. M. Muscio submitted a minority report in which they said that education was an important item in determining a minimum living standard.³⁴ They advocated a Commonwealth controlled endowment plan, part of the purpose of which would be to enable parents to provide adequate education for their children. Furthermore, in setting sixteen as the age at which dependence ended, they expressed the hope that children who would profit from a longer stay in school could be assisted with endowment money.³⁵ In making these suggestions the minority commissioners had taken cognizance of the wealth of evidence which favoured the endowment idea just because it was a means by which parents could provide basic and further education.

A wide range of witnesses applauded the endowment scheme concept because it would extend educational opportunity. William Thomas, General Secretary of the State School Teachers' Union of Western Australia, was one who affirmed that endowment subsidies would improve the health of the young, prolong their stay at school and provide more equal opportunity for education amongst the less privileged.³⁶ These themes were taken up by representatives of several Women's Groups. Eleanor Glencross, President of the National Council of Women, supported these proposals and introduced her own suggestion, namely, that young mothers-to-be should have an education to fit them for their future role.³⁷ Her

Vice-President, Edith Cowan, maintained that the Commonwealth authorities should arrange with the states to have subjects of practical use to future wives and mothers made compulsory in schools. Ella Rowlands, Supervisor of the Free Kindergarten Association, went further and claimed that training in mothercraft should be the reason behind the introduction of an endowment scheme.³⁸

Adela Walsh advanced proposals that the Commonwealth should allocate funds for such purposes as concessional travel for children, equipment for play centres, improving existing school facilities and providing staff and buildings to make possible a raising of the school leaving age.³⁹ Such suggestions for direct aid and, hence, intervention in education were a little premature at this time, and these proposals were not widely supported.

Three different points of view were expressed in support of an endowment scheme along the lines that improved education was an economic gain. Charles Sharkie, the honorary organising secretary of the New South Wales Constitutional Association, affirmed the general principle that 'healthy, nourished and well-educated children represent a valuable asset to the community'.⁴⁰ The General Secretary of the A.L.P. in Western Australia, Ernest Baker, reflected his political position in expressing the hope that endowment payments would give more opportunity in education for children whose families lived on low wages.⁴¹ A somewhat different opinion was expressed by Edmund Miller, Professor of Psychology, who advocated that more money be allocated to parents of children of high intelligence and less to those of low intelligence.⁴² Whilst the first two opinions received considerable support, the third was a lone plea.

Peter Board, Secretary of the Soldiers' Children Education Board, reversed the relationship between endowment and education as it was generally put to the Commission and asserted that the money spent by the Federal Government on education for deceased soldiers' children 'really becomes a form of child endowment'.⁴³ The Secretary put forward the position of his Board which considered 'that in any scheme of child endowment the education and training of the children should form part of such a scheme'.⁴⁴

The Convenors of the Standing Committees of the National Council of Women on both Education and Child Welfare asserted that an endowment scheme would make it possible for state governments to increase the school leaving age. In the opinion of

the Convenor of the former committee, Isabel Fedler, children should stay at school until they turned sixteen.⁴⁵ Her counterpart, Dr Clara Wilson, who based her submission on the Children's Charter of the International Council of Women, advocated the provision of endowment until children became income earners.⁴⁶ This view was also expressed by Lewis Edwards, Chief Inspector of Schools in Queensland, who claimed that children left school because they had to go to work.⁴⁷ In reply to a question from the Commission, another Queenslander, Lewis McDonald, secretary of that state's Labor Party Executive, asserted that endowment 'would give a great deal of encouragement in the direction of secondary education'.⁴⁸ For William Harding, a member of the New South Wales Constitutional Association, an endowment scheme would enable students to take two years of technical education, thus increasing the supply of skilled workers.⁴⁹

Not all the relevant submissions have been mentioned in this survey. However, the above examples serve to indicate the wealth of evidence relating endowment to education and the variety of ways in which it was suggested the money could be used. In 1929 the government accepted the majority opinion of the Commission. Yet not many years were to pass before a Bill to introduce Child Endowment was brought down in the House of Representatives.

Harold Holt, the Minister for Labour and National Service, introduced a Bill to provide child endowment into the House of Representatives on 27 March 1941.⁵⁰ In the course of his second reading speech he said that the expenditure involved was justified by the return in terms of human happiness which the measure would bring. He noted that sixteen had been set as the upper age limit because of the high cost of education which had to be borne by parents immediately their children turned fourteen, under the extant New South Wales scheme.⁵¹ It was to be hoped that parents could and would maintain their children at school, at least for the completion of courses which had been begun. Holt also expressed the hope that, should the Bill be passed, state governments would raise the school leaving age.

The Leader of the Opposition, John Curtin, supported the Bill. He expressed the hope that more boys would avail themselves of the opportunity of proceeding to High School when endowment money became available.⁵² Girls, too, could expect a variety of domestic science courses and training being made open to them

under this legislation. Curtin's views, as indeed those of most of the members of both Houses of the Parliament, were spelt out in Section 20 of the Act which indicated that endowment moneys were to be applied 'to the maintenance, training and advancement of the child'.⁵³

One interesting sidelight to the passage of the Bill was that the Parliament proceeded with it despite the fact that the Commonwealth had no constitutional power to provide child endowment. Mr Duncan-Hughes, the member for Wakefield, drew the attention of the House to the fact that it was proceeding with a Bill which was probably unconstitutional.⁵⁴ By interjection, Evatt asserted that the matter could not be held up on this probability. When challenged on this statement, the former High Court judge went on to say that he supported the measure regardless of its validity.⁵⁵ His colleague, Maurice Blackburn, also a lawyer, held that the measure was invalid. He contended, however, that the House should not view the Constitution as the sword of Damocles 'which, in terrorem, prevents the Commonwealth from doing anything at all'.⁵⁶ Unfortunately Robert Menzies was overseas at the time and his opinion was not heard. But the government's position was made clear by Holt in his reply. The Minister suggested that if the House was involved in a gamble 'at least we are gambling for a prize which represents the health and educational training of the young people of Australia'.⁵⁷

By means of the Child Endowment legislation the Federal Government intended to make, at least in part, direct grants to parents to help them give their children a longer schooling. There is also evidence that some parents viewed endowment as such a grant. In 1945, when the amount of endowment was increased to 7s. 6d. per week, the Minister for Social Services, E. J. Holloway, informed the House that a departmental survey showed that 25 per cent of the recipients of endowment banked the money for the future educational needs of their children. A similar percentage spent the benefit only on the children, while the remainder added the sum to the family income.⁵⁸ It seemed, therefore, that both Parliament and people viewed child endowment as, in part, an education allowance.

5 Movement towards Constitutional Amendment, 1942-1946

The Curtin Government gave notice on gaining office that it intended to pursue a course of social reconstruction. The Treasurer, J. B. Chifley, indicated in his 1942 budget speech some of the problems associated with his government's plans for post-war reconstruction.¹ He made it clear that the Commonwealth must have the constitutional power to carry out its program to provide social and national security. On 1 October 1942, the Attorney-General, H. V. Evatt, introduced the Constitution Alteration (War Aims and Reconstruction) Bill into the House of Representatives. The Bill proposed that several matters, including health, child welfare and vocational training, should become the responsibility of the Commonwealth Parliament. The government sought 'a broad but specific power to carry into effect the war aims and objects of Australia', including in such aims and objects 'the attainment of economic security and social justice in the post-war world and post-war reconstruction generally'.²

One week after the legislation was introduced, Curtin announced that the matter of constitutional amendment would be referred to a committee comprising federal and state parliamentarians from both government and opposition benches.³ Just two days before the Convention began the Federal Government's position was strengthened in that the High Court declared invalid National Security Regulations 407 and 422.⁴ The Commonwealth representatives were able to go to the Conference with fresh evidence of the way in which the government was hamstrung by the Constitution.

Within a week the Convention had acceded to the Commonwealth's suggestions for constitutional change. Each state agreed to pass enabling legislation handing over the powers sought for the duration of the war and a period of five years thereafter. A confident Evatt was reported as having asserted that constitutional reform was virtually accomplished.⁵ But his confidence was misplaced. Only New South Wales and Queensland passed the necessary legislation. The Tasmanian Upper House simply refused to pass the enabling Act and the remaining states either sought amendments or waited to see what other states decided.⁶ By the time the 1943

general election was held the constitution reform program had ground to a halt.

In his speech at the declaration of the poll for his seat of Barton in September 1943, Evatt gave notice that a referendum to amend the Constitution was in the offing.⁷ In November of that year a Cabinet sub-committee, comprising Evatt, Forde, Calwell and Senator Keane, was appointed to prepare a submission on constitutional alteration for the Cabinet.⁸ Within three months the finished product, the Constitution Alteration (Post-War Reconstruction) Bill, was before the House of Representatives.⁹ Education was not one of the fourteen heads of power contained in the Bill, an omission which according to the political journal *Round Table*, was 'the most obvious'.¹⁰ However, the government intended that paragraph xiii, the Family Allowances power, would provide benefits in the field of education. In reply to Menzies, who maintained that this head of power was vague, Evatt gave some examples of possible allowances. Included among them were child endowment, vocational training and university bursaries.¹¹

The overwhelming 'No' vote in 1944 seemed to close the way to any immediate prospect of the government obtaining the powers it believed necessary for its task.¹² The vote was uniformly negative in the eastern states and in New South Wales, for example, 'No' votes were recorded in eleven of the twenty-one seats held by Labor members of the Federal Parliament. Yet just fifteen months after the referendum defeat, the government was able to make its third attempt at obtaining more constitutional power.

On 19 November 1945, the High Court held that the Federal Government could not appropriate money under s. 81 of the Constitution for the purposes it proposed.¹³ The ruling raised doubts about the constitutional validity of much of the social service legislation enacted to that time, including the 1945 Education Act. The government acted to provide a constitutional base for the suspect laws. In March 1946, Dr Evatt introduced three Constitution Alteration Bills into the House of Representatives. The Cabinet had decided that the three matters, namely, social services, marketing and industrial employment, should be taken as one. Evatt had successfully moved in Caucus that the proposed powers be submitted as three questions to the people.¹⁴ The success of one of the three amendments was seen by Arthur Calwell as a vindication of the Caucus decision.¹⁵

The Pharmaceutical Benefits decision and the legal opinion which had confirmed the government in its view that much of its social service legislation was probably invalid, provided the impetus for the government's action.¹⁶ The marketing and industrial employment matters were the more contentious and occupied most of the time given to the debate in which all three Bills were discussed together. Within the social services amendment, the main discussion revolved around the dental and medical benefits provision. With an alacrity which peeved¹⁷ some of his fellow ministers, Evatt accepted Menzies's proposed amendment and added the provision to protect doctors and dentists from civil conscription. The absolute majority required for proposed constitutional amendments was easily obtained, Archie Cameron being the only dissident. The Senate decision was equally decisive.

The government decided to hold the referendum on the same day as the general elections, a point criticised by the opposition parties.¹⁸ The referendum proposals were, however, almost completely shut out of public debate by the election issues. The *Sydney Morning Herald* described the attention given them as 'perfunctory'.¹⁹ The Labor Party, of course, encouraged a 'Yes' vote on all three matters. The newly-formed Liberal Party decided to allow a free vote.²⁰ Menzies approved only of the Social Service amendment²¹ and this put him to the left of the Country Party²² and the *Sydney Morning Herald*, both of which advocated a total 'No' vote.

The electors returned the Labor Government in 1946 with an overwhelming majority in the Senate, a few less members in the House of Representatives and a new constitutional power — the Social Services amendment, s.51(xxiiiA).²⁴ Included in its benefits was one providing 'benefits to students'. Evatt declared that the object of the amendment was 'to authorize the continuance of acts providing benefits in the nature of social services, and to authorize the Parliament in the future to confer benefits of a similar character'.²⁵ Two benefits which were the subject of existing legislation and were not included in the list of provisions in the amendment were funeral payments and housing subsidies, both of which could be characterised as family allowances. As each provision in pl. xxiiiA corresponded to an existing law, so the 'benefits to students' clause was intended to provide a head of power under which appropriation could be made for the provisions contained in the 1945 Education Act. This point of view was expressed in the House

by Kim Beazley, who affirmed that the inclusion of this provision 'will enable us to perpetuate a system of benefits to students which has democratized the universities'.²⁶ William Riordan and Adair Blain, the members for Kennedy and the Northern Territory respectively, agreed with Beazley and understood the clause to imply benefits to university students.²⁷ A different interpretation was given by Bernard Corser who, although not altogether clear on the meaning of the 'benefits to students' phrase, expected it to provide the basis for future Commonwealth assistance to the states in the general field of education.²⁸ Lance Barnard held a similar view and said that he hoped the power would enable the government to fulfil its commitments to the I.L.O., particularly in its decisions on educational and vocational opportunity.²⁹ Both these members apparently regarded the 'benefits to students' provision as a broad power with respect to education.

Members of the opposition tended to be critical of the wording of the 'benefits to students' phrase. Archie Cameron, for example, said, 'I do not know what the expression means'.³⁰ Menzies remarked that he was uncertain about the scope of the phrase and he criticised the limited approach to the education problem. He went on to say that 'as time passes, the Commonwealth is bound to accept increasing responsibility for education'.³¹ But had not the Labor Government already manoeuvred the Parliament into accepting responsibility by this constitutional amendment?

6 The Intention behind the 'Benefits to Students' Provision

Although the purpose of the 'benefits to students' phrase was not clearly disclosed in the debates on the 1946 Constitution Alteration Bills, two interpretations were suggested. One was that the power provided a valid legal basis for the 1945 Education Act with its provision for university scholarships. The other was that it was a means of providing the Commonwealth Government with a broader power in education. But what was the intention of the government at this time? An answer may be obtained by seeing what was said about education in the Parliament before 1946. Also, since the Parliament was open to the influence of government departments, the states, and pressure groups such as political and education lobbies, an examination of the activities of these groups before 1946 could shed light on the intentions of those who framed the 'benefits to students' phrase.

Cabinet ministers, irrespective of the party in power, tended to maintain a States rights position on education. In 1935, for example, when the government was challenged to do something about the spiralling cost of education, Prime Minister Lyons replied 'education is a matter which comes within the administrative control of the governments of the State'.¹ When the government was asked, in 1936, by Donald Cameron, to become involved in the training of youth for the sake of defence, the answer given was 'education is a State function'.² When war did break out and Commonwealth training schemes began, the Federal Government tried not to disturb the principle of States rights. Senator McLeay put Menzies's position to the Senate. 'The Commonwealth Government', he said, 'cannot accept financial responsibilities for normal educational requirements, which it considers is a matter entirely for the states'.³ Harold Holt, Minister for Labour and National Service, made the same point later that year. He said that, 'Technical training, as such, remains, and is accepted as, the responsibility of the State Governments'.⁴

No radical change in opinion occurred when Labor occupied the Treasury benches. However, there was less rigidity in some pronouncements by ministers. John Dedman, for example, when

replying to a question asked by Arthur Calwell in connection with unrest among university students, said that 'unless the Commonwealth Government considers that it ought to control education, I think State Governments should rectify any anomalies that exist'.⁵

The traditional view was taken by Curtin when challenged by Josiah Francis on the need for improvements in technical education. Curtin asserted that 'education is a matter for State action'. Francis challenged this opinion and Curtin conceded that the Commonwealth should provide adult technical education facilities regardless of existing state systems.⁶ However, as late as July 1946, Senator McKenna declared that the government recognised 'that it has no general powers in regard to education, which is primarily a matter for the States'. Unfortunately he made no comment on whether the 'benefits to students' phrase was intended to alter this constitutional relationship.⁷

In the five years to 1939, little was heard from members on the subject of education. When the matter was raised it was usually in the context of finance. John McEwen, for example, had argued in 1939 that grants to states, made under s. 96, should have no strings attached. He maintained that the best use would be made of the grants system if the Commonwealth took over the non-productive state payments. 'I think it would be better for it' he said, 'to take over, say, the cost of education'.⁸ The more common view expressed in the Parliament was that the Federal Government lacked the financial resources necessary for its involvement in education. For example, Senator Pearce, leader of the government in the Senate, advised his counterpart, Senator Collings, that the government had rejected a proposal, submitted by the Australian Teachers' Federation, that education should be a charge on the Commonwealth as well as the states. Senator Pearce said that 'the Federation was informed that the Commonwealth Government could not see its way to assume financial responsibility for grants for the purpose of education'.⁹

In the course of the debate on the 1939 States Grants (Youth Employment) Bill, opinions were expressed on the role the Commonwealth should be playing in technical education. In denying that the scheme was an invasion of States rights, one opposition member, Maurice Blackburn, noted with approval the action of the Canadian Government which had allocated \$10 million over a ten year period for technical education. 'In that way,' he said, 'the

Federal Government has been able to regulate technical education'.¹⁰ Blackburn thought the Australian Government should follow suit and went on:

The Commonwealth Government in Australia should say that technical education is so much bound up with the future of Australian industry, of which the Commonwealth is chief controller and regulator, that it proposes to make technical education its own responsibility.

Tom Pollard, the Labor member for Ballarat, endorsed the view of his colleague as did James Scully whose argument, however, was based largely on the premise that the states could not finance technical education.¹¹ In the Senate too, the plea for more Commonwealth involvement was made.¹²

In the 1940 budget debate, Frank Baker, the member for Maranoa and formerly a school superintendent in Queensland, called on the government to accept responsibility for the provision of education in Australia. In reply to an interjection from Blain, the member for the Northern Territory, Baker declared, 'My point is that the Commonwealth should take over education entirely from the States'.¹³ In his view this was necessary for the nation's future development. A few days later the Upper House heard Senator Clothier of Western Australia assert that 'every honourable Senator will agree that the Commonwealth should take over the control of public education from the States'.¹⁴

Again in 1941, the Labor opposition demonstrated its concern for education at the school level. Its deputy-Leader, Frank Forde, moved successfully to have the National Fitness Bill amended, to enable schools to receive aid along with the universities and other public institutions mentioned in the Bill.¹⁵ But whereas Forde was content to allow the administration of the scheme to run along co-operative federal-state lines, Baker reaffirmed his stance of the previous year. 'The time has come', he said, 'when the Commonwealth should relieve the States of their responsibilities for education'.¹⁶ Baker, incidentally, was the only representative from the Parliament appointed to the Universities Commission in 1942.

Another consistent agitator for Commonwealth intervention in education was the Labor member for Reid, Charles Morgan. Speaking to the Supply Bill (No. 1) 1941-42, Morgan advocated that the

Commonwealth take over technical education in Australia.¹⁷ He said that if this happened the needs of the nation for skilled tradesmen would be met, adequate facilities for training would be provided, and sufficient finance for technical education made available. Two years later, when expressing his pleasure at the decision to provide university scholarships, Morgan called for a more thorough Commonwealth involvement in education. In the debate on the National Welfare Fund, he advocated federal subsidies for schools and Commonwealth initiation in curriculum reform. In the same debate, another Labor member, Joseph Clark, expressed the opinion that aid to university students should be broadened. He claimed that 'assistance in relation to university education should be placed on the same basis as child endowment'.¹⁸

Although little was heard on the subject of education in the debates of 1944, even when the Constitution Alteration Bill of that year was before the Parliament, it is interesting to note the comments made by John Dedman. As Minister for War Organization of Industry he was the architect of most of Labor's educational proposals in these years. He indicated to the Parliament that post-war reconstruction would involve expansion 'in respect of housing, clothing, food and education'.¹⁹ He expected that controls would have to be exercised in the erection of schools and intimated that the government would need extra powers to fulfil its social program. Although Dedman did not specifically mention education among these powers at this time, one member who did was Max Falstein. He advocated a system of free education from elementary school to the university.²⁰ Falstein based his reasons on the need for standardising the existing state systems.

The consistent Labor emphasis on Commonwealth involvement in education continued in the debates in 1945. Tom Burke told the House of Representatives that education should not be regarded as an individual benefit any more. He asserted that education was a national benefit and required, therefore, the attention of the national Parliament.²¹ In the Senate, Dorothy Tangney said that state systems of education needed to be improved and uniform standards set. She maintained that the Federal Government should be instrumental in effecting these requirements.²²

It is clear that in the decade to 1945 education had become a little less peripheral in the affairs of the national Parliament. Legislation such as the Youth Employment Act, the National Fitness

Act, the Child Endowment Act, and the Regulations under the National Security Act had involved the Commonwealth in decision-making on education. While the non-Labor parties maintained their distance from this 'States responsibility', there was a consistent call from the Labor ranks for federal involvement in, and even control of, education. There were similar calls from outside the Parliament too.

Several Federal Government departments were involved in education in the years from 1942 to 1946. Education programs were carried out among the armed forces, for example. There was no question that the government was competent to undertake such involvement in education under the Defence Power. Doubt did arise, however, when the Department of Labour and National Service, which had been extensively involved in technical education during the war years, was a co-sponsor along with the Departments of Repatriation and Post-War Reconstruction, in the Re-Establishment and Employment Act of 1945. Some parts of the legislation were thought to be invalid.²³ The validity of the Education Act of 1945 was also questioned following the High Court's decision in the Pharmaceutical Benefits Case.²⁴ This Act contained provisions which had, over the previous three years, been undertaken by Regulation under the National Security Act.²⁵

Towards the end of 1942, Dedman set out the government's policy with respect to universities. It intended to regulate admissions in certain key faculties and provide scholarships to enable students to study in those particular subject areas. The government's policy was to be administered by a Universities Commission. 'Our policy' said Dedman, 'is dictated by the demands of war and and the predictable needs of the reconstruction period'.²⁶ But never far away was Dedman's hope 'that we can, in the words of Lord Keynes, snatch from the exigency of war positive social improvements'.²⁷ Dedman's plan was made public just one month after a statement was issued by the Parliament's Committee on Social Security. It had decided that 'education is essentially a social service which should be nationally controlled'.²⁸

Dedman informed the Parliament on 18 February 1943 that a National Security Regulation had been gazetted, which authorised the establishment of a Universities Commission and provided a scholarship scheme for students in certain faculties.²⁹ The Minister said there were three reasons behind this action. In the first place,

universities were encountering financial difficulties since enrolments were considerably lower as a result of the war. One contributing factor was that potential students were more attracted to the conditions being offered in industry. Secondly, 'although education has always been a State function', the Commonwealth had now to intervene. The reason was that the Commonwealth was the greatest user of man-power and had, therefore, to maintain the quantity and quality in the output of men required by it. On the other hand, the Commonwealth had to allocate resources bearing in mind the needs of both war and peace. Thirdly, Dedman asserted that the demands of war had caused a deterioration in the financial resources of the working family, thus making university education even more remote for those with little or no means.

To meet immediate requirements and begin recouping losses, scholarships were awarded to students in the faculties of medicine, dentistry, engineering, science, veterinary science and agriculture. Students in these faculties were to receive financial assistance and the places in them were reserved only for such students.³⁰ In this way Dedman expected to meet the nation's man-power needs and to overcome the financial obstacle which prevented able students of parents in the lower economic bracket from attending university. The Minister also expressed the hope that this measure would be the forerunner of a scheme 'which would ensure that every deserving student shall get his or her chance for higher education even though the parents' means are slender'.³¹

The Universities Commission, headed by Professor R. C. Mills, was given the task of implementing the scheme. Mills had, in fact, set quotas and advised universities of them at the end of 1942, some months before the regulations were gazetted. By the time Parliament heard of the scheme it had already been implemented.

In October 1943, as Chairman of the Production Executive of Cabinet, Dedman announced that the quota scheme would continue.³² Some modifications to the scheme were also announced. Amongst the more important were the provision of reserved places in non-technical faculties, the extension of the scheme to include engineering students at technical schools, and the addition to the scheme of women students engaged in social studies courses at university level.³³

While the scholarship scheme was being established, a separate thrust in educational involvement was being developed by the

Department of Post-War Reconstruction under Ben Chifley. Cabinet had appointed a sub-committee to study this area of concern on 4 August 1942, according to the *Sydney Morning Herald* report on the following day, and the ministerial appointment was made at the end of that year. Early in 1943, Chifley put forward his National Welfare proposal, a scheme which would 'reach its fulfilment after the war'.³⁴ One class of people under consideration in the scheme were repatriated soldiers. In November 1943, following a conference between Chifley and the Vice-Chancellors, the former announced a comprehensive scheme for re-training ex-servicemen.³⁵ As well as technical education university training was included for those requiring professional qualifications. Although the scheme began the following year it reached its maximum enrolments after the war. What is important at this point is that it was just such a move, in conjunction with the fact that Chifley was Treasurer, which prompted Dedman to ask Curtin to set up an inter-departmental committee to look at educational needs.³⁶ In commenting on the work of the Committee, its Chairman, Ronald Walker, said 'our main contribution was to arouse a wider recognition in Federal Government circles that education was of basic importance in relation to various responsibilities of the Commonwealth'. He went on to say, 'we at least helped to combat the traditional view "education is purely a matter for the States"'.³⁷

Dedman reported to the House of Representatives on the progress of the educational involvement in March 1944.³⁸ The Minister noted that 50 per cent of the recipients of bursaries came from families with an income of £300 a year or less. Some 90 per cent of the total were from families whose earnings were less than £500 per annum. On this occasion, Dedman thwarted attempts to have the quota system discussed by refusing to move to have the paper printed.

The future of the scholarship scheme was mentioned by the Minister on the occasion when he spoke at the Melbourne University in support of the 1944 referendum proposals. Asked if the referendum would affect the scheme, Dedman reminded his audience that the regulations which authorised the scheme were National Security Regulations and these would lapse six months after the end of the war. He suggested that the scheme could continue within the framework of the 'family allowance' provision in the proposed alteration of the Constitution. Should the people

decide not to give this power to the Commonwealth, 'there was a doubt — he would not put it any stronger — whether the Federal Parliament could continue those subsidies'.³⁹

Despite the 'No' vote at the 1944 referendum, the Scholarship Scheme continued and was embodied in the 1945 Education Act. Just over two months after that Act was passed, the High Court handed down its decision in the Pharmaceutical Benefits Case. Since the government was appropriating money to pay for its education program and as education was not a power accorded the Commonwealth in the Constitution, the Education Act, along with other Social Service legislation, was constitutionally suspect. The Constitution Alteration (Social Services) Bill was brought down to rectify this situation. As Evatt said, in his second reading speech, 'The object of this Bill is to place Australian social service legislation on a sound legal footing'.⁴⁰ The 'benefits to students' provision was included, therefore, at least to give the Education Act with its scholarship scheme a valid constitutional base.

The Parliament's broader considerations of education in 1945 were launched by the Leader of the Opposition, Robert Menzies, who introduced a motion on notice in the House of Representatives on 26 July 1945, which incorporated the principles affirmed by the Liberal Party at its founding conferences at Albury and Canberra.⁴¹ The motion asked the House to express the opinion that 'a revised and extended educational system is of prime importance in post-war reconstruction'. It was asked to declare that attention should be given to increased facilities for secondary, rural, technical and university training, the requirements of adult education and the problem of the qualifications, status and remuneration of teachers. The proposal sought to affirm the readiness of the Commonwealth to grant financial aid for education if required, and to establish a Commission 'to report upon existing educational facilities in Australia, to make recommendations for their extension and/or amendment, and to recommend how, to what extent, on what terms, and for what purposes, Commonwealth aid should be given'.

Menzies believed that the Commonwealth should take some responsibility for financing public education and asserted, 'there is no constitutional doubt the Commonwealth could make available substantial sums in aid of educational reform and development'. The means by which this could be done were grants under s. 96 of

the Constitution. In 1926, the High Court ruled that the Commonwealth could, under the power contained in s. 96, set conditions on grants made by it to the states.⁴² Menzies knew the case well as he led the challenge to the validity of the Federal Aid Roads Act. Menzies commented: 'I recall . . . I had lumbago very badly and six hostile judges in front of me equally badly, and that I failed completely'.⁴³ However strongly that failure impressed on Menzies the potential of s. 96, he did not seem, in 1945, to be advocating its use for Commonwealth control of education but only for its financial support.

In reply to Menzies, Dedman asserted 'that education is one of the most important subjects which the national Parliament can discuss'.⁴⁴ Dedman took the opportunity to review the government's achievements in the field of education and noted that recurring government expenditure was approaching £1.5 million annually. He announced Cabinet's decision to make up to £1 million available for capital expenditure at universities and £1.3 million for similar work at technical colleges. He noted that education was 'under the constitution, primarily a matter for the States and for certain other bodies'. In announcing the formation of an Office of Education, Dedman indicated that the new establishment would not take over the functions of other Commonwealth departments nor 'any activities in the educational field which are now being undertaken by the State governments'. The government's intention was placed beyond suspicion by the announcement that in order to further co-operation with the states in education, the Commonwealth would seek to join the Australian Education Council, the interstate conference of Ministers of Education.

It is interesting to note that the only matter which caused Dedman concern with respect to the Constitution was the decision by the government to establish a university in Canberra.⁴⁵ Having expressed his doubts on the eligibility of the Commonwealth to confer degrees, Dedman sought and gained from Menzies a promise of help on this constitutional problem. It is surprising that Dedman had difficulty at this point since s. 122 of the Constitution gave the Commonwealth unfettered powers with respect to territories. As Dedman later commented, his real concern was the antagonism to the proposal for a university in Canberra which came from the existing state universities.⁴⁶

All speakers in the debate on Menzies's motion supported the

suggestion that the Federal Government should aid the states in their educational undertakings. Although the motion was defeated on party lines, the Parliament had committed itself verbally to a definite but limited involvement in education.

Just two months later, legislation was passed which authorised the establishment of both an Office of Education along the lines suggested by Dedman in the earlier debate, and a permanent Universities Commission. The Minister declared that these proposals did not imply that 'the Commonwealth should take over the control of education' but that 'it should co-operate with the States in fostering educational development'.⁴⁷

For some members Dedman's proposals did not go far enough. Beazley, for example, expressed the hope, 'that the Government will not forget the need for assistance to those on the lower rungs of the educational ladder', and the confidence 'that the Minister will desire to apply the scheme to the secondary level of education'.⁴⁸ On the other hand, Dedman's bill bred immediate suspicion in some minds. For example, Senator Leckie was not impressed by the assurance given by Senator Ashley that the Office of Education would 'not conflict in any way with existing authorities'. He believed that the legislation conferred 'some power of interference with the operation of the States in the educational field'.⁴⁹

The final decision taken by the Parliament with respect to education before the 1946 referendum resulted in the founding of the Australian National University. The main debate is of little importance to this discussion but some peripheral comments are germane.

Dedman's main problem was to allay suspicions that state universities would suffer as a result of this new development.⁵⁰ Members of Parliament expressed concern that the Commonwealth should involve itself with a university. Abbott asserted that all existing tertiary education institutions deserved federal support.⁵¹ Blain maintained that secondary education should be the area of concern while Chambers expressed the hope that this legislation would be 'a first step towards a national education system'.⁵² In the Senate, Hayes suggested that the money which would be poured into the National University should go to the existing state institutions.⁵³ Senator McLachlan championed the cause of rural education while Senator Tangney was critical of the fact that the Commonwealth had so little control of education which was to her so

obviously a national problem.⁵⁴

The Minister for Social Services, Senator McKenna, wound up the debate in the Senate and in so doing commented on the general constitutional position of the government with respect to education. He said that the National University posed no problem but

the position is entirely different when we come to consider benefits to students, family allowances and other matters which will be included in the forthcoming referendum. The Commonwealth lacks constitutional power to operate in those fields. It has no power to enter the field of education.⁵⁵

McKenna went on to note the exception provided by s. 96. He submitted, however, that the provision was

not a satisfactory way for the Commonwealth to participate in matters affecting the education of the people: it should not have to use its superior financial power to force standards and conditions on others. Accordingly, with the Constitution as it is, plenary powers in respect of education must remain with the States.⁵⁶

This was the last statement on education in Parliament before the 1946 referendum.

It remains to be seen what role political pressure groups might have played in the education policy of the national government. The obviously influential groups are the Premiers' Conferences, and for a Labor Government, the Federal Conference of the party and the Australian Council of Trade Unions. Pressure might also be expected from groups with predominantly education interests such as the Australian Teachers' Federation. The respective roles of these groups will be examined in turn with a concluding observation on the Cabinet opinion itself.

Education played only a minor part in the discussions of the Premiers' Conferences to 1946. In the first decade of Federation the Premiers varied in their approach to Commonwealth involvement in education. In 1906, for example, they agreed that the establishment of a veterinary college was, in the words of George Swinburne, the Victorian Minister for Agriculture, 'not a matter which concerns the Commonwealth, but the States'.⁵⁷ On the

other hand, in 1908, the states were agreed that the medical examination of children in schools should be a combined operation with the Commonwealth.⁵⁸

The states divided evenly on the question of cadets in schools at the Conference in 1907. The cost of running this arm of the Defence Department was borne by the states. The Commonwealth's decision to increase those costs aroused some concern. This conference was told that despite the protest of State Directors of Education, a conference of officers commanding cadets – teachers – was convened by the Defence Department. Captain Evans, Premier of Tasmania, interpreted this action as a Commonwealth invasion of States rights and asked his colleagues at the 1907 meeting to ensure that the Federal Government could not 'go in and take over our state schools'.⁵⁹ However, in 1922, when the Commonwealth proposed to discontinue the cadet scheme, the states protested vehemently and the decision was rescinded.⁶⁰

Between the wars, co-operative ventures in health, and research and training for youth, were undertaken and each of these had some effect on public education. Yet even more direct proposals, such as that of the 1936 Conference to establish an Educational Films Bureau with Commonwealth resources and state administration, were not intended to change the balance of power with respect to education.⁶¹ The balance of power was discussed by the acting Victorian Premier, Robert Menzies, in 1934. After expounding his opinion of the federal system, Menzies went on to note that the cost of education had trebled since Federation. He forecast great developments in technical and higher education. But public education was for Menzies 'a State responsibility, from which it receives no dividends, except in brains and character'.⁶²

A further discussion of education took place at the 1946 Conference. Premier Wise of Western Australia raised the question of the lack of uniformity in pre-school education. 'In Australia', he said, 'no authority Commonwealth or State, accepts responsibility for the education of the pre-school child'.⁶³ In the discussion which followed opposition was expressed to the Lady Gowrie kindergartens. The conclusion reached was that the Commonwealth should provide finance for such schemes and the states should administer them.

Also at the 1946 Conference, Prime Minister Chifley outlined the extent of the Commonwealth Government's involvement in

education. It expected to spend £15 million on education in 1946. 'Yet', he said, 'education is a subject in respect of which the Commonwealth has no Constitutional power'.⁶⁴ Chifley made this statement within one month of the 1946 referendum. That he could say it at this time to this audience without interruption or response is an indication that the Premiers' Conference acted in no way as a pressure group in bringing about the 1946 amendment.

Crisp notes that up to 1943, Federal Conferences of the Australian Labor Party had consistently rejected any move to have education handed over to federal control.⁶⁵ In 1908, for example, although the Conference sought to rescind s. 51 and have all heads of power thrown open to Commonwealth and State Governments alike, it rejected the concept of Commonwealth control of education.⁶⁶ In the unitary proposals of 1919, in which it was proposed that the State Parliaments should be abolished, education was one of the powers delegated to the provinces.⁶⁷ Eleven years later, when Scullin was given approval to seek a constitutional amendment to enable Parliament to alter the Constitution by a simple majority decision, a motion to place education under federal control was defeated.⁶⁸

The 1943 Annual Conference of the Labor Party received a letter from the Australian Teachers' Federation which was referred to its Social Committee. In due course a motion came from that Committee to the Conference. It was proposed 'that Conference urges the Federal Labor Party to press the Federal Government to undertake the financing of education throughout the Commonwealth'.⁶⁹ An amendment was moved to limit the government's responsibility to one of subsidising education. The official report states that the motion was negatived but does not say what happened to the amendment. There was, therefore, no strong pressure for federal control of education from the Conference although the Post-War Reconstruction Committee was successful in having included as an object for the Party: 'Equality of educational and occupational opportunity for all, irrespective of family circumstances and income'.⁷⁰

Two years later, in Melbourne, the Federal Conference received a motion calling for the Premiers' Conference to consider appointing a Royal Commission on education.⁷¹ The work of such a Commission would have as its goal the establishment of uniform standards of education in Australia. The motion was amended by

Kim Beazley to add the words 'and the early extension of Commonwealth financial assistance to the States for educational purposes envisaged under Section 2F of the Commonwealth Education Act'.⁷² Although this move encouraged the government to play a more active role in education, no decision of the Conferences before 1946 gave any direction to the government to take control of education at the national level.

In 1943, the Australian Council of Trade Unions decided that reforms in education were necessary.⁷³ Amongst its proposals was the suggestion that the Federal Government should make an annual appropriation for the purposes of education. States would continue to administer education directly and the Commonwealth would exercise a supervisory role by means of a Board which would be directly responsible to Cabinet.

There is little doubt that these decisions were reached as a result of pressure from the Australian Teachers' Federation as will be seen from the discussion of its activities. Some notice might also have been taken of the decision of the International Labour Organization, on which the Australian body was represented. The demands of the Trade Union movement were, however, of such a nature as to be easily accommodated in the government's proposals for education.

The Australian Teachers' Federation had long been concerned with the responsibility of the Commonwealth Government in education. In 1941, for example, the National Conference of the Federation re-affirmed a 1932 decision which advocated the establishment of a Commonwealth Bureau of Education, and a motion at that meeting urging the Commonwealth to declare education a national issue was defeated on the casting vote of the Chairman.⁷⁴ At the 1943 National Conference the 'federal plan' was agreed upon.⁷⁵

In substance, the Australian Teachers' Federation wanted the direct control of education to remain in state hands. It was opposed to federal control of education. On the other hand, the financing of education was held to be a national responsibility. The plan recognised the inherent right of the Commonwealth to supervise the spending of its own money. One of the tasks of the National Board of Education provided for in the plan was the allocation of federal funds using 'equalising of opportunity' as the appropriate yardstick. Other tasks of the Board included supervision of the states' Departments of Education so as to maintain effective

minimum standards of education, the appointment of advisers to state departments, and the determination of minimum qualifications for teachers.

The Federation publicised its plan on every available occasion. It began by sending letters to the Prime Minister and all members of the 1943 A.C.T.U. Convention asking for a debate on education. Members were told that 'education, national but not necessarily uniform in character, must of necessity be the main factor in the nation's advancement'.⁷⁶

The national decision was taken up at the state level. The Western Australian State School Teachers' Union, for example, wrote an open letter to the Minister for Education, John Tonkin, in 1944, suggesting that with the approaching referendum on the Constitution, the time was ripe for a conference of Ministers of Education to meet and draw up a national scheme of education funded by the Commonwealth.⁷⁷ The following year, the Federation's National Conference was told by its secretary, T. A. Murray, that the nation should adopt 'Federal aid for education' as a slogan.⁷⁸ When the education debate took place in Parliament in July 1945, Menzies and Dedman received telegrams from the Federation requesting Commonwealth funds for all sectors of public education. In 1946, the Federation supported the proposals to amend the Constitution. Just one day before the referendum, the New South Wales Branch of the Federation combined with the state's Parents and Citizens organisation to send a demand to the Prime Minister for a Commonwealth grant to education of £25 million.⁷⁹

The Australian Teachers' Federation aroused interest and support for its proposals. Whether it influenced the politicians to any great extent is an open question. It would have supported the 'benefits to students' provision as a power to finance education in general and not restricted its use merely to continuing assistance to university students. But the Federation stopped short of suggesting that the Commonwealth should take over the control of education.

The Labor organisations and the Teachers' Federation were joined by other groups in the drive for a more definite federal involvement in education. The Australian Education Council expressed disapproval of Commonwealth control of education.⁸⁰ It did, however, look forward to Commonwealth grants for specific educational purposes after the war. The Council had fully supported the Federal Government's scholarship program and

recommended the abolition of all university and technical college fees.

Quite unexpected support for federal involvement came at the Headmasters' Conference which met in January 1943. Two speakers recommended that the dual system of education be abolished and only the state system retained. The Conference adopted a proposal that the Commonwealth appoint a Royal Commission on education to review the present state of the various systems and recommend reforms.⁸¹ In the same year, the Australian Council for Educational Research produced its 'plan for Australia'.⁸² It was proposed in this plan that specific areas of responsibility in education should be allocated to the various governments. The states, for example, would administer primary and secondary education and, later, the Gowrie Centres. Each state would establish an Educational Commission for this purpose. Under the plan, the Commonwealth would be expected to develop its interest in tertiary education and would act as the funding agency for all new work.

There was a degree of unanimity amongst the influence groups that the Federal Government should accept more responsibility in the financing of education but not in its direct control. If the 'benefits to students' clause was the partial result of the influence of these groups it would have to be interpreted both as giving the Commonwealth power to continue its existing work and extending its power to more general financial support for education. But was the government influenced by these groups on this point? Dedman has said that it was not.⁸³ The government was aware of the need to put more money into education, indeed into all aspects of social and national development.

In an address to the Adelaide Trades and Labour Council, reported on 11 December 1943 in the *Sydney Morning Herald*, Dedman outlined the nine objectives of the government's post-war economic policy. Item five was 'equality of educational and occupational opportunity for all irrespective of family circumstances and means'. It should be noted that this speech was delivered prior to the Federal Labor Conference and the Trade Union Conference which were held later that month. Dedman claimed that the influence being brought to bear with regard to the Commonwealth Government's responsibility in education was coming from him and his department and not from pressure groups. He was bringing pressure to bear on others and was not under pressure himself. If

this was so, the intention behind the 'benefits to students' provision was not to be found in the pronouncements of influence groups. The Cabinet room contained the answer.

John Dedman has maintained that when the Cabinet had the proposed amendments to the Constitution under discussion in 1946, Evatt advised those present that the 'benefits to students' provision would give the government a broad constitutional power in education.⁸⁴ The provision was only used up to 1949 to maintain and develop the University Scholarship Scheme. But Dedman noted that the government intended to accept wider responsibility for education after the 1949 election, had it been returned. Chifley had agreed to Dedman's proposal to establish a Department of Science and Education. An officer of the Treasury, H. G. Goodes, had been chosen as the first head of the department and had accepted the appointment. There was no doubt, in Dedman's view, that 'this was a firm proposal, and if we had got back at that election there would have been a department of Science and Education twenty years before it was actually established'.⁸⁵

Dedman did not envisage that the government would establish a system of education in the states. He did expect that a Schools Commission would be established early in the life of the new department. It would have operated along the lines of the Universities Commission and would certainly have provided scholarships for secondary students. Although a scholarship scheme had not been implemented before 1949, the Production Executive of the Cabinet, of which Dedman was chairman, had, in 1944, instructed the Universities Commission to examine the wastage rate at secondary schools. The Commission undertook the study and recommended that the government provide scholarships to enable more students to complete secondary school.⁸⁶ According to Dedman, Chifley did not think the time was right for implementing the recommendations. There was, however, no doubt in Dedman's mind that the 'benefits to students' provision gave the government a broad constitutional power in education and this power would have been utilised after 1949. This contention was supported by the fact that, in the three years to 1949, the Office of Education undertook a research project into the 'Study of Wastage of Ability at Secondary School Level'.⁸⁷

Although the parties exchanged benches after the 1949 election, the new Prime Minister, Robert Menzies, implemented the

Scholarship Scheme which Dedman had outlined to the Parliament in September 1949.⁸⁸ He also appointed a committee, in 1950, under Mills, to look at the financial needs of the universities and associated colleges. As a result of the Committee's recommendations, the Commonwealth Government resolved, in 1951, to make grants to the states to assist in the development of universities and their residential colleges. In introducing the States Grant (Universities) legislation, Menzies asserted that the Bill was 'a new, almost a revolutionary departure for the Commonwealth, which has neither the power nor responsibility, if I may put it that way, in the educational field'.⁸⁹ Evatt intimated that the opposition would not oppose the Bill but commented on the apparent constitutional boldness of the Commonwealth. He said:

I direct attention to one matter that should be taken into account by the Commonwealth in future. Under the 1946 alteration of the Constitution this Parliament has power to provide benefits for students without the intervention of the States. It should be possible at the appropriate time for the Commonwealth to exercise that power and to make grants, not only to university students but also to other students in their march to the universities.⁹⁰

This was the first occasion on which Evatt gave the Parliament his interpretation of the 'benefits to students' provision. On several occasions before he retired from the Parliament in 1959, Evatt commented on this clause.

The 1952 budget provided that educational expenditure to a limit of £50 was a deductible item for taxation purposes. Speaking to this allowance, Evatt called for a more positive approach to education on the part of the government. He claimed that the 1946 amendment enabled the granting of 'benefits to students irrespective of their ages or the educational institutions that they may attend'.⁹¹ He advocated a complete new scheme of bursaries and scholarships for a wide range of students.

When Menzies introduced the 1953 States Grants (Universities) Bill, the Leader of the Opposition again made mention of pl. xxiiiA. Evatt approved of the Bill but asserted that more could be done. He reminded the House of the head of power given the Commonwealth in the Social Services amendment and asserted 'that power is

unrestricted. The Commonwealth is marching into the field of education, in which, for many years the States had the primary responsibility'.⁹² He argued that:

the Commonwealth government cannot say it is powerless in the educational field . . . Under the social services power of the Constitution, we can provide benefits to students, and we are not restricted in connection with either the benefits themselves or the standard required to qualify for them.⁹³

Evatt remained silent on the 'benefits to students' provision for some years after 1953. Francis Stewart, the member for Lang, mentioned Evatt's earlier opinion in the course of the debate on the States Grant (Universities) Bill in 1956. Evatt did not refer to it but emphasised the power contained in s. 96 of the Constitution and attempted 'to end the shibboleth that because the Commonwealth cannot control education directly, it should not go to the assistance of education'.⁹⁴ Evatt conceded that education was not a matter 'directly within Commonwealth power, but we can deal with it by means of Section 96 of the Constitution'. There is no immediate explanation for this change in emphasis except to note that pl. xxiiiA does not give the Commonwealth direct control of education.

In November 1957, Menzies, when presenting the Murray Report to Parliament, stated that, 'it is, of course, true that under Australian Constitutional division of powers between Commonwealth and State, education is in the State field'.⁹⁵ He proceeded to extol the work undertaken by State Departments of Education and assured the Parliament that 'we are not promoting any idea that the legislative power over education should, by a constitutional amendment, be transferred to the Commonwealth'.⁹⁶ He gave reasons why the Commonwealth should, however, participate in the development of tertiary education and outlined the steps he proposed to take in this matter.

Evatt did not oppose Menzies at this point although he wanted financial assistance extended down the educational ladder to primary schools.⁹⁷ Jim Cairns led the main criticism of the government's proposals, charging that the Commonwealth was relinquishing responsibility for education. The member for Yarra did not dispute the claim that education was a state responsibility, and, in

fact, affirmed it. However, he maintained that the Commonwealth had national responsibilities in this area.

It is clear from Cairns's opinion that the 'benefits to students' provision was not viewed in the Labor Party as a broad national power. Gordon Bryant confirmed this assumption in that in introducing an urgency motion 'to provide adequate public educational facilities for the people', he attacked the inadequacies of the Constitution with respect to education.⁹⁸ Menzies was quick to rise to the defence of the Constitution and challenged Bryant's charge that it was dated and should, therefore, be bypassed. Maintaining the authenticity of the Constitution, Menzies went on to assert: 'The fact is that education, except in Commonwealth territories, remains a function of the States'. He digressed from the constitutional point to argue the demerits of a centralised education system but concluded in the vein in which he began. 'Therefore', he said, 'we are dealing with a problem in which the Commonwealth does not have the power over, or responsibility for education in the States or by the States'.⁹⁹

This clear enunciation by Menzies was followed by an equally direct declaration on the part of Evatt on the power contained in the 'benefits to students' provision. Its purpose was to empower the Commonwealth Parliament, in Evatt's words:

to make provision by legislation for benefits to students – in other words, to make educational grants, this Parliament being responsible for them. It is not, therefore, a question of divided legislative power and responsibility; direct power and responsibility reside in this government.¹

He noted that the first use of the power was made by Dedman with his scholarship scheme. Evatt maintained that the power was such as to make Bryant's proposals quite feasible. 'I hope, therefore', said Evatt, 'that we can have an end to the suggestion that there is some constitutional inhibition against the Commonwealth carrying out these proposals'. Menzies interjected, 'that ludicrous argument will not provide an answer, I can assure you'.²

The Menzies-Evatt clash was continued a little over three months later in the Estimates debate.³ Again Evatt maintained that ss. 96 and 51(xxiiiA) gave the Commonwealth adequate power to enter the field of education. He reiterated the point he had made in the

closing stages of this speech in the debate on Bryant's Urgency motion. On that occasion he said:

I have made a point, which I think is unanswerable, that the Commonwealth can act directly, under the new constitutional power given by the Labor Government of Mr Chifley in 1946, in the matter of education. The Commonwealth would be free of restriction.⁴

In the course of the debate on Bryant's motion, Menzies said, by way of interjection and referring to Evatt's interpretation of pl. xxiiiA, 'he did not hold that same view in 1946'.⁵ The weight of the evidence in the debates of the 1950s is that Evatt held the 'benefits to students' provision was a broad head of power. Was Menzies right? Was Evatt expressing a view which he did not hold in 1946? It is possible but unlikely. The Attorney-General was a constitutional lawyer and former judge of the High Court. It does not seem likely that he included the 'benefits to students' provision in 1946 without being aware then of the interpretation which he placed on it in the 1950s. He may have modified his views but it is most probable that he held substantially the same view of the power in 1946 as in 1958, namely, that it was a broad power in the field of education.

The evidence of two of Evatt's contemporaries supports this contention. Mention has already been made of John Dedman's opinion on the origin of the phrase in the amendment. A supporting opinion is given by Arthur Calwell, who was also in the Cabinet in 1946. He recounted the events which led to the inclusion of the 'benefits to students' phrase.

This was written in at a Cabinet meeting by Evatt. It was peculiarly his own and it was a clever piece of draughtsmanship. I remember him saying — writing the words and saying to Chifley, 'Well, benefits to students means everything. Its not limited. A benefit is a benefit and students are students'. There's no limit about it in the matter of benefits, and the question as to who was or wasn't a student was a matter for the Parliament to decide. It could be a kindergarten student or it could be a post-graduate student.⁶

The 'benefits to students' phrase can be said to have provided the Commonwealth Government with a head of power related to education. It was immediately effective in providing a constitutional basis for the 1945 Education Act. It was also intended by some of those framing the provision that it would be a provision which would enable future governments to intervene and assist at all levels of formal education. This intention was not made public in 1946 since it would have aroused antagonism from both the state and private sectors of education. Nor did the government have formal plans at that time for using that provision other than to support existing legislation, although Dedman had future moves in mind.

7 The High Court in the Australian Federation

It has been argued that the three characteristics of a developed federal system are 'the supremacy of the constitution – the distribution among bodies with limited and co-ordinate authority of the different powers of government – the authority of the courts to act as interpreters of the constitution'.¹ Constitutional supremacy is asserted in Article 6 of the American Constitution which states 'this constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land' and goes on to bind judges and states accordingly. Section 5 of the Act constituting the Australian Federation states, 'this Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on . . .' and thereafter lists those so bound. In both cases, Dicey's point is maintained. The Constitution in these Federations is the supreme law.

In comparing Federalism with Parliamentary Sovereignty,² Dicey has asserted that 'Federalism means legalism – the predominance of the judiciary in the constitution'.³ A judicial authority is required, therefore, to maintain a federation and the constitution on which it is based. In Australia this task falls to the High Court under Chapter III of the Constitution. The Supreme Court is the comparable body in the United States under Article III of that Constitution. In both cases the Courts have the task of protecting the supremacy of the Constitution and 'to act as the interpreter of a scheme of distribution of powers'.⁴

The role of the judiciary in a federation was expounded by Alexander Hamilton in several of his papers in 1788. He maintained that a federal system required three departments of power, namely, an executive which rewarded and punished, a legislature which taxed and regulated, and a judiciary which 'has no influence over either the sword or the purse'.⁵ Although the judicial power was the weakest of the three, since it relied on the other two both for the enforcement of its decisions and economic survival, Hamilton asserted its prime importance in Montesquieu's words, 'there is no liberty if the power judging be not separated from the legislative and executive powers'.⁶ The noted American constitutional

exponent, James Bryce, writing one hundred years later said that 'the Fathers of the Constitution were extremely anxious to secure the independence of their judiciary, regarding it as a bulwark both for the people and for the States against aggressiveness of either Congress or the President'.⁷

The High Court of Australia was established by the Judiciary Act which received Royal Assent on 25 August 1903. The requirement of s. 71 of the Constitution was met and three judges were appointed, namely, Sir Samuel Griffith C.J., Barton and O'Connor JJ.⁸ The Chief Justice had acted as leader in the 1891 Federal Convention and Edmund Barton had filled that role in 1897 and 1898. R. E. O'Connor had participated in the later Conventions and served under Barton at that time and later as first leader of the Senate. The first Court comprised, therefore, members well versed in the Constitution and the background to its formulation.

The Judiciary Act not only set up the Court but provided for its continued operation as its thirty amendments to 1969 suggest. By it, tenure of office was secured and adequate maintenance provided.⁹ Part II, section 5 of the Act went beyond the requirements of the Constitution and set as a basic qualification for membership of the Court not less than five years' standing as a practising barrister or solicitor of the High Court or a state Supreme Court. Parts III and IV of the Act delineated the general and particular areas of jurisdiction of the Court.

It is interesting to note that the interpretation and application of the Constitution have played only a small part in the High Court's work. On a count made by Sawyer, covering the years from its inception to 1965, the Court heard some 4,000 cases of which only 650 involved aspects of constitutional interpretation. Of this latter number some 500 decisions were made covering the validity of laws.¹⁰ In 200 instances the Court gave a unanimous opinion and in 50 cases the majority was one. Of the 340 cases in which the validity of Commonwealth laws was in question, 100 were successful. These figures give some idea of the place of constitutional interpretation in the life of the Court.

In its interpretation of constitutional questions, the High Court has passed through three stages from 1903 to 1964.¹¹ In the first period the intentions of the Conventions were uppermost in the deliberations of Griffith, Barton and O'Connor although, in a 'regrettable decision',¹² it was decided that no resort could be had

to the Convention debates and the opinions expressed in deciding the provisions of the Constitution. The second phase of interpretation was strongly influenced by the Engineers' Case in 1920.¹³ Federal powers were given 'full range and reach, without any assumptions about "reserved" state powers'.¹⁴ The third phase counteracted the second and has been described as a 'balancing' stage.¹⁵ A prominent figure on the Bench at this time was Sir Owen Dixon, who emphasised the rights of all the governments in the Federation. A fourth stage in the history of interpretation of the High Court can be dated from the time of the appointment of the present Chief Justice, Sir Garfield Barwick. Since his appointment the Court has given a reasonably broad meaning to the words of the Constitution in question without being 'in any way deterred or influenced by the fact that by giving it that broad meaning it will be inferentially cutting down the scope of state activity'.¹⁶

The Court has endeavoured to ensure that its role was not confused with that of the legislature. Rich J., in *Australian National Airways Pty Ltd v. The Commonwealth* ((1946) 71 C.L.R. 29 at p.70) asserted that

this Court is not in the smallest degree concerned to consider whether such a project is politically, economically and socially desirable or undesirable. It is concerned only with the question whether it is within the constitutional powers of the Commonwealth Parliament to pass an Act . . . and if so whether that Act is, in whole or in part, a valid exercise of power.¹⁷

This political aloofness has been possible since appointments to the Bench have been made on the basis of legal and not political ability. It has been suggested that some nominations, such as those of Evatt and McTiernan in 1930, were politically motivated, and that the resignations of Rich and Starke were delayed to prevent replacements being decided on by a Labor Government.¹⁸

Although the composition of the Court has not been determined on the basis of the political views of its members, and despite the assertion made by Rich in the *Airlines Case*, the High Court has had a significant role to play in Australian political life. The Constitution is a politico-legal document and, while the Court continues to determine the validity of laws based on that instrument, it will, *a priori*, be shaping the nation's federal future.

Education is generally regarded as the political responsibility of the state governments in Australia. In practice it has been and still is despite more involvement by the Commonwealth Government. It is, therefore, understandable that the refrain 'education is a states right' is popularly accepted. However, in the Australian Federation it is the High Court which determines whether political practice is in accord with the Constitution, when it is required to do so. Although the Court has never been asked to determine specifically the question as to whether education is a States right its deliberations on the matter of reserved state powers suggest how it might determine the education question should it be raised.

'Federalism . . . predicates a distribution of governmental powers between the Federal State on the one hand and the constituent States on the other . . .'.¹⁹ In the Australian Constitution, ss. 51 and 52 contain lists of powers accorded the Commonwealth Government. The responsibilities and rights of state governments are spread over several sections. In ss. 9, 12 and 15, for example, the role of the states in the election of Senators is stated. The entitlement of the states to compensation for property resumed by the Commonwealth is set out in s. 85. By the provisions contained in s. 91 and s. 113, the states have rights with respect to the provision of mining bounties in the former instance and the control of trade in intoxicating liquor in the latter. Western Australia was the only state singled out for particular consideration in the Constitution. It was empowered to impose customs duties for a limited time and under certain conditions. The rights of states — and individuals — to use 'waters of rivers' for the purposes of conservation or irrigation were preserved by s. 100, while under s. 120 the states were required to provide prisons for the Commonwealth criminals.

The main group of sections dealing with States rights are ss. 106 to 109. The Constitutions of the states are maintained, 'but subject to this Constitution' in s. 106. The last of the group, s. 109, deals with inconsistency as between state and Commonwealth laws and asserts the primacy of the latter when inconsistency exists. Section 108 maintains the validity of state laws made with respect to matters which have come under Commonwealth control, until that government makes appropriate laws. Once this has happened s. 109 would be operative.

The doctrine of reserved state powers originated with s. 107.

Dicey, for example, regarded this section as the Australian equivalent to the Tenth Amendment in the Constitution of the U.S.A.²⁰ That amendment affirmed that 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively and to the people'. This was the kind of construction put on s. 107 by the first judges in the High Court of Australia and it dominated the balance of power in the Federation for the first twenty years of its life.

The High Court's determination to maintain a federal system weighted in favour of the states was evident in the earliest decided constitutional cases. One of these, *Peterswald v. Bartley* ((1904) 1 C.L.R. 497) was concerned with the validity of the Commonwealth's Beer Excise Act of 1901. Bartley, who had a liquor business, held the licence required under this Act. He was charged, however, by Peterswald, a New South Wales District Licensing Inspector, with failing to hold the licence required by the State Liquor Act of 1898. The magistrate who heard the case upheld the defendant's plea that, under the provision of s. 90 of the Commonwealth Constitution, the state had no valid power in this field. The Inspector appealed to the State Supreme Court and on having his appeal rejected sought redress in the High Court. In this he was successful and the High Court reversed the decision of the lower court.

In handing down the Court's decision, Griffith C.J., said, 'In construing a constitution like this it is necessary to have regard to its general provision as well as to particular sections and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States and conferred upon the Commonwealth'. The conclusion drawn, on the basis of this principle, was that the Constitution did not allow the Commonwealth to interfere 'with the private or internal affairs of the States . . .'.²¹

The majority opinion in *R. v. Barger* ((1908) 6 C.L.R. 41) asserted that the Australian Constitution, like its American counterpart, reserved 'to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred on the Commonwealth'.²² In declaring that the 'Act relating to Duties of Excise' was invalid, it was held that even if the taxation power could be held to affect the internal management of the state, 'its meaning in the Constitution is limited by the implied prohibition

against direct interference with matters reserved exclusively to the States'.²³

By 1908, the High Court had been enlarged to five, with Isaac Isaacs and Henry Bourne Higgins the new judges. They were the dissenting opinion in Barger's Case. Isaacs referred to the claim that by an implied prohibition Commonwealth powers can not affect reserved state powers and asked, 'on what words in the instrument is such a construction based?'. In his opinion:

the powers of the State Parliament referred to in s. 107 cannot be greater than those comprised in the State Constitution and which is 'subject to the Federal Constitution'. We search in vain for any declaration that the grant of power is subject to the powers reserved, for that would be either meaningless or would nullify the grant.²⁴

In Isaacs's view, Commonwealth powers were not restricted by reserved state powers.

The Court divided in *New South Wales v. The Brewery Employees Union* ((1908) 6 C.L.R. 469) as it had in Barger's Case, the majority holding invalid the Commonwealth's Trade Mark Act of 1908. Griffith declared that s. 51(i) did not include the phrase 'within the states'. Section 107, therefore, operated to exclude the Commonwealth from this field and did 'as fully and effectively as if Sec. 51 (1) had contained negative words prohibiting the exercise of such powers by the Commonwealth Parliament . . .'.²⁵ This comment serves to emphasise the dominant position accorded s. 107 in the interpretation of the first Court.

In the *Engineers' Case* in 1920 the Court was confronted with the constitutional question, 'Has the Parliament of the Commonwealth power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State?'²⁶. Robert Menzies appeared for the Australian Society of Engineers and left an indelible mark in his first case before the High Court. He submitted that the Commonwealth Parliament had the power in question and suggested that the Court review the decisions of its predecessors with respect to the doctrines formerly established including that of implied reserved state power as has been outlined above. One of Menzies's opponents on this occasion was Herbert

Vere Evatt who assisted counsel for the Government of New South Wales which was given leave to intervene.

The Court held, in a majority decision, that the Commonwealth had the power to make laws under s. 51(xxxv), which were binding on the states. In delivering the majority opinion, Isaacs gave notice that the earlier doctrines had been severely modified. American authorities, for example, were held as being 'not a secure basis on which to build fundamentally with respect to our own Constitution'.²⁷ This was an important assertion in view of the tendency to read s. 107 as if it were synonymous with the Tenth Amendment.

The decision in the *Engineers' Case* modified the early attitude to reserved state powers. In advancing the principle that a natural reading of the Constitution should form the basis of its interpretation, the Court disapproved the doctrine of implied prohibition. It asserted that Commonwealth powers were plenary in those areas in which it had power. The limiting factor in the exercise of those powers was that they were subject to the Constitution. The *Engineers' Case* affirmed that there were powers reserved to the states by s. 107, but that such powers were subject to the limitations of both s. 106, which declared that the Constitutions are 'subject to this constitution', and of s. 109.

Following a collision between S.S. *Kiama* and Commonwealth Launch 322, the Commonwealth sued the State of New South Wales for £1,000 for damages incurred to the launch.²⁸ The New South Wales Government claimed that the High Court had no jurisdiction to hear the matter. This submission was based on the opinion that New South Wales was a sovereign state, that is to say, it existed towards the Commonwealth as one foreign country to another. In rejecting the claim, Isaacs, Rich and Starke JJ., in a joint opinion, maintained that 'the appellation "sovereign state" as applied to the constructions of the Commonwealth Constitution is entirely out of place and worse than unmeaning'.²⁹ A similar plea was heard from the same state in its action to have the Finance Agreements Act of 1932 declared invalid. On that occasion in *New South Wales v. Commonwealth* ((1932) 46 C.L.R. at p. 184) Starke J. said 'the States are not sovereign powers . . . By the Constitution a restriction is placed upon their supposed sovereign rights by the grant to the Federal power of the right and power to legislate with respect to various matters'.

If it was held that the Commonwealth had no power over

education, however, would education be a States right? As early as 1927, Sir Robert Garran asserted that 'there is no such thing as a reserve subject-matter of legislative power reserved to the States'. He noted the power given the states under s. 113 and s. 107. He went on: 'We cannot say that merely because a subject-matter has not been given to the Commonwealth that subject-matter has been reserved to the States'.³⁰ Members of the High Court have expressed similar opinions.

In *South Australia v. Commonwealth* ((1942) 65 C.L.R. 373) the plaintiff state submitted that ss. 106 and 107 reserved powers to the states and that the four Tax Acts infringed those powers.³¹ The Chief Justice, Sir John Latham, said, 'these sections, however, do not confer any power upon a State or a State Parliament'. He went on to say that some powers had been preserved for the states subject to certain conditions. But ss. 106 and 107 'cannot be relied upon to limit either by express or implied prohibition any provision conferring powers upon the Commonwealth'.³²

Latham went on, however, to elaborate on the possible breadth of Commonwealth power and the consequent limitation on these sections which were thought to reserve powers. He pointed out that the Commonwealth Parliament had no power 'to make laws with respect to the capacity and functions of a State Parliament'.³³ But the reason for its limitations was not contained in any 'express or implied prohibition'. The reason was simply that the Commonwealth has not been given such a power. The Chief Justice did not draw the obvious conclusion, namely, that this power could be given to the Commonwealth by amendment to the Constitution. Once given the power would be plenary. In short 'the Commonwealth Constitution does not confer any exclusive power upon the States'.³⁴

In *City of Melbourne v. Commonwealth* ((1947) 74 C.L.R. 31 at p.63) Dixon J. noted that 'the attempt to read Sec.107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic'.³⁵ He dissented from the majority decision in *Uther v. Federal Commissioner for Taxation* ((1947) 74 C.L.R. 508) which affirmed that state legislation could restrict the Commonwealth in the exercise of its constitutional power. He maintained that the State Companies Act 1936 was 'diminished and controlled by the Commonwealth Constitution'. He went on:

It is of course a fallacy, in considering what a State may or may not do under this deferred residuary power, to reason from some general conception of the subjects which fall within it as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or occurs in so many and such varied applications.³⁶

The substance of Latham's 1942 dicta as well as his own opinion in *Uther's Case*, was reaffirmed by the then Chief Justice Dixon in the *Commonwealth v. Cigamic Pty Ltd* ((1962) 108 C.L.R. 372). In this case the Court departed from its decision in *Uther's Case* and denied the right of the New South Wales Government to subject payment of debits due to the Commonwealth to its own determined order of priority. In the course of giving the majority judgment the Chief Justice noted that the powers of the states were not specified in the Constitution. He went on to recall his position in *Uther's Case* in which he said that the states' powers comprise 'the undefined residue of legislative power which remains after full effect is given to the provisions of the Constitution establishing the Commonwealth and arming it with the authority of a central government of enumerated powers'.³⁷

A similar line of argument was followed by the Chief Justice of the High Court in 1971. Sir Garfield Barwick said:

Section 107 of the Constitution so far from reserving anything to the States leaves them the then residue of power after full effect is given to the powers granted to the Commonwealth: and then subject to S.109. . . It can thus be seen that the earlier doctrine virtually reversed the Constitution. The question in relation to the validity of a Commonwealth Act is whether it fairly falls within the scope of the subject matter granted to the Commonwealth by the Constitution. That subject matter will be determined by construing the words of the Constitution by which legislative power is given to the Commonwealth irrespective of what effect the construction may have upon the residue of power which the States may enjoy.³⁸

In view of these assertions in the High Court it seems inappropriate to talk about education as a reserved state power or a state right whether there is a power accorded the Commonwealth with

respect to education or not. If the Commonwealth had such a power that would be plenary although 'subject to the constitution'. With a concurrent power the Commonwealth is given supremacy under s. 109 where inconsistency occurs. The 'benefits to students' provision is one power which is related to formal education as practised in the states. The exercise of power under that provision could lead to Commonwealth participation in education as in the establishment of the Schools Commission in 1973. It can be assumed that the High Court would not revert to a pre-1920 position and allow any weight to the claim that education was reserved to the states. The only appropriate challenge to a Commonwealth law on education would be one testing its validity as an exercise of 'the provision of . . . benefits to students'.

8 High Court Cases Having a Bearing on Commonwealth Activities in Education

High Court judgments have been given which may have some bearing on Commonwealth activities in education. One of these cases is in the industrial area and required definition as to whether teaching was an industry or not. Other cases not directly related to education are concerned with the Commonwealth's external affairs power, the grants power and the defence power. These will be dealt with in turn.

In 1929 the Federated State School Teachers' Association of Australia sought to have a dispute with the Victorian and Tasmanian Governments declared an industrial dispute under the jurisdiction of a federal court. The matters in dispute concerned 'definition, salaries, appeals, holidays, sizes of schools, sick leave . . .', in fact the whole range of teacher employment.¹ The two states, as respondents, claimed that there was no industrial dispute within the meaning either of the Conciliation and Arbitration Act 1904-1928 or of s. 51(xxxv) of the Constitution.

The respondent's submission was upheld by Knox C.J., Gavan Duffy, Rich and Starke JJ. (Isaacs J. dissenting). The Court held that teaching was not an industry and, therefore, the matter in question was not an industrial dispute. Isaacs put an opposing point of view in his long dissenting judgement. He claimed that 'education so provided constitutes in itself an independent industrial operation as a service rendered to the community'.²

A quite different issue came before the Court in 1936. As defence on a charge of flying without a licence, Henry Henry claimed that the Commonwealth had no power to deal with intra state aviation operations. He was convicted and fined in a magistrate's court and appealed to the High Court.³ The regulation under which he was charged resulted from Australia's participation in the Paris Convention on Aerial Navigation held in 1919. Not all the states had passed legislation according the Commonwealth power to deal with aviation. The government had proceeded however, on the basis of the External Affairs power, s. 51(xxix).

The Court allowed Henry's appeal and quashed the conviction. But it did so only because the regulations under which he was

prosecuted were not directly implementing Convention decisions. The Court did affirm the right of the Commonwealth to make laws which gave effect to international agreements to which Australia had been a signatory. The judges varied somewhat, however, in their views as to what might be the subject of an international agreement. Latham held that it was 'impossible to say *a priori* that any subject matter is necessarily such that it could never be dealt with by international agreement'.⁴ Dixon J. maintained a more limited approach in holding that the decisions of any convention held with any country would not automatically come under this power.

Evatt and McTiernan JJ. held, with the other judges, that the legislation must only implement existing agreements and not give rise to general rules. However, they gave the term 'agreements' a very broad interpretation. The Federal Government had power, they said, subject to the Constitution, 'to execute within the Commonwealth treaties, and conventions entered into with foreign powers'. They went on:

the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.⁵

It was clear that the decision in the Burgess Case allowed the Commonwealth to legislate in areas in which it would only have acted invalidly without this power. Might education have been legislated for at least to the extent that the International Labour Organization made decisions on the subject? Note has already been made of suggestions along these lines in the Parliament, but the idea was not thoroughly canvassed. Nevertheless, the power was there. Evatt affirmed in 1939 that the Commonwealth as signatory to a Convention had the power 'to enforce the Convention throughout the Commonwealth'.⁶ In 1939 the Burgess decision was reiterated in a case in which Henry again was the delinquent citizen.⁷ But on this occasion the High Court upheld his conviction for low-flying even though the wording of the Commonwealth Act was not completely identical with that of the Paris Convention.

In disagreeing with the High Court decision in the Burgess Case, Menzies has acknowledged that the external affairs power was a broad one. Commenting on the Evatt-McTiernan judgment, however, Menzies wrote in 1967, 'the idea that the Commonwealth should apply this power over external affairs to "recommendations" or "requests" fills me with apprehension and almost horror about the future demarcation of powers'.⁸ Yet he would almost certainly have been aware of the brake put upon the broad interpretation by Sir Garfield Barwick in *Airlines of New South Wales v. State of N.S.W. and Commissioner for Motor Transport (No.2)* ((1964-1965) 113 C.L.R. 54). Having outlined some features necessary for a treaty or convention to come within the scope of this power, the Chief Justice went on:

I wish to be understood as indicating that in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament. What treaties, conventions, or other international documents can attract the power given by s.51 (xxix) can best be worked out as occasion arises.⁹

Federal governments have been signatories to agreements on education as part of Australia's membership of the International Labour Organization and the United Nations Educational Scientific and Cultural Organisation. None has attempted to force those agreements on the states. There has, therefore, been no action compelling the High Court to decide whether agreements on education could attract the External Affairs power.

Robert Menzies suffered a defeat before the High Court in *Victoria v. Commonwealth* ((1926) 38 C.L.R. 399). The Court held unanimously that the Federal Aid Roads Act was a valid exercise of constitutional power under s. 96 of the Constitution. It held that the law was 'plainly warranted by the provisions of Sec. 96 of the Constitution and not affected by those of Sec. 99 or any other provisions of the Constitution'.¹⁰

This opinion was restated by the Court in the Moran Case, thirteen years later. In his judgment, Latham asserted, 'Parliament has the fullest power of fixing the terms and conditions of any grants made under this section'.¹¹ It was also held that s. 96 was

not affected by s. 99 and could be used to adjust inequalities. That view was not entirely shared by the Privy Council which sustained the judgment of the High Court. Their Lordships did 'not take the view that the Commonwealth Parliament can exercise its powers under Sec. 96 with a complete disregard of the prohibition contained in Sec. 51 (ii) or so as altogether to nullify that constitutional safeguard'.¹²

The scope of s. 96 had long been realised as being very broad. During the Royal Commission 1927-1929, Counsel assisting the Commission, H. S. Nicholas, affirmed that the grants power gave the Commonwealth 'a very wide authority to interfere in the internal management of the States, in conditions which appear to be left with the States'.¹³ At that same time Sir Robert Garran, the Solicitor-General, noted that the Commonwealth had power under this section until it decided otherwise.¹⁴ No better example of the breadth of the power is given than that by Latham in his judgment in the First Uniform Tax Case. The Chief Justice maintained that by its use of s. 96 the Commonwealth could control all state powers and end their political independence.¹⁵ He noted that the people could prevent this at the polls but not in the courts of law.

Section 96 has been the head of power under which grants have been made to the states for educational purposes. Menzies had given notice of the use of this power in the education debate of 1945. On that occasion he expressed the opinion that 'there is no constitutional doubt, the Commonwealth could make available substantial sums in aid of educational reform and development'.¹⁶ It is clear that s. 96 operates to enable the Federal Government to aid states with their educational programs. It is also apparent that, by imposing conditions as allowed by this section, state policy on education could be influenced by the Federal Government.

Guidelines for the interpretation of the Defence Power were given in *Farey v. Burvett* ((1916) 21 C.L.R. 433).¹⁷ In the course of his judgment, the Chief Justice, Sir Samuel Griffith, noted that a Commonwealth law with respect to hoarding food would not be regarded as a valid exercise of the Defence Power in time of peace, but could be so in time of war. The question was whether 'the provision of the Regulation *can* conduce to the more effectual prosecution of the War'.¹⁸ The Court held that the regulations could be interpreted in this way in this instance.

A second case involving a breach of regulations by a baker gave

rise to an important dictum from Dixon on the Defence Power. In *Stenhouse v. Coleman* ((1945) 69 C.L.R. 457) Dixon stated that the Defence Power 'involves the notion of purpose or object'.¹⁹ He went on to say that defence or war must be seen to be the purpose to which the legislation was addressed. In this way, pl. vi of s. 51 was to be interpreted differently from the other heads of power enumerated in that section.

In the course of World War II many regulations concerning defence were gazetted. Some of these involved control of admissions to universities. It is proposed to review the one case in which the validity of defence regulations affecting education was challenged in the High Court, namely, *R. v. University of Sydney, Ex parte Drummond* ((1943) 67 C.L.R. 95).²⁰

'Let a writ of mandamus issue commanding the University of Sydney that it do allow the prosecutor John McPherson Drummond to matriculate at the University. No order as to costs.' This order marked the end to the only case to come before the High Court in which dicta on the constitutional responsibility for education are found. John Drummond had been refused admittance first to the faculty of medicine and subsequently to dentistry, by the authorities of the University of Sydney for the 1943 academic year. The refusal resulted from the quota restrictions imposed by the Universities Commission under National Security Regulation 28 of 1943. Drummond obtained from Sir John Latham, the Chief Justice, an order *nisi* for a writ of mandamus returnable to the Full Court of the High Court. The case came before the Court on 4 May 1943 and its decision was handed down on 11 June of that year.

Drummond, now a doctor in private practice in Rydalmere, a western suburb of Sydney, acted through his father, John Hugh Drummond. What the son recollected most vividly about the case was his father's obstinacy.²¹ The younger Drummond had only one concern when he finished school, namely, which of the armed services he should join. He was a party to the action to the extent that he wanted to reserve a place at the university so that he could take up medicine when the war was over. The older Drummond, however, was determined to fight the case to the end. Although he seemingly won, the result was inconclusive, as will be shown. The decision, however, had little bearing on his son's future. Drummond entered the university under the Post-War Reconstruction Training Scheme in 1946.

The first statutory instruction, Statutory Rule No.36 of 1942, controlling the number of students in university courses was issued by E. J. Ward, Minister for Labour and National Service on 2 February 1942. John Dedman had announced the government's policy a few days earlier and it was he who became responsible for the scheme.²² On 29 October 1942, the Production Executive of Cabinet adopted a proposal which originated in the Department of War Organisation of Industry and had been approved by an inter-departmental committee. The main features of the proposal were that admissions in certain courses at universities would be regulated, that all students who were selected would be given a scholarship and that a Universities Commission would be established to administer the scheme.²³

The Commission was established under Professor R. C. Mills, who had, by the end of 1942, implemented the quota system and advised universities of the number permitted to enrol in 1943. Although working under the aegis of the Department of War Organisation of Industry, there was no legal backing for the directions Mills had issued. On 3 February 1943, Statutory Rule No. 28 was gazetted. It repealed the Regulation issued by Ward in 1942 and provided for the duration of the war:

for financial assistance to students at Universities and the supervision and control of their enrolment and studies, for the purpose of conserving, organizing and directing man-power and woman-power in the best possible way to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community, and these Regulations shall be administered and construed accordingly.²⁴

The operation of the regulations was simple. The Commission recommended the number of students for each faculty to the Director-General of Man Power, Wallace Wurth. He confirmed the figure and the Commission advised the universities of the number of students for the various faculties and the methods of their selection. Students not selected were not admitted to the university.

Three students who were refused enrolment by the University of Sydney sought redress from the Courts. The first to do so was Robert Bruce King who had matriculated from Broken Hill High School. Since he was rated 164th amongst the applicants for the

Science Faculty, and only 160 were to be admitted, his enrolment was refused. He was offered a place at the University College at Armidale but his scholarship was limited to Sydney. King applied to the Supreme Court of New South Wales for a writ of mandamus directing the university to enrol him. Jordan C.J., Davidson and Halse Rogers JJ. were on the Bench.²⁵

Teece K.C. and Sugerman appeared for the university and submitted, *inter alia*, that matriculation did not act as an entitlement to enrolment. They questioned the competency of the Supreme Court to hear the matter, claiming that the Governor of New South Wales, as Visitor to the University, was the appropriate tribunal. Smyth, counsel for King, refuted these submissions, whilst Maughan, who appeared for the Commonwealth, claimed that the regulations were valid but that the question was outside the jurisdiction of the Supreme Court, since it was an 'inter se' matter.²⁶

The Court took notice of this submission and held, Davidson J. dissenting, that the question of mandamus depended on a determination as to whether the regulations were valid. Since that was a question which only the High Court was competent to decide, the matter was removed to that jurisdiction. The Chief Justice of New South Wales indicated that the opinions of the State Court on the matter were not important, but that were the matter to be determined independently of the regulations, 'I should be of the opinion that the mandamus should be granted'.²⁷ The other judges supported the contention that the university should be directed to enrol King. They also held that the Visitor to the University was not an appropriate authority to decide the matter.

A second Broken Hill High School matriculant, Laurence Douglas George Christie, made application to be enrolled in the Engineering Faculty of Sydney University. Like King, he, too, was rejected. Christie obtained an order *nisi* for a writ of mandamus directing Sydney University to enrol him from the Chief Justice of the High Court, Sir John Latham. On 29 April 1943, his case, and that of King, came before the High Court. On being informed that the university had allotted places to both plaintiffs as vacancies had occurred, the cases were discharged with King's being returned to the Supreme Court of New South Wales for an order as to costs.²⁸

Drummond had properly matriculated at the University of Sydney and was entitled to be admitted. This claim was made by

Dr Louat who appeared for Drummond. Louat argued further that Regulation 16, in Statutory Rule 28 of 1943, exceeded the powers contained in the National Security Act under which the regulations were issued.²⁹ Counsel claimed that the regulations could not be characterised as a proper exercise of the Defence Power. They were, he said, 'a restriction on education'.³⁰

Counsel for the university did not participate in the argument and it was left to Maughan, who appeared for the Commonwealth, to argue that the regulations were valid. He submitted that the regulations were not aimed at individuals but at the work required of the university. He claimed the right of the Commonwealth under the Defence Power to organise educational resources for the war effort. Maughan denied that the regulations attempted to interfere with the states' education systems.

It was held by Rich, Starke and Williams JJ. (Latham C.J. and McTiernan J. dissenting) that Regulation 16 was invalid. The Court did not decide whether the issue of the mandamus required the university to admit a student to a certain faculty. In the course of giving judgment, four of the five members on the Bench had something to say on the constitutional responsibility for education. Only McTiernan, who held the regulation valid, made no comment on this matter.

The Chief Justice, Sir John Latham, after reviewing the arguments in the case, said, 'The Commonwealth Parliament has no power to legislate with respect to the subject of education as such'.³¹ But he went on to hold the regulations valid because they bore 'a direct relation to man-power organization which in turn helps the fighting services and auxiliary civilian services'.³² The Chief Justice said he would need to hear more argument on the question of matriculation and enrolment before coming to a decision on that issue.

Rich J. noted the importance of Regulation 15 of the Regulations.³³ He affirmed that that section was 'wide enough to empower the relevant authority to control education throughout Australia from the creche to the university'.³⁴ He agreed with the Chief Justice that the Federal Parliament had no head of power which gave it authority to legislate with respect to education, but held that Regulation 16 was an attempt to use the defence power for such ends. He declared the regulation invalid and gave no opinion on the mandamus issue since it had not been argued.

'The Commonwealth, it must be remembered, has no power to

make laws with respect to education'.³⁵ This was Starke's opinion and it led him to conclude that if the regulations were to be held valid, authority to legislate with respect to education would have to be found in the Defence Power. No such power existed. It followed, therefore, that as the Commonwealth was seeking 'to control education in the universities of Australia, which is wholly beyond its power' the regulation, not being framed in connection with defence, was invalid.³⁶ Starke also left the mandamus question open.

Williams J. also noted that the Commonwealth had no power to legislate with respect to education which by the operation of ss. 106 and 107 was reserved to the states. Turning to the Defence Power, Williams found it was a power which enabled the Commonwealth to conscript teachers and students. But the national government seemed to him to be trying to do much more than that. He held Regulation 16 invalid on the grounds that,

The Commonwealth Parliament is not entitled . . . under the defence power even in time of war to assume complete control of the systems of education operating in the States either in the universities or in the schools, or to prescribe what subjects shall be taught in the universities or in the schools, and what examinations shall be held to qualify for matriculation in the universities.³⁷

On the mandamus matter, Williams agreed with the opinion expressed by the Supreme Court of New South Wales.

After his case was decided Drummond was advised by the Deputy Registrar of the University that he would be allowed to enrol in the faculty of medicine if he produced a written authority for such action from the New South Wales Director-General of Man Power.³⁸ Drummond's solicitor, E. C. Emmanuel, called on the Director-General, Mr Bellemore, who advised that he was giving immediate instructions to have Drummond called up into the Air Force, in which he had earlier enlisted. An appeal was lodged with the Governor of New South Wales, Lord Wakehurst, as Visitor to the University, claiming that the condition placed on Drummond's entry by Deputy Registrar Dale was irrelevant to the question of enrolment.³⁹ The Visitor declined to act in the matter and there the matter rested, costs for the case being shared by the parties.⁴⁰

The interested parties indicated their readiness to comply with the decision of the High Court in the Drummond Case, Dedman

said that everything would be done, consistent with the law, to attain the objectives of the quota regulations.⁴¹ The Vice-Chancellor of Sydney University, Robert Wallace, assured the public that the university would obey the law. A jubilant Clive Evatt, the Minister for Education in New South Wales, told excluded students to re-enrol. Many did and were again turned away in all but two cases.⁴² The Production Executive decided that no scholarships would be awarded to students enrolling after the High Court's decision.

The decision in the Drummond Case had little effect on the activity of the Department of War Organization of Industry. As Dedman suggested, if he could not achieve his ends one way he simply went about it another way.⁴³ Under the new procedure the Universities Commission established the required number of students for the various facilities obtained from universities the names of the selected students and gave the list of names to the Director-General of Man Power who directed all other applicants to other spheres of activity.⁴⁴ Regulation 28 was amended by Regulation 298 on 13 December 1949. The main alteration was in the omission of the invalid regulation 16 and changes to regulations 4 and 15 so as to remove direct references to the control of education. The Court's decision resulted in matters being handled in the way they should have been from the start.

The High Court's decision in the Drummond Case was criticised by Dedman since it interfered with his political program.⁴⁵ Dedman noted that Sawyer also regarded it as a 'bad' decision. Sawyer regarded the dicta on education as an out-of-character regression to pre-Engineers' Case theory.⁴⁶ Certainly the claim of Williams J., for example, that education was reserved to the states under ss. 106 and 107 and, therefore, free of Commonwealth power, was reminiscent of interpretations of the first High Court.

The Drummond Case proved to be indecisive on one particular point. The question of whether the university was required to admit Drummond was left open. The mandamus commanded matriculation but did not indicate whether Drummond was entitled to admission to the university. When some twenty years later, an unsatisfactory student sought a writ of mandamus directing the University of Sydney to enrol him, the Supreme Court of New South Wales held that the application failed 'for want of establishment of the necessary duty'.⁴⁷ Whether the university has a necessary duty to enrol newly matriculated students has, therefore, not been decided.

In 1943, the High Court judges made assertions about education which have not been contradicted by the Court to this day. However, there are two considerations to be borne in mind before those dicta are used as opinions on the constitutional responsibility for education. In the first place, the present High Court tends to interpret federal powers without reference to a doctrine of reserved state powers. Secondly, there is the federal power in the Constitution which relates to education, a power which has been included since 1943 – the power to provide ‘benefits to students’. What has the Court said about that power?

9 The High Court and the 'Benefits to Students' Power

The High Court has interpreted the laws passed by the Federal Parliament without reference to the debates associated with their passage through the legislature. In the First Uniform Tax Case, Latham C.J. emphasised that the Statutes 'express the intention of Parliament'.¹ He observed that legislation had many possible origins and purposes but asserted that 'the intention of Parliament as expressed in the Statute cannot be modified or controlled in a Court by reference to any such material'.²

Just as the laws of the Commonwealth are subject to the construction put on them by the High Court, so are the powers conferred by the Constitution. As Menzies said, in 1944, 'all the powers in the Constitution mean what the High Court of Australia ultimately says they mean'.³ This assertion applies to the 'benefits to students' provision. The Court has not yet been required to state the scope of this power. However, it was required on one occasion to examine pl. xxiiiA, in the case *Federal Council of the British Medical Association and others v. Commonwealth* ((1949) 79 C.L.R. 201).⁴ Before looking at that case, it is proposed to discuss a 1945 case which is important in that the decision of the Court was to some extent instrumental in the government's decision to seek the passage of the Social Services Amendment to the Constitution.

Although s. 81 of the Constitution was surrounded by controversy, its scope was not tested in the High Court before 1945. Until that time, the phrase in s. 81 'for the purposes of the Commonwealth' had been interpreted in two ways. One point of view was that put to the Royal Commission on the Constitution in 1927, by Sir Robert Garran. He argued that s. 81 'was an absolute power of appropriation for general purposes, and the Commonwealth Parliament had always argued on that supposition'.⁵ He put this view to practical use in the course of the hearings of the Child Endowment Commission which followed soon after. He maintained that an endowment scheme could be financed by the Parliament by the power vested in it under either s. 81 or s. 96 of the Constitution.⁶ Garran noted a parallel between s. 81 and the 'general welfare'

phrase in the Constitution of the United States of America.⁷

Owen Dixon disagreed with Garran and put forward views which were also those of the other school of thought.⁸ In his opinion, s. 81 contained a built-in restriction which prevented appropriations being made for purposes over which the Commonwealth did not have constitutional power. On this reasoning Dixon said that the 1912 Maternity Allowance Act, for example, was invalid. In his view a Child Endowment Act would also be invalid.

Appropriations had been made by the Parliament to provide benefits for the nation. Scientific and industrial research, for example, had been going on for twenty-five years and had been financed by appropriation under s. 81. That power had also provided the money to finance the social service benefits which were made available to the people. The fact that the Commonwealth Government had power to provide only aged and invalid pensions had not been viewed with any great concern as was noted in the debates on the 1941 Child Endowment Bill. It did not seem that the government's generosity would be subject to the challenge of constitutional validity.

A challenge to the Parliament's use of s. 81 was made when the Attorney-General for Victoria, *ex relatione*, sought an injunction to restrain the Commonwealth Minister for Health and his Director-General from implementing the provisions of the Pharmaceutical Benefits Act of 1944.⁹ This Act provided among other things for free medicine and had been enacted under the provisions of s. 81. The case came before the High Court on 6 October 1945.

Counsel for the plaintiff, Mr Phillips, argued that the Act affected the relationship between chemists, doctors and the public.¹⁰ He claimed that the legislation covered such subjects as the control of drugs, payment for medical services and price fixing, none of which came within any Commonwealth head of power. Phillips contended that the Appropriation Power contained no substantive grant of power. In his view, 'the purposes of the Commonwealth' was a restraining provision limiting spending under this section to powers contained in the Constitution. For these various reasons the legislation was invalid.

It was held, for the defendants, that s. 81 gave the Commonwealth broad powers of appropriation.¹¹ Under this power and the incidental power, s. 51(xxxix), the Act was valid. Counsel pointed out that should the plaintiff's action be sustained, a number of

Parliamentary Acts would be rendered suspect. Using the American Constitution as a basis for argument, Mr Coppel K.C. submitted that the power to tax contained the power to spend.¹² Other points made in the defence argument included one which asserted that the phrase 'purposes of the Commonwealth' should be interpreted as a reference to people and not powers. The main point of the argument was that the Act was an Appropriation Act, since, in Section 17 of the legislation, provision was made for appropriation in terms of the National Welfare Fund Act of 1943. The law was, according to counsel, a valid exercise of Commonwealth power.

The Court held (McTiernan J. dissenting) that the Act was beyond power. In general, the judges held to the 'narrow' view of the spending power although there was divergence of opinion as to the meaning of that power. Latham C.J., for example, maintained that the powers to make laws in s. 51 included the power to appropriate money for their execution and did not rely on s. 81. He interpreted 'for the purposes of the Commonwealth' as a reference to the people and not the political organism. The purposes ranged, therefore, beyond the scope of enumerated powers and could be held to be 'any Commonwealth purpose'.¹³ Apparently, for Latham, s. 81 was to be interpreted by the Parliament and not the judiciary.

Latham held that s. 81 was only an appropriation power and contained no other powers. To him the Pharmaceutical Benefits Act was more than this. The Chief Justice held that since the Act required certain things to be done which were not enumerated in s. 81, the legislation was invalid. Latham noted, with concern, that the Commonwealth did not accept complete jurisdiction in its attempted control of people and powers. This resulted in Commonwealth law being made subordinate to state law as against the provisions of s. 109. This basic concept was, for the Chief Justice, 'completely inconsistent with the whole basis of the Federal Constitution'.¹⁴

McTiernan J. agreed with Latham's broad interpretation of the Appropriation Power. He held that 'purposes of the Commonwealth' were 'general words and no limitation on them is expressed'.¹⁵ Unlike the Chief Justice, McTiernan concluded that the legislation was valid since the Act merely detailed the method of appropriation.

Dixon J., with whom Rich J. concurred, claimed to interpret

s. 81 broadly but not without limit.¹⁶ He restricted the application of the Appropriation Power to matters which were heads of federal legislative power, to concerns which were incidental to the Commonwealth's activities as a domestic government, and to functions which were an exercise of national government *per se*. Dixon did not give a precise interpretation of s. 81 since he maintained that, however broad an interpretation was given to the Spending Power, the Pharmaceutical Benefits Act was 'completely invalid upon the simple ground that it is not relevant to any power which the constitution confers upon the Parliament'.¹⁷ This judge asserted that the provision of Pharmaceutical Benefits was clearly stated in the title of the Act. Hence, the 'appropriation of money is the consequence of the plan; the plan is not consequential upon or incidental to the appropriation of money'.¹⁸

Dixon made his position clear on a further point. It was held by some, and had been suggested by the defendants in this case, that s. 81 was the Australian counterpart to the 'general Welfare' provision in the United States Constitution. Dixon maintained that such a view was untenable as an interpretation of the Australian provision.¹⁹ He asserted that any understanding of s. 81 along American lines would be amending the Constitution and not interpreting it.

Williams J. also held that s. 81 was a much more specific head of power than the 'general Welfare' provision. He interpreted the Appropriation Power slightly more rigidly than Dixon. Williams maintained that 'the purposes' in the 'purposes of the Commonwealth' phrase 'must all be found within the four corners of the Constitution'. It followed that the Pharmaceutical Benefits Act was invalid because 'it purports to appropriate money for a purpose which is not a purpose of the Commonwealth'. Williams went on to say that the Commonwealth 'has no general power to legislate for social services'.²⁰

Following the Pharmaceutical Benefits Case decision, the government obtained legal advice on the validity of its social service legislation.²¹ It was informed that some Acts and parts of several others would probably be held invalid in the light of the judgment given by the High Court. The government decided to obtain an amendment to the Constitution and add to the Commonwealth Government's powers one enabling it to provide social services. This particular approach was not the only one open to the

government. Mr Justice Williams had said, in the course of his judgment, that s.96 could be used to provide the scheme contained in the Pharmaceutical Benefits Act. But the government wanted direct control of the expenditure of the money obtained by it as the taxing power. The only way to provide the social services it desired was for the government to obtain the necessary constitutional power for the Commonwealth Parliament. This it proceeded to do and pl. xxiiiA was the result.

The 1945 Education Act was one piece of social service legislation affected by the Pharmaceutical Benefits Case decision. The 'benefits to students' phrase was included in the Social Services amendment to give the Commonwealth a head of power under which that Act might have a valid constitutional base. It has been argued in this study that this power was intended to give the Commonwealth Government a broader power in education. The reason why education was not mentioned in the constitutional amendment as specifically as it had been in the title of the 1945 Act was that its inclusion would have aroused opposition to the amendment. But the important issue is not what the Parliament intended by this provision but what the High Court 'says it means'.

In 1949, the Federal Council of the British Medical Association in Australia claimed that the Pharmaceutical Benefits Act 1947-1949, or parts of it, or regulations made under it, were invalid and void. In particular, Section 7A of the Act was claimed to be invalid in that it imposed a form of civil conscription on doctors contrary to s.51(xxiiiA) of the Constitution. The Commonwealth, of course, supported the validity of the legislation. It was held by Latham C.J., Rich, Williams, and Webb JJ. (Dixon and McTiernan JJ. dissenting) that Section 7A did constitute a form of civil conscription. The Court also held, with Latham dissenting, that the conscription exception in the Constitution applied only to doctors and dentists. The judges were agreed in the opinion that the Commonwealth was required to provide the benefits described in pl. xxiiiA.

Much of the judgment in this case was concerned with the question of interpreting 'civil conscription'. Latham held the view that 'compulsory service in relation to this subject matter of Federal legislation would be as valid as compulsory service in relation to defence'.²² On the other hand he noted that the Commonwealth Government could not require the states to provide the

benefits contained in this power. Nor was it within the authority of the Commonwealth to exclude the states from any field in the list of social services, although s. 109 would apply where inconsistency was proven.

The term 'benefits' was given a broad interpretation by several of the judges. McTiernan, for example, described benefits as 'pecuniary aid, service, allowance or commodity designed to promote social welfare or security'.²³ This judge agreed with Latham that people could not be compelled to accept the benefits, and that their provision was the responsibility of the Commonwealth. Dixon also included a definition of 'benefits' in his judgment. In maintaining that the term had a particular use with respect to social services, Dixon held that it was used

as a word covering provisions made to meet needs arising from special conditions with a recognised incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services.²⁴

Emphasis was placed on the plenary nature of the power conferred by pl. xxiiiA. Williams recalled the causal relationship between the Pharmaceutical Benefits Case and the recent amendment. He went on to say that 'the new paragraph is plenary in its fullest sense and must, like every other legislative power in the Constitution, be given a wide liberal interpretation'.²⁵ McTiernan also affirmed the plenary nature of the power. Dixon emphasised the fact that the principal power had had vested in it powers incidental to the subject matter. He quoted O'Connor's dictum that

it is a fundamental principle of the Constitution that everything necessary to the exercise of the power is included in the grant of a power. Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power.²⁶

The High Court has not been required to interpret the 'benefits to students' phrase and, until it is, it is possible only to conjecture as to its probable opinion.²⁷ The B.M.A. Case does provide a basis for such conjecture, although it is the only test of pl. xxiiiA and

was decided more than twenty years ago. By application of the dicta in that case certain conclusions may be drawn about the 'benefits to students' power.

In the first place, the provision of benefits to students is a plenary power belonging to the Commonwealth. In the exercise of this power some intrusion might be made on state educational systems. There is, however, no recourse to a pre-Engineers' doctrine that education belongs to the states. The Commonwealth has the power to provide benefits and should inconsistency occur, the Commonwealth law prevails.

Secondly, following the B.M.A. dicta, it is the responsibility of the Commonwealth to provide the benefits. The power contained in pl. xxiiiA does not enable the Federal Government to require states or other organisations to provide benefits. For example, a Commonwealth law requiring states to maintain class sizes at below thirty students would be *ultra vires*.

A further but more tenuous conclusion to be drawn from the B.M.A. Case is that the national government could conscript civilians in its provision of 'benefits to students'. This seems to follow from one of the points made by Latham. Furthermore, it is implied in pl. xxiiiA by the fact that in certain cases doctors and dentists may not be subject to a form of conscription. As teachers are not protected from civilian conscription, it would seem that the Commonwealth Government has the power to conscript teachers in the course of providing benefits to students.

If the definition of 'benefits' stated by the judges in the B.M.A. Case is applied to the 'benefits to students' provision, the list could embrace all the facets of a normal educational system. If buildings, facilities, teachers (including training facilities), scholarships and the like are benefits to students, it would follow that the Commonwealth has the power to provide all of them. Moreover, the Federal Government has the power to appropriate finance for the purposes of exercising its power.

It is clear that the Federal Government has the power to provide benefits to students. Interpreting 'benefits' along the lines indicated in the B.M.A. Case enables one to say that the Commonwealth could establish and maintain a system of education. But it must also be said that students cannot be compelled to accept the benefits offered to them. A Commonwealth system of education would not have the compulsion which is built into state systems.

The peculiar difficulty of the 'benefits to students' phrase is the meaning of 'to'. Sawyer has maintained that the power presupposes a general educational system *to which* the Federal Government provides benefits. 'To' does not suggest to him 'any general Commonwealth control over the educational process as a whole'.²⁸ He suggests, for example, that it would be difficult to establish, under the 'benefits to students' power, the right of the Commonwealth to set a uniform matriculation standard for Australia.

Sawyer's objection is particularly important in that he feels the High Court would give considerable attention to the force of 'to' in this phrase.²⁹ It does seem that a student body to whom benefits are provided is presupposed. But is the Commonwealth Government fettered by this implication? Perhaps not. The Commonwealth could provide benefits of the sort suggested by the decision in the B.M.A. Case to people who are students in state or private educational systems. Or it could define 'student' along the lines of the definition in the 1945 Education Act, "'student" means a student enrolled or applying for enrolment at . . .'.³⁰

Until the High Court hands down a decision on the 'benefits to students' phrase, the B.M.A. Case provides the main source of interpretation of that power. Clearly the Commonwealth Parliament may provide benefits to students, with all the ramifications associated with the exercise of any power in s. 51 of the Constitution. How far the national government can go may be decided should its Schools Commission established under the benefits to students power in 1973 become the hub of an Australian education system. Its activity may evoke a challenge to its validity and involve the High Court in a definition of the benefits to students provision.

Appendix Extracts from the Commonwealth of Australia Constitution Act

(63 & 64 Victoria, Chapter 12)

An Act to constitute the Commonwealth of Australia.

[9th July 1900]

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Commonwealth of Australia Constitution Act.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at

any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

6. 'The Commonwealth' shall mean the Commonwealth of Australia as established under this Act.

'The States' shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State.'

'Original States' shall mean such States as are parts of the Commonwealth at its establishment.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

8. After passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

9. The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION

This Constitution is divided as follows:—

Chapter I. — The Parliament:

Part I. — General:

- Part II. — The Senate:
- Part III. — The House of Representatives:
- Part IV. — Both Houses of the Parliament:
- Part V. — Powers of the Parliament:
- Chapter II. — The Executive Government:
- Chapter III. — The Judicature:
- Chapter IV. — Finance and Trade:
- Chapter V. — The States:
- Chapter VI. — New States:
- Chapter VII. — Miscellaneous:
- Chapter VIII. — Alteration of the Constitution.
- The Schedule.

Chapter I: The Parliament

Part V. — Powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

- (i.) Trade and commerce with other countries, and among the States:
- (ii.) Taxation; but so as not to discriminate between States or parts of States:
- (iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
- (iv.) Borrowing money on the public credit of the Commonwealth:
- (v.) Postal, telegraphic, telephonic, and other like services:
- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
- (vii.) Lighthouses, lightships, beacons and buoys:
- (viii.) Astronomical and meteorological observations:
- (ix.) Quarantine:
- (x.) Fisheries in Australian waters beyond territorial limits:
- (xi.) Census and statistics:
- (xii.) Currency, coinage, and legal tender:
- (xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

- (xiv.) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
- (xv.) Weights and measures:
- (xvi.) Bills of exchange and promissory notes:
- (xvii.) Bankruptcy and insolvency:
- (xviii.) Copyrights, patents of inventions and designs, and trade marks:
- (xix.) Naturalization and aliens:
- (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
- (xxi.) Marriage:
- (xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
- (xxiii.) Invalid and old-age pensions:
- (xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:
- (xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
- (xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
- (xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:
- (xxvii.) Immigration and emigration:
- (xxviii.) The influx of criminals:
- (xxix.) External affairs:
- (xxx.) The relations of the Commonwealth with the islands of the Pacific:
- (xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
- (xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
- (xxxiii.) The acquisition, with the consent of a State, of any

railways of the State on terms arranged between the Commonwealth and the State:

(xxxiv.) Railway construction and extension in any State with the consent of that State:

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Chapter II: The Executive Government

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Chapter III: The Judicature

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes.

72. The Justices of the High Court and of the other courts created by the Parliament—

- (i.) Shall be appointed by the Governor-General in Council;
- (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
- (iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and

sentences—

- (i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:
- (ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
- (iii.) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

75. In all matters—

- (i.) Arising under any treaty:
- (ii.) Affecting consuls or other representatives of other countries:
- (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv.) Between States, or between residents of different States, or between a State and a resident of another State:
- (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- (i.) Arising under this Constitution, or involving its interpretation:
- (ii.) Arising under any laws made by the Parliament:
- (iii.) Of Admiralty and maritime jurisdiction:
- (iv.) Relating to the same subject-matter claimed under the laws of different States.

Chapter IV: Finance and Trade

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

82. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable

to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

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

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Chapter V: The States

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

116. The Commonwealth shall not make any law for establishing

any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Chapter VI: New States

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Chapter VIII: Alteration of the Constitution

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the

proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

Notes

Introduction

¹From the text of an address given at Norwood Town Hall, Adelaide, Wednesday, 16 June 1971, pp. 2-3. The terms 'Commonwealth' or 'Federal' will be used in this study because they are more serviceable than the term 'Australian'.

²One example of some current academic thinking on this matter is found in the opinion of W. G. Walker, Professor of Education at the University of New England. In a paper delivered to the American Educational Research Association and reprinted in the *Journal of Educational Administration*, May 1970, Walker states: 'It is worthwhile noting at this stage that the constitution specifies the powers of the Commonwealth Government, residual powers being the responsibility of the States. Education is regarded as a residual power . . .' (pp. 19-20) From such observations, he concludes that 'public education at the primary and secondary level is . . . the responsibility of State governments' (p. 25).

³C.P.D., H. of R., vol. 19, 6 May 1958, p. 1453.

⁴Ibid., p. 1454.

⁵Ibid., p. 1456.

⁶No attempt has been made to review or appraise public and private education at the time of the Federation Conventions. Important works in this area are: A. G. Austin, *Australian Education 1788-1900, Church, State and Public Education in Colonial Australia*, 2nd ed., Melbourne: Sir Isaac Pitman & Sons, 1965, and Ronald Fogarty, *Catholic Education in Australia 1806-1950*, vols. I and II, Melbourne: Melbourne University Press, 1959.

⁷C.P.D., H. of R., vol. 75, 7 and 8 December 1971, p. 4263. The substantive points of the questions were given to Adrian Bennett, M.H.R. for Swan, who framed the actual questions.

⁸Schools Commission Act, No. 213 of 1973. Especially section 13.

⁹Report of speech by the Minister for Education, Kim Beazley, at the initial meeting of the Interim Committee for

Australian Schools Commission, 21 December 1972, mimeo, p. 1.

Chapter 1

¹The text used for this study is the *Commonwealth of Australia Constitution Act*, Canberra: Government Printing Office, 1970. Sections of the Constitution mentioned in this study appear in the Appendix. The abbreviations s. or ss. are used for section or sections and the terms placitum or placita abbreviated to pl. are used of paragraphs.

²*Commonwealth of Australia Constitution Bill*, London: Wyman and Sons, 1900.

³*Journals and Printed Papers of the Federal Council of Australasia*, vol. I, Tasmania: Government Printer, 1885, p. 7.

⁴These were held in Melbourne in 1890, Sydney 1891, Adelaide and Sydney in 1897 and Melbourne in 1898.

⁵Sawer notes in *Australian Federalism in the Courts*, (Melbourne: Melbourne University Press, 1967, pp. 24 ff.) that the phrase was introduced by an unknown official in the Foreign Office. Its meaning has remained unclear because it has no precedents or analogies.

⁶A. M. Badcock, *Federalism and Education in Australia*, M.A. thesis, Monash University, p. 7.

⁷*Official Records of the Proceedings and Debates of the Australasian Federation Conference, 1890*, Melbourne: Government Printer, 1890, p. 40 (hereafter cited as 'Melbourne, 1890').

⁸T. A. Coghlan, *The Wealth and Progress of N.S.W.*, Sydney: Government Printer, 1891, p. 546.

⁹*Official Report of the National Australasian Convention Debates*, Sydney: Acting Government Printer, 1891, p. 187 (hereafter cited as 'Sydney, 1891').

¹⁰Coghlan, op.cit., p. 554.

¹¹Austin, op.cit., p. 257.

¹²Ibid., p. 250.

¹³*Official Report of the National Australa-*

sian Convention Debates, Adelaide: Government Printer, 1897, p. 79 (hereafter cited as 'Adelaide, 1897').

¹⁴Sydney, 1891, p. 525. Civil rights was also included in this list.

¹⁵Adelaide, 1897, p. 46.

¹⁶The spelling 'States rights' is used in this work following Holder, Adelaide, 1897, p. 147. Other spellings are used in the records of the debates.

¹⁷*Official Record of the Debates of the Australasian Federal Convention*, Third Session, vol. I, Melbourne: Government Printer, undated, p. 9 (hereafter cited as 'Melbourne I, 1898').

¹⁸*Ibid.*, p. 14.

¹⁹*Ibid.*, p. 15.

Chapter 2

¹Commonwealth Acts 1968, p. 1311. The Education Act of 1945 was amended in 1959 and 1966. It was repealed by the Scholarship Act, 1969, although that act was never proclaimed.

²Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia*, 3rd ed., Sydney: Law Book Company, 1964, p. 551.

³On the scope of pl. xxxix Sawer has said: 'But as to legislative powers (other than pl. (xxxix) itself), no convincing example has yet been given of a law which would not be valid as incidental to the power itself, on general principles of constitutional interpretation, but would be valid under pl. (xxxix) — or which would be valid under pl. (xxxix), but not valid under the main power. Hence as to legislative powers, the view of Barton J. (quoted by Mr Wynes at p. 483) that pl. (xxxix) was to "make assurance doubly sure" seems to be the only commonsense one'. *Ibid.*, p. 333.

⁴For a succinct, if older, account of such conferences see G. B. Barton, *Australian Federation*, pp. 1-16.

⁵The final conference on lighthouses took place in Hobart in 1894. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney: Angus & Robertson, 1901, p. 565.

⁶Adelaide, 1897, p. 775f.

⁷Sydney, 1891, p. 703.

⁸*Ibid.*, p. 689.

⁹*Ibid.*, p. 525.

¹⁰Adelaide, 1898, p. 787.

¹¹Sydney, 1891, p. 688 and Adelaide, 1897, p. 782, respectively.

¹²Gordon Greenwood (ed.), *Australia — A Social and Political History*, Sydney: Angus & Robertson, 1960, pp. 173 ff.

¹³Melbourne, 1890, p. 69.

¹⁴*Ibid.*, p. 189.

¹⁵Adelaide, 1897, p. 229.

¹⁶*Bulletin*, 9 November 1895, and 5 October 1895 respectively.

¹⁷Secondary education was largely provided by church and private schools and the total government expenditure on technical and tertiary education was less than £40,000. See T. A. Coghlan, *The Wealth and Progress of New South Wales 1898-99*, Sydney: Government Printer, 1900, pp. 230, 237, 246, 566 and 869.

¹⁸*Statistical Register of Western Australia for 1897*, Part X, p. 12 and p. 5 respectively.

¹⁹Quick and Garran, op.cit., p. 150.

²⁰Sydney, 1891, p. 28.

²¹*Proceedings of the Colonial Conference 1887*, Tasmania: Government Printer, 1888, p. 94.

²²Sydney, 1897, p. 1881.

²³*Ibid.*, p. 1082.

²⁴*Ibid.*

²⁵*Ibid.*, p. 1085.

²⁶*Ibid.*, p. 1082.

²⁷Melbourne I, 1898, p. 29.

²⁸*Official Record of the Debates of the Australasian Federal Convention*, Third Session, vol. II, Melbourne: Government Printer, undated, p. 1996 (hereafter cited as 'Melbourne II, 1898').

²⁹*Ibid.*, pp. 17 ff.

³⁰*Ibid.*, p. 18.

³¹*Ibid.*, p. 22f.

³²Sydney, 1891, p. 406.

³³Melbourne I, 1898, p. 23.

³⁴*Ibid.*, pp. 26, 27 and 24 respectively.

³⁵Sir George Houston Reid, *My Reminiscences*, London: Cassel and Co., 1917, p. 163.

³⁶Sydney, 1897, pp. 1071 ff. O'Connor moved an amendment to give the control

of health to the Commonwealth Government.

Chapter 3

¹ *Bulletin*, 12 June 1897.

² Melbourne, 1890, p. 94.

³ *Ibid.*, p. 172.

⁴ Sydney, 1891, p. 199.

⁵ *Ibid.*, p. 274.

⁶ *Ibid.*, p. 139 and p. 104 respectively.

⁷ Adelaide, 1897, p. 94 and p. 162 respectively.

⁸ *Ibid.*, p. 162.

⁹ Sydney, 1891, p. 23.

¹⁰ *Ibid.*, p. 525. This was Griffith's position.

¹¹ *Ibid.*

¹² S. 113 is one example.

¹³ *Western Australian Parliamentary Debates*, vol. XV, new series, p. 1579.

¹⁴ Sydney, 1891, p. 153. This argument was advanced by Kingston.

¹⁵ Adelaide, 1897, p. 769. Carruthers argued in this vein.

¹⁶ *Ibid.*, p. 339. This was Cockburn's point of view.

¹⁷ *Ibid.*, p. 144.

¹⁸ *Ibid.*, p. 395.

¹⁹ John Reynolds, *Edmund Barton*, Sydney: Angus & Robertson, 1948, p. 102, n.5.

²⁰ Sydney, 1897, p. 1060. One occasion when he discussed ticks.

²¹ Sydney, 1897, p. 1082.

²² Adelaide, 1897, p. 1147.

²³ *Ibid.*, p. 1217.

²⁴ In Melbourne for example the *Argus* was pro- and the *Age* anti-Federation.

²⁵ *Bulletin*, 23 October 1897.

²⁶ *Ibid.*, 21 November 1896.

²⁷ *Ibid.*, 28 November 1896.

²⁸ *Ibid.*, 23 January 1897.

²⁹ Melbourne, 1890, p. 363. The paper made no comment on the question after the draft Constitution was agreed upon. See *Statist*, 2 September 1899.

³⁰ Adelaide, 1897, p. 95.

³¹ *Bulletin*, 13 March 1897.

³² *Ibid.*, 20 March 1897, and 27 March 1897 respectively.

³³ W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, Melbourne: Charles F. Maxwell, 1910, p. 50.

³⁴ Sydney, 1891, p. 29.

³⁵ The Adelaide Convention in 1897, as one example, received petitions from churches, suffrage and temperance groups, and chambers of commerce to mention a few interested organisations.

³⁶ The Presbyterian, Anglican and Baptist Churches petitioned along these lines in 1897. Adelaide, 1897, p. 203.

³⁷ Sydney, 1891, p. 264.

³⁸ *Bulletin*, 30 January 1897.

Chapter 4

¹ *Royal Commission on the Constitution of the Commonwealth*, vols. I and II (hereafter cited as 'Constitution 1927').

² The ten matters were Aviation, Company Law, Health, Industrial Powers, Interstate Commission, Judicial Power, Navigation Law, New States, Taxation, Trade and Commerce.

³ A list of these Bills is found in George S. Knowles, *The Commonwealth of Australia Constitution Act* (as altered to 1 July 1936), and the acts altering the constitution, with notes, tables, indexes and appendices, Canberra: Commonwealth Government Printer, undated.

⁴ *Report of the Royal Commission on the Constitution* (hereafter cited as 'Constitution 1929'), p. 183.

⁵ *Ibid.*, p. 247.

⁶ *Constitution*, 1927, p. 1233.

⁷ *Ibid.*, p. 1322.

⁸ *Ibid.*, p. 1458.

⁹ *Ibid.*, pp. 210-11.

¹⁰ *Ibid.*, p. 769.

¹¹ *Ibid.*, p. 353.

¹² *Ibid.*, p. 183.

¹³ *Ibid.*, p. 232.

¹⁴ *Ibid.*, pp. 333ff.

¹⁵ *Ibid.*, p. 553.

¹⁶ *Ibid.*, p. 1167.

¹⁷ *Ibid.*, p. 1370.

¹⁸ *Ibid.*, pp. 1283ff.

¹⁹P. H. Chown, *The Role of the Commonwealth Government in Education during and immediately after the 1939-45 War*, M.Ed. thesis, University of Sydney, 1960.

²⁰Stuart W. Semple, *The Role of the Federal Government in certain Educational Activities in the Commonwealth of Australia 1901-1942*. D.Ed. thesis, Ontario University, 1970.

²¹P. D. Tannock, *A Study of the Role of the Federal Government in Australian Education*, Ph.D. thesis, Johns Hopkins University, Baltimore, 1969.

²²*C.P.D.*, vol. 180, 24 November 1944, p. 2118.

²³*R. v. Burgess, Ex parte Henry* (1936) 55 C.L.R. 608. The Court held that the Commonwealth Government had the right to give effect to international agreements to which it had been a signatory whether the Australian Constitution made provision for the exercise of such powers or not. The case is discussed in detail in chapter 8.

²⁴This name is abbreviated to 'I.L.O.' in future references.

²⁵Senator Pearce announced Australia's decision to participate on 18 June 1937 (*C.P.D.*, vol. 153, p. 44).

²⁶*Parliamentary Papers*, 1945-46, vol. III, p. 645.

²⁷*Ibid.*, pp. 659-60.

²⁸*Parliamentary Papers*, 1940-43, vol. II, p. 405.

²⁹*C.P.D.*, vol. 153, 28 June 1937, p. 512.

³⁰*Report of the Royal Commission on Child Endowment or Family Allowances*, Canberra: Government Printer, 1929 (hereafter cited as 'Endowment Report'), p. 9. The majority members were T. S. O'Halloran (Chairman), Ivor Evans and Stephen Mills.

³¹*Ibid.*, p. 71.

³²*Ibid.*, p. 15. In the foreword to the pamphlet explaining the New South Wales scheme, Premier Lang noted that the money would be paid to mothers 'for the maintenance and education of their children'. (*Endowment Report*, p. 30).

³³*Ibid.*, pp. 86ff.

³⁴*Ibid.*, p. 116.

³⁵*Ibid.*

³⁶*Royal Commission on Child Endow-*

ment — Minutes of Evidence, Canberra: Government Printer, 1928-29 (hereafter cited as 'Endowment Evidence'), p. 379.

³⁷*Ibid.*, p. 640.

³⁸*Ibid.*, p. 433.

³⁹*Ibid.*, p. 85. It is not known which organisation, if any, this witness represented.

⁴⁰*Ibid.*, p. 166.

⁴¹*Ibid.*, p. 333.

⁴²*Ibid.*, p. 711.

⁴³*Ibid.*, p. 208.

⁴⁴*Ibid.*

⁴⁵*Ibid.*, p. 252.

⁴⁶*Ibid.*, p. 261.

⁴⁷*Ibid.*, p. 112.

⁴⁸*Ibid.*, p. 87.

⁴⁹*Ibid.*, p. 168.

⁵⁰*C.P.D.*, vol. 166, 27 March 1941, pp. 337ff.

⁵¹*Ibid.*, p. 339.

⁵²*Ibid.*, p. 420.

⁵³No. 8 of 1941, p. 40.

⁵⁴*C.P.D.*, vol. 166, 1 April 1941, p. 424.

⁵⁵*Ibid.*

⁵⁶*Ibid.*, p. 429.

⁵⁷*C.P.D.*, vol. 166, 2 April 1941, p. 527.

⁵⁸*C.P.D.*, vol. 183, 21 June 1945, p. 3455.

Chapter 5

¹*C.P.D.*, vol. 172, 2 September 1942, pp. 30-1.

²*Ibid.*, 1 October 1942, pp. 1340-1.

³*Ibid.*, 8 October 1942, pp. 1514-15. The Committee comprised twenty-four members, twelve from the Commonwealth Parliament and twelve from the states, with equal representation of government and opposition parties.

⁴*Sydney Morning Herald*, 27 November 1942, p. 9 (hereafter cited as *S.M.H.*). The Commonwealth was held to have no power to legislate with respect to the public service of a state.

⁵*Ibid.*, 5 December 1942, p. 11.

⁶*C.P.D.*, vol. 177, 11 February 1944, p. 138.

⁷*S.M.H.*, 11 September 1943, p. 11.

⁸*S.M.H.*, 24 November 1943, p. 8.

⁹*C.P.D.*, vol. 77, 11 February 1944, pp. 136ff.

¹⁰*Round Table*, vol. XXXIV, no. 135, June 1944, p. 282.

¹¹*C.P.D.*, vol. 178, 16 March 1944, p. 1392.

¹²In the referendum held on 19 August 1944, there was a resounding 'No' vote from the electorate with only South Australia and Western Australia returning 'Yes' majorities. (*C.P.D.*, vol. 180, pp. 1453-4).

¹³Attorney-General for Victoria (ex rel. Dale and others) v. Commonwealth (1945) 71 C.L.R. 237. The Victorian Attorney-General and others challenged the validity of sections of the 1945 Pharmaceutical Benefits Act after which the case is named.

¹⁴Transcript of an interview between I. K. F. Birch and A. A. Calwell, Melbourne, 14 September 1971, p. 2 (hereafter cited as 'Birch-Calwell' transcript).

¹⁵*Ibid.*, p. 3.

¹⁶For the opinion of five prominent constitutional lawyers on the validity of twelve Acts of Parliament of a social service nature see *C.P.D.*, vol. 186, 27 March 1946, p. 648.

¹⁷This is Dedman's term. Transcript of interview between I. K. F. Birch and J. J. Dedman, Canberra, 15 September 1971, p. 4 (hereafter cited as 'Birch-Dedman' transcript).

¹⁸Harold Holt, for example, regarded the move as an election gimmick, *C.P.D.*, vol. 186, 3 April 1946, p. 994.

¹⁹This was the editorial comment in *S.M.H.*, 21 September 1946, p. 2.

²⁰The Party's Federal Council decided its aim was to win the election (*S.M.H.*, 8 May 1946, p. 3).

²¹*S.M.H.*, 27 August 1946, p. 3.

²²*S.M.H.*, 4 September 1946, p. 1.

²³The *Herald's* 'how-to-vote' card appeared on 26 September 1946, p. 4, despite an editorial on 14 March 1946 approving Commonwealth power over social services and marketing.

²⁴Labor's membership in the House of Representatives was reduced by six to forty-three giving it an absolute majority

of eleven after providing for a Speaker. All but three of the Senate seats were filled by Labor.

²⁵*C.P.D.*, vol. 186, 27 March 1946, p. 648.

²⁶*Ibid.*, 3 April 1946, p. 1025.

²⁷*Ibid.*, 9 April 1946, pp. 1173-4 and 4 April 1946, p. 1170, respectively.

²⁸*Ibid.*, 9 April 1946, pp. 1179-80.

²⁹*Ibid.*, 3 April 1946, p. 992.

³⁰*Ibid.*, p. 911.

³¹*Ibid.*, p. 900.

Chapter 6

¹*C.P.D.*, vol. 148, 5 December 1935, p. 2556.

²Archdale Parkhill's answer to a question by Sir Donald Cameron, *C.P.D.*, vol. 152, 3 December 1936, p. 2833.

³*C.P.D.*, vol. 165, 4 December 1940, p. 415.

⁴*C.P.D.*, vol. 167, 25 June 1941, p. 370.

⁵*C.P.D.*, vol. 172, 29 September 1941, pp. 1067-8.

⁶*C.P.D.*, vol. 179, 14 September 1944, p. 847.

⁷*C.P.D.*, vol. 188, 24 July 1946, pp. 2914-15.

⁸*C.P.D.*, vol. 147, 18 October 1935, p. 844.

⁹*Ibid.*, 30 June 1937, p. 699.

¹⁰*C.P.D.*, vol. 160, 15 June 1939, pp. 1997-8.

¹¹*Ibid.*, pp. 2001 and 2004 respectively.

¹²*Ibid.*, p. 2066.

¹³*C.P.D.*, vol. 165, 5 December 1946, p. 488.

¹⁴*Ibid.*, 10 December 1946, p. 671.

¹⁵*C.P.D.*, vol. 167; 1 July 1941, p. 612.

¹⁶*Ibid.*, 2 July 1941, p. 698.

¹⁷*Ibid.*, 25 June 1941, pp. 397-8.

¹⁸*C.P.D.*, vol. 174, 9 March 1943, pp. 1359 and 1345 respectively.

¹⁹*C.P.D.*, vol. 177, 9 March 1944, pp. 1139-40.

²⁰*Ibid.*, p. 1180.

²¹*C.P.D.*, vol. 182, 16 May 1945, p. 1797.

²²*C.P.D.*, vol. 183, 13 June 1945, pp. 2942-3.

²³Several constitutional lawyers questioned

its validity insofar as it applied to civilians. (C.P.D., vol. 186, 27 March 1946, p. 648.)

²⁴Of the five lawyers consulted by the government, one held the Act invalid, one held it invalid except in its application to ex-servicemen, one held it was probably valid and the remaining two opinions were that some part of some sections were invalid. (C.P.D., vol. 186, 27 March 1946, p. 648.)

²⁵The National Security (Universities Commission) Regulations. Rule 28 of 1943 was the first of these and was amended by other Regulations.

²⁶S.M.H., 4 November 1942, p. 6.

²⁷Ibid.

²⁸*Parliamentary Papers*, 1940-42, vol. II, pp. 809ff.

²⁹C.P.D., vol. 173, 18 February 1943, p. 889.

³⁰Faculties in universities came to be classified as 'strategic' or 'non-strategic', 'reserved' or 'non-reserved' or 'technical' or 'non-technical'.

³¹C.P.D., vol. 173, 18 February 1943, p. 891.

³²S.M.H., 18 October 1943, p. 4.

³³S.M.H., 7 December 1943, p. 7.

³⁴C.P.D., vol. 173, 11 February 1943, p. 548.

³⁵S.M.H., 29 November 1943, p. 4.

³⁶See transcript of interview between P. D. Tannock and J. J. Dedman (hereafter cited as 'Tannock-Dedman' transcript), p. 2.

³⁷A letter from Ronald Walker to P. D. Tannock, 24 February 1969.

³⁸C.P.D., vol. 177, 2 March 1944, pp. 821-2.

³⁹According to one newspaper report — S.M.H., 5 August 1944, p. 4 — Dedman wore a baseball mask for protection. He had been roundly heckled at an appearance at the university in the previous year.

⁴⁰C.P.D., vol. 186, 27 March 1946, p. 647.

⁴¹C.P.D., vol. 184, 26 July 1945, pp. 4612-13.

⁴²*Victoria v. Commonwealth* (1926) 38 C.L.R. 399.

⁴³C.P.D., vol. 177, 23 February 1944, p. 452.

⁴⁴C.P.D., vol. 184, 26 July 1945, pp.

4619ff.

⁴⁵Ibid., p. 4627.

⁴⁶Birch-Dedman transcript, p. 8.

⁴⁷C.P.D., vol. 185, 28 September 1945, p. 6133.

⁴⁸Ibid., 4 October 1945, p. 6560.

⁴⁹Ibid., 5 October 1945, p. 6611.

⁵⁰C.P.D., vol. 187, 3 July 1946, p. 2099.

⁵¹Ibid., 5 July 1946, p. 2299.

⁵²Ibid., p. 2303.

⁵³C.P.D., vol. 188, 25 July 1946, p. 3055.

⁵⁴Ibid., pp. 3053 and 2945 respectively.

⁵⁵Ibid., p. 3057.

⁵⁶Ibid.

⁵⁷*Parliamentary Papers*, 1906, vol. II, p. 138.

⁵⁸Ibid., 1908, vol. II, p. 116.

⁵⁹Ibid., 1907-8, vol. III, p. 689.

⁶⁰Ibid., 1923-24, vol. II, p. 144.

⁶¹Ibid., 1934-37, vol. II, p. 178.

⁶²Ibid., p. 23.

⁶³Ibid., 1946, vol. II, p. 54.

⁶⁴Ibid., p. 55.

⁶⁵L. F. Crisp, *The Australian Federal Labor Party*, London: Longmans and Green, 1955.

⁶⁶Ibid., p. 232.

⁶⁷Ibid., p. 242.

⁶⁸Ibid., p. 250.

⁶⁹Australian Labor Party, *Official Report of the Proceedings of the 16th Commonwealth Conference*, p. 38.

⁷⁰Ibid., p. 42.

⁷¹Australian Labor Party, *Official Report of Proceedings at the 17th Commonwealth Triennial Conference*, p. 42.

⁷²Ibid. 2F lists as one task of the Office of Education, advising the Minister concerning grants of 'financial assistance to the States and to other authorities for educational purposes'.

⁷³S.M.H., 26 June 1943, p. 8.

⁷⁴*Western Australian Teachers' Journal* (hereafter cited as *W.A.T.J.*), 12 March 1941, p. 7.

⁷⁵The plan is set out in *W.A.T.J.*, 11 March 1943, pp. 6-7.

⁷⁶S.M.H., 14 December 1943, p. 4.

⁷⁷ W.A.T.J., 10 March 1944, p. 5.

⁷⁸ S.M.H., 3 January 1945, p. 4.

⁷⁹ S.M.H., 19 September 1946, p. 4.

⁸⁰ S.M.H., 4 May 1943, p. 4.

⁸¹ S.M.H., 27 January 1943, p. 11.

⁸² Australian Council for Educational Research, *A Plan for Australia*, pp. 9ff.

⁸³ Birch-Dedman transcript, p. 10.

⁸⁴ Birch-Dedman transcript, *passim*.

⁸⁵ *Ibid.*, p. 12.

⁸⁶ *Universities Commission Report 1943-45*, p. 4.

⁸⁷ Commonwealth Office of Education and Universities Commission, *Annual Report 1949*, p. 6.

⁸⁸ C.P.D., vol. 204, 27 September 1949, p. 580.

⁸⁹ C.P.D., vol. 215, 27 November 1951, p. 2786.

⁹⁰ *Ibid.*, 28 November 1951, p. 2973.

⁹¹ C.P.D., vol. 218, 12 August 1952, p. 199.

⁹² C.P.D., vol. H. of R. 2, 2 December 1953, p. 822.

⁹³ *Ibid.*, p. 823.

⁹⁴ C.P.D., vol. H. of R. 11, 21 June 1956, p. 3557.

⁹⁵ C.P.D., vol. H. of R. 17, 28 November 1957, p. 2695.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, pp. 270ff.

⁹⁸ C.P.D., vol. H. of R. 19, 6 May 1958, pp. 1450-4.

⁹⁹ *Ibid.*, p. 1454.

¹ *Ibid.*, p. 1456.

² *Ibid.*

³ C.P.D., vol. H. of R. 20, 26 August 1958, pp. 747ff.

⁴ C.P.D., vol. H. of R. 19, 6 May 1958, p. 1457.

⁵ *Ibid.*, p. 1458.

⁶ Birch-Calwell transcript, p. 3.

Parliament has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of the Parliament' (*ibid.*, pp. 39-40).

³ *Ibid.*, p. 175.

⁴ E. C. S. Wade in Dicey, *op.cit.*, p. LXXVII.

⁵ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, New York: New American Library, 1961, p. 465.

⁶ *Ibid.*, p. 466.

⁷ James Bryce, *The American Commonwealth*, vol. 1, London: Macmillan, 1889, p. 226.

⁸ The abbreviations C.J., J., and J.J. are used for Chief Justice, Justice and Justices respectively.

⁹ These were two provisions which Hamilton deemed necessary to establish the complete independence of the Courts of Justice, Hamilton *et al.*, *op.cit.*, p. 466.

¹⁰ Geoffrey Sawer, *Australian Federalism in the Courts*, Melbourne: Melbourne University Press, 1967, pp. 32ff (hereafter cited as 'Sawer, 1967(a)').

¹¹ Geoffrey Sawer, *Australian Government Today*, Melbourne: Melbourne University Press, 1967, pp. 11ff (hereafter cited as 'Sawer, 1967(b)').

¹² Sawer, 1967(a), p. 12. In *State of Tasmania v. Commonwealth of Australia* ((1904) 1 C.L.R. at p. 333) Griffith C.J., said: 'we think that as a matter of history of legislation the draft bills which were prepared under the authority of the Parliaments of the several states may be referred to. That will cover the draft bills of 1891, 1897 and 1898. But the express opinion of members of the Convention shall not be referred to'.

¹³ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129 — the Engineers' Case. This case is discussed more fully below.

¹⁴ Sawer, 1967(b), p. 11.

¹⁵ *Ibid.*, p. 13.

¹⁶ Transcript of an interview between I. K. F. Birch and G. Sawer in Canberra on 16 September 1971, p. 3 (hereafter cited as 'Birch-Sawer' transcript).

¹⁷ This is known as the First Airlines Case.

Chapter 7

¹ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1961, p. 44.

² According to Dicey, the principle of Parliamentary Sovereignty establishes 'that

The validity of the Australian National Airlines Act which established a National Airlines Commission with complete trading power with respect to air transport was questioned in this case.

¹⁸ Sawyer, 1967(a), p. 61.

¹⁹ W. Anstey Wynes, *Legislative, Executive and Administrative Power in Australia*, 2nd ed., Sydney: Law Book Co., 1956.

²⁰ Dicey, op.cit., p. 152.

²¹ Peterswald v. Bartley (1904) 1 C.L.R. 497, at p. 507.

²² Barger's Case (1908) 6 C.L.R. 41, at p. 67. In this case the Commonwealth sought payment of an excise tax owing on agricultural implements manufactured in New South Wales.

²³ Ibid., at p. 78.

²⁴ Ibid., at p. 83.

²⁵ Page 503 of the Union Label Case as it is called.

²⁶ Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 C.L.R. 129, at p. 132.

²⁷ Ibid., at p. 146.

²⁸ Commonwealth of Australia v. New South Wales (1923) 32 C.L.R. 200.

²⁹ Ibid., at p. 210.

³⁰ *Constitution*, 1927, p. 47.

³¹ The four Acts, all passed in 1942, were the States Grants (Income Tax Reimbursement) Act, the Income Tax (War-Time Arrangements) Act, the Income Tax Assessment Act and the Income Tax Act.

³² At p. 422 of the first Uniform Tax Case as it is called.

³³ Ibid., p. 424.

³⁴ Ibid., p. 425.

³⁵ In this case, known as the State Banking Case, the validity of the Banking Act 1948 and in particular section 48 of that Act, which stated that banks could only conduct business with a state or its authorities, including local government authorities, with the written consent of the Treasurer was questioned.

³⁶ Uther's Case at p. 350. In this case the question was whether it was the intention of the New South Wales Parliament that the Crown in right of the Commonwealth should be bound by the provisions of a State Act relating to the priority of debts in winding up insolvent companies.

³⁷ Cigamatic Case at p. 378. The quotation is at p. 530 in Uther's Case. Substantially the same matter was in question in this case.

³⁸ Strickland v. Rocla Concrete Pipes Ltd (1971) 124 C.L.R. 468. In this case, the Court disapproved the law established in Huddart, Parker and Co. Pty Ltd v. Moorhead ((1909) 8 C.L.R. 330) with regard to foreign corporations.

Chapter 8

¹ Federated State School Teachers' Assn. of Australia v. Victoria (1929) 41 C.L.R. 569 — the Teachers' Case.

² Ibid., at p. 588.

³ R. v. Burgess; Ex parte Henry (1936) 55 C.L.R. 609 (hereafter cited as the Burgess Case).

⁴ Ibid., at p. 641.

⁵ Ibid., at p. 687.

⁶ H. V. Evatt, 'Constitutional Interpretation in Australia', Reprint from *University of Toronto Law Journal*, vol. III, no. 1, 1939.

⁷ R. v. Poole; Ex parte Henry (1939) 61 C.L.R. 634.

⁸ Sir Robert Menzies, *Central Power in the Australian Commonwealth*, London: Cassel, 1967, p. 123.

⁹ The Second Airlines Case at p. 85. In this case the validity of Air Navigation Regulations insofar as they purported to regulate regular transport operations in New South Wales was in question.

¹⁰ The Main Roads Case, p. 406.

¹¹ Deputy Commissioner of Taxation v. W. R. Moran Pty Ltd (1939) 61 C.L.R. 735. The question in this case was whether a number of Commonwealth Acts passed in 1938 infringed the taxation power in that they discriminated between States.

¹² W. R. Moran v. Deputy Commissioner of Taxation (1940) 63 C.L.R. 338 (Privy Council) at p. 349.

¹³ *Constitution* 1927, p. 21.

¹⁴ Ibid., p. 72.

¹⁵ South Australia v. Commonwealth (1942) 65 C.L.R. 373, at p. 429.

¹⁶ C.P.D., vol. 184, 26 July 1945, p. 4618.

¹⁷ In this case Farey challenged the validity of an order related to the fixing of the price of bread made under regulations which were, in turn, made under the War

Precautions Act 1914-1915, as an exercise of the defence power.

¹⁸ *Farey v. Burvett* at p. 442.

¹⁹ At p. 471. The validity of an order made under a regulation made under the National Security Act 1939-1943 was in question in this case.

²⁰ *Drummond Case* at p. 115.

²¹ Personal information was obtained from *Drummond*. Transcript of interview between I.K.F. Birch and J.McP.Drummond, Sydney, 16 September 1971.

²² *S.M.H.*, 31 January 1942, p. 15.

²³ *Universities Commission, Summary of Activities 1943 to 1945*, p. 2.

²⁴ *Commonwealth Statutory Rules*, 1943, p. 774.

²⁵ *Ex parte King; Re The University of Sydney* (1944) 44 S.R. 19.

²⁶ The question was one of the limits of the Constitutional power of the Commonwealth.

²⁷ *Ibid.*, at p. 29.

²⁸ The university paid the costs in both cases.

²⁹ Regulation 16 read: '(1) The Director-General of Man Power may, on the recommendation of the Commission, from time to time determine the total number of students who may be enrolled in any faculty or course of study in the Universities in Australia.

(2) For the purpose of giving effect to any determination of the Director-General of Man Power under the last preceding sub-regulation, the Commission may, from time to time, by direction in writing to the Vice Chancellor or other appropriate officer of the University —

(a) regulate restrict or enlarge the number of students who may be enrolled in any faculty or course of study at that University;

(b) in any case where any direction is given under paragraph (a) of this sub-regulation, determine the method of selection of students who may be enrolled in any faculty or course of study at the University and prescribe the examinations or tests by which students may be admitted to any faculty or course of study; and

(c) determine whether any student who has failed in the whole or any part of any course of study shall be permitted to continue that course of study during the

present war.

(3) The Commission may, by order, make provision for any matters or things necessary or convenient for exercising its powers or performing its functions under these Regulations.

(4) The power conferred by this regulation shall be exercised only in so far as is necessary for giving effect to the object of these regulations.'

³⁰ *Drummond Case*, at p. 97.

³¹ *Ibid.*, at p. 100.

³² *Ibid.*, at p. 104.

³³ Regulation 15, which was concerned with the Universities Commission, read '(1) The commission shall be responsible for the administration of these Regulations (including the scheme of financial assistance to students contained in the Second Schedule to these Regulations) and, in particular and without limiting the generality of this regulation, shall —

a) inquire into and report to the Minister upon any matter relating to Universities or to education in Australia which the Minister refers to the Commission, or upon any matter which the Commission thinks necessary or desirable for ensuring the provision of facilities to enable persons to receive suitable education and training to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community;

b) advise the Director-General of Man Power on all questions relating to the exemption of students and employees of Universities from service in the Defence Force or any form of service authorized by the National Security (Man Power) Regulations; and

c) advise the Minister, the Director-General of Man Power, the central Medical Co-ordination Committee and the Commonwealth Public Service Board, on the employment during the war of graduates of Universities, or persons who have completed any course at the University, for the purpose of meeting the requirements of the Defence Force and ensuring the maintenance of supplies and services essential to the life of the community.' Sections 2) and 3) were machinery clauses.

³⁴ *Drummond Case* at p. 105.

³⁵ *Ibid.*, at p. 107.

³⁶ *Ibid.*, at p. 109.

³⁷ *Ibid.*, at p. 115.

³⁸ *S.M.H.*, 26 June 1943.

³⁹ *S.M.H.*, 1 July 1943.

⁴⁰ This information was given verbally by the Registrar of the University of Sydney, 17 September 1971.

⁴¹ *S.M.H.*, 12 June 1943, p. 11.

⁴² *S.M.H.*, 24 June 1943, p. 4.

⁴³ Birch-Dedman transcript, p. 6.

⁴⁴ Universities Commission, *op.cit.*, p. 12.

⁴⁵ Birch-Dedman transcript, p. 5.

⁴⁶ Birch-Sawer transcript, p. 17.

⁴⁷ *Ex parte Forster*; re University of Sydney (1963) 63 S.R. 723. The Court noted that in *King's Case*, to which Forster's Counsel referred, King was a recent matriculant.

Chapter 9

¹ First Uniform Tax Case, at p. 409.

² *Ibid.*

³ *C.P.D.*, vol. 177, 23 February 1944, p. 453.

⁴ In this case it was claimed that the Pharmaceutical Benefits Act 1947-1949 or regulations made under it were beyond the power of the Commonwealth Government as provided for in s. 51(xxiiiA).

⁵ *Constitution 1927*, p. 69.

⁶ *Endowment Evidence*, p. 10.

⁷ Section 8 of Article 1 of the Constitution of the United States of America specifies the powers of Congress, among which is the power to 'provide for the common Defence and general Welfare of the United States'. This power has enabled the Federal Government to make funds available for education.

⁸ *Endowment Evidence*, p. 12.

⁹ *Attorney-General for Victoria (ex rel. Dale) v. Commonwealth and others* (1945) 71 C.L.R. 237.

¹⁰ *Ibid.*, at pp. 239ff.

¹¹ *Ibid.*, at p. 242.

¹² *Ibid.*, at p. 245.

¹³ *Ibid.*, at p. 256.

¹⁴ *Ibid.*, at p. 263.

¹⁵ *Ibid.*, at p. 273.

¹⁶ *Ibid.*, at p. 269.

¹⁷ *Ibid.*, at p. 267.

¹⁸ *Ibid.*, at p. 270.

¹⁹ *Ibid.*, at p. 272.

²⁰ *Ibid.*, at p. 282.

²¹ *C.P.D.*, vol. 186, 27 March 1946, p. 648.

²² *Federal Council of the British Medical Association and others v. Commonwealth* (1949) 79 C.L.R. 201 at p. 247.

²³ *Ibid.*, at p. 279.

²⁴ *Ibid.*, at p. 260.

²⁵ *Ibid.*, at p. 286.

²⁶ *Ibid.*, at p. 271. (O'Connor's dictum is found in *Baxter v. Ah Way* (1909) 8 C.L.R. at p. 637.)

²⁷ Two conditions need to be met before the Court can hear a case. In the first place there has to be a law or laws based on this power. Secondly, there has to be a case testing the validity of such law or laws. In 1921, the Court held that the Parliament cannot 'confer power or jurisdiction on the High Court to determine abstract questions of law without the right or duty of any body or person being involved'. (In *re Judiciary and Navigation Acts* (1921) 29 C.L.R. at p. 267.)

The likelihood of an appeal being made against Commonwealth law is related to the right to challenge (*locus standi*) as has been defined by the High Court. It held, in *Anderson v. Commonwealth* ((1923) 47 C.L.R. 51), that members of the public as such did not have *locus standi*. In 1943, Starke J. said, 'only those whose rights are infringed and not strangers are entitled to challenge the validity of legislation'. (*Victoria Chamber of Manufacturers v. Commonwealth* (1943) 67 C.L.R. at p. 343.) But not any one claiming to have had rights infringed has *locus standi*. In 1945, the Chief Justice, Sir John Latham, in *Toowoomba Foundry Pty Ltd v. Commonwealth* (1945) 71 C.L.R. at p. 570, said: 'it is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause for action in this court for a declaration that the legislation is invalid'. The following year he said, 'The enactment of a law cannot in itself give any cause of action to a person who is injured by the operation of the law. All members of the community are subject to the risk of a law being made, altered or repealed to their detriment, and they have no remedy for

any injury consequently suffered unless the Commonwealth provides for some form of compensation'. (Arthur Yates and Co. v. The Vegetable Seeds Committee (1946) 72 C.L.R. at p. 64.)

It is difficult to envisage a *person* having the right to take action against the Commonwealth to test the validity of its laws connected with education. The Australian Constitution unlike its American counterpart guarantees few personal freedoms.

States' Attorneys-General have much more ready access to the High Court. In Attorney-General for Victoria v. Commonwealth (1935) 52 C.L.R. at p. 556, Gavan Duffy C.J., Evatt and McTiernan JJ. said, 'in our opinion, it must now be taken as established that the Attorney-General of the State of the Commonwealth has a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within the State whose interests he represents'. The

interests which the Attorney-General acts to safeguard may be those of individuals as in the Pharmaceutical Benefits Case or those of the state as in the First Uniform Tax Case.

A recent example of the difficulty of obtaining standing was that of a group wishing to challenge certain Commonwealth legislation related to education on the grounds that the national government had violated ss. 96 and 116 of the Constitution. The Commonwealth Attorney-General and some states' Attorneys-General declined to act for the group. However, a writ has now been issued out of the High Court with the Attorney-General for Victoria as plaintiff at the relation of twenty-eight people, fifteen of whom are involved in education either as parents or teachers. (Writ No. 57 of 1973).

²⁸Birch-Sawer transcript, p. 2.

²⁹*Ibid.*, p. 12.

³⁰No. 55 of 1945, sec. 3.

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I. K. F. Birch is a research scholar in the Education Research Unit of the Australian National University. He is at present engaged in further research in the use of law in the state education system and also the increasing amount of Commonwealth statutory law in education.



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The Australian Constitution makes no reference to education as one of the responsibilities transferred by the states to the central government. Yet the Australian Government is very much involved, both in financing education in the states and also in its future development. Is the Australian Government usurping states' rights? This book examines the development of central government involvement in education, and its justification, in particular the 'benefits to students' clause in the 1946 social services amendment to the Constitution. Leading court cases concerning these powers, decided in the High Court of Australia, suggest that the central government does have authority for its actions. Clearly, the book is of fundamental importance for educationists, states-righters, and lawyers, amongst others, and its implications are far reaching.

I.K.F. Birch is a research scholar in the Education Research Unit of the Australian National University. He is at present engaged in further research in the use of law in the state education system and also the increasing amount of Commonwealth statutory law in education.

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