HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

BRYAN REGINALD PAPE PLAINTIFF

AND

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA AND ANOR DEFENDANTS

Pape v Commissioner of Taxation [2009] HCA 23
Date of order: 3 April 2009
Date of publication of reasons: 7 July 2009
S35/2009

ORDER

Order that the questions stated in the amended special case be answered as follows:

Question 1: *Does the plaintiff have standing to seek the relief claimed in his writ of summons and statement of claim?*

Answer: *Yes.*

Question 2: *Is the* Tax Bonus for Working Australians Act (No 2) *2009 (Cth) valid because it is supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?*

Answer: *The* Tax Bonus for Working Australians Act (No 2) *2009 is a valid law of the Commonwealth.*

Question 3: *Is payment of the tax bonus to which the plaintiff is entitled under the* Tax Bonus for Working Australians Act (No 2) *2009 supported by a valid appropriation under ss 81 and 83 of the Constitution?*

Answer: *There is an appropriation of the Consolidated Revenue Fund within the meaning of the Constitution in respect of payments by the Commissioner required by s 7 of the* Tax Bonus for Working Australians Act (No 2) *2009.*

Question 4: *Who should pay the costs of the special case?*

Answer: *In accordance with the agreement of the parties announced on the second day of the hearing of the special case, there is no order for costs.*

Representation

B R Pape in person (instructed by Toomey Pegg Drevikovsky Lawyers)

S J Gageler SC, Solicitor-General of the Commonwealth with S B Lloyd SC and G M Aitken for the defendants (instructed by Australian Government Solicitor)

Interveners

R J Meadows QC, Solicitor-General for the State of Western Australia with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Hinton QC, Solicitor-General for the State of South Australia with S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M J Leeming SC with J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

CATCHWORDS

Pape v Commissioner of Taxation

Constitutional law – Standing – Section 7 of the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Act") provides that the Commissioner of Taxation must pay a tax bonus to entitled persons – Persons entitled under s 5 of Act if, inter alia, an individual, Australian resident with an adjusted tax liability greater than nil and not exceeding $100,000 for 2007-08 income tax year – Whether person entitled under s 5 of Act has standing to bring action for declarations and injunction.

Constitutional law – Appropriations of moneys from the Consolidated Revenue Fund – Whether payment of tax bonus supported by valid appropriation under ss 81 and 83 of Constitution – Whether appropriation "for the purposes of the Commonwealth" under s 81 – Whether phrase "for the purposes of the Commonwealth" limits legislative power – Whether source of legislative "power to spend" is ss 81 and 51(xxxix).

Constitutional law – Powers of the Commonwealth Parliament – Whether Act law with respect to trade and commerce under s 51(i) – Whether Act law with respect to taxation under s 51(ii) – Whether Act law with respect to external affairs under s 51(xxix) – Whether Act supported by implied nationhood power – Whether Act supported by power conferred by ss 81 and 51(xxxix) – Whether Act supported by power conferred by ss 61 and 51(xxxix) – If Act beyond power, whether Act can be read down so as to be within power.

Constitutional law – Executive power of the Commonwealth – Global financial and economic crisis – Whether Act supported by ss 61 and 51(xxxix).

Constitutional law – Taxation power – Persons entitled under s 5 of Act included persons entitled to tax bonus greater than their adjusted tax liability for the 2007-08 financial year – Whether Act law with respect to taxation.

Words and phrases – "appropriation", "for the purposes of the Commonwealth", "made by law" and "maintenance of this Constitution".

Constitution, ss 51(i), (ii), (xxix), (xxxix), 61, 81 and 83.
Acts Interpretation Act 1901 (Cth), s 15A.
Tax Bonus for Working Australians Act (No 2) 2009 (Cth).
Taxation Administration Act 1953 (Cth), ss 2 and 16.

FRENCH CJ.

Introduction

1 On 4 February 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs introduced into the House of Representatives the Tax Bonus for Working Australians Bill 2009. The Minister said that the measure would provide, at a cost of $8.2 billion, financial support to about 8.7 million taxpayers. This support was to take the form of one-off payments ranging from $950 to $300 according to the taxable income of the recipients in the year ended 30 June 2008. Their stated purpose was to[1]:

> "immediately support jobs and strengthen the Australian economy during a severe global recession."

2 The Bill was defeated in the Senate. A fresh Bill in substantially the same terms save for the amounts of the payments was introduced into the House of Representatives on 12 February 2009 as the Tax Bonus for Working Australians Bill (No 2) 2009. It provided for payments ranging from $900 to $250 for taxpayers earning between nil and $100,000 for the year ended 30 June 2008. A Tax Bonus for Working Australians (Consequential Amendments) Bill (No 2) 2009 was introduced at the same time.

3 The Second Reading Speeches for the new Bills incorporated by reference the Second Reading Speeches for their predecessors[2]. The payments were said to be among five key one-off payments for lower and middle-income households and individuals[3].

4 Eligibility for the payments, according to entitlements defined by the legislation, was to be determined by the Commissioner of Taxation. The bonus would be available from April 2009 to Australian resident taxpayers who had already had their tax returns assessed. Taxpayers who had not yet lodged their returns would have their bonus paid following assessment of their returns by the Australian Taxation Office ("the ATO").

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1 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 February 2009 at 175.

2 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 February 2009 at 1267.

3 The *Household Stimulus Package Act (No 2)* 2009 (Cth) provided for the "back to school bonus", the "single income family bonus", the "training and learning bonus" and the "farmers hardship bonus", primarily by amendments to the *Social Security Act* 1991 (Cth) and the *A New Tax System (Family Assistance) Act* 1999 (Cth).

5 The Bills were enacted and assented to on 18 February 2009 as the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Tax Bonus Act") and the *Tax Bonus for Working Australians (Consequential Amendments) Act (No 2)* 2009 (Cth) ("the Consequential Amendments Act").

6 On 26 February 2009, Bryan Reginald Pape, a person apparently entitled to receive $250 under the Tax Bonus Act, issued a writ out of the Sydney Registry of this Court against the Commissioner of Taxation claiming, inter alia, declarations that the Tax Bonus Act is invalid and that the tax bonus payable to him under that Act is "unlawful and void". He also sought an injunction restraining the making of the payment to him.

7 The Commonwealth was joined as a defendant to the action. The parties agreed to submit a Special Case pursuant to r 27.08 of the High Court Rules 2004, stating questions for the opinion of the Full Court. On 13 March 2009, Gummow J ordered that the Special Case be referred to the Full Court for hearing commencing on 30 March 2009. Notices under s 78B of the *Judiciary Act* 1903 (Cth) were issued on 17 March 2009 to the Attorneys-General of the States and Territories. The States of New South Wales, South Australia and Western Australia intervened. In my opinion, Mr Pape had standing to claim the relief he sought. I am also of the opinion that the Tax Bonus Act is valid and the tax bonus payable to Mr Pape is lawful. On 3 April 2009, I joined in the pronouncement of orders reflecting this conclusion by way of the answers then given to the questions stated in the Special Case.

8 I base my opinion as to validity upon the following propositions:

1. The executive power of the Commonwealth conferred by s 61 of the Constitution extends to the power to expend public moneys for the purpose of avoiding or mitigating the large scale adverse effects of the circumstances affecting the national economy disclosed on the facts of this case, and which expenditure is on a scale and within a time-frame peculiarly within the capacity of the national government.

2. The executive power so to expend public moneys is conditioned, by ss 81 and 83 of the Constitution, upon appropriation of the requisite moneys by an Act of the Parliament for that purpose.

3. The appropriation necessary to authorise the proposed expenditure in this case was effected by s 16 of the *Taxation Administration Act* 1953 (Cth) ("the Taxation Administration Act") read with s 3 of the Tax Bonus Act.

4. The legislative power to enact statutory provisions, beyond appropriation, to support the exercise of the executive power in this case is found in the incidental power conferred by s 51(xxxix) of the Constitution.

5. The provisions of ss 81 and 83 do not confer a substantive "spending power" upon the Commonwealth Parliament. They provide for parliamentary control of public moneys and their expenditure. The relevant power to expend public moneys, being limited by s 81 to expenditure for "the purposes of the Commonwealth", must be found elsewhere in the Constitution or statutes made under it.

6. It is not necessary in light of the preceding to consider the specific heads of power otherwise relied upon by the Commonwealth to support the Tax Bonus Act.

9 The implications of these propositions for the scope of the executive power generally are limited. The aspect of the power engaged in this case involves the expenditure of money to support a short-term national fiscal stimulus strategy calculated to offset the adverse effects of a global financial crisis on the national economy. The legislative measures defining the criteria of that expenditure and matters incidental to it were authorised by s 51(xxxix). The expenditure was necessarily conditioned upon a parliamentary appropriation, in legislative form, mandated by ss 81 and 83 of the Constitution. The constitutional support for expenditure for national purposes, by reference to the executive power, may arguably extend to a range of subject areas reflecting the established practice of the national government over many years, which may well have relied upon ss 81 and 83 of the Constitution as a source of substantive spending power. It is not necessary for present purposes to define the extent to which such expenditure, previously thought to have been supported by s 81, lies within the executive power.

10 Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws, absent authority supplied by a statute made under some head of power other than s 51(xxxix) alone, are likely to be answered conservatively[4]. They are likely to be answered bearing in mind the cautionary words of Dixon J in the *Communist Party Case*[5]:

> "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of

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4 See discussion of the authorities in Zines, *The High Court and the Constitution*, 5th ed (2008) at 414-415.

5 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187; [1951] HCA 5.

> government may need protection from dangers likely to arise from within the institutions to be protected."

In that connection, and as appears below, the identification of a class of events or circumstances which might, under some general rubric such as "national concern" or "national emergency", enliven the executive power does not arise for consideration here.

The questions for determination

11 The Special Case stated the following questions for the opinion of the Full Court:

1. Does the plaintiff have standing to seek the relief claimed in his writ of summons and statement of claim?

2. Is the Tax Bonus Act valid because it is supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

3. Is payment of the tax bonus to which the plaintiff is entitled under the Tax Bonus Act supported by a valid appropriation under ss 81 and 83 of the Constitution?

4. Who should pay the costs of the Special Case?

The Special Case proceeded in part on the basis of certain "agreed facts" incorporated in it by recitation and by documentary attachment. It is necessary to consider the nature of those facts and their role in the decision in this case before turning to their detailed content.

The nature of the agreed facts

12 The facts agreed in the Special Case fall into the following categories:

(i) Statements of law or mixed law and fact. In particular the statement that Mr Pape is putatively entitled under the Tax Bonus Act to a payment of $250 and that his adjusted tax liability for the year ended 30 June 2008 was $25,951.92.

(ii) The existence of certain economic conditions.

(iii) Statements made by the Executive and by international bodies comprising the Group of 20 ("the G20"), the International Monetary Fund ("the IMF") and the Organisation for Economic Co-operation and Development ("the OECD").

(iv) Decisions taken by the Executive.

13 Mr Pape contested the relevance of the factual matters. He did not dispute their accuracy or that of the statements, attached to the Special Case, made by the Commonwealth Government, the G20, the IMF and the OECD.

Organisations referred to in the agreed facts

14 In order to understand the agreed facts it is necessary to describe the international entities referred to in the attachments to the Special Case. The G20, the IMF and the OECD may be explained briefly by reference to materials provided to the Court, without objection, during the hearing of the Special Case.

15 The G20, of which Australia is a member, comprises Finance Ministers and Central Bank Governors of industrialised and developing countries. Meetings of the Ministers and Governors are usually preceded by two meetings of Deputies[6].

16 The IMF was established in 1945 pursuant to the Articles of Agreement of the International Monetary Fund, a treaty which entered into force for Australia on 5 August 1947. The purposes of the IMF set out in Art I of the treaty include:

> "(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
>
> (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy."

Members of the IMF assume, inter alia, obligations to collaborate with the IMF to promote exchange stability and maintain orderly exchange arrangements with other members and to avoid competitive exchange alterations[7]. Members also undertake not to impose restrictions on the making of payments and transfers for current international transactions without the approval of the IMF[8].

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6 http://www.g20.org accessed 28 March 2009, provided to the Court by the Commonwealth at the hearing.

7 Articles of Agreement of the International Monetary Fund, Art IV, s 1.

8 Articles of Agreement of the International Monetary Fund, Art VIII, s 2(a).

17 Australia is also a party to the Convention on the Organisation for Economic Co-operation and Development made in Paris in 1960. The Convention entered into force for Australia on 7 June 1971. The Convention reconstituted what was formerly the Organisation for European Economic Co-operation as the OECD. The aims of the OECD are set out in Art 1 of the Convention, including the promotion of policies designed:

> "(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
>
> (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
>
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations."

The members also agree that they will "co-operate closely and where appropriate take co-ordinated action"[9].

Factual background

18 The following sets out salient features of the agreed facts, including those reflected in the attachments to the Special Case.

19 There have been rapid adverse changes in macroeconomic circumstances globally and in Australia in 2008 and 2009. These are characterised in the agreed facts as a global financial and economic crisis. No country's economy is expected to avoid its effects. It has already involved the most severe and rapid deterioration in the global economy since the Great Depression. It is the most significant economic crisis since the Second World War. It involves sharp world-wide declines in growth, rises in unemployment, restricted access to credit and falling wealth.

20 The crisis has triggered a global recession. This has caused a deterioration in the Australian economy with almost all of its sectors facing significant weakness over the forecast horizon. Significantly weakened domestic growth and higher unemployment are forecast.

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9 Convention on the Organisation for Economic Co-operation and Development, Art 3(c).

21 On 15 November 2008 the G20 held a Summit on Financial Markets and the World Economy in Washington DC and issued a declaration which referred to "serious challenges to the world economy and financial markets" and the determination of the members to enhance cooperation, to restore global growth and to achieve needed reforms in the world's financial systems. The declaration included the following statement:

> "Against this background of deteriorating economic conditions worldwide, we agreed that a broader policy response is needed, based on closer macroeconomic cooperation, to restore growth, avoid negative spillovers and support emerging market economies and developing countries. As immediate steps to achieve these objectives, as well as to address longer-term challenges, we will:
>
> …
>
> * Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability."

22 In December 2008 in an OECD publication entitled "OECD Economic Outlook" reference was made to fiscal stimulus packages. The general observation was offered that in some countries the scope for the reduction in policy rates was limited. In that unusual situation fiscal policy stimulus over and above the support provided through automatic stabilisers had an important role to play:

> "Fiscal stimulus packages, however, need to be evaluated on a case-by-case basis in those countries where room for budgetary manoeuvre exists. It is vital that any discretionary action be timely and temporary and designed to ensure maximum effectiveness."

Reference was made to the long-term nature of infrastructure investment and:

> "[a]lternatives, such as tax cuts or transfer payments aimed at credit-constrained, poorer households, might prove more effective in boosting demand."

23 Staff of the IMF prepared a note of a meeting of the Deputies of the Group of 20 held between 31 January and 1 February 2009 in London. The note referred to the current downturn in the global economy and an "adverse feedback loop between the real and financial sectors". The Executive Summary to the note stated:

> "More aggressive and concerted policy actions are urgently needed to resolve the crisis and establish a durable turnaround in global activity. To be effective, policies need to be comprehensive and internationally

coordinated to limit unintended cross-border effects. Action is needed on two fronts – to restore financial sectors to health and to bolster demand to sustain a durable recovery in global activity."

24 The need to support demand was specifically referred to:

"Macroeconomic policy stimulus will be critical to support demand while financial issues are addressed and to avoid a deep and prolonged recession. With conventional monetary policy reaching its limits, central banks will need to explore alternative policy approaches with a focus on intervention to unlock key credit markets. That said, with constraints on the effectiveness of monetary policy, fiscal policy must play a central role in supporting demand, while remaining consistent with medium-term sustainability. A key feature of a fiscal stimulus program is that it should support demand for a prolonged period of time and be applied broadly across countries with policy space to minimize cross-border leakages."

25 The role of direct fiscal stimulus was also identified:

"Fiscal policy is providing important support to the economy through a range of channels, including direct stimulus, automatic stabilizers and the use of public balance sheets to shore up the financial system. While such support is critical to bolster aggregate demand and to limit the impact of the financial crisis on the real economy, it implies a significant deterioration in the fiscal accounts."

26 At the time of the Deputies' meeting, G20 countries had adopted or planned to adopt fiscal stimulus measures amounting on average to around ½% of GDP in 2008, 1½% of GDP in 2009 and about 1¼% of GDP in 2010. There was considerable variation across G20 countries in the size and composition of stimulus packages. Fiscal stimulus, to that time, had consisted of one-third revenue measures and two-thirds expenditure measures. Revenue measures had focussed on cuts in personal income tax and indirect taxes such as VAT or excises. Increased spending for infrastructure had been emphasised on the expenditure side. Other expenditure measures included transfers to states or local governments, support for housing sectors and aid to small and medium enterprises.

27 Fiscal stimulus measures in G20 countries were expected to affect their growth in 2009 by the order of ½ to 1¼ percentage points.

28 A statement from an IMF-OECD-World Bank seminar convened in February 2009 included the following:

"In parallel, there continues to be an urgent need for fiscal stimulus. The size and composition of fiscal packages should be consistent with each

> country's fiscal space and institutional capacity. The deepening of the downturn suggests the need for an increase in high-impact fiscal expenditures in the first half of 2009, with further support in the following quarters, by countries in a position to prudently undertake such spending. At the same time, embedding stimulus packages in a credible medium-term strategy that safeguards fiscal sustainability will also increase their impact in the short term."

29 The Updated Economic and Fiscal Outlook ("the UEFO") published by the Treasurer and the Minister for Finance on 3 February 2009 referred to the deteriorating global economy and falling tax revenues. The circumstances were described as "exceptional" and the conclusion offered that "fiscal policy must take a strong role in supporting the economy". The paper described support for economic growth and jobs as "the immediate and overriding priority for fiscal policy". The Ministers said that a $42 billion Nation Building and Jobs Plan would deliver a fiscal stimulus package of about 2% of GDP in 2008-09.

30 Elements of the proposed fiscal stimulus package were set out in the UEFO. The element relevant to these proceedings was described:

> "The Government will provide $12.7 billion to deliver an immediate stimulus to the economy to support growth and jobs now before investment spending and lower interest rates take effect. These measures include an $8.2 billion Tax Bonus for Working Australians, a $1.4 billion Single-income Family Bonus, a $20.4 million Farmer's Hardship Bonus, a $2.6 billion Back to School Bonus and a $511 million Training and Learning Bonus. These bonuses will be paid from early March."

The Ministers referred to statements by international financial institutions about the necessity for domestic fiscal stimulus. The decisions taken by the Commonwealth Government by way of response to the macroeconomic circumstances included:

(i) To create three substantial fiscal stimulus packages and a range of other interventions in financial markets, including a deposit and wholesale funding guarantee. The fiscal stimulus packages are the Economic Security Strategy, announced 14 October 2008, the Nation Building Package announced 12 December 2008 and the Nation Building and Jobs Plan announced in the UEFO on 3 February 2009;

(ii) To provide an $8.2 billion tax bonus for working Australians, which was reduced to $7.7 billion as a result of the legislative process.

31 A copy of a joint media release by the Prime Minister and the Treasurer on 3 February 2009 in relation to the Nation Building and Jobs Plan was set out as an annexure to the Special Case. The press release said, inter alia:

> "Targeted bonuses to low and middle income households will provide an immediate stimulus to the economy and support Australian jobs.
>
> In conjunction with the payments delivered as part of the $10.4 billion Economic Security Strategy announced in October, these measures have been designed to assist those groups most affected by the flow-on effects of the global recession."

32 The Special Case annexed a minute of the ATO relating to the implications of delaying the tax bonus as a result of these proceedings. The minute referred to:

> "an extremely tight implementation schedule in order to ensure that as many tax bonus payments as possible are distributed in the last quarter of the financial year in line with the objectives of the Government's fiscal stimulus strategy."

Distribution of the payments was planned to begin in the week commencing 6 April 2009 with some 80% of the payments being made over the following four weeks. A smaller wave of distributions was to be made in May and June.

33 The objective of the Commonwealth Government was that payments of the tax bonus be made as soon as possible on the basis that the earlier the stimulus was delivered the more effective it would be.

The statutory framework

34 The Tax Bonus Act commenced on the day on which it received the Royal Assent[10]. Section 3 of the Act provides:

> "The Commissioner has the general administration of this Act."

This provision makes the Tax Bonus Act a "taxation law" within the meaning of s 995-1(1) of the *Income Tax Assessment Act* 1997 (Cth). The term "taxation law" is there defined, inter alia, as:

> "an Act of which the Commissioner has the general administration".

35 Section 5 of the Tax Bonus Act creates the entitlement to a tax bonus payment:

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10 Tax Bonus Act, s 2.

"**Entitlement to tax bonus**

(1) A person is entitled to a payment (known as the ***tax bonus***) for the 2007-08 income year if:

(a) the person is an individual; and

(b) the person is an Australian resident for that income year; and

(c) the person's adjusted tax liability for that income year is greater than nil; and

(d) the person's taxable income for that income year does not exceed $100,000; and

(e) the person lodges his or her income tax return for that income year no later than:

(i) unless subparagraph (ii) applies – 30 June 2009; or

(ii) if, before the commencement of this Act, the Commissioner deferred the time for lodgment of the return under section 388-55 in Schedule 1 to the *Taxation Administration Act* 1953 to a day later than 30 June 2009 – that later day.

Exception for persons aged under 18 without employment income etc.

(2) However, the person is not entitled to the tax bonus for the 2007-08 income year if:

(a) he or she is a prescribed person in relation to that income year and is not an excepted person in relation to that income year; and

(b) his or her assessable income for the income year does not include excepted assessable income."

The term "prescribed person" is defined in s 4 as having the same meaning as in s 102AC of the *Income Tax Assessment Act* 1936 (Cth). An "excepted person" is also defined by reference to s 102AC[11].

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11 In s 102AC, "prescribed person" refers to a person aged less than 18 years at the end of a given income year who is not an excepted person. An "excepted person" is a minor who is engaged in a full-time occupation, or who receives certain allowances or pensions, or who suffers from certain types of disability.

36 Section 6 sets out the amounts of the tax bonus payable to persons entitled to it for the 2007-08 income year. The amounts are:

> "(a) if the person's taxable income for that income year does not exceed $80,000 – $900; or
>
> (b) if the person's taxable income for that income year exceeds $80,000 but does not exceed $90,000 – $600; or
>
> (c) if the person's taxable income for that income year exceeds $90,000 but does not exceed $100,000 – $250."

37 The obligation to pay the tax bonus is imposed on the Commissioner by s 7, which provides, inter alia:

> "(1) If the Commissioner is satisfied that a person is entitled to the tax bonus for the 2007-08 income year, the Commissioner must pay the person his or her tax bonus as soon as practicable after becoming so satisfied."

38 It was submitted by the Solicitor-General of the Commonwealth that the entitlement created by s 5 did not give rise to a right of recovery by the person entitled to the tax bonus. It was the Commissioner's duty to pay under s 7 which would be enforceable by mandamus. In my opinion, however, a right of recovery would lie on the basis of the Commissioner's duty. And where, as in this case, the debt is liquidated an action in debt would lie[12].

39 Section 8 makes provision for recovery of overpayments in the event that a tax bonus is paid to a person not entitled to it or in the event that a person is paid more than the correct amount of his or her tax bonus. There is a general interest charge applicable by virtue of s 9 in the event that a person liable to repay an amount does not do so within the required time.

40 The Commonwealth[13] relied upon s 16 of the Taxation Administration Act as the provision effecting the appropriations necessary under ss 81 and 83 of the Constitution to authorise the payment of the bonuses. Section 16 provides, inter alia:

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12 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65] per McHugh and Gummow JJ; [1998] HCA 20, citing *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 70; [1920] HCA 51 and *Shepherd v Hills* (1855) 11 Ex 55 at 67 [156 ER 743 at 747].

13 Reference in these reasons to submissions by the Commonwealth refers to the common submissions put by the Commonwealth and the Commissioner.

"(1) Where the Commissioner is required or permitted to pay an amount to a person by or under a provision of a taxation law other than:

(a) a general administration provision; or

(b) a provision prescribed for the purposes of this paragraph;

the amount is payable out of the Consolidated Revenue Fund, which is appropriated accordingly.

…

(3) In this section, ***general administration provision*** means a provision of a taxation law that provides that the Commissioner has the general administration of the taxation law."

41 The Explanatory Memorandum which accompanied the Bills for the Tax Bonus Act and the Consequential Amendments Act, under the heading "Context of the Bills", stated:

"1.3 These Bills give effect to the Government's *Nation Building and Jobs Plan* announced on 3 February 2009. The plan was introduced to assist the Australian people deal with the most significant economic crisis since the Second World War and provide immediate economic stimulus to boost demand and support jobs. This measure, at a cost of $7.7 billion, provides financial support to around 8.7 million taxpayers."

The constitutional framework

42 Provisions of the Constitution central to the arguments advanced for and against validity were:

(a) Paragraphs of s 51 conferring express legislative power on the Parliament 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;

…

(xxix) external affairs;

…

(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."

(b) The executive power of the Commonwealth conferred by s 61 of the Constitution:

"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."

(c) Section 81 which directs government revenues into a Consolidated Revenue Fund subject to appropriation in the following terms:

"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."

(d) Section 83 which provides:

"No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament."

43 The Commonwealth seeks to support the validity of the provisions of the Tax Bonus Act by reference to the following broad propositions:

1. The Tax Bonus Act read with s 16 of the Taxation Administration Act is supported by ss 81 and 51(xxxix) of the Constitution.

2. In the alternative the Tax Bonus Act is supported by legislative powers identified as:

(i) Section 51(xxxix) of the Constitution read with ss 61, 81 and 83.
(ii) The Trade and Commerce Power – Constitution, s 51(i).
(iii) The External Affairs Power – Constitution, s 51(xxix).
(iv) The Taxation Power – Constitution, s 51(ii).

Jurisdiction

44 The jurisdiction of this Court to entertain the application is derived from s 30 of the *Judiciary Act* which confers upon the Court original jurisdiction:

> "(a) in all matters arising under the Constitution or involving its interpretation".

That statutory jurisdiction is conferred pursuant to the authority given to the Parliament by s 76(i) of the Constitution.

The plaintiff's standing

45 The Commonwealth accepted that Mr Pape had a sufficient interest and therefore standing to seek a declaration that the tax bonus payable to him is unlawful and void. However, it maintained that he did not have standing to seek a declaration that the Tax Bonus Act is invalid. In particular, it was submitted, he could not argue that the Tax Bonus Act was invalid in its application to persons who would receive a tax bonus of a greater amount than the tax that they paid given that he himself will not be in that class of persons.

46 The submission was an unattractive one. It assumed that if Mr Pape were to succeed in establishing that the payment to him was unauthorised because the Tax Bonus Act was beyond power, there would be no consequence beyond his entitlement. It is difficult to imagine how the Commonwealth, faced with a finding by this Court that the Tax Bonus Act is invalid, could confine the application of that finding to Mr Pape and disregard it in its application to the remainder of those purportedly entitled under the Act. A declaration of invalidity of the Act would reflect the resolution of a question forming part of the matter in respect of which Mr Pape has invoked this Court's jurisdiction. Existing authorities as to standing in constitutional litigation would not prevent Mr Pape from obtaining the declaration he seeks as to the invalidity of the Act.

47 There is a long history of judicial caution in relation to the standing of private individuals to challenge the validity of statutes absent some particular or special interest to be advanced by such challenge. The Supreme Court of the United States described the relation of taxpayer to federal government as "shared with millions of others" and "comparatively minute and indeterminable"[14]. The resolution of the standing issue in that case was related to the availability of equitable relief[15] and limiting considerations flowing from the separation of

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14 *Massachusetts v Mellon* 262 US 447 at 487 (1923).

15 262 US 447 at 487 (1923).

legislative and judicial powers[16]. The decision was referred to and relied upon in Australia in the formulation of a "private or special interest" test for standing[17].

48 Earlier decisions of the Court have left some doubt about the standing of taxpayers to challenge taxing legislation. Absent exposure to a specific liability or obligation, taxpayers have been thought to lack the interest needed to support a challenge to the validity of the legislation[18].

49 Private challenges to spending arrangements have also encountered standing difficulties. In the *AAP Case*[19], Mason J observed that the activity there under challenge created no cause of action in the individual citizen and that the individual taxpayer would have no interest at all in funds standing to the credit of the Consolidated Revenue Fund[20]. Similarly, in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[21], Gibbs J did not think that plaintiffs who were taxpayers and parents of children at government schools had a sufficiently "special interest in the subject matter" of an action to challenge the validity of grants made under s 96 for the purposes of funding church schools[22]. His Honour referred to an exception which appeared to have been recognised for constitutional cases by the Supreme Court of Canada in *Thorson v Attorney-General of Canada*[23]. He expressed no concluded opinion on that exception[24].

50 The question of standing is not readily detached from that of jurisdiction where the jurisdiction is federal. In *Croome v Tasmania*[25], Gaudron, McHugh and Gummow JJ pointed to the conceptual awkwardness, if not impossibility, of

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16 262 US 447 at 488 (1923).

17 *Anderson v The Commonwealth* (1932) 47 CLR 50 at 52; [1932] HCA 2.

18 *Fishwick v Cleland* (1960) 106 CLR 186; [1960] HCA 55 and *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177; [1965] HCA 16.

19 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338; [1975] HCA 52.

20 (1975) 134 CLR 338 at 402.

21 (1981) 146 CLR 559; [1981] HCA 2.

22 (1981) 146 CLR 559 at 589.

23 [1975] 1 SCR 138.

24 (1981) 146 CLR 559 at 589-590.

25 (1997) 191 CLR 119; [1997] HCA 5.

the attempted severance between questions going to the standing of the plaintiffs and those directed to the constitutional requirement that federal jurisdiction be exercised with respect to a "matter"[26]. Their Honours said[27]:

> "Where the issue is whether federal jurisdiction has been invoked with respect to a 'matter', questions of 'standing' are subsumed within that issue. The submission made in the present case, to the effect that a proceeding in which a citizen seeks a declaration of invalidity of a law of a State, by reason of the operation of the Constitution, is liable to be struck out unless there is attempted enforcement of the State law against the citizen, indicates the interdependence of the notions of 'standing' and of 'matter'."

51 The interdependence of jurisdiction and standing was revisited in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[28]:

> "[I]n federal jurisdiction, questions of 'standing', when they arise, are subsumed within the constitutional requirement of a 'matter'. This emphasises the general consideration that the principles by which standing is assessed are concerned to 'mark out the boundaries of judicial power' whether in federal jurisdiction or otherwise." (footnotes omitted)

52 Mr Pape's standing was conceded in relation to his challenge to the lawfulness of the payment to be made to him under the Tax Bonus Act. That concession concludes the question of his standing for the purpose of the relief he claimed. It was a necessary part of the disposition of the matter before the Court that it determine whether the Tax Bonus Act was valid. Declaratory relief which Mr Pape sought would reflect, were he to succeed, findings made by the Court leading to the conclusion that he was not entitled to the tax bonus payment. He would be entitled to a declaration of invalidity in relation to the Act reflecting that conclusion. There is no basis for the contention that he lacks standing to seek declaratory relief in relation to the validity of the Tax Bonus Act.

53 It is necessary now to consider the so-called "appropriations power", which has been called "the spending power"[29], under ss 81 and 83 of the

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26 (1997) 191 CLR 119 at 132.

27 (1997) 191 CLR 119 at 132-133.

28 (1998) 194 CLR 247 at 262 [37] per Gaudron, Gummow and Kirby JJ; [1998] HCA 49.

29 For example, see Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369.

Constitution. Having regard to their text, their historical antecedents in the history of responsible government and their development at the Conventions of the 1890s, these provisions are better seen as parliamentary controls of the exercise of executive power to expend public moneys than as a substantive source of such power. It follows that the "purposes of the Commonwealth", for which appropriation may be authorised, are to be found in the provisions of the Constitution and statutes made under it which, subject to appropriation, confer substantive power to expend public moneys.

Appropriation and responsible government – historical background

54 Parliamentary control of executive expenditure of public funds had its origins in 17th century England. Quick and Garran, in their commentary on s 53 of the Constitution, referred to the resolution of the House of Commons on 3 June 1678[30]:

> "That all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords."

Although the resolution was concerned with the relationship between the House of Commons and the House of Lords, it also reflected the assertion by the House of Commons of control as against the Executive of the expenditure of public moneys.

55 The needs of government before the Revolution of 1688 were "principally supplied by various ordinary lucrative prerogatives inherent in the Crown, and which had existed time out of mind"[31]. After the Revolution the public revenue of the Crown was[32]:

> "dependent upon Parliament, and … derived either from annual grants for specific public services, or from payments already secured and

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30 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 667.

31 Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 200.

32 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 554.

> appropriated by Acts of Parliament, and which are commonly known as charges upon the Consolidated Fund".

56 The *Bill of Rights* 1689 provided, inter alia:

> "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal."

57 The concept of a Consolidated Revenue Fund dates back to the 18th century. Before its emergence particular taxes were assigned to particular items of expenditure. There was some movement to partial consolidation. Blackstone wrote of a history of distinct funds set up to receive the products of various taxes and the reduction of the number of those funds to three[33]. In 1787 a Consolidated Fund was established by statute[34] "into which shall flow every stream of the public revenue, and from whence shall issue the supply for every public service"[35]. Drafts made upon the Consolidated Fund were based upon resolutions of a parliamentary ways and means committee. The resolutions were the basis for[36]:

> "sessional Consolidated Fund Acts, and finally the Appropriation Act, which endows those resolutions with complete legal effect; and upon receipt of the order from the sovereign, which gives final validity to a supply grant, the treasury makes the issues to meet those grants out of the Consolidated Fund."

58 The right of supreme control over taxation with the correlative right to control expenditure was regarded as the "most ancient, as well as the most valued, prerogative of the House of Commons"[37]. The prohibition upon raising taxes without parliamentary authority would be nugatory if the proceeds, even of

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33 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, ch 8 at 318.

34 27 Geo III, c 13.

35 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 558.

36 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 558.

37 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3 citing Todd, *Parliamentary Government in England*, (1892), vol 2 at 196.

legal taxes, could be expended at the will of the sovereign[38]. The principle that the Executive draws money from Consolidated Revenue only upon statutory authority is central to the idea of responsible government.

59 The principle of parliamentary control of public expenditure was recognised by the Privy Council in *Auckland Harbour Board v The King*[39]. Viscount Haldane said[40]:

> "For it has been a principle of the British Constitution now for more than two centuries … that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

60 Emerging from the *Bill of Rights* 1689 and the common law in England were what have been described as "three fundamental constitutional principles" supporting parliamentary control of finance[41]:

(i) The imposition of taxation must be authorised by Parliament.

(ii) All Crown revenue forms part of the Consolidated Revenue Fund.

(iii) Only Parliament can authorise the appropriation of money from the Consolidated Revenue Fund.

These principles were imported into the Australian colonies upon their achievement of responsible government. A Consolidated Revenue Fund was established for each of them. The principles operate today in all States and Territories, albeit they are not expressly referred to in all of their Constitutions[42].

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38 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3.

39 [1924] AC 318.

40 [1924] AC 318 at 326-327.

41 Carney, *The Constitutional Systems of the Australian States and Territories*, (2006) at 86.

42 For more specific references see: *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 58(1); *Constitution Act* 1902 (NSW), s 39(1); *Northern Territory*

(Footnote continues on next page)

They are central to the system of responsible ministerial government which "prior to the establishment of the Commonwealth of Australia in 1901 … had become one of the central characteristics of our polity"[43].

61 The Executive in English and Australian constitutional history has on occasions expended public moneys without prior parliamentary appropriation[44]. Professor Keith wrote in 1933[45]:

> "The practice is far from rare, but in some cases it has been mitigated by legislation which permits expenditure either of sums up to a fixed amount or sums based on the expenditure authorised for the previous year pending Parliamentary sanction … The Governor-General's position in these matters is governed by the consideration that he cannot, unless in a very flagrant case of illegality, refuse to accept the assurance of ministers that funds must be provided to carry on the administration."

In the context of executive agreements involving commitments to expenditure, but not involving actual expenditure, he accepted that ministers could act and obtain an appropriation later on and described as "very dubious" the suggestion in *Colonial Ammunition Co* that a commitment by the Executive not previously

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(Self-Government) Act 1978 (Cth), s 45(1); *Constitution of Queensland* 2001 (Q), ss 64-66; *Constitution Act* 1934 (SA), ss 60, 73B; *Constitution Act* 1934 (Tas), s 36; *Constitution Act* 1975 (Vic), ss 62-65, 89-93; *Constitution Act* 1889 (WA), ss 64-68.

43 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114; [1931] HCA 34 quoted with approval in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558; [1997] HCA 25. For reference to the historical roots of ss 81 and 83 in British constitutional law and practice see also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 575 per Mason CJ, Deane, Toohey and Gaudron JJ, 580 per Brennan J, 591 per Dawson J, 597-598 per McHugh J; [1993] HCA 12.

44 Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 150, citing instances dating back to 1860 in England and 1868 in New South Wales. As to the various devices used to circumvent the appropriation requirement in Victoria and New South Wales in the 1860s and 1870s see Waugh, "Evading Parliamentary Control of Government Spending: Some Early Case Studies", (1998) 9 *Public Law Review* 28.

45 Keith, *The Constitutional Law of the British Dominions*, (1933) at 244.

authorised by the Parliament could not be put right by a subsequent appropriation[46].

62 In *New South Wales v Bardolph*[47], this Court upheld the validity of a contractual obligation undertaken by the Government of New South Wales without the benefit of a current parliamentary appropriation. Dixon J said[48]:

> "It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."

He also said, however, that "all obligations to pay money undertaken by the Crown are subject to the implied condition that the funds necessary to satisfy the obligation shall be appropriated by Parliament"[49]. This did not qualify the legal requirements of s 83. As Brennan J in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* said[50]:

> "The actual withdrawal of money from the CRF requires a prior valid appropriation."

In *Australian Woollen Mills Pty Ltd v The Commonwealth*[51] the Court, relying upon *Bardolph*, regarded it as "well settled" that judgment may be given against

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46 Keith, *The Constitutional Law of the British Dominions*, (1933) at 245, citing *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198; [1924] HCA 5.

47 (1934) 52 CLR 455.

48 (1934) 52 CLR 455 at 509. See also at 498 per Rich J, 502 per Starke J, 523 per McTiernan J.

49 (1934) 52 CLR 455 at 508 citing *New South Wales v The Commonwealth [No 1]* (1932) 46 CLR 155 at 176; [1932] HCA 7.

50 (1993) 176 CLR 555 at 581.

51 (1954) 92 CLR 424; [1954] HCA 20.

the Crown on a contract although that judgment cannot be enforced in the absence of provision of funds by an Act of Parliament[52].

63 The phenomenon of the so-called standing appropriation may be linked to the practical exigencies that in the past gave rise to expenditure without prior parliamentary authority. It is useful briefly to mention the two classes of appropriation made as a matter of practice.

64 Appropriations fall into two classes, annual and special (or standing) appropriations. The annual appropriations comprise the budget. The standing appropriations are permanent and provide for appropriation from time to time. They were described by Quick and Garran as "payments which it is not desirable to make subject to the annual vote of Parliament"[53]. Stawell CJ characterised them as "a voluntary surrender by Parliament of what is supposed to be its most important power"[54].

65 The Senate Standing Committee on Finance and Public Administration reported in 2007 that the great majority of Commonwealth funds are now provided by means of special appropriations. In 2002-03 they represented more than 80% of all appropriations drawings for the year[55]. Professor Lindell in a submission to the Committee described "the modern reality … that Parliament is gradually losing control over the expenditure of public funds. Appropriations are increasingly permanent rather than annual and they are also framed in exceedingly broad terms"[56].

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52 (1954) 92 CLR 424 at 455. See also *Vass v Commonwealth* (2000) 96 FCR 272 at 287-288 [24]-[25] and generally Seddon, "The Interaction of Contract and Executive Power", (2003) 31 *Federal Law Review* 541.

53 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 814.

54 *Alcock v Fergie* (1867) 4 W W & A'B (L) 285 at 319.

55 Australia, Senate, Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure*, March 2007 at 15.

56 Australia, Senate, Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure*, March 2007 at 15; see also the discussion in Lawson, "Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure", (2008) 32 *Melbourne University Law Review* 879, particularly at 916 and 921.

66 The history of executive and parliamentary practice does not suggest any legal qualification in existence at the time of federation, or subsequently under the Constitution, of the well established proposition, reflected in the law of Great Britain and its colonies, that parliamentary appropriation conditions the lawfulness of executive expenditure[57].

67 It is not submitted in the present case that there is any basis upon which the executive power of the Commonwealth would extend to the expenditure of public moneys without parliamentary appropriation[58]. It was the Commonwealth's contention that the requisite appropriation had been made.

Appropriation in the Convention Debates

68 The 1891 draft Bill for the Constitution contained two provisions directly material to appropriations. They appeared in Ch IV of the draft entitled "Finance and Trade". Clause 1 of Ch IV provided, in language foreshadowing that of s 81:

> "All duties, revenues, and moneys, raised or received by the Executive Government of the Commonwealth, under the authority of this Constitution, shall form one Consolidated Revenue Fund, to be appropriated for the Public Service of the Commonwealth in the manner and subject to the charges provided by this Constitution."

Clause 3 provided:

> "No money shall be drawn from the Treasury of the Commonwealth except under appropriations made by law."

This limitation set out the terms of what was to become the first sentence in s 83.

69 Clause 1 was not discussed at the 1891 Sydney Convention. Clause 3 was discussed and agreed to. In the course of debate an amendment was proposed to cl 3 which would have added the words "and for purposes authorised by this Constitution"[59]. Mr Thynne, who proposed the amendment, had originally

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57 Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 150 and see *Australian Alliance Assurance Co Ltd v John Goodwyn, the Insurance Commissioner* [1916] St R Qd 225 at 252-253 per Lukin J.

58 As to other provisions of the Constitution which may authorise expenditure directly see Lawson, "Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure", (2008) 32 *Melbourne University Law Review* 879 at 895 fn 135.

59 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 7 April 1891 at 788-789.

intended to incorporate it in the precursor of s 51 with a view to "restricting the powers of the federal parliament for the appropriation of money absolutely to the purposes authorised by this constitution". He withdrew the amendment at the suggestion of Sir Samuel Griffith with a view to introducing it into cl 3.

70 The amendment was opposed and defeated. Sir Samuel Griffith commented that the words in cl 1 already contained "all the limitations we can really insert, however many words we may use to express them"[60].

71 Clause 79 of the draft Bill considered by the 1897 Adelaide Convention was in the same terms as cl 1 of Ch IV of the 1891 draft Bill. It was amended to omit the words "duties" and "moneys"[61]. The object of the amendment was to prevent loan moneys being taken into the revenue for the purposes of the Commonwealth. However, later in the drafting process, the word "moneys" was brought back. While Quick and Garran were unable to point to any reason for its reinsertion, they pointed out that it was the "universal constitutional practice, not only of Great Britain, but of all the British colonies, to keep loan funds distinct from revenue funds" and that there was no intention evidenced at the Convention of departing from that established usage[62].

72 Proposed cl 81 of the 1897 draft, corresponding to cl 3 of Ch IV of the 1891 draft, read:

> "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law and by warrant countersigned by the Chief Officer of Audit of the Commonwealth."

The clause was agreed to in that form[63].

73 By the close of the 1897 Adelaide Convention, cl 79 of the draft there considered had been renumbered as cl 81. That clause became s 81 of the

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60 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 7 April 1891 at 789.

61 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 19 April 1897 at 835.

62 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 811.

63 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 19 April 1897 at 835.

Constitution. An amendment proposed in Melbourne in 1898 to add back the word "moneys" after "revenues" was unsuccessful[64].

74 Clause 81 of the draft Bill considered in 1897 became cl 83 of the 1898 draft Bill. It foreshadowed s 83 of the Constitution. It was agreed to at the 1898 Melbourne Convention with two amendments. The first omitted the words "and by warrant countersigned by the Chief Officer of Audit of the Commonwealth"[65]. The second amendment foreshadowed the second paragraph of s 83 as set out in the Constitution. That amendment was itself further amended on the motion of Edmund Barton and the clause agreed to in its present form[66].

75 An amendment to cl 81, substituting the words "Public Service" with the word "purposes", was prepared by the Drafting Committee and ordered to be embodied in the draft Bill pro forma and printed on 1 March 1898[67]. Dixon J referred to the change in the *Pharmaceutical Benefits Case* when saying of s 81[68]:

> "it is a provision in common constitutional form substituting for the usual words 'public service' the word 'purposes' of the Commonwealth only because they are more appropriate in a Federal form of government".

Notwithstanding the submission on behalf of the Attorney-General of New South Wales to the contrary, the words "purposes of the Commonwealth" must be given their full amplitude and not read down on the assumption that they are simply another way of saying "public service".

76 The terms of ss 81 and 83 have been contrasted in this Court with the equivalent provisions in the Constitution of the United States, which were known

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64 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 14 February 1898 at 900.

65 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 14 February 1898 at 901-907. Note: a printing error on p 907 incorrectly indicates that the amendment was negatived.

66 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1899.

67 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1 March 1898 at 1721.

68 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 271; [1945] HCA 30.

to the framers of the Commonwealth Constitution. Article I, §8, cl 1 of the United States Constitution confers upon the Congress the power:

> "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States".

Article I, §9, cl 7 provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law …"

77 There is nothing in the consideration at the Convention Debates, of what became ss 81 and 83 of the Constitution, to suggest that they were intended as other than parliamentary controls of public funds and of executive expenditure in accordance with established principles of responsible government. As Professor Harrison Moore wrote in 1910, the Constitution in ss 81 and 83 "adopts the results of English and Colonial experience"[69].

78 This experience was reflected in the observation of Griffith CJ in the *Surplus Revenue Case*[70]:

> "The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements. A contractual obligation may or may not be added by some statutory provision or by authorized agreement, but it does not arise from the appropriation. The Appropriation Act does, however, operate as a provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated by the Act."

79 In similar vein, Isaacs J remarked[71]:

> "'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the

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69 Harrison Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 522.

70 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190-191; [1908] HCA 68.

71 (1908) 7 CLR 179 at 200.

> Constitution has itself declared, or Parliament has lawfully determined, shall be carried out."

80 In his judgment in the *Wool Tops Case*[72], Isaacs J relied upon the British constitutional history. The Court there held that the Executive of the Commonwealth had no power, absent parliamentary authorisation, to enter into agreements involving the exaction of fees or the payment of public moneys. Some of the reasoning has been overtaken by later cases about the scope of the executive power[73]. Relevantly to parliamentary control of taxation and expenditure, Isaacs J said[74]:

> "For centuries under responsible government, as any history will tell us, the insistence of the House of Commons on control of taxation was the basis of popular liberty. That alone, however, would have been of little use but for the accompanying power over appropriation. The *Report of the Committee on Public Moneys* of 1857 (App 3, p 568) said: 'The chain of historical evidence undeniably proves that a previous and stringent appropriation, often minute and specific, has formed an essential part of the British Constitution.'"

The last quoted sentence was taken from *Durell on Parliamentary Grants*[75]. It was repeated by Isaacs and Rich JJ in *The Commonwealth v Colonial Ammunition Co Ltd*[76], which also involved an executive agreement. They said of the appropriation requirement[77]:

> "It … neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that

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72 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421; [1922] HCA 62.

73 For example, *Barton v The Commonwealth* (1974) 131 CLR 477; [1974] HCA 20; *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337; [1975] HCA 58; *Johnson v Kent* (1975) 132 CLR 164; [1975] HCA 4; *Davis v The Commonwealth* (1988) 166 CLR 79; [1988] HCA 63.

74 (1922) 31 CLR 421 at 449.

75 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3.

76 (1924) 34 CLR 198 at 224.

77 (1924) 34 CLR 198 at 224-225.

> specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction. It does not annihilate all other legal conditions."

That view supports the conclusion that appropriation is a necessary condition which takes its place with other conditions and limitations, derived from statute or otherwise, upon the executive power to spend. The history does not support a view that the requirement for parliamentary appropriation is itself a substantive source of power to expend public money.

The appropriation of moneys – s 81

81 Consideration of s 81 requires an examination of its text, albeit that examination may be informed by the history already outlined. The section directs that revenues or moneys raised or received by the Executive Government of the Commonwealth "form one Consolidated Revenue Fund". It requires that those revenues or moneys be appropriated in the manner and subject to the charges and liabilities imposed by the Constitution. It also requires that they be appropriated for the purposes of the Commonwealth. These are not words of legislative power in the ordinary sense. They are words of constraint. The manner of appropriation is shortly specified in s 83 and requires that it be made "by law". That can be taken as a reference to appropriation by a statute enacted by the Parliament of the Commonwealth, or otherwise authorised by the Constitution[78].

82 The textual basis for the proposition that the appropriation provisions of the Constitution should be elevated into a source of substantive power is elusive. In order to ascertain the correctness or otherwise of that proposition it is necessary to have regard to the way in which the provisions have been construed previously in this Court.

83 Section 81 was invoked in aid of Commonwealth power in the *Clothing Factory Case*[79]. The majority of the Court in that case held that the impugned extension of the operation of a Commonwealth clothing factory to supply clothing to civilians was authorised by the *Defence Act* 1903 (Cth) and supported

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78 It is not necessary for present purposes to consider whether and to what extent particular provisions of the Constitution authorise expenditure in their own terms; see Lawson, "Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure", (2008) 32 *Melbourne University Law Review* 879 at 895 fn 135.

79 *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533; [1935] HCA 31.

by the defence power[80]. Only Starke J, who dissented, considered whether s 81 could be a source of the necessary power. After contrasting s 81 with Art I, §8, cl 1 of the United States Constitution he concluded[81]:

> "The power to appropriate moneys 'for the purposes of the Commonwealth' does not, in my opinion, enable the Commonwealth to appropriate such moneys to any purposes it thinks fit, but restricts that power to the subjects assigned to, or departments or matters placed under the control of the Federal Government by the Constitution."

84 In *Australian Woollen Mills*[82] the Court referred in passing to the basis upon which subsidies were paid to wool manufacturers under the National Security (Wool) Regulations. The Court said of s 81 that it "authorizes the appropriation of the revenues and moneys of the Commonwealth for the purposes of the Commonwealth"[83]. The subsidies could not be described as bounties under s 51(iii) because they were not payable on the production or export of goods. The Court continued[84]:

> "The justification, however, for the appropriation of moneys for paying subsidies would probably, if challenged, be sought in the defence power, which is conferred by s 51(vi)."

But no contention that there was a want of power to support the subsidy having been raised, the matter was not pursued further. This passage in the judgment in *Australian Woollen Mills* seems to suggest that while the Court regarded s 81 as the source of parliamentary authority for appropriation, the power to expend the money had to be found elsewhere.

85 These decisions, however, did not foreshadow a consensus on the Court as to the extent of the term "purposes of the Commonwealth" in s 81, which was central to the judgments in the *Pharmaceutical Benefits Case*[85] and the *AAP*

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80 (1935) 52 CLR 533 at 558 per Gavan Duffy CJ, Evatt and McTiernan JJ, 563 per Rich J.

81 (1935) 52 CLR 533 at 568.

82 (1954) 92 CLR 424.

83 (1954) 92 CLR 424 at 454.

84 (1954) 92 CLR 424 at 454.

85 (1945) 71 CLR 237.

Case[86]. In the *Pharmaceutical Benefits Case* a majority of this Court held that the *Pharmaceutical Benefits Act* 1944 (Cth), which appropriated money to pay chemists for medicines supplied to the public and imposed associated duties on them and medical practitioners, was not authorised by s 81 or the incidental power in s 51(xxxix)[87]. Opinions about the construction of s 81 varied among the members of the Court.

86 A wide view was adopted by Latham CJ and by McTiernan J, the latter in dissent. Latham CJ held that the Commonwealth Parliament has "a general, and not a limited, power of appropriation of public moneys" and that it was for the Parliament to determine whether a particular purpose was a purpose of the Commonwealth[88]. This treated s 81, in effect, as a substantive spending power, albeit it was held not to authorise "legislative control of matters relating to any such objects in respect of which there is no other grant of legislative power"[89]. On this latter basis the impugned Act was beyond power[90].

87 Dixon J, with whom Rich J agreed[91], referred to the "power of expenditure" under s 81 and gave it a wide construction although not as wide as that of the Chief Justice. He said[92]:

> "Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day."

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86 (1975) 134 CLR 338.

87 (1945) 71 CLR 237 at 263 per Latham CJ, 266 per Starke J, 272 per Dixon J (Rich J agreeing at 264), 275 per McTiernan J (dissenting), 282 per Williams J.

88 (1945) 71 CLR 237 at 254, 256.

89 (1945) 71 CLR 237 at 256.

90 (1945) 71 CLR 237 at 263.

91 (1945) 71 CLR 237 at 264.

92 (1945) 71 CLR 237 at 269.

Despite the reference to the "power of expenditure", the passage quoted is consistent with the view that "the purposes of the Commonwealth" are to be found in laws made by the Parliament and in the discharge by the Executive of the powers otherwise conferred upon it by the Constitution and particularly by s 61. As his Honour later said, "s 81 has little or no bearing upon the matter"[93].

88 In the event Dixon J did not express a concluded view on the construction adopted by Latham CJ and McTiernan J. It was sufficient for his purposes that s 81 was not to be equated to Art I, §8, cl 1 of the United States Constitution. To do so would import a "conception foreign" to the provisions in the Australian Constitution[94]. He said[95]:

> "The words of our Constitution are 'purposes of the Commonwealth' and whether ultimately they are, or are not, held to be consistent with a power of expenditure unrestrained in point of subject matter or purpose, they cannot be regarded as doing the work which the words 'general welfare' have been required to do in the United States. That is all, I think, that need be decided in the present case about the power of expenditure under the Commonwealth Constitution."

Importantly he added that, in deciding what appropriation laws might validly be enacted, it would be necessary to remember the position occupied by a national government and "to take no narrow view"[96]. The "basal consideration", he said in a passage that would be described 43 years later as a "Delphic counsel"[97], "would be found in the distribution of powers and functions between the Commonwealth and the States"[98].

89 Starke J, like Dixon J, rejected the equation of s 81 to Art I, §8, cl 1 of the United States Constitution, and said[99]:

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93 (1945) 71 CLR 237 at 271.

94 (1945) 71 CLR 237 at 270.

95 (1945) 71 CLR 237 at 271.

96 (1945) 71 CLR 237 at 271.

97 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 832 [11.300].

98 (1945) 71 CLR 237 at 271-272. Similar considerations were referred to by Evatt J, albeit in a different context, in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 319-320; [1940] HCA 13.

99 (1945) 71 CLR 237 at 265-266.

> "[t]he purposes of the Commonwealth are those of an organized political body, with legislative, executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government."

The *Pharmaceutical Benefits Act* was "beyond any purpose of the Commonwealth"[100]:

> "No legislative, executive or judicial function or purpose of the Commonwealth can be found which supports it, and it cannot be justified because of the existence of the Commonwealth or its status as a Federal Government."

An implication in the reasoning of Starke J was that an appropriation could be justified for the exercise of an executive function.

90 Williams J regarded "the purposes of the Commonwealth" as words of limitation[101]. The purposes had to be found "within the four corners of the Constitution". The *Pharmaceutical Benefits Act* could not be supported on that basis[102].

91 At issue in the *AAP Case*[103] was the validity of an appropriation of money for the Australian Assistance Plan, under which grants were to be made to Regional Councils for Social Development programs. Six of the Justices were evenly divided on the validity of the legislation[104]. Stephen J held that neither the State nor its Attorney-General had standing to impugn the legislation[105]. The challenge therefore failed on two different bases.

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100 (1945) 71 CLR 237 at 266.

101 (1945) 71 CLR 237 at 282.

102 (1945) 71 CLR 237 at 282.

103 (1975) 134 CLR 338.

104 (1975) 134 CLR 338 at 364 per Barwick CJ, 378 per Gibbs J, 401 per Mason J (against validity); 370 per McTiernan J, 413 per Jacobs J, 425 per Murphy J (in favour of validity).

105 (1975) 134 CLR 338 at 390-391.

92 Barwick CJ held that the words "purposes of the Commonwealth" in s 81 were words of limitation and not a matter for the Parliament to determine[106]. They were not confined to the heads of legislative power in ss 51 and 52. Some powers, legislative and executive, might come from the formation of the Commonwealth as a polity and its emergence as an international state. The extent of powers inherent in the fact of nationhood and of international personality had not been fully explored. They included the power to explore on foreign lands or seas or in areas of scientific knowledge or technology[107]. But to say of a matter that it was of national interest or concern did not attract power to the Commonwealth. Recognising that Australia has but one economy and that the economy of the nation is of national concern, Barwick CJ said[108]:

> "But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget, whether it be in surplus or in deficit. The national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power."

The federal distribution of powers was an important element in the reasoning of the Chief Justice, who said in that connection[109]:

> "However desirable the exercise by the Commonwealth of power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained."

93 McTiernan J adhered to the wide view he and Latham CJ had adopted in the *Pharmaceutical Benefits Case*[110]. Gibbs J considered that the power of appropriation was not general and unlimited but could only be exercised for purposes which the Commonwealth could "lawfully put into effect in the exercise of the powers and functions conferred upon it by the Constitution"[111]. They were purposes for which the Commonwealth had power to make laws but were not limited to those mentioned in ss 51 and 52. They could include "matters

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106 (1975) 134 CLR 338 at 360.

107 (1975) 134 CLR 338 at 362.

108 (1975) 134 CLR 338 at 362.

109 (1975) 134 CLR 338 at 364.

110 (1975) 134 CLR 338 at 369.

111 (1975) 134 CLR 338 at 373-374.

incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government"[112].

94 Stephen J's refusal to accord standing to the State of Victoria to challenge the appropriation in the *AAP Case* rested on the basis that what was complained of was "not truly an instance of law making but rather an example of the exercise of fiscal control over the executive by the legislature"[113]. This was consistent with the view, albeit he did not articulate it, that s 81 was not a source of substantive legislative power.

95 Mason J adopted the wide construction of "purposes of the Commonwealth" in s 81[114]. However, like Latham CJ in the *Pharmaceutical Benefits Case*, he held that the section was not a source of "legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent"[115]. He referred to s 51(xxxix) of the Constitution and its conjunction with s 61, relied upon in *Burns v Ransley*[116] and *R v Sharkey*[117], and added[118]:

> "Secondly, the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity … So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."

The establishment of the Commonwealth Scientific and Industrial Research Organisation was an exercise of that national governmental capacity by the

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112 (1975) 134 CLR 338 at 375.

113 (1975) 134 CLR 338 at 390.

114 (1975) 134 CLR 338 at 396.

115 (1975) 134 CLR 338 at 396.

116 (1949) 79 CLR 101; [1949] HCA 45.

117 (1949) 79 CLR 121; [1949] HCA 46.

118 (1975) 134 CLR 338 at 397.

Commonwealth. So too was expenditure of money on inquiries, investigation and advocacy in matters of public health. Mason J said[119]:

> "No doubt there are other enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government."

96 Mason J added the necessary qualification that the executive power could not, in this way, be given a wide operation effecting a radical transformation in what had hitherto been thought to be the Commonwealth's area of responsibility under the Constitution. His Honour said that the Commonwealth could not thereby be empowered to carry out programs standing outside acknowledged heads of legislative power, simply because they could conveniently be formulated and administered by the national government[120].

97 Jacobs J linked the appropriation provisions to the executive power under s 61 and the incidental power[121]:

> "Within the words 'maintenance of this Constitution' appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States."

It was within the competence of the Parliament to legislate on any matter within the competence of the Executive under s 61, including the exercise of that area of the prerogative which attached to the government of Australia. It did not follow that legislation was necessary before a prerogative power could be exercised[122].

98 As to the term "purposes of the Commonwealth" in s 81, Jacobs J adopted what he perceived as the majority view in the *Pharmaceutical Benefits Case*[123],

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119 (1975) 134 CLR 338 at 397-398.

120 (1975) 134 CLR 338 at 398.

121 (1975) 134 CLR 338 at 406.

122 (1975) 134 CLR 338 at 406.

123 (1975) 134 CLR 338 at 412.

namely that the power of appropriation is limited by the nature and purposes of the government of the Commonwealth, which not only fall within the subject matter of general or particular power prescribed in the Constitution but may include other purposes adhering fully to Australia as a nation externally and internally sovereign. He said[124]:

> "The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out. Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of services designed to meet those needs. Research and exploration likewise have a national, rather than a local, flavour."

Murphy J took the same wide view of the purposes for which public moneys could be appropriated under ss 81 and 83 as adopted by Latham CJ and McTiernan J in the *Pharmaceutical Benefits Case*[125].

99 As Professor Cheryl Saunders wrote in a helpful paper in the *Melbourne University Law Review* in 1978, "no clear constitutional principles emerged" from the *Pharmaceutical Benefits Case* and the *AAP Case* "did little to clarify the uncertainty" which has "bedevilled" the scope of the spending power since federation[126].

100 In *Davis v The Commonwealth*[127], Mason CJ, Deane and Gaudron JJ adverted to the "long-standing controversy about the meaning of 'purposes of the Commonwealth' in s 81"[128]. Taking the judgments of McTiernan, Mason, Jacobs and Murphy JJ in the *AAP Case* together, they treated that case as authority for the proposition that "the validity of an appropriation act is not ordinarily susceptible to effective legal challenge"[129]. It was unnecessary in that case to

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124 (1975) 134 CLR 338 at 412-413.

125 (1975) 134 CLR 338 at 417, 421.

126 Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 372, 373, 401 and 403.

127 (1988) 166 CLR 79.

128 (1988) 166 CLR 79 at 95.

129 (1988) 166 CLR 79 at 96.

consider whether "extraordinary circumstances" might exist in which an appropriation could be susceptible to such challenge[130].

101 Professor Leslie Zines has made the fair point that it is doubtful whether the proposition extracted by their Honours in *Davis* from the *AAP Case* would ordinarily be regarded as its ratio decidendi. Nor was there an indication of what might amount to "extraordinary circumstances"[131].

102 The nature and purpose of s 81 was again considered in *Northern Suburbs General Cemetery Reserve Trust*[132]. Mason CJ, Deane, Toohey and Gaudron JJ, in a joint judgment, said of s 81 that it must be read with s 83. Their Honours said of s 83[133]:

> "That section expresses the principle that parliamentary authority is required for the expenditure of *any* moneys by the Crown." (emphasis in original)

In similar vein, Brennan J said[134]:

> "What s 81 is concerned to do is to identify the moneys which form the CRF and to prevent their application otherwise than in accordance with an appropriation by the Parliament for the purposes of the Commonwealth."

His Honour, referring to the passage extracted earlier in these reasons from the judgment of Griffith CJ in the *Surplus Revenue Case*[135], said that "[a]n appropriation is not a withdrawal of money from the CRF"[136].

103 In the same case, McHugh J expressed the view, to which I will presently return, that[137]:

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130 (1988) 166 CLR 79 at 96.

131 Zines, *The High Court and the Constitution*, 5th ed (2008) at 354.

132 (1993) 176 CLR 555.

133 (1993) 176 CLR 555 at 572.

134 (1993) 176 CLR 555 at 580.

135 (1908) 7 CLR 179 at 190; see [78] above.

136 (1993) 176 CLR 555 at 581.

137 (1993) 176 CLR 555 at 601.

> "Neither s 81 nor s 83 of the Constitution gives any express power to appropriate money for Commonwealth purposes. However, the power to appropriate is a necessary incident of the power to make laws with respect to a subject matter and is implied by the grant of that power."

104 Professor Zines has helpfully summed up the different approaches to the appropriations power emerging from the decisions of this Court[138]:

> "(a) The appropriation power is a power to appropriate for any purpose. The executive power enables the Commonwealth to carry out that purpose (McTiernan and Murphy JJ) and s 51(xxxix) provides a legislative source of power (Murphy J).
>
> (b) 'Purposes of the Commonwealth' in s 81 refer to legislative and executive purposes to be ascertained by examining the specific powers of the Commonwealth and its inherent power as a nation: Barwick CJ and Gibbs J.
>
> (c) Section 81 permits appropriations for any purpose but does not permit the Commonwealth to engage in activities unless those activities come within s 61. The scope of s 61 is to be ascertained as in (b) above: Mason J."

105 A significant feature of the appropriation process discussed in the plurality judgment in *Combet v The Commonwealth*[139] flows from s 56 of the Constitution. The plurality made it clear that it is "the Executive Government which begins the process of appropriation"[140]. It does this by specifying the purpose of the appropriation by message from the Governor-General to the House of Representatives.

106 The wide view adopted by Latham CJ and McTiernan J in the *Pharmaceutical Benefits Case*, and by McTiernan, Mason and Murphy JJ in the *AAP Case*, reflected opinions extant well before the former case was decided. Sir Robert Garran, in evidence given to the 1929 Royal Commission on the Constitution, said he had always considered that s 81 was "an absolute power of appropriation" and that "the Commonwealth Parliament has always acted on that supposition". He contrasted the term "purposes of the Commonwealth" in s 81

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138 Zines, *The High Court and the Constitution*, 5th ed (2008) at 353.

139 (2005) 224 CLR 494; [2005] HCA 61.

140 (2005) 224 CLR 494 at 570 [143].

with "any purpose in respect of which the Parliament has power to make laws" in s 51(xxxi) to buttress that proposition[141].

107 In a paper published in 1952, the year he retired as Chief Justice, Sir John Latham gave examples of the "many occasions" on which, he said, Parliament had "authorized the expenditure of money upon matters which the Parliament regarded as of general interest and concern, but as to which the Parliament had no power to make laws so as to impose obligations upon any persons"[142]. Referring back to the *Pharmaceutical Benefits Case* he acknowledged the differing views as to the meaning of s 81 there expressed, but said that "the decision in the case did not depend upon the acceptance of one or other of these views"[143].

108 Notwithstanding what Sir Robert Garran may have perceived to be the prevailing view at one time about the operation of s 81, the uncertain foundations upon which that view rested were acknowledged in the Final Report of the Constitutional Commission of 1988 which recommended the amendment of the section to allow appropriation from the Consolidated Revenue Fund "for any purpose that the Parliament thinks fit"[144]. In support of that recommendation, the Commission referred to the differing judicial views about s 81 and what it described as the "Delphic counsel" provided by the judgment of Dixon J in the *Pharmaceutical Benefits Case*. The use of that metaphor may have been intended to draw out the indeterminate character of the boundary conditions formulated for the validity of appropriation laws, namely the "position occupied by a national government" and "the basal consideration" of the distribution of powers and functions between the Commonwealth and the States[145].

109 The Executive Government Committee advising the Commission had expressed the opinion that practical considerations favouring the wider view of

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141 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 1 at 69.

142 Latham, "Interpretation of the Constitution", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961) 1 at 43.

143 Latham, "Interpretation of the Constitution", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961) 1 at 44.

144 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 831 [11.296]; see also at 832 [11.298].

145 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 832 [11.300], citing the *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 271-272.

the appropriations provision were compelling[146]. In its Report, the Commission noted that the Parliament had for many years made appropriations to persons or bodies for purposes having little or no apparent connection with the powers or functions of the Commonwealth[147]:

> "If, as some of the Justices have said, the extent of the appropriation power is to be measured by that of the legislative power, many of such payments have been illegally made and likely to be so made in the future."

That observation reflected the view of Owen Dixon KC in evidence given to the 1929 Royal Commission on the Constitution. He said of s 81[148]:

> "We have considered this matter somewhat closely, because we understand differences of opinion exist upon the subject, and in the view which we have suggested [ie that the appropriations power was limited to the subjects of the legislative powers of the Commonwealth] the Federal Parliament has upon a number of occasions, and over a long period of time, exceeded its powers in the expenditure of money."

110 The 1988 Constitutional Commission recommended amendment to dispel uncertainty. Notwithstanding its recommendation, the constitutional amendments which went to the unsuccessful referendum in 1988 did not include its proposed amendment to s 81.

111 In my opinion, the history, the text and the logic underlying the operation of ss 81 and 83 are inconsistent with their characterisation as the source of a "spending" or "appropriations" power, notwithstanding their description as such in some of the judgments of Justices of this Court[149]. There is no clear indication in the judgments of a majority consensus in support of a contrary view. The clearest statement of the character of ss 81 and 83 in this regard, with which I respectfully agree, is that of McHugh J in the passage quoted above from

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146 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 833 [11.304].

147 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.312].

148 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 3 at 780.

149 See, for example, the *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 251 per Latham CJ, 273 per McTiernan J; and the *AAP Case* (1975) 134 CLR 338 at 371 per Gibbs J.

Northern Suburbs General Cemetery Reserve Trust[150]. Neither provision confers power. Section 81 directs all revenues or moneys made by the Executive Government into the Consolidated Revenue Fund. Such moneys are only to be appropriated from that Fund for "the purposes of the Commonwealth". By virtue of s 83 no money can be drawn from the Fund absent such an appropriation by law, that is to say by statute. Substantive power to spend the public moneys of the Commonwealth is not to be found in s 81 or s 83, but elsewhere in the Constitution or statutes made under it. That substantive power may be conferred by the exercise of the legislative powers of the Commonwealth. It may also be an element or incident of the executive power of the Commonwealth derived from s 61, subject to the appropriation requirement and supportable by legislation made under the incidental power in s 51(xxxix).

112 In my opinion, the Commonwealth's submission that the Tax Bonus Act can be supported by a combination of ss 81 and 51(xxxix) should not be accepted. The requisite power in this case is to be found in s 61 read with s 51(xxxix), conditioned upon the appropriation requirement in s 83 read with the requirement in s 81 that appropriations must be for "the purposes of the Commonwealth".

113 The preceding conclusions do not involve an undesirable shift in the locus of a spending power of uncertain extent from Parliament to the Executive. They leave in place questions about the scope of the executive power which cannot be answered in the compass of a single case. They involve a rejection of the proposition that s 81 is a source of power to spend money on anything that the Parliament designates as a purpose of the Commonwealth. The "purposes of the Commonwealth" are the purposes otherwise authorised by the Constitution or by statutes made under the Constitution[151].

The executive power of the Commonwealth

114 The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General. Ministers commissioned by the Governor-General and their officers and other officials exercise that power in the name of the Crown. The principal source of that power is s 61. Other references to executive power relating to particular matters are to be found in other provisions of the Constitution[152]. The only repository of the executive power other than the

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150 (1993) 176 CLR 555 at 601; see [103] above.

151 As to particular provisions of the Constitution which may authorise expenditure in their own terms, see above at [81] fn 78.

152 These include matters which might otherwise have been read into s 61 as inherited royal prerogatives – see ss 5, 28, 32, 56, 62, 64, 67, 68, 70 and 72: Campbell,

(Footnote continues on next page)

Governor-General was the Inter-State Commission which, under s 101, was to have "such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder".

115 In his speech moving consideration of the draft Bill for a Constitution at the Australasian Federal Convention in Sydney in 1891, Sir Samuel Griffith said of the proposed Ch II, dealing with the executive power[153]:

> "This part of the bill practically embodies what is known to us as the British Constitution as we have it working at the present time; but the provisions of the bill are not made so rigid that our successors will not be able to work out such modifications as their experience may lead them to think preferable."

116 Clause 8 of Ch II, which evolved into part of what is now s 61 of the Constitution, then provided:

> "The executive power and authority of the Commonwealth shall extend to all matters with respect to which the legislative powers of the Parliament may be exercised, excepting only matters, being within the legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers."

117 Griffith moved an amendment to cl 8 during the debate in Committee. The amendment was agreed to and the amended clause read[154]:

> "The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth."

"Parliament and the Executive", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 88 at 89.

153 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 31 March 1891 at 527.

154 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 April 1891 at 777-778.

He said of the amendment that it did not alter the intention of cl 8 and added[155]:

> "As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be."

He also said that the amendment would cover all that was meant by the clause and, in words that turned out not to be prophetic, said that it was "quite free from ambiguity"[156].

118 The first Attorney-General of the Commonwealth, Alfred Deakin, observed in his well-known opinion of 12 November 1902, arising out of the *Vondel* incident[157]:

> "The original clause, therefore, extended the executive power of the Commonwealth to all matters within the legislative power of the Parliament, with a negative limitation applying to the execution of State laws on matters within the concurrent power of the States. The form was altered, to avoid even a negative limitation, but the intention remained the same."

As appears later in these reasons, Deakin did not intend to convey that the executive power was exhaustively defined by reference to the heads of Commonwealth legislative power[158].

119 The draft Bill as adopted by the National Australasian Convention on 9 April 1891, in Ch II dealing with the Executive Government, contained two relevant provisions:

> "1. The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative.

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155 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 April 1891 at 777.

156 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 April 1891 at 778.

157 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 132.

158 See [124] below.

…

8. The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth."

The provisions were reproduced in the draft Constitution approved by the Australasian Federal Convention at Adelaide in April 1897 but were renumbered as cll 60 and 67.

120 At the Sydney Convention in 1897, cl 60 was amended to substitute the word "exercisable" for the word "exercised". Mr Reid, who moved the amendment, described it as "more in harmony with the nature of the clause which vests in the Queen the power and authority of the commonwealth"[159]. Clause 67 was agreed to without debate[160].

121 Clauses 60 and 67 were not debated in Committee at the 1898 Melbourne Convention. However, they were condensed by the Drafting Committee into one clause, cl 61, which became s 61.

122 Quick and Garran pointed to the encroachment by s 1 of the Constitution upon the old notion that the Crown enacts the law. Legislative power is vested by s 1 in the Parliament comprising the Senate, the House of Representatives and the Queen. However, in respect of the executive power they said[161]:

> "The dictum that 'the Crown conducts all the affairs of State', is still true in theory, and has been followed and maintained in form, by s 61, which says that the executive power of the Federal Government is vested in the Queen."

123 There is a marked difference between the way in which the Constitution sets out the legislative and executive powers of the Commonwealth. Whereas Ch I provides a detailed account of the distribution of legislative power, Ch II is "suggestive rather than expressive" concerning the distribution of executive

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159 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 17 September 1897 at 782.

160 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 17 September 1897 at 806.

161 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 702.

power[162]. Professor Michael Crommelin has pointed out that this approach accorded with colonial constitutional practice. In that connection he referred to Professor Harrison Moore's observation[163]:

> "For more than one reason, Statutes defining the Constitutions of the Colonies have been almost silent on the subject of the powers as of the organization of the Executive. In the first place, the legislative power has included the power of making full provision for the execution of the law. Secondly, a large measure of executive power resides in the prerogative of the Crown, and has been conferred through prerogative acts and not by Statute, lest thereby the prerogative should be prejudiced. Finally, the organization of the Government and the relations of the Ministry and Parliament in our system are a very type of matters which are not under the continual direction of organic laws, but are freely organized as utility has suggested or may suggest within the ultimate bounds of law."

Further, as Professor Crommelin wrote, the sources of executive power in statute and the prerogative were recognised in the Conventions but it is not clear how they were reflected in the Constitution.

124 The content of the executive power of the Commonwealth was not defined nor in terms limited by the drafters of the Constitution. Alfred Deakin, in his *Vondel* opinion, said of s 61[164]:

> "No exhaustive definition is attempted in the Constitution – obviously because any such attempt would have involved a risk of undue, and perhaps unintentional, limitation of the executive power. Had it been intended to limit the scope of the executive power to matters on which the Commonwealth Parliament had legislated, nothing would have been easier than to say so."

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162 Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986) 127 at 130-131.

163 Harrison Moore, *The Constitution of The Commonwealth of Australia*, (1902) at 212, quoted in Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986) 127 at 131.

164 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130.

Noting the extension of executive power to the execution and maintenance "of this Constitution" as well as "of the laws of the Commonwealth", Deakin wrote[165]:

> "The framers of that clause evidently contemplated the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define, flowing naturally and directly from the nature of the Federal Government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted."

And further[166]:

> "The scope of the executive authority of the Commonwealth is therefore to be deduced from the Constitution as a whole. It is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government of which Parliament is the legislative department."

125 In testimony to the 1929 Royal Commission on the Constitution, Sir Edward Mitchell KC offered the same wide view of s 81 as Sir Robert Garran had and, in relation to the Executive Government, added that[167]:

> "Of course, the executive government cannot be confined, like a manager of a business might, merely to those specific matters which come within the provisions enumerating what it is authorized to bring before Parliament to legislate about. It is clear that all sorts of emergencies may arise, and all sorts of things may happen as to which the executive government must have a free hand."

126 It is not necessary for present purposes to consider the full extent of the powers and capacities of the Executive Government of the Commonwealth.

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165 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130.

166 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 131.

167 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 3 at 760.

Such powers as may be conferred upon the Executive by statutes made under the Constitution are plainly included. So too are those powers which are called the prerogatives of the Crown, for example the power to enter into treaties and to declare war[168]. In addition, whatever the source[169], the Executive possesses what have been described as the "capacities"[170] which may be possessed by persons other than the Crown.

127 The collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power. They lie within the scope of s 61, which is informed by history and the common law relevant to the relationship between the Crown and the Parliament. That history and common law emerged from what might be called an organic evolution. Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of "national government" cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions. This important qualification may conjure the "Delphic" spirit of Dixon J in the *Pharmaceutical Benefits Case*. But to say that is to say no more than that there are broadly defined limits to the power which must be respected and applied case by case. As for this case, it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional distribution of powers.

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168 *Farey v Burvett* (1916) 21 CLR 433 at 452; [1916] HCA 36. Australia lacked executive independence in the conduct of foreign relations at the time of federation. Such independence was recognised for all Dominions at the Imperial Conference held in 1926. See Winterton, "The Acquisition of Independence", in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution*, (2003) 31 at 34-35.

169 There are various competing views as to the nature, source and scope of these capacities: see *Clough v Leahy* (1904) 2 CLR 139; [1904] HCA 38; *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 per Rich J, 509 per Dixon J; Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 47, 120-122; Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 16-17; and Zines, *The High Court and the Constitution*, 5th ed (2008) at 345-346. It is unnecessary to enter into that debate.

170 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J.

128 In this connection, Professor Geoffrey Sawer in 1976, referring to the judgment of Mason J in the *AAP Case*, suggested that s 61 includes "an area of inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of a modern national government"[171]. There has been substantial support in this Court for that proposition.

129 In the *Pharmaceutical Benefits Case*, in a passage cited earlier in these reasons, Dixon J abjured any "narrow conception of the functions of the central government of a country in the world of to-day"[172]. Starke J mentioned the "status of the Commonwealth as a Federal Government"[173]. In the *AAP Case*, Barwick CJ referred to the powers "inherent in the fact of nationhood and of international personality"[174]. Mason J spoke of "the existence and character of the Commonwealth as a national government" and referred to ss 61 and 51(xxxix) in the context of "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation"[175].

130 In *Barton v The Commonwealth*[176] the Court held that it was within the prerogative powers of the Commonwealth to request a foreign state to detain and surrender to Australia a person alleged to have committed an offence against a law of the Commonwealth. Mason J approached the case on the basis that in the United Kingdom, absent a treaty, a request to a foreign state for extradition of an offender fell within the executive power of the Crown at the end of the 19th century. It was necessary therefore to examine the executive power of the Commonwealth. He referred to the establishment by its Constitution of the Commonwealth of Australia as a political entity and as a member of the community of nations, and said[177]:

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171 Sawer, "The Executive Power of the Commonwealth and the Whitlam Government", unpublished Octagon Lecture, University of Western Australia, (1976) at 10, cited in Winterton, "The Limits and Use of Executive Power by Government", (2003) 31 *Federal Law Review* 421 at 430-431.

172 (1945) 71 CLR 237 at 269; see [87] above.

173 (1945) 71 CLR 237 at 266.

174 (1975) 134 CLR 338 at 362.

175 (1975) 134 CLR 338 at 397.

176 (1974) 131 CLR 477.

177 (1974) 131 CLR 477 at 498.

> "By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law."

Jacobs J thought it "within the executive power of the Australian Government as the government of a sovereign state to communicate in such terms as it thinks fit" with a foreign government unless that power is taken away by statute[178].

131 In *Davis*[179] Mason CJ, Deane and Gaudron JJ acknowledged that the scope of the executive power of the Commonwealth had "often been discussed but never defined"[180]. The spheres of responsibility vested in the Executive under the Constitution which had been referred to in *Barton* were described thus[181]:

> "These responsibilities derived from the distribution of legislative powers effected by the Constitution itself and from the character and status of the Commonwealth as a national polity … So it is that the legislative powers of the Commonwealth extend beyond the specific powers conferred upon the Parliament by the Constitution and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity".

The plurality acknowledged the federal distribution of powers between Commonwealth and States, and added[182]:

> "On this footing … s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself. Thus the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth

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178 (1974) 131 CLR 477 at 505.

179 (1988) 166 CLR 79.

180 (1988) 166 CLR 79 at 92.

181 (1988) 166 CLR 79 at 93.

182 (1988) 166 CLR 79 at 93-94.

> executive or legislative action involves no real competition with State executive or legislative competence."

Brennan J spoke of the executive power thus[183]:

> "But s 61 does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation', to repeat what Mason J said in the *AAP Case*. In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth. It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit. The variety of enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria but, as cases are decided, perhaps more precise tests will be developed." (footnote omitted)

Toohey J took a more restrictive approach to s 61 than Mason CJ, Deane and Gaudron JJ and was in general agreement with the view of Wilson and Dawson JJ that the legislative powers of the Commonwealth were to be found in the enumerated matters in s 51 of the Constitution, including the incidental power in s 51(xxxix)[184].

132 In *R v Hughes*[185] six of the members of this Court referred with evident approval to a passage from the judgment of Mason J in *Duncan*[186], where his Honour had said[187]:

> "The scope of the executive power is to be ascertained, as I indicated in the *AAP Case*, from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate

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183 (1988) 166 CLR 79 at 111.

184 (1988) 166 CLR 79 at 117 per Toohey J; see at 103-104 per Wilson and Dawson JJ.

185 (2000) 202 CLR 535 at 554-555 [38]; [2000] HCA 22.

186 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535; [1983] HCA 29.

187 (1983) 158 CLR 535 at 560.

> to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation." (footnote omitted)

The judgment in *Hughes* referred, in the footnote against that quotation, to the pages in *Davis* covering the various passages to which I have referred.

133 Elucidation of the content of the executive power in s 61 and the incidental power conferred by s 51(xxxix) is a process to be distinguished from the discovery by implication of a "nationhood" power as an implied head of legislative competence[188]. This is not a case which depends for its resolution upon the existence of any such implied power. The executive power extends, in my opinion, to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government. This is consistent with the executive power as broadly explained by Mason CJ, Brennan, Deane and Gaudron JJ in *Davis*, and by Mason J in the passage from *Duncan* quoted in *Hughes*. To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. In this case the Commonwealth had the resources and the capacity to implement within a short time-frame measures which, on the undisputed facts, were rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries. The question of the reviewability of factual assertions of the Executive grounding the exercise of its powers under s 61 does not arise in this case, having regard to the accepted facts[189].

134 The executive power is exercised in this case with the necessary prior authority of the Parliament under s 83. The incidental power supports the provisions of the Tax Bonus Act which set up a statutory framework in aid of the tax bonus payments. In my opinion the impugned provisions are within the legislative power of the Commonwealth.

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188 *Davis v The Commonwealth* (1988) 166 CLR 79 at 103-104 per Wilson and Dawson JJ.

189 As noted earlier at [13], Mr Pape did not challenge the factual content of the Special Case but rather its relevance.

The locus of the appropriation

135 For the reasons set out in the judgment of Gummow, Crennan and Bell JJ[190], I agree that the requisite appropriation was effected by s 16 of the Taxation Administration Act read with s 3 of the Tax Bonus Act.

Conclusion

136 The Tax Bonus Act is supported by s 61 of the Constitution and by the incidental power. The expenditures made under it are authorised by an appropriation made in conformity with ss 81 and 83. Having regard to this conclusion, it is not necessary to consider whether the Tax Bonus Act is supported by the other heads of power relied upon by the Commonwealth.

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190 See below at [168]-[171]; see also at [267] and [394] per Hayne and Kiefel JJ.

137 GUMMOW, CRENNAN AND BELL JJ. The *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Bonus Act") received the Royal Assent on 18 February 2009 and commenced on that day. The first defendant ("the Commissioner") has the general administration of the Bonus Act (s 3). The Bonus Act is valid.

138 The reasons for that conclusion and upon other issues which are before the Full Court are organised as follows:

The legislation

139 The central provisions of the Bonus Act are as follows. Section 5(1) states:

> "A person is entitled to a payment (known as the ***tax bonus***) for the 2007-08 income year if:
>
> (a) the person is an individual; and
>
> (b) the person is an Australian resident for that income year; and
>
> (c) the person's adjusted tax liability for that income year is greater than nil; and

(d) the person's taxable income for that income year does not exceed $100,000; and

(e) the person lodges his or her income tax return for that income year no later than:

(i) unless subparagraph (ii) applies – 30 June 2009; or

(ii) if, before the commencement of this Act, the Commissioner deferred the time for lodgment of the return under section 388-55 in Schedule 1 to the *Taxation Administration Act* 1953 [(Cth) ('the Administration Act')] to a day later than 30 June 2009 – that later day."

Section 5(2) limits the entitlement of minors to the tax bonus, by the adoption of criteria consistent with the treatment of the income of minors by the *Income Tax Assessment Act* 1936 (Cth). Section 6 specifies the amount of the tax bonus as $250, $600 or $900, depending upon the size of the taxable income of persons entitled to the tax bonus. If the Commissioner is satisfied that a person is entitled under s 5 to the tax bonus, s 7 requires the Commissioner to pay it to the person as soon as practicable after becoming so satisfied. It is agreed between the parties that the plaintiff is "putatively entitled" under the Bonus Act to the payment of a tax bonus of $250.

140 Section 5 states an entitlement of certain persons and s 7 imposes a duty or obligation upon the Commissioner which arises upon the Commissioner being satisfied of the entitlement. The better view is that these provisions attract the reasoning of Parke B in *Shepherd v Hills*[191] and that an action in debt is the appropriate means of enforcement. Baron Parke said in that case:

> "There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary."

The result is that the payment of the tax bonus involves, contrary to the submission of the plaintiff, more than the receipt of a mere gratuity; the payment

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191 (1855) 11 Ex 55 at 67 [156 ER 743 at 747]. See also *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 70; [1920] HCA 51; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65]; [1998] HCA 20; cf *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242-243; [1994] HCA 8.

is the discharge of a legal obligation. There is a concomitant obligation to repay to the Commonwealth overpayments (s 8).

141 The *Tax Bonus for Working Australians (Consequential Amendments) Act (No 2)* 2009 (Cth) ("the Consequential Amendments Act") also commenced on 18 February 2009. Among the consequential amendments is the amendment of the *Income Tax Assessment Act* 1997 (Cth) ("the Assessment Act") so as to provide that a tax bonus paid in accordance with the Bonus Act "is not assessable income and is not exempt income". The amendment is made to Div 59 of the Assessment Act. Further, the Consequential Amendments Act amends the *Taxation Administration Act* 1953 (Cth) ("the Administration Act")[192] to ensure that the payment of the tax bonus cannot be considered a credit to offset tax debts or liabilities.

The context of the legislation

142 The Explanatory Memorandum circulated by the authority of the Treasurer to the House of Representatives on 3 February 2009 dealt together with the Bills for the Bonus Act and the Consequential Amendments Act. Under the heading "Context of the Bills" the Explanatory Memorandum stated:

> "These Bills give effect to the Government's *Nation Building and Jobs Plan* announced on 3 February 2009. The plan was introduced to assist the Australian people [to] deal with the most significant economic crisis since the Second World War and provide immediate economic stimulus to boost demand and support jobs. This measure, at a cost of $7.7 billion, provides financial support to around 8.7 million taxpayers."

143 The parties accept that the Bonus Act was enacted to respond to a crisis in economic affairs. As a result of rapid, adverse changes in macroeconomic circumstances in 2008 and this year, the world is in the midst of a global recession; no country can expect its economy to avoid the effects of the crisis which include sharp world-wide declines in growth, rising unemployment, restricted access to credit and falling wealth; the global recession has caused a deterioration in the Australian economy; and the Treasury forecasts significantly weaker domestic growth and higher unemployment.

144 The Nation Building and Jobs Plan proposed measures "targeted towards those low- and middle-income households who are most likely to spend

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192 Section 8AAZA, amended by the Consequential Amendments Act, Sched 1, Item 6.

additional income and who are most vulnerable during an economic slowdown". It stated that payments which are saved rather than spent will "accelerate balance sheet repair and underpin consumption over time". One of the proposed measures is implemented substantially by the Bonus Act. The measure was designed for quick implementation so that the expected boost to demand would occur in the first half of 2009.

145 On 6 March 2009 the Second Commissioner of Taxation estimated that 6.7 million people were presently eligible to receive the tax bonus and would receive $900, that 250,000 would receive $600, and that 160,000 would receive $250. The Commissioner planned to begin distribution of payments on 6 April 2009. The Second Commissioner also estimated that a remainder of about 1.6 million people would file, after 6 March and before 30 June 2009, their income tax returns for the 2007-2008 income tax year and some would subsequently become eligible for payment of the tax bonus.

The litigation

146 On 26 February 2009 the plaintiff instituted an action in the original jurisdiction of this Court against the Commissioner asserting the invalidity of the Bonus Act and seeking declaratory and injunctive relief. The Commonwealth was later joined as a defendant. Directions for the further conduct of the litigation were given by a Justice on 13 March 2009 and on 17 March 2009, pursuant to r 27.08 of the High Court Rules 2004, the plaintiff and the defendants agreed a Special Case stating four questions for the opinion of the Full Court.

147 The Special Case was heard by the whole Court on 30 and 31 March and 1 April 2009. There were interventions by the Attorneys-General of New South Wales, South Australia and Western Australia. Their submissions offered varying degrees of support to those of the defendants.

148 On 3 April 2009 the Court pronounced its order and reserved to a later occasion the delivery of reasons. The questions and the answers given by the Court, with our support, are as follows:

> Question 1: Does the Plaintiff have standing to seek the relief claimed in his Writ of Summons and Statement of Claim?
>
> Answer: Yes.
>
> Question 2: Is the [Bonus Act] valid because it is supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

Answer: The Bonus Act is a valid law of the Commonwealth.

Question 3: Is payment of the tax bonus to which the plaintiff is entitled under the [Bonus Act] supported by a valid appropriation under ss 81 and 83 of the Constitution?

Answer: There is an appropriation of the Consolidated Revenue Fund within the meaning of the Constitution in respect of payments by the Commissioner required by s 7 of the Bonus Act.

Question 4: Who should pay the costs of the special case?

Answer: In accordance with the agreement of the parties announced on the second day of the hearing of the Special Case, there is no order for costs.

149 It is convenient to consider Question 1 and Question 3 before turning to Question 2.

Question 1 – standing

150 This asks whether the plaintiff has standing to seek the relief he claims. The plaintiff seeks declarations that the tax bonus payable to him by the Commissioner "is unlawful and void", and that the Bonus Act is invalid, and an interlocutory injunction restraining the Commissioner from making any payment to him of the tax bonus.

151 The controversy between the parties comprises several heads of "matter" within the original jurisdiction of this Court. Section 75(iii), s 75(v), and s 76(i) as implemented by s 30(a) of the *Judiciary Act* 1903 (Cth), are engaged.

152 It is now well established that in federal jurisdiction, questions of "standing" to seek equitable remedies such as those of declaration and injunction are subsumed within the constitutional requirement of a "matter"[193]. This

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193 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551; [1980] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119 at 124-126, 132-136; [1997] HCA 5; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37]; [1998] HCA 49; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610-613 [42]-[50], 629-633 [101]-[109], 659-660 [177]-[179]; [2000] HCA 11.

important point appears to have been insufficiently appreciated in some of the submissions upon Question 1.

153 The defendants submit that the plaintiff has standing to challenge the payment of the tax bonus to him but "does not have standing to challenge the validity of the payment of tax bonus to anyone else". The defendants are supported in this submission by New South Wales, South Australia and Western Australia.

154 It is accepted, for example, by New South Wales that (i) the plaintiff has a right to payment by the Commissioner of the tax bonus pursuant to s 7 of the Bonus Act, and (ii) there thus is an immediate right and duty in the relationship between the plaintiff and the defendants which gives rise to a justiciable controversy. However, it is submitted that while the relief the plaintiff may obtain includes the injunction he seeks against the Commissioner, it cannot include a declaration against the Commissioner and the Commonwealth of invalidity of the Bonus Act. That outcome is said by New South Wales to be dictated by the absence in the plaintiff of a "particular interest in that broader issue of validity".

155 This and other submissions to like effect should be rejected. They proceed from erroneous assumptions as to the nature and incidents in the present case of the adjudication of matters arising under the Constitution or involving its interpretation, and thus give insufficient weight to the place of the rule of law in the scheme of the Constitution.

156 It may be accepted, to adapt the words of Starke J in *The Real Estate Institute of NSW v Blair*[194], that the plaintiff cannot "roam at large" over the Bonus Act and that he should be restricted to a declaration of invalidity with respect to those provisions applying to him, so far as they are unauthorised by the Constitution.

157 However, the Bonus Act is a statute of nine sections which together present what appears to be an inseverable whole. The plaintiff's entitlement is in an amount of $250 (s 6(c)). Other persons qualify for $900 (s 6(a)), or $600 (s 6(b)). Assume that the plaintiff demonstrates the invalidity of so much of the statute as purports to confer his entitlement to the $250. A question of severance would then arise as to the operation of the statute with respect to the payments of

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194 (1946) 73 CLR 213 at 227; [1946] HCA 43.

$900 and $600[195]. The plaintiff has the competence, as a step in the resolution of the controversy between him and the defendants, to embark upon that question as it may arise.

158 The disposition of the controversy between the plaintiff and the Commissioner and the Commonwealth does not turn solely upon facts or circumstances unique to the plaintiff. If the plaintiff succeeds in establishing, as a necessary step in making out his case for relief, that the Bonus Act is invalid, then the reasoning of the Court upon the issue of invalidity would be of binding force in subsequent adjudications of other disputes. Hence the very great utility in granting declaratory relief in the plaintiff's action. In this way the resolution pursuant to Ch III of the Constitution of the plaintiff's particular controversy acquires a permanent, larger, and general dimension. The declaration would vindicate the rule of law under the Constitution. The fundamental considerations at stake here were recently affirmed and explained in *Plaintiff S157/2002 v The Commonwealth*[196].

159 Question 1 should be answered "Yes".

Question 3 – appropriation

160 Question 3 of the Special Case asks:

> "Is payment of the tax bonus to which the plaintiff is entitled under the [Bonus Act] supported by a valid appropriation under ss 81 and 83 of the Constitution?"

161 Section 81 states:

> "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."

162 The first sentence of s 83 reads:

> "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

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195 See *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 501-503; [1996] HCA 56.

196 (2003) 211 CLR 476 at 513-514 [103]-[104]; [2003] HCA 2.

163 The question assumes that the Commissioner is bound by the terms of s 83 and that this may present a justiciable issue as to the existence of an "appropriation" within the meaning of that section and s 81. Notwithstanding the doubts expressed by Jacobs J, and perhaps by Mason J, in *Victoria v The Commonwealth and Hayden* ("the *AAP Case*")[197] the contrary is not submitted in the present dispute.

164 However, the processes for the making of an appropriation involve other provisions of the Constitution, in particular the Vice-Regal recommendation provision in s 56 and the respective authority of the House of Representatives and the Senate which is identified in s 53. It may be noted that these provisions treat together those "money bills" dealing with the raising of revenue by the imposition of taxation and those providing for appropriation.

165 Section 53 has been said in this Court to be a procedural provision governing the intra-mural activities of the Parliament and not giving rise to invalidity of legislation which has passed both legislative chambers and received the Royal Assent[198].

166 The adjudication of the issue presented by Question 3, respecting the operation of s 81 and s 83 of the Constitution, thus requires some care lest that adjudication trespass upon the anterior operation of s 53 with respect to the passage of the Bill for the Bonus Act.

167 It may, however, be noted that *House of Representatives Practice*[199], edited by the Clerk of the House, treats as a special appropriation bill one which:

> "while not in [itself] containing words of appropriation, would have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be paid out of the Consolidated Revenue Fund under existing words of appropriation in a principal Act to be amended, or another Act".

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197 (1975) 134 CLR 338 at 410-412 and 394 respectively; [1975] HCA 52. See also *Combet v The Commonwealth* (2005) 224 CLR 494 at 561 [112]-[114], 578-579 [164]-[165]; [2005] HCA 61.

198 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 409 [41]; [2004] HCA 53.

199 Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 409.

168 The Bill for the Bonus Act, as will appear, was of that character. Accordingly, the answer to Question 3 is that there is an appropriation of the Consolidated Revenue Fund within the meaning of the Constitution in respect of payments by the Commissioner required by s 7 of the Bonus Act.

169 The Bill for the Bonus Act received its Second Reading in the House of Representatives on 12 February 2009. The Official Hansard for that day records the announcement of a message from the Governor-General dated 12 February 2009 and recommending to the House "that an appropriation be made for the purposes of a Bill [for the Bonus Act]"[200]. Section 56 of the Constitution states:

> "A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

170 It was the inclusion in the Bill of what became s 3 of the Bonus Act, stating:

> "The Commissioner has the general administration of this Act",

which had the effect of increasing and extending the objects or purposes of the amount which may be paid out of the Consolidated Revenue Fund under existing words of appropriation in s 16 of the Administration Act.

171 Section 16 of the Administration Act appropriates the Consolidated Revenue Fund to the payment thereout of certain amounts the Commissioner is required to pay by a provision of a "taxation law". This term has an ambulatory definition. Section 2 of the Administration Act gives it "the meaning given by [the Assessment Act]" and this includes in its meaning "an Act of which the Commissioner has the general administration". The definition of "taxation law" was "picked up" by the Bonus Act, with the consequence that the Bill for the Bonus Act was a special appropriation bill as identified by the Practice.

The submissions upon Question 3

172 That answer involves rejection of three submissions by the plaintiff which are put in the alternative in his written submissions. The first is that upon its proper construction, s 16 of the Administration Act is limited to refunds of tax

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200 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 February 2009 at 1295.

and related payments and the payments under the Bonus Act are not of that character. The second submission involves several steps. There is said to be no appropriation which answers s 81 of the Constitution, because the phrase "for the purposes of the Commonwealth" was correctly construed by Barwick CJ and by Gibbs J in the *AAP Case*[201] as requiring appropriation for a purpose for which the Parliament has power to make laws, and the Bonus Act is beyond power. The third submission is that the Bonus Act is "inoperative" because there is no appropriation provision stipulated in the terms of the Bonus Act itself and as a result no "appropriation made by law" as required by s 83 of the Constitution.

The first submission by the plaintiff

173 The first submission fails. As a matter of construction, s 16 of the Administration Act is ambulatory in its operation, in the sense described earlier in these reasons. The Bonus Act is a statute the general administration of which is given by s 3 to the Commissioner and as a consequence s 16 of the Administration Act is engaged.

Appropriation and law-making

174 Consideration of the second and third submissions by the plaintiff (and of certain submissions made by the defendants) requires construction of the text of s 81 and s 83 and an appreciation of the nature of an "appropriation" by the Parliament.

175 The term "appropriation" is an ordinary English word but it is apparent that it is used in the Constitution in a particular sense. The term appears in provisions of the Constitution dealing with the carriage of financial measures within the Parliament. These processes require recommendation by message from the Governor-General to the House of Representatives (s 56) and ss 53 and 54 lay down the respective roles of the two legislative chambers. Sections 81 and 83 on their face are concerned with the treatment of moneys raised or received by the Executive Government of the Commonwealth and the imposition of a requirement for the drawing of money from the Treasury.

176 The term "appropriation" is used here to identify the conferral of authority upon the Executive to spend public moneys, rather than the subsequent exercise of that authority and the debiting of the relevant account. This understanding is

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201 (1975) 134 CLR 338 at 363 per Barwick CJ, 373-375 per Gibbs J.

apparent in the statement by Griffith CJ in *The State of New South Wales v The Commonwealth*[202]:

> "The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements."

In the same case, Isaacs J said of s 81[203]:

> "'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out."

The use of the phrase "the Constitution has itself declared, or Parliament has lawfully determined" is significant. Isaacs J was distinguishing the grant of authority to the Executive to appropriate from subsequent expenditure. The grant of an appropriation is not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure. Yet, in different ways, both the plaintiff and the defendants presented submissions which assumed the contrary.

177 There is, as Mason J indicated in the *AAP Case*[204], no analogy between the validity of legislation and the validity of expenditure. Jacobs J, with respect, correctly said of an appropriation that it "is no more than an earmarking of the money, which remains the property of the Commonwealth" and the disclosure "that the Parliament assents to the expenditure of the moneys appropriated for the purposes stated in the appropriation"[205]. To the same effect is the statement by Stephen J in the *AAP Case*[206]:

> "When an item in an Appropriation Act is attacked as ultra vires it is not in any real sense the Commonwealth Parliament's legislative power

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202 (1908) 7 CLR 179 at 190; [1908] HCA 68.

203 (1908) 7 CLR 179 at 200.

204 (1975) 134 CLR 338 at 392-393.

205 (1975) 134 CLR 338 at 411.

206 (1975) 134 CLR 338 at 386.

> that is attacked but rather the taking of the first step in the expenditure of moneys on a particular purpose."

Stephen J also said of an appropriation Act[207]:

> "It is an Act which, while a necessary precondition to lawful disbursement of money by the Treasury, is not in any way directed to the citizens of the Commonwealth; it does not speak in the language of regulation, it neither confers rights or privileges nor imposes duties or obligations. It only permits of moneys held in the Treasury being paid out, upon the Governor-General's warrant, to departments of the Government."

The reference in this passage to permission should be noted. Section 94 of the Constitution assumes that there may be surplus revenue of the Commonwealth, from which Parliament may provide payments to the States. However, the *Surplus Revenue Act* 1908 (Cth), the validity of which was upheld in *The State of New South Wales v The Commonwealth*[208], established the practice of appropriating to Commonwealth "trust" accounts revenues unexpended at the end of the financial year, so that there since has been no scope for the operation of s 94.

178 Once the nature of the process of parliamentary appropriation is appreciated, the sections of the Constitution which provide for it do not serve as sources of a "spending power" by the width of which is determined the validity of laws which create rights and impose obligations or otherwise utilise the supply approved by an appropriation.

179 Submissions which assume the contrary found upon statements in the several judgments delivered in *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*")[209] and in the *AAP Case* of a range of opinions as to the construction of s 81 and s 83 and their place in the plan of the Constitution. However, it is fair to say that from those decisions no firm consensus emerges which is to the contrary of what has been said in these reasons[210].

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207 (1975) 134 CLR 338 at 386-387.

208 (1908) 7 CLR 179.

209 (1945) 71 CLR 237; [1945] HCA 30.

210 See Zines, *The High Court and the Constitution*, 5th ed (2008) at 351-354.

180 The difficulty with some of the reasoning in the earlier cases in significant measure is the consequence of the form of the argument presented by the Commonwealth in the *Pharmaceutical Benefits Case*, to which the judgments responded and which they rejected. The holding of invalidity of the legislation largely was based on a minor premise. This assumed that s 81 conferred a "spending power" but constrained it by the phrases "for the purposes of the Commonwealth" in s 81[211] or "by law" in s 83[212]. However, the result in *Pharmaceutical Benefits* should today be supported by denial of the major premise.

181 Dr Coppel KC, who appeared for the Commonwealth, relied upon "the power to spend under s 81", which was "as wide as the power to tax", and "perhaps, for all practical purposes unlimited"[213]. The Commonwealth submitted that s 51(xxxix) provided for the means of execution of the power to spend money.

182 That submission reflected the long held view of those instructing counsel for the Commonwealth that s 81 enabled achievement of a financial outcome for the Executive Government without the need for legislation having a root outside s 81. That view saw a power of expenditure as the concomitant of the wide power of taxation enjoyed by the Commonwealth. It had been vigorously expressed by Sir Robert Garran in his evidence given to the 1929 Royal Commission on the Constitution of the Commonwealth. He said[214]:

> "There is in the Commonwealth Constitution no limitation whatever of the purposes for which money may be raised by taxation. The Commonwealth Government can increase its taxation to any extent, and what constitutional or other reason there can be for limiting its power to spend the money so raised, I confess I am unable to see."

In particular, reliance upon a combination of s 81 and s 51(xxxix) made it unnecessary for the Executive Government of the Commonwealth to risk a narrow construction of what might be achieved by use of the power associated with s 61, with or without legislation relying upon s 51(xxxix).

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211 See (1945) 71 CLR 237 at 266 per Starke J, 282 per Williams J.

212 See (1945) 71 CLR 237 at 264 per Rich J, 271-272 per Dixon J.

213 (1945) 71 CLR 237 at 245.

214 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 1 at 71.

183 That construction of s 81 was urged once more by the Commonwealth as its primary argument in the present case, and it was opposed by the plaintiff and by New South Wales, South Australia and Western Australia. For the reasons given above and following, it should be rejected.

Conclusions respecting s 81

184 Section 81 does not occupy either of the decisive (but opposing) positions which the plaintiff and the defendants sought to give it. The section does not support the validity of the Bonus Act (contrary to the defendants' submission), and the existence of the appropriation made by s 16 of the Administration Act is not impeached by the absence of s 81 as legislative support for the Bonus Act (contrary to the plaintiff's second submission).

185 There is no support in the text or structure of the Constitution for the construction for which the plaintiff contends in his second submission, treating the phrase in s 81 "for the purposes of the Commonwealth" as containing words of limitation of legislative power. The plaintiff answers reliance by the defendants upon s 16 of the Administration Act as the appropriation supporting the payments by the Commissioner under s 7 of the Bonus Act by construing s 81 as requiring a link to a head of legislative power. That submission should be rejected.

186 An issue of legislative power arises, but it does so with the challenge by the plaintiff in Question 2 of the Special Case to the validity of the Bonus Act itself. It does not arise with respect to the operation of s 81.

At Westminster and Whitehall

187 Matters of Imperial and colonial history respecting the raising and expenditure of public moneys support these conclusions respecting the power of appropriation conferred by the Constitution. A knowledge of legal history is indispensable to an appreciation of the essential characteristics of the power of appropriation in the Constitution; it affords an understanding of the setting in which the Constitution was formulated. This case thus illustrates the importance of the remarks on the subject of legal history by Gleeson CJ in *Singh v The Commonwealth*[215].

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215 (2004) 222 CLR 322 at 331-332 [8]-[10]; [2004] HCA 43.

188 Even before *Cole v Whitfield*[216] broadened the scope of constitutional interpretation some attention had been given to successive draft bills for the Constitution which were debated in 1891, 1897 and 1898[217]. However much this may have been the practice before *Cole v Whitfield*, that case undoubtedly supports the giving of attention to considerations not expressly adverted to in the earlier decisions of this Court respecting s 81 and s 83. To these matters of Imperial and colonial history we now turn. They also give the setting for the provision made by s 61 respecting the executive power of the Commonwealth, which it will be necessary to treat when considering Question 2.

189 For the United Kingdom executive government (identified as "the Crown")[218] to function it was necessary to provide the "ways and means" for the raising of the revenue to fund its activities and for the appropriation of that revenue to make it available to the executive government for expenditure. Much of the development in the United Kingdom of a parliamentary system of government in the period before 1900 had concerned the control of the power of the purse.

190 The significance of this for Australia was well appreciated by Alfred Deakin when he said as early as 1902 (and with the later approbation of Sir Robert Menzies[219]):

> "As the power of the purse in Great Britain established by degrees the authority of the Commons, so it will in Australia ultimately establish the authority of the Commonwealth."

191 In the United Kingdom, the control by the Parliament (particularly by the House of Commons) was effected by the principles that (i) taxes were to be imposed only by the authority of statute[220], and (ii) public moneys were subject to

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216 (1988) 165 CLR 360 at 385; [1988] HCA 18.

217 *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 501-502; [1990] HCA 2.

218 In *Sue v Hill* (1999) 199 CLR 462 at 497-503 [83]-[94]; [1999] HCA 30, reference was made to the various senses in constitutional theory and practice in which that term has been used.

219 *Central Power in the Australian Commonwealth*, (1967) at 94.

220 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 465-468; [1995] HCA 44.

parliamentary control, until expended by the executive pursuant to a parliamentary appropriation[221]. Here lie the antecedents of the concurrent treatment in provisions such as s 56 and s 53 of the Constitution of proposed laws raising and appropriating revenue, a matter referred to earlier in these reasons.

192 At the time of the adoption of the Constitution the received understanding in the United Kingdom of the place of appropriations in the relationship between the executive and the legislature was stated in the then current edition of Erskine May's work[222] as follows:

> "The Sovereign, being the executive power, is charged with the management of all the revenue of the state, and with all payments for the public service. The Crown, therefore, acting with the advice of its responsible ministers, makes known to the Commons the pecuniary necessities of the government; the Commons, in return, grant such aids or supplies as are required to satisfy these demands; and they provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which they have granted. Thus the Crown demands money, the Commons grant it, and the Lords assent to the grant: but the Commons do not vote money unless it be required by the Crown; nor do they impose or augment taxes, unless such taxation be necessary for the public service, as declared by the Crown through its constitutional advisers.
>
> The demand by the Crown for grants of aid and supply for the service of each financial year is made in the speech from the throne at the opening of Parliament. The sovereign addresses the Commons, demands the annual supply for the public service, and acquaints them that estimates will be laid before them of the amount that will be required. The form in which the Commons vote those supplies is consequently a resolution that each sum 'be granted to her Majesty;' nor is a grant of supply, even when endowed with the force of law, available for use until the sovereign puts it

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221 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3-4; Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 145-147; Selway, *The Constitution of South Australia*, (1997) at 127-128.

222 *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 515-516. See also Hearn, *The Government of England: Its Structure and Its Development*, 2nd ed (1886) at 376-378, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 681.

> at the disposal of the treasury by a royal order under the sign manual." (citation omitted)

193 The Royal Order was addressed to the Commissioners of the Treasury and recited the grant of the sums mentioned in the Schedule to the Order "to defray the expenses of the Public Supply Services" which would come "in course of payment" in the next year; the Order directed the Commissioners to authorise the Bank of England to transfer the requisite sums to the accounts of those charged with payment of these Services[223].

194 It was important, as appears from the treatment of "Revenue" in the first edition of *Halsbury's Laws of England*, published in 1912[224]:

> "to distinguish between the control which consists in determining in anticipation how the revenue is to be spent, and therefore ends with the act of voting, and that which is exercised over those who actually expend the grants, by the knowledge that accounts will have to be submitted and will be carefully scrutinised. It is only in recent times that Parliament has sought to obtain this latter form of control."

195 Thus, legislation controlled the actual receipt and issue of public money and provided for the examination of the accounts of all supply grants for the purpose of reporting thereon to the House of Commons: *Exchequer and Audit Departments Act* 1866 (UK)[225]. This system was adapted in the Australian colonies and the review and audit laws of the colonies were carried over by s 97 of the Constitution until the Parliament otherwise provided. It has done so first by the *Audit Act* 1901 (Cth) and more recently by the *Auditor-General Act* 1997 (Cth) and the *Financial Management and Accountability Act* 1997 (Cth)[226]. These are laws supported at least by s 51(xxxvi) of the Constitution, as matters in respect of which the Constitution made provision in s 97 until the Parliament otherwise provided. They may also be laws with respect to matters incidental to the execution of the power of appropriation vested in the Parliament and so supported by s 51(xxxix). It is unnecessary to pursue that question.

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223 A form of Royal Order is set out in Anson, *The Law and Custom of the Constitution*, 4th ed (1935), vol 2, pt 2 at 372-373.

224 Vol 24, Title "Revenue" at 539, fn (b).

225 29 & 30 Vict c 39. See *Halsbury's Laws of England*, 1st ed (1912), vol 24, Title "Revenue", §§1049-1056.

226 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 569 [140], 570-572 [144]-[147].

196 The degree of the control of the public purse by the House of Commons was qualified in at least three relevant respects. First, the Commons relinquished their annually exercised power over expenditure when a standing appropriation was enacted, because such appropriations do not need to be included in annual appropriations.

197 Secondly, as the dispute in *Combet v The Commonwealth* illustrates and as the Court in that case held[227], it is for the legislature to identify the degree of specificity with which the purpose of an appropriation is identified. One consequence is that, as Jacobs J indicated in the *AAP Case*[228], the description given to items of appropriation provides an insufficient textual basis for the determination of issues of constitutional fact and for the treatment of s 81 as a criterion of legislative validity. This underlines the conclusion reached earlier in the present reasons which denies to s 81 the character of a legislative "spending power".

198 The third aspect is a development of the second. It concerns the wide scope in the United Kingdom of appropriation for expenditure by the executive for "the Public Service". An understanding of this will assist in the construction of s 61 of the Constitution.

199 Appropriation was provided in the United Kingdom by annual grants for the "Public Service" and after 1787 by charges upon the Consolidated Fund established by the statute 27 Geo III c 13 ("the Consolidated Fund Act"). The Consolidated Fund had been designed to receive "every Stream of the Public Revenue, and from whence shall issue the Supply for every Public Service" and thereby introduce "the most simple of all Modes of Account into the Depository of the Public Treasure"[229]. The phrase "Public Service" was not used in this period and thereafter as a limitation upon the activities of the executive branch of government. Rather, it encompassed the range of those activities conducted from time to time[230], and whether pursuant to statute or to what in the United Kingdom might be identified as "the prerogative". The concept of "Public Service" extended to what Pitt the Younger, in speaking in 1798 on the new income tax

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227 (2005) 224 CLR 494 at 577 [160]-[161].

228 (1975) 134 CLR 338 at 411.

229 Great Britain, *The Thirteenth Report of the Commissioners appointed to Examine, Take, and State, the Public Accounts of the Kingdom*, (1785) at 60.

230 See *Pfizer Corporation v Ministry of Health* [1965] AC 512 at 533-534, 566-567.

introduced to meet a financial emergency caused by the war with Revolutionary France[231], described as[232]:

> "every purpose of national safety and glory ... every advantage of permanent credit and of increased prosperity".

Chitty distinguished the Civil List voted to the sovereign from the appropriation of the rest "to the public service", saying[233]:

> "The civil list is indeed properly the whole of the King's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the Crown".

Blackstone had written in similar terms[234]. There is seen in such writings the themes that taxation was a gift to the executive government made by the Commons, the representative chamber, and was then disbursed for the benefit of the body politic[235].

200 The *House of Commons (Disqualification) Act* 1782 (UK)[236] is a progenitor of s 44(v) of the Constitution. This was noted by Barwick CJ in *In re Webster*[237]. The earlier statute spoke of disqualification by reason of the interest of a Member in any contract "for or on account of the public service", and s 44(v) speaks of "any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth". Of the 1782 statute,

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231 Pitt faced a deficit of £17m and the new tax in 1799 yielded about £6m: Arnold-Baker, *The Companion to British History*, (1996), Title "Income Tax" at 686.

232 Bland, Brown and Tawney (eds), *English Economic History: Select Documents*, (1914) 683 at 686.

233 Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 201.

234 *Commentaries on the Laws of England*, (1765), bk 1, ch 8 at 321.

235 See also Goldsworthy, *The Sovereignty of Parliament*, (1999) at 69-70, 192-194.

236 22 Geo III c 45, s 1.

237 (1975) 132 CLR 270 at 278; [1975] HCA 22.

Viscount Haldane LC said that the phrase in question reached "any service of the Crown anywhere"[238].

The Australian situation

201 The development in the Australian colonies of representative and responsible government during the second half of the nineteenth century presented several issues which are relevant for the present case. One concerned the sharing or division of executive power between the Imperial and colonial governments[239]. Another required the making of legislative provision for parliamentary control of the appropriation of public moneys for the purposes of the colonial executive governments. In New South Wales, s 47 in Sched (1) to the *New South Wales Constitution Act* 1855 (Imp)[240] provided for all revenues of the Crown, from whatever source arising in the colony and over which the legislature had power of appropriation, to form:

> "One Consolidated Revenue Fund, to be appropriated for the Public Service of this Colony".

No part of the revenue in the Colony arising from an appropriation was to issue except in pursuance of warrants under the hand of the Governor and directed to the Public Treasurer (ss 54, 55). Similar provisions were made for Victoria in the same year[241]. The result was later described by Mr H B Higgins as having been to make it "impossible to impugn any appropriation for Victoria or New South Wales"[242].

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238 *In re Samuel* [1913] AC 514 at 526.

239 See *Yougarla v Western Australia* (2001) 207 CLR 344 at 358-362 [31]-[37]; [2001] HCA 47.

240 18 & 19 Vict c 54.

241 By s 44 and by ss 57 and 58 respectively in Sched (1) to the *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55); see Jenks, *The Government of Victoria (Australia)*, (1897) at 279-284. Provision in similar terms also was made by the *Constitution Act* 1867 (Q), s 34; the *Constitution Act* 1889 (WA), s 64; in s 54 of the *New Zealand Constitution Act* 1852 (Imp) (15 & 16 Vict c 72), and in Canada by s 106 and s 126 of the *British North America Act* 1867 (Imp) (30 Vict c 3).

242 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 July 1903 at 1998.

202 It was no doubt with an understanding of these matters of law and practice both at Westminster and in Whitehall and in the colonies that Isaacs and Rich JJ in *The Commonwealth v Colonial Ammunition Co Ltd*[243] explained the operation of the mechanism of supply and appropriation as being "simply to furnish the [Executive Government] with authority and opportunity to obtain the money it desires for the government of the country". After referring to *Durell on Parliamentary Grants*[244], their Honours identified the function of the Parliament as "financial, not regulative" and as not being concerned with "general legislation"[245]. Hence, the statement by Mason J in the *AAP Case*[246]:

> "An Appropriation Act therefore is something of a rara avis in the world of statutes; its effect is limited in the senses already explained; apart from this effect it does not create rights, nor does it impose duties."

The drafting of s 81 of the Constitution

203 Against this background, it is unsurprising that the 1891 draft constitution prepared by Inglis Clark provided for a Consolidated Revenue Fund which was to be appropriated by the federal Parliament "for the Public Service of the Federal Dominion of Australasia"[247]. It became apparent, as the processes of drafting of the Constitution continued in the years after 1891, that even the broad expression "for the Public Service" of the proposed new federal polity might not extend to new and federal subject matter. This included grants to the States under what became s 96, and the provisions for the payments to the States before the imposition of uniform duties of customs (s 89), the distribution of all surplus revenue of the Commonwealth (s 94), the funding of pensions of certain former State public servants (s 84) and compensation to the States for property passing to the Commonwealth under s 85. At the Melbourne Convention, on 14 February 1898, Mr Isaacs suggested that the words "public service of the Commonwealth" were not sufficiently large to cover the proposed return of moneys to the States[248].

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243 (1924) 34 CLR 198 at 222; [1924] HCA 5.

244 (1917) at 3.

245 (1924) 34 CLR 198 at 224.

246 (1975) 134 CLR 338 at 393.

247 Williams, *The Australian Constitution*, (2005) at 80-81, 91.

248 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 14 February 1898 at 900.

204 What Quick and Garran describe as a "drafting amendment" by the substitution of "purposes" for "public service" then was made "to make it clear that the payments to the States, under ss 89 and 93, were included"[249]. The amendment was made to confirm the extended reach of s 81, not to place a limit upon its scope. In the commentary on s 81 of the Constitution, they wrote[250]:

> '"The purposes of the Commonwealth' include the payments to the States made by virtue of the Constitution. The States being 'parts of the Commonwealth,' expenditure by the federal government in pursuance of its constitutional liability to the States is as much a 'purpose of the Commonwealth' as its expenditure upon the services of the federal government."

205 In construing s 81, regard should be had to this history. This supports the statement by Dixon J in the *Pharmaceutical Benefits Case*[251] that s 81 is but "a provision in common constitutional form substituting for the usual words 'public service' the word 'purposes' of the Commonwealth only because they are more appropriate in a Federal form of government". In the course of argument, Dixon J said of the substitution of "the purposes" for "the Public Service" that "[i]t was merely done as a piece of draftsmanship, without much reflection"[252].

Section 83 of the Constitution

206 Before turning to Question 2, there remains the third submission by the plaintiff, namely that there is no appropriation "made by law" as required by s 83 of the Constitution. It is said that taken by itself the Bonus Act contains no appropriation. For the reasons given under the heading "Question 3 – appropriation", that submission should be rejected. However, given the consideration given to s 83 in the *Pharmaceutical Benefits Case*, something further should be said respecting s 83.

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249 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 811.

250 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 812.

251 (1945) 71 CLR 237 at 271.

252 Transcript, 10 October 1945 at 198.

207 What then is conveyed by the requirement that the drawing be under appropriation "made by law"? The provision resembles Art I, §9, cl 7 of the United States Constitution which, in part, reads:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law".

Story said of the object of this provision[253]:

> "As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure. ... Congress is made the guardian of this treasure".

208 The reference to the Congress, and thus to both legislative chambers, is significant. The primacy of the House of Commons with respect to money bills gave a different slant to the subject in the United Kingdom. This gave rise to controversy in the Australasian colonies after the establishment of bicameral legislatures and the assertion by lower houses of an authority comparable to that of the House of Commons[254].

209 Against this background, the inclusion in s 83 of the Constitution of the words "by law" served, as Harrison Moore wrote[255]:

> "[to exclude] the once popular doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House".

Thus s 83 affirms that a vote or resolution of either chamber cannot suffice[256]. Where, for the purposes of the Constitution, a resolution rather than a law will suffice, as it does for the exception as to bounties made by s 91, the Constitution

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253 *Commentaries on the Constitution of the United States*, (1833), vol 3 at 213-214.

254 Twomey, *The Constitution of New South Wales*, (2004) at 532-537.

255 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 522-523.

256 *Combet v The Commonwealth* (2005) 224 CLR 494 at 558 [103].

expressly so provides. Further, the phrase "by law" is apt also to include those appropriations, such as for the salaries of the Governor-General (s 3), and Ministers (s 66), which are made by force of the Constitution itself.

210 In the *Pharmaceutical Benefits Case*[257], however, Dixon J went further. He said that:

> "s 83, in using the words 'by law' limits the power of appropriation to what can be done by the enactment of a valid law".

Section 83 thus provided the path by which Dixon J responded to the Commonwealth's submission as to the width of "the power to spend" and in doing so his Honour reached the point which the plaintiff seeks by fixing upon the phrase "the purposes of the Commonwealth" in s 81. For the reasons that have been given above respecting the place of appropriation in the scheme of the Constitution, neither construction of s 81 and s 83 should be accepted. Nor, as explained above, should that broad, and reiterated, submission by the Commonwealth respecting the "spending power".

211 It is now convenient to pursue that aspect of the Special Case by turning to Question 2.

Question 2 – validity

212 Question 2 asks whether the Bonus Act is a valid law of the Commonwealth. The statute is a valid law of the Commonwealth.

213 The Bonus Act is a law with respect to matters incidental to the execution of a power vested by the Constitution "in the Government of the Commonwealth" (s 51(xxxix)), being the executive power of the Commonwealth recognised by s 61, vested in the Queen and exercisable by the Governor-General.

The Executive Government of the Commonwealth

214 The text of the Constitution in ss 67, 70, 81, 84 and 86 assumes the existence and conduct of activities of government by what it identifies as "the

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257 (1945) 71 CLR 237 at 271. He had long held this view; see Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 385; Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 3 at 780.

Executive Government of the Commonwealth". It is upon that understanding that Ch II (ss 61-70) is headed "The Executive Government" and s 61 states:

> "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."

The Constitution assumes also, in s 119[258], the existence and conduct of activities by "the Executive Government of the State". The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with "the prerogative"; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it[259].

215 With that understanding, the phrase "maintenance of this Constitution" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.

216 In *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops Case*"), Isaacs J said[260]:

> "When the Constitution was framed there were six separate Colonies, six separate 'constitutional units,' in Australia. In the aggregate they covered the whole territory of the continent of Australia. Each had its separate Constitution and laws, throughout the territory of each the Sovereign exercised the executive power of the Colony in accordance with the local Constitution, and by the advice of local Ministers, and that executive power, by whatsoever functionary exerted, extended to the execution and maintenance of the Colonial Constitution and laws. But the limit of executive jurisdiction as to every Colony was its geographical area, and that was easily gathered from its Constitution as a truth long familiar.

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258 See also s 110 which refers to the administration of the government of a State.

259 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464; [1997] HCA 36; *Ruddock v Vadarlis* (2001) 110 FCR 491 at 540.

260 (1922) 31 CLR 421 at 439.

> Over the whole of that geographical area, and not beyond it, the local Government exercised executive power – and normally the power was exclusive."

His Honour then observed that the creation by the Constitution of the Commonwealth "superimposed" upon the constituent States a new constitutional unit, and went on[261]:

> "Two conditions had, therefore, to be satisfied. First, the constitutional domain of the new unit had to be delimited and distinguished from the respective constitutional domains of the States, and, next, that could not be done simply in terms of territory. It was found by applying to the territory certain powers – powers differently phrased with respect to the three branches of government. As to the executive power, it was delimited by attaching to the notion of territory, which is always connoted, the words 'extends to the maintenance of this Constitution, and of the laws of the Commonwealth.'"

217 What the text of the Constitution did not attempt was to detail the respective relationships between those Executive Governments and between them and the Imperial Government[262]. With respect to the latter, the matter was fully settled only upon the commencement of the *Australia Act* 1986 (Cth)[263]. There could thereafter, even if not before 1986, be no doubt that the polity which the Constitution established and maintains is an independent nation state with a federal system of government.

218 But it is as well to recall that references to "nationhood" and the like in the decisions of this Court may be traced to its earliest years. In *Commissioners of Taxation (NSW) v Baxter*[264] Griffith CJ, Barton and O'Connor JJ said:

> "The object of the advocates of Australian federation, then, was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian Commonwealth

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261 (1922) 31 CLR 421 at 439-440.

262 See the remarks of Brennan J in *Davis v The Commonwealth* (1988) 166 CLR 79 at 108; [1988] HCA 63.

263 *Sue v Hill* (1999) 199 CLR 462.

264 (1907) 4 CLR 1087 at 1108; [1907] HCA 76.

> embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British Crown."

219 It has also long been recognised that in ascertaining the boundaries of the authority of the Executive Government of the Commonwealth in any given situation there will be a need to deal, as Isaacs J put it, with "new positions which the Nation in its progress from time to time assumes"[265].

220 Express provision was made in s 109 respecting the exercise of concurrent legislative powers. But what are the respective spheres of exercise of executive power by the Commonwealth and State governments? We have posed the question in that way because it is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament. Otherwise there appears no good reason to treat the executive power recognised in s 61 of the Constitution as being, in matters of the raising and expenditure of public moneys, any less than that of the executive in the United Kingdom at the time of the inauguration of the Commonwealth.

221 New South Wales submitted that the Constitution split the executive and legislative power of the respective bodies politic in a particular way so as to effect an accommodation between them. The executive power, whether of the Commonwealth or the States, it was said, "continues to be subservient to legislative power irrespective of whether the source of the legislative power is State or Commonwealth".

222 There are difficulties with that submission and, like the submission itself, these are fundamental in nature. First, the submission gives insufficient acknowledgement to the comparative superiority of the position of the Commonwealth in the federal structure. That superiority informs the doctrine associated with the judgment of Dixon CJ in *The Commonwealth v Cigamatic Pty Ltd (In liq)*[266], and concerns the placement beyond the reach of the States of rights "belonging to the Commonwealth as a government" and of the "legal rights

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265 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438.

266 (1962) 108 CLR 372 at 377-378; [1962] HCA 40. See, further, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 441-442, 453-454, 469-470.

and duties between the Commonwealth and its people". Secondly, the submission of New South Wales, in speaking in terms of continuation, gives insufficient weight to the creation by the Constitution of a new body politic which enjoyed capacities superior to that of a mere aggregation of the federating colonies.

223 State laws of general application may regulate activities of the Executive Government of the Commonwealth in the same manner as persons generally[267], and, by the exercise of its legislative powers, the Commonwealth may affect the executive capacity of a State, but the States do not have power to affect the capacities of the Executive Government of the Commonwealth[268].

224 The submission for New South Wales referred to the position of s 109 in the scheme of the Constitution. But that weakens rather than strengthens its submission. In *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[269], after referring to s 109, Dawson, Toohey and Gaudron JJ said:

> "The States, on the other hand, do not have specific legislative powers which might be construed as authorising them to restrict or modify the executive capacities of the Commonwealth. The legislative power of the States is an undefined residue which, containing no such authorisation, cannot be construed as extending to the executive capacities of the Commonwealth. No implication limiting an otherwise given power is needed; the character of the Commonwealth as a body politic, armed with executive capacities by the Constitution, by its very nature places those capacities outside the legislative power of another body politic, namely a State, without specific powers in that respect. Having regard to the fundamental principle recognised in *Melbourne Corporation v The Commonwealth*, only an express provision in the Constitution could authorise a State to affect the capacities of the Commonwealth executive and there is no such authorisation."

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267 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427, 443-444, 455, 473-474.

268 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 471 [229]; [1999] HCA 5.

269 (1997) 190 CLR 410 at 440.

225 In the same case, Brennan CJ stated that the States lack any legislative power that can reach the executive power of the Commonwealth[270].

226 A question thus may arise whether there is applicable to the scope of s 61 that very broad proposition concerning the extent of the common weal which was expressed in the United Kingdom constitutional theory in the notion of the public service of the Crown. That such notions were understood in the drafting of the Constitution is apparent from the provisions of s 52(i) of the Constitution. This contemplates the acquisition by the Commonwealth of "places ... for public purposes". The notion here of the public purposes of the Commonwealth resembles that of the public service understood in the Imperial and colonial application of moneys appropriated by the legislature and discussed earlier in these reasons. There is here, as Windeyer J put it in *Worthing v Rowell and Muston Pty Ltd*[271], the expression of "a large and general idea". He added[272]:

> "[P]ublic purposes are not necessarily purposes for which the Parliament can make laws. I can see no reason why the Commonwealth, or a Commonwealth statutory body on behalf of the Commonwealth, should not be able to accept a gift from a landowner by his deed or will of land for the purpose, say, of a public park, just as I suppose it could become by gift possessed of pictures or books for public use and enjoyment."

227 However, in deciding the validity of the Bonus Act it is unnecessary to attempt to determine the outer limits of the executive power. One such settled limit, that respecting the need for statutory authority to support extradition from Australia of fugitive offenders, was affirmed in *Vasiljkovic v The Commonwealth*[273]. Another concerns the incapacity of the Executive Government to dispense with obedience to the law[274].

228 After denying the proposition that the Constitution created no more than an aggregation of colonies, with a redistribution of powers between the federal

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270 (1997) 190 CLR 410 at 424-426. See also at 457-458 per McHugh J, 473-474 per Gummow J.

271 (1970) 123 CLR 89 at 125; [1970] HCA 19.

272 (1970) 123 CLR 89 at 127.

273 (2006) 227 CLR 614 at 634-635 [49]-[50]; [2006] HCA 40.

274 *A v Hayden* (1984) 156 CLR 532 at 580-581; [1984] HCA 67; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592 [37]; [2007] HCA 29.

and State governments[275], Brennan J went on in *Davis v The Commonwealth*[276] to say:

> "It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s 61 does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation', to repeat what Mason J said in the *AAP Case*[277]. In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth."

That formulation should be accepted, subject to qualifications which it will be necessary to develop later in these reasons. The formulation, and the qualifications to be made, together emphasise a point made by six members of the Court in the joint reasons in *R v Hughes*[278]. This was that while s 51(xxxix) authorises the Parliament to legislate in aid of the executive power, that does not mean that it may do so in aid of any subject which the Executive Government regards as of national interest and concern.

The present crisis

229 This case requires consideration of certain novel or at least unusual matters which are not contested for the purposes of the Special Case. Some of these are identified, in short form, earlier in these reasons. In the determination of the existence of facts said to attract the exercise of the executive power of the Commonwealth, as with other matters of constitutional fact, the Court may rely on agreed facts[279]. The agreement of the plaintiff in the present case to the matters detailed in the Special Case was qualified only as to their relevance. They are relevant at least to the operation of the executive power.

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275 (1988) 166 CLR 79 at 110.

276 (1988) 166 CLR 79 at 111.

277 (1975) 134 CLR 338 at 397.

278 (2000) 202 CLR 535 at 555 [39] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

279 *Thomas v Mowbray* (2007) 233 CLR 307 at 517 [629]; [2007] HCA 33.

230 Collectively the facts emphasise the unusual nature of the current economic times being experienced globally and in the domestic national economy. Rapid changes in macroeconomic circumstances globally have caused the Commonwealth Department of the Treasury to revise economic forecasts downwards from those released in the 2008-2009 Budget on 13 May 2008. The Government has published a document entitled *Updated Economic and Fiscal Outlook*, in which it is stated that the world is experiencing a global recession triggered by a global financial and economic crisis which is the most severe deterioration in the global economy since the Great Depression and the most significant economic crisis since the Second World War. The revised forecasts mentioned foreshadow significantly weaker domestic growth and higher unemployment. Reports and statements provided by international bodies, the Group of Twenty[280] and the International Monetary Fund[281], emphasise the global nature of the current financial and economic crisis. The Group of Twenty, colloquially the G20, is an informal forum of Finance Ministers and Central Bank Governors established in 1999 to discuss key issues in the global economy. Australia is a member. Such is the background and context in which the Commonwealth Government has announced three "fiscal stimulus packages"[282].

231 The third and most recent "package" includes the payment of the tax bonus pursuant to the Bonus Act. The defendants contend that the purpose of the tax bonus is immediate fiscal stimulus to the economy to support economic growth and employment and to help reduce the impact of the global recession in Australia. They also contend that without a timely stimulus to the economy of this kind, Australia would face a more severe financial and economic slowdown than has been forecast. It was alleged that the global conditions were extraordinary and that that circumstance gives rise to the need for a fiscal stimulus to support economic growth and jobs. It was said that the fiscal stimulus was targeted towards low and middle income households, which are most likely to spend the additional income and are most vulnerable during the economic downturn. Swiftness of execution was said to be desirable.

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280 Declaration of the Summit on Financial Markets and the World Economy, 15 November 2008.

281 World Economic Outlook Update, 28 January 2009.

282 The Economic Security Strategy announced on 14 October 2008; the Nation Building Package announced on 12 December 2008; and the Nation Building and Jobs Plan announced on 3 February 2009 [SCB 24 [13]].

Conclusions respecting s 61 and s 51(xxxix)

232 In determining whether the Bonus Act is supported by s 61 and s 51(xxxix) of the Constitution, it is necessary to ask whether determining that there is the need for an immediate fiscal stimulus to the national economy, in the circumstances set out above, falls within executive power and then to ascertain whether s 51(xxxix) of the Constitution supports the impugned legislation as a law which is incidental to that exercise of executive power.

233 As already mentioned, that there is a global financial and economic crisis is not contested in this proceeding. It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out above is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity.

234 The content of the power provided by s 61 of the Constitution presents a question of interpretation of the Constitution. That power has at least the limitations discussed in these reasons, but it is unnecessary in the present case to attempt an exhaustive description. A question presented in a particular controversy as to the existence of power provided by s 61 may be determined under Ch III of the Constitution with appropriately framed declaratory and other relief.

235 The decision in *Australian Communist Party v The Commonwealth*[283], to which reference was made in oral submissions, is not to the contrary. The provisions of the statute held in that case to be invalid included sections empowering the Governor-General to declare to be an "unlawful association" a body of persons in respect of which the Governor-General was "satisfied" of certain matters. Dixon J rejected a submission[284] that the validity of such a declaration might be impugned upon the principles governing the exercise of discretionary powers which were considered in *Water Conservation and*

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283 (1951) 83 CLR 1; [1951] HCA 5.

284 (1951) 83 CLR 1 at 180.

Irrigation Commission (NSW) v Browning[285]. One ground for that rejection was that the matters of which the Governor-General was to be satisfied were expressed in vague and indefinite terms[286]. Another was that decisions under statute of the Governor-General in Council had never been examined upon judicial review[287]. But that was said before *FAI Insurances Ltd v Winneke*[288].

236 What then is of immediate, and decisive, importance for the present case is the notion of national crisis captured by Sir Robert Garran in his evidence to the Royal Commission as follows[289]:

> "Political and national emergencies are so unknown and unforseeable that the framers of the Constitution decided to give an unlimited power of taxation to the Commonwealth Parliament. After all, when you have once had the power of raising the money, the power of spending it is one with which you may very easily entrust the parliament."

237 Of course, the taxation power is not "unlimited". It must be employed "so as not to discriminate between States or parts of States" (s 51(ii)), nor by any law or regulation of revenue may the Commonwealth "give preference to one State or any part thereof over another State or any part thereof" (s 99). Nor may a subject of the Queen, resident in one State, be subject in any other State to discrimination as prohibited by s 117. Bounties on the production or export of goods must be "uniform throughout the Commonwealth" (s 51(iii)).

238 The provision for payments made by the Bonus Act does not operate by any criterion which discriminates, gives preferences or has a lack of uniformity of application in the sense of these revenue and other provisions of the Constitution. The criteria for entitlement specified in s 5 of the Bonus Act are not of that character. Had the contrary been the case, then a question may have arisen as to the scope of the executive power to support a law resting on s 51(xxxix).

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285 (1947) 74 CLR 492; [1947] HCA 21.

286 (1951) 83 CLR 1 at 185.

287 (1951) 83 CLR 1 at 180.

288 (1982) 151 CLR 342; [1982] HCA 26.

289 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 1 at 72.

239 In *Davis v The Commonwealth*[290] Mason CJ, Deane and Gaudron JJ said:

> "[T]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence."

In the same case Brennan J remarked of the determination of whether an enterprise or activity lies within the executive power of the Commonwealth[291]:

> "It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit."

240 The governments of the States have the interest given by s 94 of the Constitution in the distribution of all surplus revenue of the Commonwealth, but, as remarked above, the Commonwealth has no obligation to tailor its expenditure to provide a surplus[292]. The Parliament may grant financial assistance to any State, but, by force of s 96, the Parliament may impose such terms and conditions as it thinks fit. The Parliament of the Commonwealth is constrained by s 114 of the Constitution from imposing any tax on property of any kind "belonging to a State". That prohibition is supplemented by the principles of federalism associated with *Melbourne Corporation v The Commonwealth*[293] but no reliance is placed by the plaintiff or the interveners upon those doctrines. Further, to say that the power of the Executive Government of the Commonwealth to expend moneys appropriated by the Parliament is constrained by matters to which the federal legislative power may be addressed gives insufficient weight to the significant place in s 51 of the power to make laws with respect to taxation (s 51(ii)).

241 The intervening States do not seriously dispute that only the Commonwealth has the resources available to respond promptly to the present financial crisis on the scale exemplified by the Bonus Act. The submissions of the interveners appear to have been moved more by apprehension of a wide

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290 (1988) 166 CLR 79 at 93-94.

291 (1988) 166 CLR 79 at 111.

292 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179.

293 (1947) 74 CLR 31; [1947] HCA 26.

reading of the scope of s 61. But in considering what enterprises and activities are peculiarly adapted to the government of the country and which cannot otherwise be carried on for its benefit, this case may be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.

242 It is not to the point to regret the aggregation of fiscal power in the hands of the Commonwealth over the last century. The point is that only the Commonwealth has the resources to meet the emergency which is presented to it as a nation state by responding on the scale of the Bonus Act. That Australia is a federal state does not produce the consequence that the policy determined upon by the Executive Government cannot be put into effect by measures such as the Bonus Act. The present is an example of the engagement by the Executive Government in activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit.

243 To the extent that the implementation of this policy involves the creation by s 7 of the Bonus Act of a right to receive the tax bonus and the imposition by s 8 of an obligation to restore overpayments, legislation is necessary and the authority to enact it is supplied by s 51(xxxix) of the Constitution.

244 In that regard the reasoning of Latham CJ in the *Pharmaceutical Benefits Case*[294] is important, albeit addressed to the attachment of s 51(xxxix) to s 81 not to an exercise of the executive power of the Commonwealth. It has long been established in the United Kingdom that the executive government cannot create a new offence and that limitation applies in this country[295]. Against that background, Latham CJ viewed as limited the extent to which s 51(xxxix) empowered the Parliament to make laws creating rights and imposing duties which were not incidental to the execution of another head of legislative power.

245 The legislation held invalid in the *Pharmaceutical Benefits Case* by the creation of rights and imposition of duties attempted to control medical practice. This was a matter beyond the legislative powers of the Commonwealth. The entitlement to payment which is conferred by the Bonus Act is not a use of s 51(xxxix) of such a character; it is incidental to the effectuation of the fiscal stimulus policy.

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294 (1945) 71 CLR 237 at 256-260.

295 *Davis v The Commonwealth* (1988) 166 CLR 79 at 112.

The taxation power – s 51(ii)

246 In the course of his oral submissions, the Commonwealth Solicitor-General made an important concession. It was that the defendants did not seek to support the Bonus Act as an exercise of the taxation power "to the extent that it would authorise payment to an individual of tax bonus that is in excess of that individual's adjusted tax liability". Without a reading down of s 6 of the Bonus Act, it was said that some 820,880 taxpayers, approximately 11 percent of recipients, would receive an amount greater than their adjusted liability.

247 Later in the hearing the Solicitor-General proposed a reading down of s 6 as follows:

> "If a person is entitled to the tax bonus for the 2007-08 income year, the amount of his or her tax bonus is *the lesser of the amount of the person's adjusted tax liability for that income year and*:
>
> (a) if the person's taxable income for that income year does not exceed $80,000 – $900; or
>
> (b) if the person's taxable income for that income year exceeds $80,000 but does not exceed $90,000 – $600; or
>
> (c) if the person's taxable income for that income year exceeds $90,000 but does not exceed $100,000 – $250." (emphasis supplied)

248 The plaintiff responded that a reading down in these terms was beyond what the authorities in this Court permitted. He referred to the statement by Dixon J in *Bank of NSW v The Commonwealth*[296]:

> "[W]here severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law."

Thereafter, in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[297] the authorities were collected and one question they pose with respect to s 6 of

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296 (1948) 76 CLR 1 at 371; [1948] HCA 7.

297 (1996) 187 CLR 416 at 502-503.

the Bonus Act is whether it was designed to operate fully and completely according to its terms or not at all. The plaintiff correctly submits that the lower income earners, whose position was of particular concern in the framing of this fiscal stimulus "package", are the most prejudiced by the reading down proposed by the defendants. The reading down suggested by the Solicitor-General must yield to the contrary intention[298] to most benefit those who have paid the least tax. Section 6 cannot be read down as proposed.

249 In aid of the submissions in support of the reading down proposed by the Solicitor-General, counsel referred to the reading down effected in *R v Hughes*[299] and *British American Tobacco Australia Ltd v Western Australia*[300]. In the first case, the general words "functions and powers" were treated as limited to functions and powers in respect of matters within the legislative powers of the Parliament of the Commonwealth. In the second case, the phrase "in any suit to which ... a State is a party" was construed as applying to suits in which a State is a defendant.

250 These decisions provide examples of that class of case where the phrase "shall nevertheless be a valid enactment to the extent to which it is not in excess of [the legislative] power [of the Commonwealth]" in s 15A of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") is applied to a provision which is addressed "to a larger subject matter, territory or class of persons than the power allows". The words quoted are those of Dixon J in *R v Poole; Ex parte Henry [No 2]*[301]. In that case the word "aerodrome" was construed as applying to aerodromes used for air navigation with other countries and among the States.

251 The proposed reading down of s 6 of the Bonus Act does not limit the provision to one or more of various operations otherwise encompassed by any form of general words. Rather, it seeks to introduce a foreign integer, namely the adjusted tax liability of those persons who otherwise would have answered the criteria in one of pars (a), (b) and (c) of s 6. To treat s 15A of the Interpretation

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298 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339 per Brennan J, 371-372 per McHugh J; [1995] HCA 16.

299 (2000) 202 CLR 535 at 556-557 [43].

300 (2003) 217 CLR 30 at 66 [85]-[87]; [2003] HCA 47.

301 (1939) 61 CLR 634 at 652; [1939] HCA 19.

Act as authorising such a reading of s 6 would be to risk construing s 15A as impermissibly entrusting legislative power to Ch III courts[302].

252 The result is that the plaintiff has the benefit of the concession by the defendants and the Bonus Act is not supported by s 51(ii) of the Constitution.

253 New South Wales sought to gainsay that concession by arguing that it was unnecessary because the Bonus Act in its terms was supported by s 51(ii). That submission, made orally after the concession by the defendants, may have exceeded the proper role of an intervener, but no objection was taken to it.

254 In any event, the Bonus Act could not be sustained on the basis suggested. This is that the statute is analogous to that considered in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[303]. That statute provided for the refund of payments of taxes paid pursuant to an invalid law. Here the Parliament has not acted to make any refund of tax lawfully exacted for the 2007-2008 income tax year.

255 In *Moore v The Commonwealth*[304], Dixon J said that the power conferred by s 51(ii) covers "what is incidental to the imposition and collection of taxation". The Bonus Act takes as the criterion of its operation certain taxpayers for the 2007-2008 income year. But that does not render the Bonus Act a law with respect to the imposition and collection of taxation. In particular, given the formulation of s 6 as enacted, the Bonus Act cannot be said to be "in substance" a law conferring a rebate of tax on income brought to account for 2007-2008.

Other heads of power

256 The defendants relied upon other heads of power, principally those with respect to trade and commerce (s 51(i)) and external affairs (s 51(xxix)). It is unnecessary to consider whether these also support the Bonus Act.

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302 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 485-486; [1995] HCA 47.

303 (1994) 179 CLR 155 at 164-165; [1994] HCA 9.

304 (1951) 82 CLR 547 at 569; [1951] HCA 10.

Result

257 The challenge by the plaintiff to the Bonus Act has failed. The further conduct of the plaintiff's action, from which the Special Case stemmed, should involve the taking of the necessary procedural steps to dismiss the action.

258 HAYNE AND KIEFEL JJ. On 3 February 2009, the Commonwealth Government published its *Updated Economic and Fiscal Outlook*. That document ("the 2009 Outlook") recorded that the International Monetary Fund ("the IMF") was forecasting "a deep global recession". The 2009 Outlook noted that advanced economies are expected to experience the sharpest collective decline in gross domestic product in the period since World War II and that the "key emerging economies" of China and India are expected to slow markedly. The global commodity boom, which was said to have provided significant stimulus to Australian growth and incomes over recent years, was described as "unwinding". The parties and interveners did not dispute that there is a global financial crisis. No party or intervener suggested that Australia stands apart from that crisis or is immune from its effects.

259 In response to these circumstances, the Commonwealth Government has taken a number of steps. In particular, three "fiscal stimulus packages" have been announced: an "Economic Security Strategy" announced on 14 October 2008; a "Nation Building Package" announced on 12 December 2008; and a "Nation Building and Jobs Plan" announced in the 2009 Outlook. This litigation concerned the validity of one statute enacted as part of the third fiscal stimulus package, the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Impugned Act").

260 The constitutional questions presented in this matter are deeper and more enduring than the particular and urgent circumstances that caused the enactment of the particular law. They raise issues that are fundamental to the constitutional structure of the nation, and transcend the immediate circumstances in which the questions were posed.

The Impugned Act

261 The long title of the Act is "An Act to provide for a tax bonus, and for related purposes". Its central provision is s 5, which reads:

> "(1) A person is entitled to a payment (known as the ***tax bonus***) for the 2007-08 income year if:
>
> (a) the person is an individual; and
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> (b) the person is an Australian resident for that income year; and
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> (c) the person's adjusted tax liability for that income year is greater than nil; and
>
> (d) the person's taxable income for that income year does not exceed $100,000; and

(e) the person lodges his or her income tax return for that income year no later than:

(i) unless subparagraph (ii) applies – 30 June 2009; or

(ii) if, before the commencement of this Act, the Commissioner deferred the time for lodgment of the return under section 388-55 in Schedule 1 to the *Taxation Administration Act 1953* to a day later than 30 June 2009 – that later day.

Exception for persons aged under 18 without employment income etc.

(2) However, the person is not entitled to the tax bonus for the 2007-08 income year if:

(a) he or she is a prescribed person in relation to that income year and is not an excepted person in relation to that income year; and

(b) his or her assessable income for the income year does not include excepted assessable income."

(The expressions "excepted person" and "prescribed person" are defined by s 4(1) of the Impugned Act as having the same meaning as in s 102AC of the *Income Tax Assessment Act* 1936 (Cth); the expression "tax offset" is defined as having the meaning given by the *Income Tax Assessment Act* 1997 (Cth).)

262 Section 3 of the Impugned Act provides that "[t]he Commissioner has the general administration of this Act", and the "Commissioner" is defined in s 4(1) as the Commissioner of Taxation.

263 The amount of the tax bonus is fixed by s 6 as $900 (if the person's taxable income for the 2007-08 income year does not exceed $80,000), $600 (if taxable income exceeds $80,000 but does not exceed $90,000) or $250 (if taxable income exceeds $90,000 but does not exceed $100,000). Section 7(1) provides that if the Commissioner is satisfied that a person is entitled to the tax bonus for the 2007-08 income year "the Commissioner must pay the person his or her tax bonus as soon as practicable after becoming so satisfied". Section 8 provides for recovery of overpayments and s 9 levies the general interest charge, worked out under Pt IIA of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"), on overpayment debts.

264 A person's taxable income is worked out[305] by subtracting allowable deductions from assessable income. The amount of the tax bonus to be paid is fixed according to the amount of a person's taxable income. But, as the Impugned Act recognises, the amount of a person's taxable income is not the only matter that affects how much income tax that person must pay.

265 To be eligible for a payment under the Impugned Act, a person must have had an "adjusted tax liability" for the 2007-08 income year that is "greater than nil"[306]. A person's "adjusted tax liability" is to be worked out[307] by taking the sum of a person's basic income tax liability (worked out in accordance with step two of the method statement in s 4-10(3) of the *Income Tax Assessment Act* 1997), Medicare levy and Medicare levy surcharge and reducing that by the sum of the person's tax offsets for that income year. Tax offsets are identified in s 13-1 of the *Income Tax Assessment Act* 1997 and include amounts allowed in respect of such diverse subject-matters as social security and other benefit payments, dependents, franked dividends, primary production, private health insurance and superannuation.

266 It follows that the amount to be paid under the Impugned Act is not expressed as being determined by reference to the amount of income tax that a person was liable to pay for the 2007-08 income year. It is to be paid only to persons who were liable to pay some amount for income tax during that year, but its amount is fixed as one of three set amounts by reference to that person's taxable income, regardless of how much tax the person was required to pay.

267 The Impugned Act contains no express provision appropriating the Consolidated Revenue Fund for the purposes of making the payment. Section 3 of the Impugned Act gives the general administration of the Act to the Commissioner of Taxation. This engages the standing appropriation made by s 16(1) of the Administration Act, which provides:

> "Where the Commissioner is required or permitted to pay an amount to a person by or under a provision of a taxation law other than:
>
> (a) a general administration provision; or
>
> (b) a provision prescribed for the purposes of this paragraph;

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305 *Income Tax Assessment Act* 1997 (Cth), s 4-15.

306 s 5(1)(c).

307 s 4(2).

the amount is payable out of the Consolidated Revenue Fund, which is appropriated accordingly."

Section 2(1) of the Administration Act defines "taxation law" as having the meaning given by the *Income Tax Assessment Act* 1997 and that latter Act provides in s 995-1(1) that:

"***taxation law*** means:

(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or

(b) regulations under such an Act (including such a part of an Act)."

Although the plaintiff contended to the contrary, if the Impugned Act is valid, s 16(1) of the Administration Act is engaged and, subject to compliance with the requirements of the *Financial Management and Accountability Act* 1997 (Cth) ("the Financial Management Act") concerning the drawing of moneys, s 16(1) authorises the withdrawal of the amounts necessary from the Treasury of the Commonwealth. If the Impugned Act is valid, s 27(2)(a) of the Financial Management Act obliges the Finance Minister to issue sufficient drawing rights to allow payment in full of the amount that the Impugned Act requires to be paid.

The proceedings

268 The plaintiff, Mr Pape, is an Australian resident eligible to receive a tax bonus if the Impugned Act is valid. In an action commenced in the original jurisdiction of this Court against the Commissioner of Taxation, he sought orders declaring the Impugned Act invalid, declaring the tax bonus payable by the Commissioner to the plaintiff "unlawful and void", and restraining the Commissioner from making any payment of the tax bonus to the plaintiff. The Commonwealth was joined as a defendant. The defendants were jointly represented. It is convenient, therefore, to refer to the submissions made on behalf of both defendants as submissions made on behalf of the Commonwealth.

269 The parties joined in stating questions of law in the form of a Special Case for the opinion of the Full Court. For that purpose they agreed certain facts. The questions were:

1. Does the Plaintiff have standing to seek the relief claimed in his Writ of Summons and Statement of Claim?

2. Is the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) valid because it is supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

3. Is payment of the tax bonus to which the plaintiff is entitled under the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) supported by a valid appropriation under ss 81 and 83 of the Constitution?

4. Who should pay the costs of the special case?

During the hearing of the matter, the parties agreed that, whatever the outcome of the case, each party would bear its own costs.

270 On 3 April 2009, the Court made orders answering the questions. We joined in the answers given to the first question, about standing, and to the last question, about costs. We did not agree with the answers given to the second and third questions. We would have answered the second question, about the validity of the Impugned Act:

> "The *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) is a valid law of the Commonwealth to the extent to which it provides for the payment to a person entitled to a tax bonus of the lesser of the amount of the person's adjusted tax liability for the 2007-08 income year and the amount of the bonus fixed in accordance with that Act. Otherwise, no."

We would have answered the third question: "Yes".

Standing

271 The Commonwealth submitted, and no intervener submitted to the contrary, that Mr Pape has standing to seek relief in respect of the payment of the tax bonus to him. In particular, it was not disputed that Mr Pape has standing to seek a declaration that the tax bonus payable to him by the Commissioner of Taxation is unlawful and void, and an injunction restraining the Commissioner from making that payment.

272 The Commonwealth further submitted, however, and the interveners did not submit to the contrary, that Mr Pape does not have standing to seek a declaration that the Impugned Act is invalid. It was submitted that he "has no special interest which would allow him to challenge the validity of the Act in its application to other persons".

273 For the reasons given by Gummow, Crennan and Bell JJ this submission should be rejected and question 1 answered: "Yes".

274 It was not made clear in argument whether the Commonwealth's submission about standing was directed only to the form in which a declaration was made or was intended to advance some more general proposition to the

effect that the decision in this case could later be seen and acted upon on a footing that it concerned facts or circumstances unique to Mr Pape and did not decide any point of more general application. A submission of the latter kind would have profoundly serious implications for the rule of law when, as was the case here, the Commonwealth pointed to no fact or circumstance unique to Mr Pape (apart, that is, from him being the only person willing to take a proceeding in this Court the outcome of which, if successful, would deny him entitlement to $250). It is not necessary, however, to consider this aspect of the matter further.

Question 2 – Heads of power

275 The Commonwealth submitted that the Impugned Act was supported on any or all of five bases: the appropriations power read with the incidental power, the implied "nationhood power", the external affairs power, the trade and commerce power and the taxation power.

276 Chief weight was placed upon the first of these arguments. It proceeded in two steps. The Commonwealth submitted first that an appropriation does no more than provide lawful authority of the Parliament for the Executive to withdraw money from the Treasury of the Commonwealth, and prescribe the purpose for which that money may be applied. The second step was to submit that s 51(xxxix) (the incidental power) supports a law imposing a duty on an officer of the Executive to withdraw and apply money which has been validly appropriated. This second step was described as s 51(xxxix) "relevantly [adding] to ss 61 and 81 of the Constitution by allowing for 'the making of laws for the purpose of securing that public money is applied to the purposes for which it is appropriated and not otherwise'[308]".

277 It will be observed that s 51(xxxix) was said to "add to" both s 61 and s 81. That is, the Commonwealth submitted that s 51(xxxix) was engaged in the present matter in two distinct ways: first, by the grant of legislative power with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth" and secondly, by the grant of legislative power with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament" (in this case the power given to the Parliament by s 81).

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308 *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 250 per Latham CJ; [1945] HCA 30.

Section 81 and the incidental power

278 The argument about s 81 and the incidental power in s 51(xxxix) may be dealt with briefly. The Impugned Act is not a law whose making is incidental to the execution of a power vested by the Constitution in the Parliament to appropriate moneys.

279 Section 81 of the Constitution provides that:

> "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."

280 Section 83 provides that "[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

281 The Commonwealth submitted that the Impugned Act provides "an essential element of the appropriation" because it prescribes the purposes for which amounts are appropriated. The Commonwealth submitted that because s 7(1) of the Impugned Act directs the Commissioner to pay the tax bonus it "is a sufficiently clear indication by the Parliament that the [Consolidated Revenue Fund] is to be debited for the purposes of making that payment". And in this connection the Commonwealth pointed to the fact that the Bill for the Impugned Act was the subject of a message from the Governor-General under s 56 of the Constitution recommending to the House of Representatives "that an appropriation be made for the purposes of a Bill for an Act to provide for a tax bonus, and for related purposes". The Bill identified in the message was the Bill for what was to become the Impugned Act.

282 As already noticed, the Impugned Act does not expressly provide any appropriation of the Consolidated Revenue Fund. It is sufficient for present purposes to conclude that the Impugned Act was evidently intended to engage, and if valid will engage, the standing appropriation in s 16(1) of the Administration Act. As the Commonwealth rightly pointed out in argument, s 3 of the Impugned Act, giving the general administration of the Act to the Commissioner of Taxation, had no purpose other than engaging s 16(1) of the Administration Act. That being so, it is not necessary to examine what the position would have been if the standing appropriation had not been engaged in this way.

283 It is not to be doubted that the Parliament has power to make a standing appropriation of the kind found in s 16(1) of the Administration Act: an appropriation permitting application of the Consolidated Revenue Fund to the

execution of valid laws administered by the Commissioner of Taxation. But it is not incidental to the power of the Parliament to make a law providing for that standing appropriation to make a new law requiring a new and wholly different outlay to be made. The argument relying on the power with respect to matters incidental to the execution of a power of appropriation that is vested in the Parliament amounts to an assertion that it is incidental to a standing appropriation to make any law that would require a payment drawn against that standing appropriation. But, as was correctly submitted on behalf of New South Wales, that inverts the proper order of inquiry. The standing appropriation in s 16(1) responds to enable fulfilment of legal obligations whose source lies elsewhere. The creation of those obligations, by the Impugned Act, is not incidental to the standing appropriation which would respond to enable fulfilment of those same obligations.

Section 61 and the incidental power

284 This leaves for separate consideration the other way in which the Commonwealth submitted that the incidental power is engaged in connection with an appropriation: as the enactment of a law with respect to a matter incidental to the execution of power vested by the Constitution in the Government of the Commonwealth. Consideration of these submissions is organised as follows:

(a) The Commonwealth's submissions

(b) Beginning at s 81?

(c) The place of s 81 in the Constitution

(d) The "purposes of the Commonwealth" as a limit?

(e) Some matters of history

(f) The decided cases

(g) The executive power

(h) Conclusions respecting s 61 and the incidental power

(a) The Commonwealth's submissions

285 The Commonwealth submitted that "[m]aking a payment pursuant to an appropriation Act involves the doing of something authorised by a law of the Commonwealth and, accordingly, falls within the executive power of the Commonwealth under s 61 of the Constitution". The Commonwealth further

submitted that the Executive, through the exercise of executive power, can give effect to an appropriation in a variety of ways but accepted that there remained unresolved issues about whether "the Commonwealth has a general power to engage in the activities that are the subject of the appropriation". The Commonwealth submitted that these unresolved issues do not need to be decided in this case because the appropriation effected by s 16(1) of the Administration Act in respect of the tax bonus is "for the purposes of the Commonwealth" within the meaning of s 81 of the Constitution.

286 Examination will reveal that this branch of the Commonwealth's argument has a number of elements which should be identified and treated separately. Ultimately, however, the critical question will be whether the payment of money drawn from the Treasury of the Commonwealth to those entitled under the Impugned Act is a payment that could validly be made in exercise of the executive power of the Commonwealth without any legislative support except the law which appropriates the Consolidated Revenue Fund for the payment. If it could, the Impugned Act will be valid as incidental to the execution of the executive power to make the payment. If the payment could not be made in exercise of the executive power of the Commonwealth, the validity of the Impugned Act must depend upon engaging some other head or heads of power.

287 The Commonwealth's submission that the Impugned Act was supported by ss 51(xxxix) and 61, as a law with respect to a matter incidental to the execution of a power vested by the Constitution in the Government of the Commonwealth, was expressed in various ways in the course of oral argument. Although not articulated in these terms, the submission can be summarised as follows:

(a) the Parliament has power to appropriate the Consolidated Revenue Fund for *any* purpose it thinks fit;

(b) the Executive necessarily has power to expend any money lawfully appropriated; and

(c) the Parliament may enact a law requiring that payment, and regulating the conditions that are to be met before payment is made.

Thus, so the argument concluded, the appropriation power having no relevant limitation (whether by reference to heads of legislative power or otherwise) the Executive of the Commonwealth may spend money for any purpose which the Parliament by its appropriation treats as a purpose of the Commonwealth.

(b) Beginning at s 81?

288 Although the argument, thus framed, proceeds from premises about the ambit of the Parliament's power to appropriate, it is important to recognise that there is no textual or structural reason to treat s 81 as the point at which it is necessary to begin in defining the ambit of the Executive's power to spend. It is necessary to construe each provision of the Constitution as part of the whole. There is no little danger in taking one of its provisions (for example, s 81), construing it in isolation, and then taking that construction as a premise for further conclusions about the ambit of other powers. Of course it is necessary to observe that the constitutional text is to be construed "with all the generality which the words used admit"[309]. But that neither requires nor permits consideration of particular provisions in isolation from their place within the Constitution as a whole.

289 Especially is this so with respect to s 81, which is not cast in its terms as a grant of legislative power. Rather, the head of legislative power relevant to s 81 is more readily identified in s 51(xxxix). And in the case of a number of other provisions of Ch IV of the Constitution (for example, ss 87, 93 and 96) the relevant head of legislative power is not to be found in Ch IV but rather in s 51(xxxvi).

290 Although it is convenient to begin the examination of this branch of the Commonwealth's arguments by considering s 81 and what is meant in that section by "for the purposes of the Commonwealth", it will ultimately be unnecessary to attempt some definitive exposition of the meaning of this phrase beyond saying that there is evident force in the view that it is not limited to purposes in respect of which the Parliament has express power to make laws. Not least is that so when it is recognised that there may be an appropriation for a valid exercise of the executive power of the Commonwealth and that, at least to the extent of matters going to the very survival of the polity[310] and a class of matters like national symbols and celebrations[311], the executive power of the Commonwealth is not bounded by the express grants of legislative power. But it

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309 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; [1964] HCA 15; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14.

310 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188; [1951] HCA 5.

311 *Davis v The Commonwealth* (1988) 166 CLR 79; [1988] HCA 63.

is neither necessary nor possible to attempt to chart the boundaries of the area encompassed by the phrase "for the purposes of the Commonwealth" when it is used in s 81. And in particular, it is not necessary to decide whether the phrase encompasses *any* purpose determined by the Parliament to be a purpose of the Commonwealth[312].

(c) The place of s 81 in the Constitution

291 The nature of the processes for which ss 81 and 83 of the Constitution provide must be understood having regard to their constitutional context. As was pointed out in the plurality reasons in *Combet v The Commonwealth*[313], ss 81 and 83 of the Constitution must be understood in the light of other provisions of Ch IV of the Constitution, notably s 94[314] and s 97[315], and those provisions of

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312 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 254 per Latham CJ; *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 417 per Murphy J; [1975] HCA 52.

313 (2005) 224 CLR 494 at 569-570 [139]-[143]; [2005] HCA 61.

314 Section 94 provides:

> "After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth."

315 Section 97 provides:

> "Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned."

Pt V of Ch I (in particular, s 53[316], s 54[317] and s 56[318]) which regulate the relations between the two Houses of the federal Parliament in respect of money bills. Section 94, with its provision for distribution of surplus revenue, emphasises the importance to other integers of the Federation of the prohibition in s 83 against drawing from the Treasury except under appropriation made by law. And s 97, with its provisions about audit of receipt and expenditure of money on account of the Commonwealth, is important because the audit arrangements that were picked up and applied required report to the Parliament. Section 97 thus emphasises that ss 81 and 83 are directed to regulating the relationship between the Executive and the Parliament.

292 Although s 81 has often been referred to as "the appropriation power" it is important to recognise that its purpose is to regulate a particular aspect of the relationship between the Executive and the Parliament: the relationship in matters of finance. Section 81 is *not* directed to the making of laws which will regulate the rights, duties or obligations of citizens. Rather, as Griffith CJ said in *The State of New South Wales v The Commonwealth* ("the *Surplus Revenue Case*")[319]:

> "The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements. A contractual obligation may or may not be added by some statutory provision or by authorized

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316 Section 53 provides, in part, that "[p]roposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate" and that "[t]he Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government".

317 Section 54 provides:

> "The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

318 Section 56 provides:

> "A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

319 (1908) 7 CLR 179 at 190-191; [1908] HCA 68.

> agreement, but it does not arise from the appropriation. The Appropriation Act does, however, operate as a provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated by the Act."

Or, as Isaacs J put the same point[320]:

> "'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out."

293 Section 81 is not the only provision that regulates the relationship between the Executive and the Parliament in matters of finance. Sections 53, 54 and 56 make plain, among other things, that appropriations "for the ordinary annual services of the Government" are treated as a distinct class of appropriation. The appropriation relied on in this case is not of that kind; it is a standing appropriation of a kind long recognised[321] as distinct from appropriations for the ordinary annual services of the government.

294 But while the appropriation which would be relied on in this case is a standing appropriation, it is important to recognise that the provisions of Ch IV of the Constitution and Pt V of Ch I reflect the cardinal principle of parliamentary control which underpinned the British financial system at the time of Federation and which had earlier been transported to the Australian colonies. Proposed laws appropriating revenue or moneys or imposing taxation must originate, in Britain in the House of Commons, in the colonies in the more numerous House of the colonial legislature, and in the Commonwealth, under s 53 of the Constitution, in the House of Representatives. In Britain, "[t]he most ancient, as well as the most valued, prerogative of the House of Commons is the right of supreme control over taxation, *to which the right to control issues is a natural corollary*"[322]. So too, under the Constitution, the power of appropriation given by ss 81 and 83 is a logical consequence of the right of levying supplies. But no less importantly, it is the Executive which seeks supplies[323] and applies the moneys that have been appropriated.

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320 (1908) 7 CLR 179 at 200.

321 *Combet v The Commonwealth* (2005) 224 CLR 494 at 570 [143].

322 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3 (emphasis added).

323 s 56.

295 An appropriation from the Consolidated Revenue Fund permits application of the Fund to the purpose or purposes described in the appropriation and, subject to any statutorily prescribed steps, permits the drawing of money from the Treasury of the Commonwealth. Drawing and application of appropriated moneys are now regulated by the Financial Management Act and provision is now made for the "review and audit of ... the receipt of revenue and the expenditure of money on account of the Commonwealth", as contemplated by s 97 of the Constitution, by the combined operation of the Financial Management Act and the *Auditor-General Act* 1997 (Cth). Those two Acts are examples of laws whose making is supported by the incidental power. The subjects with which those Acts deal are matters incidental to the execution of the Parliament's power under ss 81 and 83 to make an appropriation by law which will authorise withdrawal from the Treasury of the Commonwealth.

296 Parliamentary appropriation is the process which *permits* application of the Consolidated Revenue Fund to identified purposes. Since Federation, those purposes have usually been articulated at a very high level of abstraction. The adoption of output accounting practices described in *Combet* has led to the adoption of even more general, not to say diffuse, descriptions of those purposes. The appropriation of funds, standing alone, does not and never has required application of the amounts appropriated. Any *obligation* to apply the funds to the permitted purpose must be found elsewhere than in the appropriation.

(d) The "purposes of the Commonwealth" as a limit?

297 It has been said[324] that "for the purposes of the Commonwealth" in s 81 of the Constitution encompasses any and every purpose which the Parliament may choose. Others have concluded[325] that the purposes of the Commonwealth can only be purposes for which the Parliament of the Commonwealth has power to enact a law. Between these polar extremes lie several intermediate positions, including the view[326] that:

> "[e]ven upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the

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324 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 256 per Latham CJ; *AAP Case* (1975) 134 CLR 338 at 417 per Murphy J.

325 *AAP Case* (1975) 134 CLR 338 at 360 per Barwick CJ, 374-375 per Gibbs J.

326 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 269 per Dixon J.

> Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day."

(e) Some matters of history

298 Much of what has been written about the construction and application of s 81 of the Constitution has been written without express resort to any material extrinsic to the Constitution, whether in the form of Convention Debates or like material. In *Cole v Whitfield*, the Court referred[327] to the history of s 92:

> "not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".

Like reference should be made in this matter to the history of the drafting of s 81 in order to understand better the contemporary meaning of the language used ("for the purposes of the Commonwealth"), the subject to which that language was directed, and the nature and objectives of the movement towards Federation which bear upon the questions that now arise.

299 There was disagreement at the 1891 Sydney Convention about whether the draft Bill for the Constitution, as it then stood, empowered the Commonwealth to appropriate and spend money raised for any purpose, and disagreement about whether the Commonwealth should have such a power. In debate, Mr Inglis Clark denied[328] that the Bill as it stood gave such power to the Commonwealth. Sir Samuel Griffith agreed[329] in substance with Mr Inglis Clark whereas Mr Deakin may be understood[330] to have been of the opposite opinion.

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327 (1988) 165 CLR 360 at 385; [1988] HCA 18.

328 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 698-699.

329 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 699-700.

330 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 700.

300 The draft Bill, as it stood after the Sydney session of the Convention in 1897, provided[331] in cl 81 that:

> "All revenues raised or received by the Executive Government of the Commonwealth, under the authority of this Constitution, shall form one Consolidated Revenue Fund to be appropriated for the Public Service of the Commonwealth in the manner and subject to the charges provided by this Constitution."

301 In debate at Melbourne on 14 February 1898, Mr Isaacs suggested[332] that the words "Public Service of the Commonwealth" may not be sufficiently large to cover the proposed return of surplus revenues to the States. Thereafter, the Bill was amended by deleting from cl 81 reference to the Public Service of the Commonwealth and substituting "for the purposes of the Commonwealth".

302 Apart from the intervention of Mr Isaacs, the Convention Debates do not give any indication of why "for the purposes of the Commonwealth" was chosen in preference to "for the Public Service of the Commonwealth". It may be assumed that the latter phrase was modelled on the common form of expression used in colonial constitutions[333] in connection with the appropriation powers of colonial legislatures. Further, as Quick and Garran noted[334], "for the Public Service" was itself an expression reflecting then current British parliamentary practice which, as recorded in the edition of Erskine May's *Parliamentary Practice*[335] current at Federation, was to appoint those Committees of the whole House of Commons known as the Committee of Supply and the Committee of Ways and Means to respond to "the demand of aid and supply for the public service made by the speech from the throne".

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331 Williams, *The Australian Constitution: A Documentary History*, (2005) at 785.

332 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 14 February 1898 at 899-900.

333 *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54), Sched 1, s 47; *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55), Sched 1, s 44; *Constitution Act* 1867 (Q), s 34; and *Constitution Act* 1889 (WA), s 64 each provided for revenue to be appropriated to or for the public service of the Colony.

334 *The Annotated Constitution of the Australian Commonwealth*, (1901), §242 at 666.

335 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 554-555.

303 It may be accepted, then, that the expression "for the Public Service" had a very wide application and that adoption of "for the purposes of the Commonwealth" was intended to encompass within its ambit the proposed return of surplus revenue. But it is also necessary to notice one other aspect of the drafting history of the Constitution.

304 During the Convention Debates about what was to become s 96 of the Constitution (enabling the Commonwealth to grant financial assistance to the States on condition) differing views were expressed[336] about whether, without an express provision to that effect, the power to make such grants would in any event be implied. Mr O'Connor expressed[337] the view that such an express power would be necessary because, although the colonial parliaments "do as they think fit almost within any limits", the only expenditures that would be constitutionally permitted to the Commonwealth would be expenditures within the heads of legislative power.

305 Taken together, these matters of drafting history may well be equivocal. Whether, as has been suggested[338], "it seems unlikely on balance that [s 81] was intended to allow appropriation for any purpose" need not be decided. It is enough for present purposes to say that the drafting history of the relevant provisions of the Constitution does not point unequivocally to a settled understanding at the time of Federation that the appropriation and spending powers of the Commonwealth extended to any purpose.

306 That there was no such settled understanding about the extent of the appropriation and spending powers of the Commonwealth is confirmed by the fact that debate about the extent of the Commonwealth powers of appropriation and spending continued after Federation. In the early years of Federation

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336 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 17 February 1898 at 1107-1108.

337 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 17 February 1898 at 1108.

338 Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 377.

Mr Higgins[339], Sir John Forrest[340] and Sir John Quick[341] all expressed the view, in the course of parliamentary debates, that the spending power was limited to the heads of legislative power. Yet despite the expression of such views, the Commonwealth enacted several pieces of legislation whose validity could rest only in an extended understanding of the appropriation and spending powers. Thus, the *Maternity Allowance Act* 1912 (Cth) provided an allowance to "every woman who ... gives birth to a child" in Australia and who fell within the class of claimants described by s 6 of the Act. And in 1923 Acts were passed to promote the purchase by settlers in outback areas of wire netting for fencing[342] and to authorise the first systematic road grants[343]. The validity of these Acts was not challenged in the courts.

307 In 1926, however, by the *Federal Aid Roads Act* 1926 (Cth) the Parliament provided for specific purpose grants to the States for construction and reconstruction of roads. The State of Victoria challenged the validity of the Act. The challenge was dismissed by this Court[344] with very brief reasons. The Act was said[345] to be "plainly warranted by the provisions of s 96 of the Constitution". Further exposition of that conclusion was said[346] to be unnecessary.

308 The ambit of the Commonwealth's powers to appropriate remained controversial. The *Report of the Royal Commission on the Constitution*, presented on 21 November 1929, considered the appropriation power. It concluded[347] that:

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339 Australia, House of Representatives, 14 *Parliamentary Debates* (Hansard), 9 July 1903 at 1997-1998.

340 Australia, House of Representatives, 66 *Parliamentary Debates* (Hansard), 25 September 1912 at 3422-3424.

341 Australia, House of Representatives, 66 *Parliamentary Debates* (Hansard), 1 October 1912 at 3639.

342 *Advances to Settlers Act* 1923 (Cth).

343 *Main Roads Development Act* 1923 (Cth).

344 *Victoria v The Commonwealth* (1926) 38 CLR 399; [1926] HCA 48.

345 (1926) 38 CLR 399 at 406.

346 (1926) 38 CLR 399 at 406.

347 Australia, *Report of the Royal Commission on the Constitution*, (1929) at 137.

> "[t]he only constitutional limitations on the power of the Commonwealth Parliament to appropriate the [Consolidated] Revenue Fund are those which are mentioned or referred to in s 81. The Commonwealth Parliament cannot disregard the charges and liabilities imposed by the Constitution, or the obligations of the Commonwealth under the Financial Agreement of 12 December 1927, but subject to these charges liabilities and obligations it may appropriate any part of the Fund 'for the purposes of the Commonwealth'."

309 How far those words limit the power of appropriation was the subject of conflicting evidence to the Royal Commission. Sir Robert Garran submitted that "the Commonwealth" was used in the phrase "for the purposes of the Commonwealth" in the wider sense of "the whole government structure, that is, the Commonwealth as an organised system of government, including the States"[348]. Thus, in Sir Robert Garran's view, the Commonwealth Parliament may appropriate for any purpose which it considers to be a purpose of the Commonwealth. Further, even if the power of appropriation was not properly to be regarded as unlimited, the purpose of an appropriation was, in his view, a political question on which the High Court would not interfere "unless it could be satisfied that the purpose was one which could, by no conceivable means, have any interest for the Commonwealth qua Commonwealth, or have any relation to any of the powers given to the Commonwealth by the Constitution"[349]. By contrast, Sir Edward Mitchell and Mr Owen Dixon gave evidence to the Royal Commission to the effect that s 81 should be read as limiting the objects of appropriation. Sir Edward Mitchell's view was that "the purposes of the Commonwealth" included not merely everything about which the Parliament may legislate but also everything which the Executive Government of the Commonwealth may do without express legislative authority. Mr Dixon submitted that the power of the Parliament to appropriate money was restricted to the subjects assigned to federal legislative power.

310 The competing views expressed to the Royal Commission reveal four distinct strands of argument which did not necessarily intersect. First, Sir Robert Garran focused upon what is meant by "the Commonwealth" in the phrase "for the purposes of the Commonwealth". Secondly, Sir Edward Mitchell pointed to the difficulty of using "for the purposes of the Commonwealth" as a criterion of constitutional validity when appropriations are expressed at a very high level of

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348 Australia, *Royal Commission on the Constitution of the Commonwealth*, Minutes of Evidence, Pt 1 at 69.

349 Australia, *Report of the Royal Commission on the Constitution*, (1929) at 138.

generality and abstraction. Thirdly, all of those who gave evidence on this subject to the Royal Commission gave attention to questions of federal structure. Finally, all recognised that although Parliament controls the application of public moneys by the processes of appropriation, it is the Executive that initiates the process by proposing the estimates of expenditure not only for the ordinary annual services of the government but for "the Public Service" more generally.

311 It is necessary to say something further about two of these strands of thought: the Executive's role with respect to appropriations and the debate about the meaning of "the Commonwealth" in s 81.

312 As was said in the 10th edition of Erskine May's *Parliamentary Practice*[350]:

> "The Sovereign, being the executive power, is charged with the management of all the revenue of the state, and with all payments for the public service. The Crown, therefore, acting with the advice of its responsible ministers, makes known to the Commons the pecuniary necessities of the government; the Commons, in return, grant such aids or supplies as are required to satisfy these demands; and they provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which they have granted. *Thus the Crown demands money, the Commons grant it, and the Lords assent to the grant: but the Commons do not vote money unless it be required by the Crown; nor do they impose or augment taxes, unless such taxation be necessary for the public service, as declared by the Crown through its constitutional advisers*". (emphasis added)

313 There is no doubt that in British parliamentary practice the "public service" encompassed a wide variety of purposes. But the breadth and diversity of purposes for which money might be appropriated under British parliamentary practice is consistent with the absence of any relevant limitation of the subjects to which the executive power in Britain could apply the revenues of the state. If the Crown demanded money for a particular purpose, and if the Commons granted it and the Lords assented to the grant, money could be applied to the purpose. The breadth of the powers of the Crown in Britain provides no assistance in deciding whether, in the federal form of government for which the Constitution provides, the Executive Government of the central polity has some lesser power.

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350 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 515.

314 Similarly, the debate about whether "the Commonwealth" when used in the phrase "for the purposes of the Commonwealth" refers to the polity created upon Federation or refers to the nation organised in accordance with the Constitution is a debate which, however it is resolved, sheds little light upon the questions that must be decided in the present matter. It sheds little light on those issues because the debate about the meaning of "the Commonwealth" when used in s 81 masks a more fundamental question.

315 That more fundamental question is whether "for the purposes of the Commonwealth" is to be understood as limiting the purposes for which the Executive Government of the Commonwealth has power to apply money drawn from the Consolidated Revenue Fund. Consistent with the notion that it is the Executive that demands money, the more numerous House of the Parliament (the House of Representatives) that grants it, the upper House (the Senate) that assents to the grant and the Executive that then outlays the money demanded and granted, the question is whether "for the purposes of the Commonwealth" provides some limitation upon executive power in relation to spending that is not derived by reference to other provisions of the Constitution, notably s 61. That question is not resolved by choosing between reading "the Commonwealth" in s 81 as referring to the polity or the nation.

316 It is readily accepted that "for the purposes of the Commonwealth" does not yield a criterion easily applied as a measure of constitutional validity of an appropriation. When it is recognised that parliamentary appropriation is a necessary but not sufficient step for the spending of money by the Executive it may be thought to follow that a more precise and concrete issue would be presented by considering whether particular expenditure for identified purposes was a valid exercise of the executive power of the Commonwealth or was authorised by a valid law of the Parliament. Even in such a case, however, determining whether the purpose being pursued is within the phrase "the purposes of the Commonwealth" would not be easy.

317 In *Victoria v The Commonwealth and Hayden* ("the *AAP Case*"), McTiernan J concluded[351] that the question of what is a purpose of the Commonwealth was "non-justiciable". In *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*"), Latham CJ described[352] the question as a "political matter". It is not necessary to adopt either of those paths of reasoning to conclude that asking whether a particular appropriation can be described as being for a purpose of the Commonwealth will

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351 (1975) 134 CLR 338 at 370.

352 (1945) 71 CLR 237 at 256.

seldom if ever yield an answer determinative of constitutional litigation in this Court. There are at least two reasons why that is so. First, the generality with which appropriations are ordinarily expressed will not readily permit examination of whether the purposes thus identified are purposes of the Commonwealth. Secondly, if there is a plaintiff (other than a State Attorney-General) who has standing to challenge a particular expenditure, the question at issue will be about a particular application of money to a particular purpose. That is an inquiry that will turn upon the ambit of the power (legislative or executive) that is said to be engaged if the expenditure is made.

318 All this being so, the question at issue in the present matter is not to be understood as depending upon first resolving the meaning or application of the expression "for the purposes of the Commonwealth" in s 81. Rather, validity of the Impugned Act depends upon other considerations.

(f) The decided cases

319 The argument advanced on behalf of the Commonwealth in the present matter is not substantially different in effect from the argument urged on behalf of the Commonwealth in the *Pharmaceutical Benefits Case*[353]. In the *Pharmaceutical Benefits Case* and in this case, the Commonwealth's argument treated s 81 not as directed to the regulation of the relationship between the Executive and the Parliament but as giving to the Executive a power to spend. Thus, in the *Pharmaceutical Benefits Case* it was submitted[354] that "the purposes of the Commonwealth" was a larger field of Commonwealth expenditure than what might be called "the domestic or governmental expenditure, the necessary expenses of carrying out the functions of the Government" encompassed by the reference in s 82 to "the expenditure of the Commonwealth". The Commonwealth further submitted[355] that the effect of the reference in s 81 to "the purposes of the Commonwealth" was analogous to the meaning attributed to Art I, §8, cl 1 of the Constitution of the United States[356] and that, consistent with certain decisions of the Supreme Court of the United States[357], the

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353 (1945) 71 CLR 237.

354 (1945) 71 CLR 237 at 243.

355 (1945) 71 CLR 237 at 243.

356 "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States".

357 *United States v Butler* 297 US 1 (1936); *Charles C Steward Machine Co v Davis* 301 US 548 (1937). See also *Helvering v Davis* 301 US 619 at 640-645 (1937);

(Footnote continues on next page)

Commonwealth power to spend should be understood as being "for purposes as large as the purposes for which it is empowered to raise money"[358].

320 The validity of the premise for the Commonwealth's argument in the *Pharmaceutical Benefits Case*, that s 81 gives power to spend money, was not examined in that case. The decision in the case turned on consideration of the reach of the incidental power. But the premise for the Commonwealth's argument in the *Pharmaceutical Benefits Case*, that s 81 gives a power to spend, should not be accepted. Section 81 does not provide for spending; it regulates the relationship between the Executive and the Parliament. Section 81 provides for control by the Parliament over the *purposes* to which the Consolidated Revenue Fund may be applied and s 83 regulates withdrawal of money from the Treasury of the Commonwealth. The power to spend lies elsewhere.

321 Because of the way in which opinions were divided in the *AAP Case*, no proposition about the ambit of the Commonwealth's powers as to appropriation and expenditure can be identified as commanding the assent of a majority of the Justices in that case. Two members of the Court, Barwick CJ and Gibbs J, were of opinion that the Commonwealth's power of appropriation was limited to purposes in respect of which the Parliament has legislative power. By contrast, McTiernan, Mason and Murphy JJ were of opinion that the purposes of the Commonwealth are not limited to those purposes for which the Commonwealth has power to make laws and that it is for Parliament to determine what are the purposes of the Commonwealth. Although Jacobs J treated the purposes of the Commonwealth as being limited to purposes identified from within the Constitution, those purposes included, in his Honour's view[359], purposes implied from the existence of "Australia as a nation externally and internally sovereign" including "co-ordination of services" to meet the "various interrelated needs" of a complex society. The seventh member of the Court, Stephen J, held that the plaintiffs, the State of Victoria and the Attorney-General for that State, lacked standing to bring the proceedings.

322 For present purposes, it is useful to focus particularly upon the reasons of Mason J. First, Mason J rejected[360] the argument that the express provision of power under s 96 of the Constitution to make grants of financial assistance to the

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United States v Gerlach Live Stock Co 339 US 725 at 738 (1950); *Buckley v Valeo* 424 US 1 at 90-91 (1976).

358 (1945) 71 CLR 237 at 245.

359 (1975) 134 CLR 338 at 412-413.

360 (1975) 134 CLR 338 at 395.

States on conditions was reason to confine s 81. Rather, in his Honour's view, s 96 was to be seen as a provision which put beyond question the power of Parliament to attach conditions to grants made to the States. For the reasons given earlier, this understanding of the purpose for including s 96 in the Constitution may not be consistent with the course of debate at the constitutional conventions. For the moment, however, it is convenient to proceed on the footing that s 96 was included for the limited purposes identified by Mason J in the *AAP Case*.

323 Although Mason J gave to the words "for the purposes of the Commonwealth" the meaning ascribed to them by Latham CJ in the *Pharmaceutical Benefits Case* (for such purposes as Parliament may determine[361]) that conclusion was not seen[362] as leading to the conclusion that the Commonwealth has an unlimited executive power or to the conclusion that a statutory appropriation provides lawful authority for the engagement by the Commonwealth in particular activities. Rather, Mason J emphasised[363] that the executive power of the Commonwealth "is not unlimited and ... its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government". Having regard[364] to the provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States, any other conclusion was described by Mason J as "unacceptable". In the *AAP Case*, Mason J would have restrained[365] the Commonwealth from carrying into effect the activities for which money was appropriated and restrained the Commonwealth from expending those moneys.

(g) The executive power

324 As has been observed, the Commonwealth's submissions on s 61 and the incidental power can be understood as proceeding by three steps: (a) the Parliament has power to appropriate the Consolidated Revenue Fund for *any*

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361 (1945) 71 CLR 237 at 256.

362 (1975) 134 CLR 338 at 396.

363 (1975) 134 CLR 338 at 396.

364 (1975) 134 CLR 338 at 396-397.

365 (1975) 134 CLR 338 at 402.

purpose it thinks fit; (b) the Executive necessarily has power to expend any money lawfully appropriated; and (c) the Parliament may enact a law requiring that payment and regulating the conditions that are to be met before payment is made.

325 These submissions necessarily proposed a particular understanding of the structure of the Federation. It is an understanding in which the central polity has legislative power with respect to taxation (limited by the requirement "not to discriminate between States or parts of States"[366]) and an executive power with respect to expenditure limited only by the necessity to secure the approval of the Parliament for that expenditure. And because both the initiative for expenditures and the making of expenditures are matters for the Executive, the understanding of the Federation for which the Commonwealth contends is one which gives the Executive of the Commonwealth an unlimited power to propose financial expenditures and, subject to parliamentary appropriation, power to make those expenditures that is in no way limited by subject-matter or purpose. Such an understanding of the structure of the Federation does not fit easily with the long-accepted understanding of the constitutional structure, expressed in *Melbourne Corporation v The Commonwealth*[367] or *R v Kirby; Ex parte Boilermakers' Society of Australia*[368], of separate polities, separately organised, continuing to exist as such, in which the central polity is a government of limited and defined powers.

326 In *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops Case*"), Isaacs J pointed out[369] that:

> "Section 61 makes three declarations as to the executive power of the Commonwealth. Observe, it is not as to the Executive Government of the Commonwealth or as to the powers of the Government, but as to the 'executive *power* of the *Commonwealth*.' As to that 'power', it declares that it (*a*) is vested in the Sovereign, (*b*) is exerciseable by the Governor-General as the Sovereign's representative, (*c*) 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' The reference to the Governor-General as the representative of the Sovereign must be read with sec 2 of the Constitution, which constitutes him such representative. As to the first

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366 s 51(ii).

367 (1947) 74 CLR 31 at 82; [1947] HCA 26.

368 (1956) 94 CLR 254 at 267-268; [1956] HCA 10.

369 (1922) 31 CLR 421 at 437-438; [1922] HCA 62.

> declaration it is a renewed statement of the law and introductory of what follows. *Blackstone* (vol I at 190) says: 'The Supreme executive power of these Kingdoms is vested by our laws in a single person, the King or Queen.' In *Halsbury's Laws of England* (vol VI at 318) it is said: 'The executive authority is vested in the Crown as part of the prerogative.' The second declaration need not be further considered now. The third is very important. It marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution, but it leaves entirely untouched the definition of that power and its ascertainment in any given instance. It no more solves the difficulty in the present case than would the words 'for the peace welfare and good government of New South Wales' or the words 'in and for Victoria' solve a similar difficulty in relation to the constitutional executive authority of those States. *But the third declaration is an essential starting-point, and the extent it marks out cannot be exceeded.*" (last emphasis added)

327 Although the ambit of Commonwealth executive power is not otherwise defined by Ch II, "it is not unlimited [in scope] and ... its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government"[370].

328 As Mason J had earlier observed, in *Barton v The Commonwealth*[371], the executive power of the Commonwealth:

> "extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution."

As was later explained in the plurality reasons in *Davis v The Commonwealth*[372], those "spheres of responsibility" vested in the Executive Government of the Commonwealth include responsibilities derived from the character and status of the Commonwealth as a national polity. In the *Pharmaceutical Benefits Case*[373],

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370 *AAP Case* (1975) 134 CLR 338 at 396 per Mason J.

371 (1974) 131 CLR 477 at 498; [1974] HCA 20.

372 (1988) 166 CLR 79 at 93.

373 (1945) 71 CLR 237 at 269.

Dixon J made a related point in relation to the power of expenditure, when he said that the power "necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government". And as Dixon J went on to say[374]:

> "These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day."

329 In the *AAP Case*, Mason J said[375]:

> "[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".

The establishment by the Commonwealth of the Commonwealth Scientific and Industrial Research Organisation to undertake scientific research on behalf of the nation was given[376] as an example of the capacity of the Commonwealth to engage in enterprises and activities "peculiarly adapted to the government of a nation ... which cannot otherwise be carried on for the benefit of the nation". Whether the establishment of that organisation could be supported as an exercise of the patents power need not be explored.

330 Mason J distinguished[377] between the power to spend money and the power of the Commonwealth to engage in particular activities. Mason J indicated[378] that the executive power to engage in such activities, "arising as it does from an implication drawn from the Constitution and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope". As Mason J went on to point out[379]:

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374 (1945) 71 CLR 237 at 269.

375 (1975) 134 CLR 338 at 397.

376 (1975) 134 CLR 338 at 397.

377 (1975) 134 CLR 338 at 396.

378 (1975) 134 CLR 338 at 398.

379 (1975) 134 CLR 338 at 398.

> "It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government."

331 As has already been noted, the Commonwealth submitted that it was unnecessary to consider how far the power identified by Mason J in the *AAP Case* might extend. Rather, it was submitted that it was sufficient to conclude that the power to make the expenditure now in question was to be found in the Executive's power to spend what Parliament has appropriated, coupled with the legislative power with respect to matters incidental to the execution of the executive power to spend, giving power to enact a law making the expenditure mandatory.

332 In the course of oral argument, it was suggested that to conclude that the Commonwealth Executive did not have power to spend money that had been appropriated by the Parliament to any purpose falling within the appropriation was to return to notions of reserved powers which underpinned *R v Barger*[380] but were discarded in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[381]. That is, it was suggested that the conclusion proceeded from an unstated assumption about the ambit of State executive or legislative power.

333 The decision in the *Engineers' Case* does not entail that any reference to notions of "constitutional structure" or implications based upon the division of powers between the integers of the Federation is necessarily wrong. Reference to those notions may invite attention to whether they are being used in a way that proceeds from some unstated premise about "federal balance". As pointed out in *New South Wales v The Commonwealth* (*Work Choices Case*)[382], an appeal to "federal balance" depends upon making an a priori assumption about the consequences of division of legislative powers. And the *Engineers' Case* established that federal legislative power is not to be determined by resorting to

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380 (1908) 6 CLR 41; [1908] HCA 43.

381 (1920) 28 CLR 129; [1920] HCA 54.

382 (2006) 229 CLR 1 at 119-121 [194]-[196]; [2006] HCA 52.

any assumption of that kind. As five members of the Court said[383] in the *Work Choices Case*:

> "What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution. The *Engineers' Case* did not establish that no implications are to be drawn from the Constitution. So much is evident from *Melbourne Corporation*[384] and from *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)*[385]. Nor did the *Engineers' Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation*[386]:
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> > 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities.'
>
> And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be."

And, it may be added, nor does it say what those executive functions are to be.

334 Whether the Impugned Act is a law incidental to the execution of a power vested by the Constitution in the Government of the Commonwealth depends upon the ambit of the Commonwealth's executive power. To conclude that the executive power of the Commonwealth is not unbounded is neither to revert to some doctrine of reserved powers nor to treat the new and national polity created by Federation as a cripple. It does not leave some element of executive power (let alone some essential element of such power) undistributed between the integers of the Federation, and thus unavailable to any.

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383 (2006) 229 CLR 1 at 119-120 [194].

384 (1947) 74 CLR 31.

385 (1956) 94 CLR 254.

386 (1947) 74 CLR 31 at 82. See also *Austin v The Commonwealth* (2003) 215 CLR 185; [2003] HCA 3.

335 The bound that is passed when the Commonwealth Executive seeks to spend money in the manner for which the Impugned Act provides is the boundary set by those structural considerations which informed and underpinned the decision in *Melbourne Corporation*. The executive power of the Commonwealth is the executive power of a polity of limited powers. The *Engineers' Case* decided that the powers are not to be understood as confined by a priori assumptions. But no statement of this Court suggests that the executive power of the Commonwealth is unbounded.

336 Why do structural considerations require the conclusion that the executive power of the Commonwealth in matters of spending is not unbounded? That question is best approached by examining the proposition that, in matters of raising and expenditure of public moneys, the executive power recognised in s 61 is the same as the power of the Executive in the United Kingdom at the time of Federation. There are several reasons to reject that proposition.

337 First, the ambit of the Commonwealth executive power is to be identified having regard to the whole of the constitutional structure, not only those provisions that deal directly with the subject of executive power. To do otherwise would not read s 61 in the context of the whole Constitution. In particular, identifying the scope of Commonwealth executive power in relation to raising and expenditure of public moneys requires consideration of more than the respective spheres of exercise of executive power by the Commonwealth and State governments. To confine attention to executive power is to ignore the intersection between executive and legislative power for which s 51(xxxix) expressly provides. The Parliament's legislative powers cannot be determined without regard to the engagement of s 51(xxxix) with respect to matters incidental to the execution of powers vested by the Constitution in the Government of the Commonwealth. Conversely, the powers of the Commonwealth Executive must be determined bearing in mind that there is legislative power with respect to matters incidental to the execution of that executive power.

338 Secondly, determination of the ambit of the Commonwealth Executive's power in matters of raising and expending public moneys must not ignore the carefully delineated intersection between the respective roles of the Executive and the Parliament that not only lies at the centre of a proper understanding of the provisions of Pt V of Ch I and Ch IV of the Constitution but also informs the meaning that is to be given to s 61 in matters of executive power with respect to public moneys. The central elements of the delineation of the respective roles of the Executive and the Legislature provided by the Constitution came directly from the United Kingdom practices of the late nineteenth century. But there was one fundamental alteration to those arrangements that was made by the Constitution and cannot be ignored. The Parliament which was to control both

taxation and expenditure under the Australian Constitution was given only limited legislative powers. Yet when it is said that the position of the Commonwealth Executive in matters of expenditure is no different from that of the United Kingdom Executive at the time of Federation, it is asserted that the executive arm of government has unbounded powers.

339 Of course it must be understood that, as Dixon J said[387] in *Melbourne Corporation*:

> "The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth."

But it is the very fact of the supremacy of the Commonwealth's legislative power that directs attention to the consequences that follow for the continued existence of separate polities, separately organised, if the executive power of the Commonwealth in matters of expenditure is unbounded. If the executive power in this respect is unbounded, the legislative power of the Parliament in such matters, given by s 51(xxxix), is limited only by the requirement that the legislation be with respect to a matter incidental to the execution of that power.

(h) Conclusions respecting s 61 and the incidental power

340 To the extent to which the Commonwealth's submissions about s 61 and s 51(xxxix) depended upon distinguishing between the power to spend and the power to engage in activities, those submissions should be rejected as resting upon a distinction that cannot be maintained. The distinction cannot be maintained if proper account is taken of the incidental power.

341 As was said in *Re Wakim; Ex parte McNally*[388], "[n]o single formula will describe the relationship that must exist between a power or group of powers and some exercise of power that is said to be incidental to the execution of the principal power or is necessary or proper to render the main grant of power effective". But both the central idea and the generality of the incidental power

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387 (1947) 74 CLR 31 at 82-83.

388 (1999) 198 CLR 511 at 580 [122]; [1999] HCA 27.

are stated by Marshall CJ in *McCulloch v Maryland*[389], cited with approval in *Grannall v Marrickville Margarine Pty Ltd*[390]:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

342 It would be wrong to read the incidental power as having some narrow or confined application in connection with the execution of powers vested by the Constitution in the Government of the Commonwealth. The matters incidental to the execution of the power of the Executive to withdraw from the Treasury (under an appropriation made by law) and spend the money so withdrawn are not limited to matters incidental to the withdrawal; they must include matters incidental to the execution of the power to spend what has been withdrawn. And if the Executive has power to spend money for a particular purpose, it is not to be supposed that the incidental power would not authorise the enactment of legislation facilitating and controlling that expenditure and its application. Legislation which facilitates and controls the expenditure and its application is not a narrow subject. It includes the specification (as in the Impugned Act) of conditions that must be met if the payment is to be made. But it extends to providing for terms and conditions regulating the manner and circumstances of application of the money provided. No distinction can then be drawn between cases where the money is to be spent by giving it to a third party and cases where it is to be spent directly by or on behalf of the Commonwealth. The spending of money by giving it to a third party may be classed as "spending" and spending it directly by or on behalf of the Commonwealth might be classed as the Commonwealth "engaging in activities". But even if such a classification could be made it supports no different engagement of the incidental power. That is why attention must focus on the ambit of the executive power, not upon a supposed distinction between spending money and engaging in activities.

343 The executive power of the Commonwealth extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The Executive's power to spend money is not confined to expenditures made in accordance with a law made by the Parliament under an enumerated head of legislative power. But, for the reasons given earlier in connection with the executive power generally, the executive power to spend is not unlimited. Its

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389 17 US 159 at 206 (1819).

390 (1955) 93 CLR 55 at 77; [1955] HCA 6.

limits are determined in the same manner as are the limits on the executive power generally.

344 In the present matter it will later be demonstrated that some but not all operations of the Impugned Act are supported as a law with respect to taxation. To that extent the expenditure in satisfaction of the rights created by the Impugned Act (as read down) is a valid exercise of the executive power as executing a law of the Commonwealth. To the extent to which the Impugned Act is not supported as a law with respect to taxation, it will later be shown that it is not supported by any other head of legislative power.

345 It is not shown that so much of the expenditure as is not supported by a head of legislative power is to be supported as an exercise of executive power identified as derived from the character and status of the Commonwealth as a national polity or as deduced from the existence and character of the Commonwealth as a national government. That proposed expenditure is not shown to fall within this area by demonstrating only that the expenditure in question is directed to an end that is described as a national economic emergency. It is necessary to say something in amplification of this last point.

346 It is said that, because there is a national economic crisis or emergency to which a *national* response must be made, the executive power under s 61, to spend money that has been lawfully appropriated, extends to spending money to meet that crisis in whatever way the Executive chooses. And it is said that the Impugned Act is valid because the Parliament may make a law providing for the execution of the power of the Executive by requiring the Commissioner of Taxation to make the payments that the Impugned Act requires.

347 Words like "crisis" or "emergency" do not readily yield criteria of constitutional validity. It may be accepted, for the purposes of argument, both that there is shown to be a national crisis to which a national response is required and that only the Commonwealth has the administrative and financial resources to respond. It does not follow, however, that the Commonwealth's executive power to respond to such circumstances by spending money is a power that is unbounded. Were it so, the extensive litigation about the ambit of the defence power during World War II was beside the point.

348 Though variously expressed, the argument by reference to national "crisis" or "emergency" can be summed up as being: "There is a crisis; if the Commonwealth cannot do this, who can?"

349 What that and similar forms of rhetorical question obscure is a conflation of distinct questions about ends and means. The questions are conflated because the legislative power to enact the Impugned Act is treated as depending upon the execution of a power, said to be implicitly vested by the Constitution in the

Executive, to meet a national crisis (in this case a financial or economic crisis). But if that is the *end* to which the exercise of power is to be directed, it by no means follows that any and every *means* of achieving that end must be within power. To argue from the existence of an emergency to either a general proposition that the Executive may respond to the crisis in any way it sees fit, or to some more limited proposition that the Executive has power to make this particular response, is circular.

350 Describing the expenditure in issue in this matter as a "short term fiscal [measure] to meet adverse economic conditions affecting the nation as a whole" engages no constitutional criterion of a kind hitherto enunciated by this Court. It is a description that conflates the distinction between ends and means that this Court must maintain. It is for the political branches of government, not this Court, to fix upon the ends to be sought by legislative or executive action. It is for the Court, not the political branches of government, to decide whether the means chosen to achieve particular political ends are constitutionally valid and it is for the Court to identify the criteria that are to be applied to determine whether those particular means are constitutionally valid.

351 The question for decision is whether the response that has been made (by the enactment of the Impugned Act) is within power. That question is not answered by pointing out why the Impugned Act was enacted.

352 Reference to notions as protean and imprecise as "crisis" and "emergency" (or "adverse effects of circumstances affecting the national economy") to indicate the boundary of an aspect of executive power carries with it difficulties and dangers that raise fundamental questions about the relationship between the judicial and other branches of government.

353 It was noted at the start of these reasons that no party or intervener disputed that there is a global financial crisis, or sought to suggest that Australia stands apart from the crisis or is immune from its effects. It was, therefore, not necessary in this case to identify the relevant constitutional facts. In particular, it was not necessary to examine whether it is for this Court to decide what constitutes a "crisis" or an "emergency", or whether it is sufficient that the Executive has concluded that circumstances warrant such a description. If it is for the Court to decide these matters, questions arise about what evidence the Court could act upon other than the opinions of the Executive, and how those opinions could be tested or supported. Yet, if it is to be for the Executive to decide whether there is some form of "national emergency" (subject only to some residual power in the Court to decide that the Executive's conclusion is irrational), then the Executive's powers in such matters would be self-defining.

354 The difficulties that are presented by such an understanding of executive power are real and radical. They are difficulties that have their immediate origins

in two different sources. The first is the conflation of ends and means. The second is that reference is made to crisis or emergency to invoke (at least inferentially) that notion of which Dixon J wrote in *Australian Communist Party v The Commonwealth*[391] when speaking of the source of the legislative power to put down subversive activities and endeavours as[392] "the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities". But as Dixon J went on to say[393], "[t]he extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper".

355 The different ways in which a fiscal stimulus can be delivered were described in several documents which were produced by international organisations and upon which the Commonwealth relied as demonstrating both the existence of an international financial crisis and the degree of international agreement about how it should be met. Those documents show that a fiscal stimulus can be delivered in a number of different ways, including direct government investment as, for example, in capital works and provision of additional disposable income to some or all members of the community, by reduced taxation and taxation instalments, rebates in respect of taxation that has not yet been paid, refunds of taxation that has been paid, increased social security benefits or other direct payments to recipients.

356 Legislative measures with respect to taxation and social security benefits would find ready support in s 51(ii), s 51(xxiii) and s 51(xxiiiA). Legislation for some other forms of direct payments to recipients may likewise be supported by other heads of power within s 51. The question is whether a direct payment not otherwise supported by legislation made under an enumerated head of power may be made in exercise of the executive power of the Commonwealth.

357 In the end the Commonwealth's submissions about the executive and incidental powers came down to the proposition that the Commonwealth's power to spend is limited only by the need to obtain parliamentary approval for the proposed expenditure. That contention should be rejected. The matters of history described earlier in these reasons do not require its acceptance. Its

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391 (1951) 83 CLR 1 at 187-188.

392 Quoting *Black's American Constitutional Law*; see Black, *Handbook of American Constitutional Law*, 2nd ed (1897) at 340, 3rd ed (1910) at 392.

393 (1951) 83 CLR 1 at 188.

acceptance would not be consistent with what Mason J referred[394] to as "the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers" and would, by "enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government", effect a radical transformation in what has hitherto been thought to be the constitutional structure of the nation. To hold that the Commonwealth power to spend does not extend so far is consistent with what was decided in the *Pharmaceutical Benefits Case* and, after the *AAP Case*, in *Davis v The Commonwealth*[395].

Nationhood

358 The Commonwealth submitted that the Impugned Act is to be supported as an exercise of legislative power with respect to matters that follow from the Commonwealth's status as the national government. Many of the matters urged in this regard have already been dealt with in connection with executive power and the treatment of those matters need not be repeated here. Rather, it is necessary to deal with a more particular expression of the Commonwealth's argument under this heading, namely, that it should now be recognised that the Commonwealth has legislative power with respect to the national economy.

359 The Commonwealth advanced the argument in two forms. First, it was submitted that a legislative power with respect to the "national economy" was created and sustained by s 92 of the Constitution together with the aggregation of specific heads of legislative power with respect to trade and commerce, taxation, bounties, borrowing, banking, currency, insurance, corporations and external affairs, and the exclusive power under s 90 to impose duties of customs and of excise. Secondly, the Commonwealth submitted that a legislative power with respect to the national economy is a necessary implication from the Commonwealth being the national government. Both submissions should be rejected.

360 With respect to the first argument, it is enough to say that the aggregation of separate heads of power yields no greater power than the sum of the parts.

361 With respect to the second of the arguments, it may readily be accepted that the Constitution recognises that there is a national economy. Where once there may have been six separate markets, one of the chief elements of the design

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394 *AAP Case* (1975) 134 CLR 338 at 398.

395 (1988) 166 CLR 79.

of the Constitution (and in particular Ch IV concerning Finance and Trade) was to create and foster national markets[396]. But the implication of legislative power with respect to a subject-matter described as the "national economy" by no means follows from the observation that there is a national economy.

362 First and foremost, despite the evident constitutional intention to create and foster national markets the Parliament was given no express head of power with respect to such a subject-matter.

363 Secondly, the expression "national economy" is anything but certain. Its uncertainty is demonstrated by the fact that a central premise of the present litigation was that Australia's economic wellbeing is not isolated from global economic influences. That may suggest that there is only limited utility in treating (or at least in continuing to treat) the Australian national economy as if it is a separate and distinct unit. It is not necessary, however, to examine that subject further. More particularly it was not explained what areas the asserted power would cover beyond such subject-matters as now fall within s 51(i) ("trade and commerce with other countries, and among the States"), s 51(ii) ("taxation; but so as not to discriminate between States or parts of States") and s 51(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"). Rather, the power which it was said should be implied was treated as sufficiently described by its alleged connection with the fact of the existence of Australia as a nation. But that connection does not create or give content to such a power.

364 As is apparent from what has already been said in these reasons, it may be accepted that there is some implied legislative power in the Parliament that follows from the existence of the national polity. That power extends to laws putting down subversive activities and endeavours[397]. But that implied legislative power does not extend so far as to encompass the general subject of the "national economy".

365 Not only is the content of such a power too uncertain to permit its implication, but, even if the power could be given sufficiently certain content, its implication is not necessary. As will later be shown, in all but a small part of its operation, the Impugned Act is a law with respect to taxation. There is no lack of power to provide for refunds of taxation paid by those who paid tax for the

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396 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [12]; [2008] HCA 11.

397 *Communist Party Case* (1951) 83 CLR 1 at 187-188.

2007-08 income year; no lack of power to provide for reduction in taxation instalments payable in respect of those who are "Pay as you go" taxpayers[398]; no lack of power to provide for reduction in rates of direct or indirect taxation. And no other aspect of the three "fiscal stimulus packages" mentioned at the start of these reasons was said to be dependent upon the implication of the power now under consideration.

366 These considerations apart, the argument that power with respect to the national economy is a necessary implication from the constitutional text and structure amounted ultimately to no more than the proposition that the economic circumstances that now exist require national action. That provides no sufficient basis for the implication of the asserted power.

367 The Impugned Act is not supported by considerations stemming from the position of the Commonwealth as the central government of the nation.

External affairs

368 The Commonwealth submitted that the Impugned Act is a law with respect to external affairs on either of two different bases. First, it was submitted that the Impugned Act is an appropriate and adapted response to what is an external matter or thing, namely, the global financial crisis. Secondly, it was submitted that the fiscal stimulus (including the provision of the tax bonus) implements an international agreement or understanding. Neither argument should be accepted.

369 The causes of the financial difficulties which now confront Australia may be found in events occurring outside Australia. Those events and their consequences have affected many countries. The Impugned Act provides for payments to Australian taxpayers with a view to reducing the domestic consequences of those events. The Impugned Act is directed, and directed only, to providing a fiscal stimulus to the Australian economy. It is not a law with respect to any matter or thing external to Australia[399].

370 It is not shown that Australia has undertaken any international obligation sufficient to found the Impugned Act in the external affairs power. It was submitted that there is an international agreement or understanding to make a co-ordinated international response to a global economic problem. The agreement or understanding was said to have two sources. First, reference was

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398 Administration Act, s 3AA, Sched 1, Ch 2.

399 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 546 [30]; [2006] HCA 25.

made to a Declaration of the Summit on Financial Markets and the World Economy made by the leaders of the Group of Twenty ("the G-20") on 15 November 2008 in Washington DC. Australia is a member of the G-20. Secondly, reference was made to some recommendations of the IMF and the Organisation for Economic Co-operation and Development ("the OECD"). Australia is a member of each of those organisations.

371 As was pointed out in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[400] legislation may be supported under the external affairs power if the legislation gives effect to some international obligation. But as also pointed out in that case, what is said to be the legislative implementation of a treaty may present some further questions for consideration, including whether the treaty in question sufficiently identified the means chosen in legislation as one of the ways in which parties to the treaty are to pursue some commonly held aspiration expressed in the treaty. In the present case, however, it is not necessary to examine these questions. It is sufficient to observe that neither the Declaration by the leaders of the G-20, nor the recommendations of either the IMF or the OECD, imposed any obligation on Australia to take action of the kind now in question.

372 The chief focus of the Declaration by the leaders of the G-20 was the articulation of some "common principles for reform of financial markets" and the statement of an "action plan to implement principles for reform". Whether the statement of these principles, or the settling of an action plan, are to be understood as imposing obligations on participants need not be considered. What the Commonwealth submitted to be the relevant obligation was not contained in these parts of the Declaration. Rather, the relevant obligation was said to be contained in a part of the Declaration that described "Actions Taken and to Be Taken". Under that heading, the Declaration recorded that the nations represented had taken certain actions and would take a number of steps to "restore growth, avoid negative spillovers and support emerging market economies and developing countries". Six steps were set out. One of them was:

> "Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability".

Read in the context of the Declaration as a whole it is evident that none of the six steps described was intended to bind the nations whose leaders signed the Declaration to any particular course of action. Rather, the document as a whole made plain (by its use of expressions like "as appropriate") that it was for each

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400 (1996) 187 CLR 416 at 486-487; [1996] HCA 56.

nation to chart its own course in responding to the circumstances that have arisen. The Impugned Act was not enacted in fulfilment of any obligation on Australia recorded in the Declaration of the leaders of the G-20.

373 The recommendations made by the IMF and the OECD are of a similarly advisory or hortatory character. In a *World Economic Outlook Update*, published in January 2009, the IMF said that "[m]onetary and fiscal policies need to become even more supportive of aggregate demand and sustain this stance over the foreseeable future, while developing strategies to ensure long-term fiscal sustainability" and further, that "the timely implementation of fiscal stimulus across a broad range of advanced and emerging economies must provide a key support to world growth". But these and similar statements made by staff of the IMF in a paper presented to a meeting of the Deputies of the G-20 did no more than point to the perceived need for action to be taken by individual nations if there was to be a durable recovery in global economic activity. They imposed no obligation upon any nation.

374 The Impugned Act is not a law with respect to external affairs.

Trade and commerce with other countries and among the States

375 It may be accepted that the Impugned Act was promoted and passed with the hope that many recipients would spend the sum paid. Those who do spend the money may spend it in a way that constitutes international or interstate trade and commerce. But neither the legal nor the practical effect of the Impugned Act is such as to make it a law with respect to either or both of international or interstate trade and commerce.

376 The Commonwealth did not press for any reconsideration of the accepted doctrine of the Court about the trade and commerce power. The Commonwealth submitted that the question critical to the engagement of s 51(i) in this case was one about the practical effect of the Impugned Act. In particular, would the Impugned Act have "a substantial economic effect on the flow of commercial transactions, goods, services, money, credit, among the States?"

377 It is not necessary to decide whether an affirmative answer to the question posed by the Commonwealth would suffice to show that the Impugned Act is a law supported by s 51(i). It was not submitted that the material in the Special Case directly answered the factual question posed by the Commonwealth. The material in the Special Case showed that the "$42 billion Nation Building and Jobs Plan" announced in February 2009 (of which the Impugned Act was one component) was designed to provide "a boost to the economy of around ½ per cent of [Gross Domestic Product] in 2008-09 and around ¾ to 1 per cent of GDP in 2009-10". About $12.77 billion of the total sum of $42 billion is intended to be spent in 2008-09. Sums expected to be payable under the Impugned Act

during 2008-09 total $6.95 billion and this would account for more than half of the expenditure of $12.77 billion to be made during 2008-09. But the material in the Special Case shows no estimation of how the increase in Gross Domestic Product relates to trade and commerce with other countries, or among the States. As the Commonwealth acknowledged in argument, "nobody has modelled the precise effect on the flow [of transactions] among the States".

378 The Impugned Act is not a law with respect to trade and commerce with other countries, and among the States.

A law with respect to taxation?

379 Although the Commonwealth, in its written submissions, had sought to support the whole of the Impugned Act as a law with respect to taxation, that submission was not maintained in oral argument. The parties agreed that it was expected that, of those taxpayers who on the face of the Impugned Act were eligible for payment of a tax bonus, about 11 per cent would be entitled to a bonus greater than the amount of the taxpayer's adjusted tax liability for the 2007-08 income year. In oral argument, the Commonwealth submitted that only so much of the Impugned Act as provided for the payment of amounts less than or equal to the amount of a taxpayer's adjusted tax liability for the 2007-08 income year was properly characterised as a law with respect to taxation. It was submitted that if the Impugned Act was not otherwise supported as a valid law, s 15A of the *Acts Interpretation Act* 1901 (Cth) was engaged and the Impugned Act was to be read down. This submission should be accepted.

380 New South Wales, intervening, submitted that the Impugned Act, in all its operations, was a law with respect to taxation. New South Wales submitted that the Impugned Act was to be characterised in this way because s 5 of the Act gives those who were taxpayers for the 2007-08 income year a right to recover the amount of the tax bonus. The submission should be rejected; the Impugned Act is not, in all its operations, a law with respect to taxation.

381 For the purposes of considering the New South Wales submission that the Impugned Act is a law with respect to taxation in all its operations it is convenient to put on one side the questions of reading down presented by the Commonwealth submissions.

382 The Impugned Act raises no revenue. It requires the making of payments to persons who were liable to pay income tax for the immediately preceding financial year. As explained at the start of these reasons, on the face of the Act, the amount to be paid is fixed by reference to the taxable income of that person in that financial year but is not fixed by reference to the amount of tax that was paid. Only those who have lodged their taxation return are eligible for the payment.

383 The Court's decisions about the ambit of the taxation power have focused, at least for the most part, upon whether a law requiring payment of a sum to government is a law with respect to taxation. It is to be recalled that Kitto J expressed his often-quoted propositions[401] about characterisation of a law in the context of deciding whether the statutory provisions then in question were to be supported as a law with respect to taxation. The law at issue in *Fairfax v Federal Commissioner of Taxation* provided for trustees of superannuation funds to pay tax at a higher rate if the fund was not invested to a specified level in public securities including Commonwealth bonds. The question was whether the law was, as the plaintiffs in that case contended, a law with respect to investment in public securities and not a law with respect to taxation[402]. Subsequent decisions, including *Australian Tape Manufacturers Association Ltd v The Commonwealth*[403], *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[404], *Airservices Australia v Canadian Airlines International Ltd*[405] and *Luton v Lessels*[406], have also focused upon whether particular forms of compulsory exaction are properly described as taxation. By contrast, the question in this case is whether a law which requires payment of money *to* those who have been taxpayers is a law with respect to taxation.

384 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*[407], the Court held, subject to a qualification that is not now material, that a law regulating and defining rights of refund of amounts unnecessarily or mistakenly paid to the Commonwealth in discharge of asserted taxation liabilities was a law with respect to taxation. But that is not this case. If the Impugned Act operated according to its terms, there would be no necessary connection between the amount that was paid as tax and the amount to be paid as a tax bonus.

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401 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; [1965] HCA 64.

402 (1965) 114 CLR 1 at 2.

403 (1993) 176 CLR 480; [1993] HCA 10.

404 (1993) 176 CLR 555; [1993] HCA 12.

405 (1999) 202 CLR 133; [1999] HCA 62.

406 (2002) 210 CLR 333; [2002] HCA 13.

407 (1994) 179 CLR 155 at 167, 175, 183, 205, 209 and 212; [1994] HCA 9.

385 Rather, the argument that the Impugned Act, in all its operations, is a law with respect to taxation may be understood as the reflex of the argument considered and rejected in *Fairfax*. In *Fairfax*, it was submitted that consideration of what "seems most likely to have been the main preoccupation of those who enacted"[408] the law then in question showed that the law was a law with respect to *that* subject-matter (promotion of investment in government securities) not a law with respect to taxation. This was said to follow from the need to distinguish between form and substance, and extensive reference was made not only to *R v Barger*[409], but also to *McCulloch v Maryland*[410] and other United States decisions. But as Kitto J rightly pointed out in *Fairfax*[411], an inquiry into the ultimate indirect consequences of the operation of a law can yield no conclusion except about the motives of the legislators. And those motives, even if they could safely be identified, are beside the point.

386 Here, it is said that the Impugned Act, in all its operations, is a law with respect to taxation because it takes as the critical criterion for its operation the identification of a person as one who has paid tax for the most recently completed financial year. And because those, and only those, who have paid tax (and whose taxable income for that year did not exceed $100,000) are eligible for the payment, the law is said to be a law with respect to taxation. But as in *Fairfax*, that fact, standing alone, directs attention to why the legislators may have enacted the Impugned Act. While it may readily be accepted that the Impugned Act seeks to single out certain taxpayers for the benefit for which it provides, that does not make the Impugned Act a law with respect to taxation. Further, although the payment to be made under the Impugned Act is called a "tax bonus", attribution of that name adds nothing to the debate about characterisation. The character of the Impugned Act depends upon "the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes"[412].

387 The amount to be paid depends upon a person's taxable income for 2007-08. On the face of the Impugned Act there is no direct connection, in all operations of the Act, between the amount of the bonus and the amount that has been paid in tax. As the Act is written, the amount that is paid under the

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408 (1965) 114 CLR 1 at 7 per Kitto J.

409 (1908) 6 CLR 41.

410 17 US 159 (1819).

411 (1965) 114 CLR 1 at 10-11.

412 *Fairfax* (1965) 114 CLR 1 at 7.

Impugned Act may be more or it may be less than the amount of tax the person paid for that year. By the time payments must be made under the Impugned Act it will not be known whether a person to whom the payment is made will be liable to pay income tax for 2008-09.

388 The Commonwealth was right to accept that the Impugned Act is not a law with respect to taxation in all its operations.

Reading down

389 The principles governing whether s 15A of the *Acts Interpretation Act* is to be applied to read down a statutory provision that in some operations would be beyond legislative power are not controversial. They are conveniently described in the joint reasons of five Justices in the *Industrial Relations Act Case*[413]:

> "Section 15A of the Interpretation Act may fall for application in two distinct situations. It may fall for application in relation to 'particular clauses, provisos and qualifications, separately expressed, which are beyond legislative power'[414]. It may also fall for application in relation to general words or expressions[415]. It is well settled that s 15A cannot be applied to effect a partial validation of a provision which extends beyond power unless 'the operation of the remaining parts of the law remains unchanged'[416]. Nor can it be applied to a law expressed in general terms if

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413 (1996) 187 CLR 416 at 502.

414 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 577; [1989] HCA 12; as to provisions of this kind, see *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; [1939] HCA 19; and *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 371; [1948] HCA 7.

415 See *Pidoto v Victoria* (1943) 68 CLR 87 at 108; [1943] HCA 37; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 517-518; [1971] HCA 40; *Re F; Ex parte F* (1986) 161 CLR 376 at 384-385; [1986] HCA 41.

416 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 54; [1910] HCA 33; *Vacuum Oil Co Pty Ltd v Queensland [No 2]* (1935) 51 CLR 677 at 692; [1935] HCA 9; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369-371; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 348; [1995] HCA 16.

> it appears that 'the law was intended to operate fully and completely according to its terms, or not at all'[417].
>
> Where a law is expressed in general terms, it may be more difficult to determine whether Parliament intended that it should, nonetheless, have a partial operation. And there is an additional difficulty if it 'can be reduced to validity by adopting any one or more of a number of several possible limitations'[418]. It has been said that if, in a case of that kind, 'no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid'[419]."

The critical question in this case is whether it appears that "the law was intended to operate fully and completely according to its terms, or not at all"[420]. The metaphor of "intention" must not be permitted to mislead[421]. It may greatly be doubted that legislation is ever passed with legislators intending less than full and complete operation of the statute according to its terms. And in the present matter it may be observed that an important motive for the Impugned Act being directed to taxpayers with low adjusted tax liabilities was the expectation that those taxpayers are more likely to spend the tax bonus than others. But if the question identified in the *Industrial Relations Act Case* is to be understood, as it must, as directing a comparison between the legal and practical operation of the Act according to its terms and its legal and practical operation as read down, the Impugned Act should be read down in the manner submitted by the Commonwealth. The operation of the Impugned Act as read down is not so different from its operation in accordance with its terms as to lead to the conclusion that it is not intended to operate in that restricted fashion. In particular, because the Impugned Act was evidently intended to provide an

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417 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 54; *Cam & Sons Pty Ltd v Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454; [1951] HCA 59; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

418 *Pidoto v Victoria* (1943) 68 CLR 87 at 111 per Latham CJ.

419 *Pidoto v Victoria* (1943) 68 CLR 87 at 111 per Latham CJ.

420 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 54; *Cam & Sons Pty Ltd v Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454.

421 cf *Wilson v Anderson* (2002) 213 CLR 401 at 418 [8]; [2002] HCA 29.

urgent stimulus to the economy by putting money in the hands of the intended recipients quickly, it is not to be assumed that the legislative "intention" was that there were to be no payments at all unless those who had paid the least amount of tax for the 2007-08 income year received the whole of the intended amount.

390 That is, the reading down that is required is of the second class identified by Dixon J in *R v Poole; Ex parte Henry [No 2]*[422]. Provision is made which, in relation to a limited class of persons, might validly have been enacted, but "is expressed to apply ... to a larger ... class of persons than the power allows". It is intended that "the particular command or requirement expressed in the provision should apply to or be fulfilled by each and every person within the class independently of the application of the provision to the others"[423]. It is not to be supposed that none were to receive unless all did.

391 As the Commonwealth rightly submitted, the simplest and most elegant drafting expression of the valid operation of the Impugned Act would be to read s 6 as if it provided that the amount of a person's tax bonus is the lesser of the amount of the person's adjusted tax liability for the 2007-08 income year and the amount specified in s 6 as the amount of the tax bonus. But in fact the reading down that is required concerns the entitlement to a tax bonus, not its amount.

392 The valid operation of the Impugned Act depends upon reading down the class of those who are entitled to the payment. In particular, what is necessary is the reading down of one of the five cumulative requirements set out in s 5(1) as conditions to be satisfied for entitlement to a tax bonus: the requirement of par (c) that "the person's adjusted tax liability for that income year is greater than nil". The class of persons that s 5(1)(c) identified is larger than the legislative power with respect to taxation allows[424] to the extent that it entitles a person to payment of a tax bonus that is greater than the amount of the person's adjusted tax liability.

393 Read down in the manner indicated, the Impugned Act provides for payment to taxpayers whose taxable income for the income year 2007-08 did not exceed $100,000 (and who are not within one of the exceptions provided by

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422 (1939) 61 CLR 634 at 652.

423 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

424 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652. See also *R v Hughes* (2000) 202 CLR 535 at 556-557 [43]; [2000] HCA 22; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 66 [85]-[87]; [2003] HCA 47.

s 5(2)) of the amount of that person's adjusted tax liability for that income year or the amount of the tax bonus fixed under the Act, whichever is the less. Read with that operation, the Impugned Act provides for repayment to certain taxpayers of some or all of the amount the taxpayer was liable to pay for income tax for the last complete income year. With that operation the Impugned Act is a law with respect to taxation.

Question 3

394 For the reasons given earlier, s 16(1) of the Administration Act responds to the valid operation of the Impugned Act and appropriates the Consolidated Revenue Fund to the necessary extent.

Conclusion

395 For these reasons we would have answered the questions in the Special Case as follows:

1. Yes.

2. The *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) is a valid law of the Commonwealth to the extent to which it provides for the payment to a person entitled to a tax bonus of the lesser of the amount of the person's adjusted tax liability for the 2007-08 income year and the amount of the bonus fixed in accordance with that Act. Otherwise, no.

3. Yes.

4. In accordance with the agreement of the parties announced on the second day of the hearing of the Special Case, there is no order for costs.

396 HEYDON J. I dissent.

397 The preferred arguments of the defendants in these proceedings advanced wide constructions of s 61[425] of the Constitution read with s 51(xxxix)[426] and of s 81[427] read with s 51(xxxix). These were arguments capable of producing very extreme results[428]. If correct, they would cause the "incidental" legislative power in s 51(xxxix) to be wider in its effects than any of the non-incidental legislative powers, and perhaps wider than all of them taken together. What s 1 of the Constitution calls a "Federal" Parliament would have a power to enact legislation of the kind usually associated with non-federal parliaments.

398 The defendants started with s 16[429] of the *Taxation Administration Act* 1953 (Cth) ("the Taxation Administration Act"). They submitted that s 16 was a standing appropriation which authorised the payment of "tax bonuses" under the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Tax Bonus Act"). Let that be assumed. The remaining issues are whether the plaintiff had standing to challenge the constitutional validity of the Tax Bonus Act, and, if so, whether there was legislative power to enact it. All the defendants' submissions on these remaining issues are erroneous. For that reason, since success for the defendants on any one issue would have been sufficient to bring them victory, it is necessary to deal with them all. The reasons why the defendants must fail are set out in the following order.

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425 Set out above at [214].

426 Set out above at [277].

427 Set out above at [161] and [279].

428 Cf *Liversidge v Anderson* [1942] AC 206 at 244.

429 Set out above at [267].

STANDING

399 The defendants accepted that the plaintiff had standing to seek two forms of relief. One was a declaration that "the tax bonus [payable to him] is unlawful and void". The other was an interlocutory injunction restraining the first defendant from paying the tax bonus to the plaintiff. But the defendants contended that the plaintiff did not have standing to obtain a declaration that the Tax Bonus Act was invalid. They contended that the plaintiff had no special interest which would allow him to challenge the validity of the Tax Bonus Act in its application to other persons. They also contended that, for example, the plaintiff could not argue that the Tax Bonus Act was invalid in its application to persons who would receive a tax bonus of a greater amount than the tax that they paid, given that the plaintiff himself would not be in that class of persons.

400 This last submission lost its foundation when, late in the oral argument, the defendants made an inevitable concession. They conceded that if the validity of the Tax Bonus Act depended on s 51(ii), the taxation power, the Act could not be supported to the extent to which it would authorise payment to an individual of a tax bonus in excess of that person's adjusted tax liability. But the other submissions, too, must fail.

401 On the defendants' approach, even if the Court held the Tax Bonus Act invalid in relation to the plaintiff, the Commonwealth could continue to treat it as valid in relation to all other persons to whom it applies, and make payments under it even though the duty to do so depended on a statute which had been enacted beyond power, unless each of those persons instituted proceedings similar to those instituted by the present plaintiff. The defendants contemplated that bizarre and unimaginable state of affairs with remarkable equanimity. In fact, it would not arise. The concession that the plaintiff has standing in relation

to his own position entails the conclusion that he has standing for all purposes. The defendants' submissions rest on the theory that the Tax Bonus Act could be void in relation to the plaintiff but not in relation to all other persons to whom it applies. That theory is wrong. If the Act is void in relation to the plaintiff, it must be void for all similarly placed persons upon whom an entitlement is conferred. The defendants and the interveners cited numerous well-known authorities on standing[430]. But in none of them did the problems created by the defendants' argument and concession arise. None of them say anything about those problems.

402 The plaintiff submitted that the law in relation to standing to challenge unconstitutional legislation was too narrow and ought to be widened[431]. Given that under the existing law the plaintiff has sufficient standing, it is not necessary to examine that submission.

CONSTITUTIONAL CONSTRUCTION

The defendants' preamble

403 The defendants made six points as part of a preamble to their substantive constitutional arguments.

404 The first step was to say that "a constitutional grant of power is to be *read with all the generality that the words used admit*"[432] (emphasis added).

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430 *Anderson v The Commonwealth* (1932) 47 CLR 50 at 52; [1932] HCA 2; *Pye v Renshaw* (1951) 84 CLR 58 at 83; [1951] HCA 8; *Fishwick v Cleland* (1960) 106 CLR 186 at 199; [1960] HCA 55; *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177 at 187; [1965] HCA 16; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 402; [1975] HCA 52; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 511, 530-531, 547-548 and 551; [1980] HCA 53; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37; [1981] HCA 50; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; [1995] HCA 11; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49.

431 He cited *Thorson v Attorney General of Canada* [1975] 1 SCR 138 at 145 and 161; *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644.

432 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14.

405 The second step was to contend that the reason for that rule was explained by O'Connor J's celebrated words in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[433]. The defendants quoted two passages. One was: "[The] broad and general … terms" of the Constitution are "intended to apply to the varying conditions which the development of our community must involve." The other was:

> "For that reason, where the question is whether the Constitution has *used an expression* in the wider or in the narrower sense, the Court should … always lean to the broader interpretation". (emphasis added)

406 The third step was to assert that:

> "the historical reality is that the framers of the Constitution, as they emerged from the very significant depression that the Australasian colonies went through in the 1890s, could have had no concept of macroeconomic policy."

407 The fourth step argued that nobody had discovered or understood that concept "until the Keynesian revolution of the 1930s in the wake of the Great Depression".

408 The fifth step was the statement that:

> "what the framers did quite consciously, deliberately and expressly was, by the constitutional restraints and structures that they created, establish a single national economy".

409 The sixth step contended:

> "[T]o the extent that competing constructions may be [open] in respect of the structures which they created a construction ought not be chosen … which would deprive national institutions of the ability to manage the national economy in the interests of the Australian people as a whole and with the same flexibility as national institutions in other developed nations, including, in particular, Canada and the United States, both of which have sophisticated federal systems."

410 Although those points were made in relation to a supposed constitutional power to manage the national economy[434], they pervaded the defendants' approach to other issues. For this reason they require early attention.

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433 (1908) 6 CLR 309 at 367-368.

434 See below at [547]-[552].

O'Connor J's approach considered

411 *The breadth of O'Connor J's approach.* The first and second steps in the defendants' preamble talk of the construction of "words", "terms" and "expressions". They do not speak of drawing implications, but analysing the meaning of express language. Generally that is how the courts have applied O'Connor J's statement in the *Jumbunna* case[435]. However, properly understood, it has some application to the drawing of implications as well.

412 *O'Connor J's approach in its totality.* There is a forensic technique which is becoming increasingly common. The technique takes a particular statement by a judge like O'Connor J, who was one of the framers of the Constitution, who is revered as one of the finest constitutional lawyers in our annals, whose judgments are much-cited by persons of all constitutional persuasions, whose character is deeply admired, whose "work has lived better than that of anybody else of the earlier times."[436] But it sets it out incompletely. It ignores the totality

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435 For example, *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 332 per Dixon J; [1948] HCA 7; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; [1964] HCA 15; *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 96 per Barwick CJ; [1970] HCA 19; *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 282 per Murphy J; [1975] HCA 46; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68 per Murphy J; [1975] HCA 53; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 207 per Mason J; [1982] HCA 23; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 227-228 per Mason J; [1982] HCA 27; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ; [1983] HCA 19; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 128 per Mason J and 220-221 per Brennan J; [1983] HCA 21; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 378-379 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1989] HCA 49; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 554 per Toohey J; [1989] HCA 53; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 550-551 [43] per Gummow, Hayne and Crennan JJ; [2006] HCA 25. A possible exception is *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 25. Another is *McGinty v Western Australia* (1996) 186 CLR 140 at 200 per Toohey J; [1996] HCA 48.

436 Remarks by Dixon CJ on his retirement on 13 April 1964, 110 CLR viii at xi.

of the judge's position as stated in a particular case. It ignores the totality of the judge's position over a judicial lifetime.

413 The defendants adopted that technique in these proceedings. They, not the Court, interrupted their reading in the middle of the last sentence they quoted from O'Connor J's judgment in the *Jumbunna* case. Their quotation omitted the following important words: "unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."[437] The meaning of the first half of the sentence considered in isolation is thus totally different from its meaning when read with the second half.

414 For O'Connor J, the expression "context" was not limited to the local context of the words being construed or even to the content of the Constitution as a whole. In another important passage to which the defendants did not refer, O'Connor J had said four years earlier in *State of Tasmania v The Commonwealth and State of Victoria*[438]:

> "I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State. … The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law … In considering the history of the law … you must have regard to the historical facts surrounding the bringing [of] the law into existence. … You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it."

There are many other decisions of O'Connor J revealing his concern to look at context, to view the Constitution as a whole, and to examine the circumstances surrounding its enactment[439]. For him, a key element in the "context", the "other

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437 (1908) 6 CLR 309 at 368.

438 (1904) 1 CLR 329 at 358-359; [1904] HCA 11. See also at 360; and see Griffith CJ at 338-339, with whom O'Connor J concurred at 358.

439 See *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 239 and 242; [1904] HCA 50; *Peterswald v Bartley* (1904) 1 CLR 497 at 507 per Griffith CJ, Barton and O'Connor JJ; [1904] HCA 21; *Deakin v Webb* (1904) 1

(Footnote continues on next page)

provisions" and the "historical facts surrounding the bringing [of] the" Constitution into existence was the federal nature of the Constitution. That was a matter which O'Connor J made plain in yet another of his observations not referred to by the defendants. In *Huddart, Parker & Co Pty Ltd v Moorehead*[440] O'Connor J said:

> "[I]t will be well to bear in mind the principle now firmly established in this Court that the Constitution, like any other instrument, must be construed as a whole. Where it confers a power in terms equally capable of a wide and of a restricted meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the Constitution has adopted, and which is most in harmony with the general scheme of its structure."

415 As Callinan J said in *New South Wales v The Commonwealth*[441], O'Connor J was there being "careful to make clear, a matter of which sight has at times been lost, that generality must make way to context and other limiting provisions in the Constitution". And as Callinan J also pointed out[442], it is the "object and purpose" of each particular constitutional expression under examination which is material.

416 What Dawson J said in *The Commonwealth v Tasmania* is, with respect, compelling[443]:

CLR 585 at 630; [1904] HCA 57; *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 534-535 per Griffith CJ, Barton and O'Connor JJ; [1906] HCA 94; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1103 per Griffith CJ, Barton and O'Connor JJ; [1907] HCA 76; *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304 at 1321; [1907] HCA 27; *R v Barger* (1908) 6 CLR 41 at 72 per Griffith CJ, Barton and O'Connor JJ; [1908] HCA 43; *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 533; [1908] HCA 94; and *Australian Boot Trade Employés Federation v Whybrow & Co* (1910) 10 CLR 266 at 304-305; [1910] HCA 8.

440 (1909) 8 CLR 330 at 369; [1909] HCA 36.

441 (2006) 229 CLR 1 at 317 [767]; [2006] HCA 52.

442 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 317 [768].

443 (1983) 158 CLR 1 at 302.

> "No doubt it is true that in the construction of the Constitution an expression should, where possible, be given a wider rather than a narrower construction. But it is only possible to do so where the context, which above all else emphasizes the federal nature of the Constitution, does not suggest that a narrower interpretation will best carry out the object and purpose of that instrument: see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[444]. No doubt the legislative powers of the Commonwealth should not be construed with any preconception in mind of the residual powers of the States, but that does not mean that Commonwealth powers should receive an interpretation which has no regard to the federal context in which they are found. The notion that Commonwealth legislative powers are to be given the widest interpretation which the language bestowing them will bear, without regard to the whole of the document in which they appear and the nature of the compact which it contains, is a doctrine which finds no support in [the *Engineers'* case][445] and is unprecedented as a legitimate method of construction of any instrument, let alone a constitution."

417 The defendants' submissions would, in Callinan J's words, give the Court a "constitutional role … no different from the role of an umpire of a cricket match, who, by the rules of that game, is obliged to give the batsman, at the expense of the bowler, the 'benefit of the doubt'."[446] As bowlers have often lamented, that rule is extremely favourable to batsmen. The defendants urged an approach equally favourable to the Commonwealth.

418 *Misapplication of O'Connor J's approach.* At one point in their oral address, the defendants observed that nothing is unarguable. That is not so. But the observation was significant. The defendants' reading of the statements of O'Connor J in the *Jumbunna* case which they quoted was that where there is a controversy between parties about a constitutional expression, one of whom advocates a "wide" meaning (however irrational or unlikely, and however inconsistent with other parts of the Constitution), and the other of whom advocates a "narrow" meaning (however intrinsically more likely that meaning may be), the former should always be adopted. That is not what his language means, whether one looks at the *Jumbunna* case by itself or other cases in which he explained his approach. Plainly O'Connor J had in mind a contest between two meanings, neither of which had unmistakably compelling force, but each of

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444 (1908) 6 CLR 309 at 368.

445 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

446 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 318 [768].

which was reasonably available. Only in those circumstances did his reasoning come into play.

419 It is not hard to find decisions where a broad view of a constitutional power was available, but a narrower view was selected for particular reasons, even though judicial minds differed about the merits of those reasons[447]. On that ground it may be said that Sir Harry Gibbs spoke with some exaggeration, though understandably so, when he said[448]:

> "The fact that the Constitution is a federal one has been allowed to play no significant part in determining the meaning and scope of the various powers conferred by s 51 of the Constitution."

420 The arguments of the defendants treat both the legislative and the executive power of the Commonwealth as having great width. When the thinking of O'Connor J is invoked in support of these quite extreme submissions, it is time to pause. Despite their invocation of O'Connor J's approach, the submissions of the defendants are fundamentally inconsistent, it will be seen, with that element of the approach which called attention to the constitutional division of powers between the Commonwealth and the States[449].

421 *Original meaning.* The defendants' submissions are inconsistent with O'Connor J's approach in another way. Some of the defendants' submissions rested on an assumption that the Constitution has changed since 1901: that the Executive has powers now that it did not have in 1901, and that either for that reason, or independently of that reason, the legislature has wider powers as well. Whatever that assumption rests on, it cannot rest on the sources which the defendants assigned to it – the propositions stated by O'Connor J in the *Jumbunna* case. O'Connor J's reference to applying the broad and general terms of the Constitution to the varying conditions which the community would face

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447 For example, *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 498; cf at 506; [1990] HCA 2.

448 Gibbs, "The Decline of Federalism?", (1994) 18 *University of Queensland Law Journal* 1 at 3.

449 For examples of the defendants' invocation of O'Connor J's approach, see below at [531], [585] and [592]. For examples of inconsistencies between that invocation and O'Connor J's approach, see below at [534], [605] and [608].

after 1901 does not stand alone in his judgments[450]. And it had both precursors and successors. In 1816, Story J said in *Martin v Hunter's Lessee*[451]:

> "The [Constitution] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."

In similar vein, in 1819 Marshall CJ said in *McCulloch v Maryland* that "we must never forget that it is a *constitution* we are expounding"[452]. In the same case he said that constitutions are "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[453] In 1884, Gray J, in delivering the opinion of the Supreme Court of the United States, said[454]:

> "A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."

Griffith CJ, Barton and O'Connor JJ quoted Story J's statement in *Baxter v Commissioners of Taxation (NSW)*[455]. Barton J quoted Gray J's dictum in *Farey v Burvett*[456]. The passages from Marshall CJ set out above were echoed by Dixon J in *Australian National Airways Pty Ltd v The Commonwealth*[457]:

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450 For example, *State of Tasmania v The Commonwealth and State of Victoria* (1904) 1 CLR 329 at 358, concurring with Griffith CJ at 338; *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 534 per Griffith CJ, Barton and O'Connor JJ.

451 14 US 304 at 326 (1816).

452 17 US 316 at 407 (1819) (italics in original).

453 17 US 316 at 415 (1819) (italics in original).

454 *Juilliard v Greenman (Legal Tender Case)* 110 US 421 at 439 (1884).

455 (1907) 4 CLR 1087 at 1105.

456 (1916) 21 CLR 433 at 444; [1916] HCA 36.

457 (1945) 71 CLR 29 at 81; [1945] HCA 41.

> "[I]t is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

422 These passages do not suggest that their authors believed that the meaning of either the United States or the Australian Constitution changed over time. They rather suggest that their authors believed that, while the meaning did not change, the meaning was broad. As Justice Scalia wrote[458]:

> "Marshall was saying that the Constitution had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary."

And Marshall CJ himself specifically said that the American Constitution was "designed to be permanent" and was "unchangeable by ordinary means"[459].

423 Certainly O'Connor J was no adherent to any theory that the meaning of constitutional language changed through time. Thus in *R v Barger*[460], a judgment in which he joined with Griffith CJ and Barton J, he said:

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458 Scalia, "Originalism: The Lesser Evil", (1989) 57 *University of Cincinnati Law Review* 849 at 853. See also Goldsworthy, "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1 at 28.

459 In *Marbury v Madison* 5 US 137 at 176 (1803) he said:

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."

At 177 he indicated that the "constitution is … a superior paramount law, unchangeable by ordinary means".

460 (1908) 6 CLR 41 at 68. See also *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 535.

> "What is the meaning of the word 'taxation' as used in the Constitution, an instrument which became law in the year 1900?
>
> It is possible that since that time the word may have been used in Australia in a wider or more limited sense, but whatever it meant in 1900 it must mean so long as the Constitution exists, so far as regards the nature and extent of the power conferred on the Parliament with respect to it."

This rests on the view that the Constitution is a statute, to be construed as a statute. For the idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, each of which is correct at one time but not another, without any intervention from the legislature which enacted it, is, surely, to be polite, a minority opinion. The disfavouring of certain aspects of *R v Barger* in later cases does not affect the correctness of the passage just quoted.

424 *O'Connor J's approach: conclusion.* Striking aesthetic effects can be achieved by selecting semi-precious stones, splitting them into fragments, jettisoning some fragments, fine-chiselling the remainder, and placing them into a fore-ordained pattern in the manner of a Byzantine mosaic, or a Florentine table of pietra dura, or that type of Mughal craftsmanship involving the inlaying of marble known as parchin kari. The employment of analogous processes in relation to legal propositions, however, rarely leads to convincing conclusions. The defendants appear to think that some parts of O'Connor J's approach suit their interests: these they rely on. They appear to dislike other parts: about these they are silent. But it is not rationally possible to embrace the first and enfold them in the radiant glory of O'Connor J's name while shunning the second.

425 It is true to say that not every part of O'Connor J's constitutional thinking accords with the authorities. His view that the Constitution should be read down on an assumption that some specific heads of power were reserved to the States[461] was rejected in the *Engineers'* case[462]. But that view was not an

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461 For example, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 370: "The grant of power to the Parliament must … be so construed as to be consistent as far as possible with the *exclusive control over its internal trade and commerce vested in the State*" (emphasis added).

462 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. That decision, though it is assumed to possess almost constitutional status in its own right, is open to many criticisms of various kinds: for example, *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 305-308 [740]-[747] and Walker, "The Seven Pillars of Centralism: Engineers' Case and Federalism", (2002) 76 *Australian Law Journal* 678. The trade unions and governments whose short-term interests lay in attacking it in *New South Wales v The Commonwealth*

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essential aspect of the approach to statutory construction described above. It is one thing to construe the Constitution on the presumption that some specific heads of power are reserved to the States. It is another thing to construe it without any such presumption, but bearing in mind that sometimes a narrower rather than a broader meaning for Commonwealth powers will best give effect to the construction of the federal compact considered as a whole. In all relevant respects other than the reserved State powers doctrine, O'Connor J's approach survives. The *Engineers'* case does not alter the present relevance of his approach to construction. Nor does the fate of his opinions on the substantive point in *Huddart, Parker & Co Pty Ltd v Moorehead*[463]. His approach to construction does not rest on any discredited idea of "federal balance"[464]. Far from supporting the defendants, O'Connor J's approach to construction is fatal to their position at numerous points[465].

Two "constitutional facts"

426 *Failure to demonstrate constitutional facts.* The third step in the preamble to the defendants' arguments asserted that the framers had no concept of macroeconomic policy. The fourth step made a related assertion – that no-one else did either, until Keynes.

427 It must be conceded that the fourth step corresponds with popular myth. But is the myth true? The fact is that the defendants made no endeavour at any stage of their argument to demonstrate the truth of these two assertions. In the absence of demonstration, they cannot be accepted. The defendants tender for consideration two "constitutional facts". The consideration calls for inquiry into "the general facts of history as ascertained or ascertainable from the accepted writings of serious historians"[466] – here economic or intellectual historians. This may require agreement between the parties on what are accepted writings and

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did not do so, no doubt because their long-term interests were perceived to lie elsewhere, and hence there was no need to examine its status in that case. The same may be said of their failure to challenge *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1971] HCA 40.

463 (1909) 8 CLR 330 at 374. See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *New South Wales v The Commonwealth* (2006) 229 CLR 1.

464 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 119-121 [194]-[196].

465 See [534], [605] and [608].

466 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196 per Dixon J; [1951] HCA 5.

who are serious historians[467]. The defendants took the Court to no writings of any historians or anyone else – to no "serious studies and inquiries and historical narratives."[468] That may not be fatal, because there are other ways of establishing constitutional facts[469]. But what is fatal is that the defendants did not rely on those other ways or advance any other reason for accepting the accuracy of the constitutional facts relied on.

428 *The 1937 Royal Commission.* In similar vein, the defendants contended that the:

> "whole notion of monetary policy in respect of the national economy … really was not around as a macroeconomic concept, but it could not have had any implementation before the common currency was introduced by the Commonwealth in 1910[470]. It was 1924 when the Commonwealth Bank came to have control over the issue of currency[471]."

The defendants contended that fiscal policy only "creeps in … [,] was invented, and started being used … in 1937 and following". The sole material relied on was the following passage in the *Report of the Royal Commission on Monetary and Banking Systems in Australia*[472], published in August 1937:

> "In general, the proper policy for the governments to pursue if a depression is developing is to expand public works, refrain from increasing taxation, and avoid a general contraction of government

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467 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 512 [165] per Callinan J; [2002] HCA 9.

468 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196 per Dixon J.

469 *Thomas v Mowbray* (2007) 233 CLR 307 at 517 [629]; [2007] HCA 33.

470 A reference to the *Australian Notes Act* 1910 (Cth).

471 In fact this event took place in 1920, when the relevant amendment to the *Commonwealth Bank Act* 1911 (Cth) was effected by the *Commonwealth Bank Act* 1920 (Cth), s 7.

472 Australia, *Report of the Royal Commission on Monetary and Banking Systems in Australia*, (1937) at 209-210. One member was the Hon J B Chifley. The coming event of his attempt as Prime Minister to nationalise the banks cast long shadows before it in his brief but well-known dissent advocating that course. The other members were Mr Justice Napier (Chairman), Edwin Van-der-vord Nixon, Professor R C Mills, Henry Arthur Pitt and Joseph Palmer Abbott.

> expenditure, even although deficits are incurred. When conditions have improved as private enterprise revives and full employment is approached, the proper policy is to contract public works expenditure, maintain or increase taxation, budget for surpluses, and reduce the debt which has been incurred through the depression policy. … The assistance which can be given by the central bank in meeting or preventing a depression is to expand or control credit in conformity with the general policy. If an expansion of central bank credit is to be successful in promoting recovery, the credit must be used, and this comes about mainly through government spending as a supplement to private spending."

The defendants submitted that this passage was a reference to the treatment of fiscal policy in Keynes's *General Theory of Employment, Interest and Money*. Some of the ideas in that work had been propounded in the circles in which Keynes moved a little before it was published in January 1936[473]. But the proposition that what was discussed in the courts and combination rooms of Cambridge or the squares of Bloomsbury had come to the attention of the Commissioners at the other end of the earth needs demonstration if it is to be relied on. Further, Keynes's *General Theory* itself is not easy or simple to absorb[474]. In truth, for all that appears on its face, the quoted passage seems to have origins quite independent of Keynes. The passage does not present itself as containing some insight never before perceived in the history of economic thought. Rather its authors evidently conceived themselves to be referring to well-understood commonplaces in a matter-of-fact way. The passage suggests that "Keynesian" methods had been employed by governments in earlier times, even though those governments may not have appreciated the subtleties of the theoretical framework Keynes erected to defend those methods. There were, indeed, distinguished reviewers who thought that Keynes's work was not a landmark, but in part a symptom of trends and in part a reversion to mercantilism[475]. In truth, Keynes's brilliance and originality may have lain in

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473 Harrod, *The Life of John Maynard Keynes*, (1951) at 452.

474 "His main difficulty was not that his critics disagreed with his position, still less that they brought good arguments against it, but that he simply could not make them understand what the position was that he was taking up": Harrod, *The Life of John Maynard Keynes*, (1951) at 451. In 1931, Samuelson said of the book: "It is a badly written book, poorly organised … It is arrogant, bad-tempered, polemical, and not overly-generous in its acknowledgments. It abounds in mares' nests and confusions … Flashes of insight and intuition intersperse tedious algebra": quoted by Skidelsky, *John Maynard Keynes, Volume Two: The Economist as Saviour 1920-1937*, (1992) at 548.

475 Skidelsky, *John Maynard Keynes, Volume Two: The Economist as Saviour 1920-1937*, (1992) at 576.

places other than those suitable for the defendants' arguments. Whatever the truth, it is not possible to accept the third and fourth steps in the defendants' preamble: the Court was not directed to any consideration which might support them.

429 *Original intent.* There are two further difficulties with the third and fourth steps.

430 One difficulty is that recourse to history, so far as *Cole v Whitfield*[476] permits it, is limited to "identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged." Reference to history is not permitted for the purpose of substituting for the meaning of the words used in the Constitution the scope and effect which the framers subjectively intended the Constitution to have. Whether or not this type of reasoning is limited to the construction of express language[477], the third and fourth steps appear to be "originalist" assertions. What is more, as United States lawyers would say, they seem to be laying the groundwork for inferences about "original intent", not "original meaning". The unusual course of drawing originalist inferences from negatives to support conclusions about the mental state of the framers is impermissible.

431 The other difficulty is that even if, as the defendants assert, the framers were unaware of macroeconomic policy, and even if, contrary to *Cole v Whitfield*, material revealing the framers' actual mental states may be considered, acceptance of the third and fourth steps would suggest that there had not been a conferral on the Commonwealth of general powers of control over the economy. If the mental states of the framers are relevant, as distinct from the meaning of the words they used at the time they used them, any ignorance they had of macroeconomic policy would suggest a complete failure to advert to the question whether the Commonwealth should have general powers of control over the economy. That in turn would support the conclusion that there was no intention to confer the relevant power on the Commonwealth, and no conferral of it in fact.

432 What in fact was the defendants' purpose in seeking to establish the propositions stated in the third and fourth steps of their preamble? They seem to

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476 (1988) 165 CLR 360 at 385; [1988] HCA 18.

477 See, in *Cole v Whitfield* (1988) 165 CLR 360 at 385, the expressions "the *meaning* of the words used", "the scope and effect … which the founding fathers subjectively *intended the section to have*", "the contemporary *meaning* of language used" and "that *language*" (emphasis added).

have had in mind an argument against them that while the Commonwealth legislature is expressly granted many particular powers to manage the national economy, there is no general power to manage the national economy, because none was expressly granted. The defendants appear to have been seeking to rebut that argument by saying that the absence of an express grant of a general power can be explained by the framers' ignorance of macroeconomic policy, and by hinting that the Constitution would have contained an express grant of a general power had the framers been aware of macroeconomic policy. This enterprise seems to assume that the words which the framers might have used in the Constitution had their knowledge been greater than it was, but which they did not use, is relevant to the construction of the words they actually did use. This novel approach to the interpretation of the Constitution must be rejected.

Deliberate creation by the framers of a national economy?

433 The fifth step in the preamble asserted that the framers deliberately established a "single national economy". This is problematic because it is not possible for constitutions to establish economies or prevent them from being established, whether they be "single national economies" or otherwise, outside Colbertian mercantilist states or totalitarian regimes of the Nazi or Stalinist type – and even in those systems it is very hard to do so. The Constitution made possible the eventual emergence of a national economy. The fact that a national economy eventually emerged – a very general phenomenon resulting from many imponderable factors and processes independent of the will of the framers – has no significance in determining whether the Commonwealth has an exclusive, as distinct from a very substantial, power to manage it.

The United States and Canada

434 The sixth step contended that the Commonwealth Government should have the same powers as the central governments in the United States and Canada. The problem with the sixth step is that it purports to apply the rules of construction set out in steps one and two to the "construction" either of express words, or of "structures … created" by the Constitution which, if in fact created by the Constitution, must have been created by express words. The defendants did not point to any express words which could profitably be exposed to the rules of construction stated in the first two steps. Nor did they at any stage compare the express words of the Constitutions which created the "sophisticated federal systems" of the United States and Canada with the express words of the Australian Constitution to see what, if any, difference there was.

435 Further, the sixth step, when taken with other parts of the defendants' arguments, can be seen to rest on two fallacies underlying many of those arguments. One is velleity. The defendants persistently advocated conclusions which corresponded with what the defendants desired, irrespective of any difficulties in the path of achieving that desire. Their motto was: "We

want it to be so, therefore it is so." The other fallacy is the Panglossian belief that what is said to have evolved over time as a matter of governmental practice corresponds with the Constitution. It holds, not only that everything which exists is for the best in the best of all possible worlds, but also that what exists in that world is constitutionally valid. It fails to face up to the fact that, magnificent though the framers' achievement was, the Constitution is not consistent with every human desire[478]. If it is to be changed, s 128 is a means, and the sole means, of doing so.

SECTION 51(i): TRADE AND COMMERCE POWER

The key distinction

436 Section 51(i) of the Constitution gives power to make laws with respect to "trade and commerce with other countries, and among the States". It compels a distinction between trade and commerce with other countries, and among the States, on the one hand, and other forms of trade and commerce, on the other[479]. It does not permit an argument that trade and commerce in Australia is one indivisible whole. Nor does it permit an argument that any legislation having an effect on trade and commerce in Australia must inevitably have an effect on trade and commerce with other countries, and among the States. While it may not be necessary to demonstrate that the Tax Bonus Act is exclusively related to trade and commerce with other countries, and among the States, it is necessary to show at least that it has some definable relationship with that class of trade and commerce.

The key question

437 To establish this relationship, the defendants posed the key question as being: "does this law have a substantial economic effect on the flow of commercial transactions, goods, services, money, credit, among the States?"

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478 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 596-597 [186].

479 *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 88, 115, 128, 142-144 and 155; [1965] HCA 3; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 499, 502-503 and 508-511; cf at 529-530; [1976] HCA 66. Despite indicating a conditional desire to reopen these cases, and despite reminders from New South Wales of the necessity to do so if the defendants were to win on s 51(i), the defendants did not in fact apply to do so.

The controversial proposition

438 The defendants' argument was, in summary, that the intended practical operation of the Tax Bonus Act was to inject $7.7 billion into the Australian economy and give around 8.7 million recipients the means to participate directly in trade or commerce "thereby affecting both directly and indirectly trade and commerce among the States and with other countries." The only controversial part of this proposition is what appears in quotation marks.

439 The defendants supported this part with two submissions.

The purposes of the government

440 *Explanatory Memorandum.* The first of the defendants' submissions appeared to rest, whether or not legitimately, on the intentions or purposes of those who introduced the legislation. The submission was that the Explanatory Memorandum to the Bill for the Tax Bonus Act explained it as part of a package to give effect to the government's "Nation Building and Jobs Plan", which was "introduced to assist the Australian people [to] deal with the most significant economic crisis since the Second World War and [to] provide immediate economic stimulus to boost demand and support jobs."[480] However, the Explanatory Memorandum does not establish the legislative purpose necessary to support the submission, namely a purpose that the trade and commerce in which recipients of the bonus will participate will be trade and commerce with other countries, and among the States.

441 *"Updated Economic and Fiscal Outlook".* The same is true of other indications of legislative purpose. Thus the government's "Updated Economic and Fiscal Outlook" (February 2009) contended that a purpose underlying the decision to provide for tax bonuses was, together with all the other elements in the "Nation Building and Jobs Plan", to "support economic growth and jobs in Australia", and, taken with certain other bonus payments, was to "deliver an immediate stimulus to the economy to support growth and jobs now". These goals are neutral as between the impact on trade and commerce with other countries, and among the States, on the one hand, and other types of trade, on the other. It was not demonstrated to be the case that if there is a significant impact on the latter types of trade and commerce it will merely be a collateral and unintended result of endeavouring to provide the former type.

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480 Australia, House of Representatives, Tax Bonus for Working Australians Bill (No 2) 2009 and Tax Bonus for Working Australians (Consequential Amendments) Bill (No 2) 2009, Explanatory Memorandum, par 1.3.

442 *The Tax Bonus Act itself.* Leaving aside s 15AB of the *Acts Interpretation Act* 1901 (Cth) and the capacity at common law to resort to other material giving contextual background, the only evidence of statutory purpose is that to be found by construing the statute. The Tax Bonus Act does not reveal a purpose of having an impact on trade and commerce with other countries, and among the States, as distinct from other kinds of trade. This point demonstrates weakness in the defendants' second submission on s 51(i) as well.

The likely effects of the legislation

443 *The submission.* The second submission advanced by the defendants appeared to turn not on the purposes of those who promoted the legislation, but on its likely effects. The submission was that "[i]t can reasonably be anticipated that the spending generated by the payments made under the Act will have a material effect on the amount of" trade and commerce with other countries, and among the States.

444 *The silence of the Tax Bonus Act.* As South Australia pointed out, nothing in the provisions of the Tax Bonus Act reflects any criterion ensuring that particular recipients are more likely to make expenditures, if they make expenditures at all, in trade and commerce with other countries, and among the States. The Act is structured so as to target a class – persons with taxable incomes between nil and $100,000, divided into three subclasses. The class as a whole is not inherently likely to favour trade and commerce with other countries, and among the States, as the object of their expenditures. The same is true of each subclass.

445 *"Updated Economic and Fiscal Outlook".* The defendants pointed to the following passage in "Updated Economic and Fiscal Outlook" (February 2009):

> "Well-designed discretionary fiscal policy should work in conjunction with monetary policy to provide an immediate boost to demand. The most effective fiscal policy measures to achieve this in the current circumstances are those that can be implemented quickly and are targeted to those who are most likely to spend additional income.
>
> Like the Economic Security Strategy, the Nation Building and Jobs Plan includes measures that can be implemented quickly, so that it will support growth through to June 2009, and has been targeted towards those low- and middle-income households who are most likely to spend additional income and who are most vulnerable during an economic slowdown. To the extent that these payments are saved rather than spent immediately, they will accelerate balance sheet repair and underpin consumption over time."

This passage does not indicate that the bonus payments will have an impact on trade and commerce with other countries, and among the States, as distinct from other forms of trade and commerce.

446 *Absence of financial modelling.* At other points in their arguments the defendants referred to the financial modelling underlying the "Nation Building and Jobs Plan". But no financial modelling was cited to support the alleged reasonable anticipation that the expenditure of the bonus payments would have a material effect on the amount of trade and commerce with other countries, and among the States. Indeed the defendants specifically conceded that no financial modelling of that kind had been done. All they pointed to was modelling indicating an effect on gross domestic product of 0.5 percent by June 2009 and another 0.75 to 1 percent by June 2010. The tax bonuses were to be paid across the country. The country has, as the defendants rightly agreed, a fairly homogeneous character geographically in terms of distribution of wealth. The payments are to poor or relatively poor people, or "low- and middle-income households" (or as "Updated Economic and Fiscal Outlook" (February 2009) more euphemistically still puts it, "liquidity constrained households"). The problem is that while these figures measure an impact on trade and commerce, they do not measure any impact on trade and commerce with other countries, and among the States.

447 *Sufficient practical connection?* The defendants accepted that the payments were "not focused on interstate trade and commerce", but were focused on trade and commerce in general. However, they submitted that the desired effect on gross domestic product gave the payments a sufficient practical connection with trade and commerce with other countries, and among the States. That submission must be rejected. It ignores a necessary distinction. It fails to bridge a gap not otherwise bridged. It could not be correct unless s 51(i) were rewritten by leaving out the last seven words.

Conclusion

448 The answer to the question posed by the defendants as the key one[481] is "no". But even if it is assumed that the spending of the bonus payments will have some eventual connection with trade and commerce with other countries, and among the States, it has not been demonstrated that the connection is more than "insubstantial, tenuous or distant". Hence "[the legislation] cannot be described as made with respect to" that kind of trade and commerce[482].

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481 See above at [437].

482 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J; [1947] HCA 26.

SECTION 51(ii): TAXATION POWER

Section 51(ii) was available

449 Section 51(ii) of the Constitution gives power to make laws with respect to "taxation; but so as not to discriminate between States or parts of States". There is no doubt that a law supported by s 51(ii) could have been employed to achieve the goals of the Tax Bonus Act. For example, a law could have made a retrospective downward adjustment of tax liability and provided for corresponding repayment of excess sums assessed[483]. Nothing in the materials before the Court suggested that that technique would have been slower or less convenient or less effective than the technique embodied in the Tax Bonus Act. The only question is whether the different technique actually employed by the Tax Bonus Act makes it a law with respect to taxation.

The defendants' submission on the taxation power

450 The defendants relied on some language in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[484]. They contended that s 51(ii) conferred power to make a law "to define and regulate rights of refund", in the words of Deane and Gaudron JJ[485], and to create "a procedure for repaying the sums collected … to those who had paid those sums", in the words of McHugh J[486]. They submitted that these propositions did not apply only to the repayment of taxes wrongly collected or, as Deane and Gaudron JJ said, "of amounts unnecessarily or mistakenly paid to the Commonwealth"[487]. They submitted that the Tax Bonus Act was a law "that, in substance, returns taxes collected to a class of taxpayers who had a positive adjusted tax liability" for the 2007-2008 income year.

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483 Putting aside individuals with an adjusted tax liability of less than $900 to whom the Commonwealth could not make a payment of $900 under the taxation power because it would involve a "return" of more money than they had paid in tax for the relevant year.

484 (1994) 179 CLR 155; [1994] HCA 9.

485 (1994) 179 CLR 155 at 182.

486 (1994) 179 CLR 155 at 218.

487 (1994) 179 CLR 155 at 183.

The plaintiff's submission on the taxation power

451 The plaintiff submitted that the Tax Bonus Act when examined "by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes"[488] was not a law with respect to taxation within the meaning of s 51(ii). He submitted that in truth the payments of tax bonuses had no effect on the legal rights and liabilities of the recipients with respect to their taxation affairs. They were not debts due and payable. They were only gifts arbitrarily fixed by Parliament.

A gift?

452 This particular submission cannot be accepted without qualification. If a monetary "gift" is a payment which could not have been legally enforced, the tax bonuses are not gifts. It is true that they were not bargained for, that there is no consideration for them and that no trust was declared in relation to them. But ss 5-7 of the Tax Bonus Act describe identified persons as being "entitled" to them[489]. There is a right to receive them. There is a duty to pay them which is legally enforceable either by an action in debt[490], or by obtaining an order of mandamus against the Commissioner[491].

Tax liability issues

453 However, the other submissions of the plaintiff broadly to the following effect are correct. The right to recover the payments did not affect the legal rights and liabilities of recipients with respect to their *taxation* affairs. The *tax* liability of recipients as assessed under the *Income Tax Assessment Act* 1997 (Cth) remains unchanged: they are obliged to pay a sum corresponding to the tax assessed as payable in their notices of assessment, not that sum less the tax bonus. The Tax Bonus Act does not provide for the amendment of any assessment. It does not provide for a refund or repayment or rebate. The entitlement to a tax bonus cannot be set off by the Commissioner or the recipient

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488 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J; [1965] HCA 64.

489 See above at [139], [261] and [263].

490 *Shepherd v Hills* (1855) 11 Ex 55 at 67 [156 ER 743 at 747]; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65]; [1998] HCA 20.

491 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242-243; [1994] HCA 8.

against the recipient's existing tax liability[492]. The lack of correlation of the tax bonuses with tax liability is revealed by the fact that even if the recipient's "adjusted tax liability" is less than the bonus – even if it is as little as $1 – it may still trigger a bonus of $900. The Tax Bonus Act has nothing to do with arriving at a figure which the recipient must pay by way of tax, or which the Commonwealth must pay in order to ensure that no more than the legally correct amount of tax was exacted. The tax bonuses were to come to recipients, in the ordinary course, by payment to the credit of a nominated financial institution account pursuant to s 7(2) of the Tax Bonus Act. The Tax Bonus Act injects $7 billion into the bank accounts of persons thought likely to spend what they receive. The Tax Bonus Act is thus a method of achieving fiscal goals. It is not a law about tax liabilities. It does not change, regulate or abolish any right, duty, power or privilege with respect to taxation. The Tax Bonus Act may produce for recipients an effect equivalent in money terms to an Act retrospectively reducing their tax liability and reimbursing any overpayment[493], but, even in substance, it is not equivalent in law. An Act of the latter kind would alter *taxation* liabilities; the Tax Bonus Act does not. The references to "adjusted tax liability" and "taxable income" serve as methods for identifying the class of recipients and the quantum of what they are to receive. These references to their tax position have nothing to do with the correctness of their tax liability. Their tax position is significant because of its utility as a guide to whether recipients are likely to spend rather than save the bonuses paid, and because of the Commissioner's possession of readily available records enabling expeditious assessment of whether recipients meet the criteria for entitlement to the bonuses. It was not the bonus which adjusted any tax liability; rather, it was the "adjusted tax liability" which was a criterion for identifying which persons were eligible for the bonus.

454 The defendants submitted that a law could relate to taxation even though it provided for a payment to achieve an object other than the correction of a taxation error. The present difficulty, however, is that the Tax Bonus Act, although devised to achieve an object other than the correction of a taxation error, has no other connection with rights and liabilities in relation to taxation.

Incentive to lodge tax returns?

455 The defendants did not seek to have the Tax Bonus Act characterised as a law relating to taxation merely because s 5(1)(e)[494] may have the effect of

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492 *Tax Bonus for Working Australians (Consequential Amendments) Act (No 2)* 2009 (Cth), Sched 1, item 6.

493 Putting aside the individuals referred to in n 483 above.

494 See above at [139] and [261].

causing persons who want to receive the bonus to lodge their tax returns by 30 June 2009. Their stance in this respect was correct. The primary duty of taxpayers, established by a legislative instrument long antedating the enactment of the Tax Bonus Act, was to lodge returns by 31 October 2008. By 6 March 2009, 7.11 million taxpayers had lodged their tax returns, and 1.6 million had not. It was not an intended effect of the Tax Bonus Act to generate an incentive for taxpayers to file their tax returns up to eight months after they should have. The date 30 June 2009 was selected merely as a means of assisting ascertainment of which taxpayers would and which taxpayers would not be eligible for the tax bonus. Like other references to taxation integers, it helped mark out a class of persons to which the law would apply. But neither it nor the other markers gave the law the character of one relating to tax.

Refund of mistaken payment?

456 Unlike the legislation upheld in *Mutual Pools & Staff Pty Ltd v The Commonwealth*, the Tax Bonus Act did not regulate and define "rights of refund of amounts unnecessarily or mistakenly paid to the Commonwealth in discharge of asserted taxation liabilities"[495]. In that case the amounts were paid on the faith of an assumption that the legislation in question, which was invalidated by this Court, was valid. It cannot be said that the Commonwealth was acknowledging that it had "mistakenly imposed" too much tax on the persons falling within s 5 of the Tax Bonus Act, and was saying "we want to hand it back." The Commonwealth was not acknowledging any mistake. It had not made any mistake. It regarded the tax levels in force for the 2007-2008 year of income as correct at all material times – not as correct at all times up to the decision to adopt the "Nation Building and Jobs Plan" in February 2009. It did not want to "hand back" something mistakenly received. It wanted to hand over sufficient monies to stimulate the economy.

Reading down

457 The defendants made a concession that if the Tax Bonus Act could only be validated by recourse to s 51(ii), it could not be supported "to the extent that it would authorise payment to an individual of [a] tax bonus that is in excess of that individual's adjusted tax liability." However, they submitted that the Tax Bonus Act could be read down and remain valid so far as it was not in excess of power. But the submission only extended to a reading down of the Tax Bonus Act which would cure that relatively minor defect. The defendants did not submit that even if the much more radical defect discussed in the preceding paragraphs existed, the Tax Bonus Act was nonetheless capable of being validated by being read down. The decision to abstain from that submission was correct. The only

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495 (1994) 179 CLR 155 at 183 per Deane and Gaudron JJ.

reading down submission advanced by the defendants was structured so as to deal with the consequences of their concession – not the much more radical defect.

SECTION 51(xxix): EXTERNAL AFFAIRS POWER

458 Section 51(xxix) of the Constitution gives power to make laws with respect to "external affairs". The defendants submitted that the Tax Bonus Act was a law with respect to external affairs on one or more of four bases.

One: origins of crisis physically external to Australia – the submission

459 The defendants submitted that if a place, person, matter or thing lies outside the geographical limits of Australia, then it is external to it and falls within the meaning of the phrase "external affairs". Hence they submitted that a law of the Commonwealth legislature would be valid if it can properly be characterised as a law "with respect to" a place, person, matter or thing which is external to Australia[496]. The criterion of validity was whether an Australian law was sufficiently connected in its legal and practical operation with s 51(xxix)[497]. The defendants submitted that the power to make laws with respect to external affairs extended to laws "addressing adverse consequences within Australia which result from matters or things physically external to Australia." They submitted that the Tax Bonus Act was a response to internal difficulties which have arisen because of a sharp downturn in external economic conditions. In the end, the defendants widened the submission. It was said that s 51(xxix) supported not only laws which responded to overseas causes for local Australian difficulties, but also laws which might have a beneficial effect overseas.

Two: matter of international concern – the submission

460 The defendants advanced a contention, sometimes as part of the next argument, and sometimes as an independent (though secondary) argument, that the global financial crisis is a matter of international concern.

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496 Citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 530, 599, 695-696 and 712; [1991] HCA 32.

497 Citing *Leask v The Commonwealth* (1996) 187 CLR 579 at 624; [1996] HCA 29; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 103 [142].

Three: pursuit and advancement of comity with foreign governments – the submission

461 The defendants submitted that a law seeking the pursuit and advancement of comity with foreign governments could be a law with respect to external affairs. They submitted that international economic agencies have called for all countries with advanced economies to pursue policies of fiscal stimulation. The Australian Government had answered the calls by agreeing to use fiscal measures to stimulate domestic demand rapidly in committing to the Declaration of the Summit on Financial Markets and the World Economy on 15 November 2008 ("the G-20 Declaration"). The Tax Bonus Act pursued international comity with foreign governments in dealing with the global financial crisis. And the defendants submitted that a failure by Australia to act had the capacity to affect its relations with other countries.

Four: implementation of international commitment – the submission

462 South Australia advanced a fourth basis for invoking the external affairs power by developing a narrow version of the defendants' third argument, which it rejected as being uncertain and apt to mislead. It contended that the Tax Bonus Act would be valid if it were a proportionate legislative response to an assumption by the Australian Government of "a precise and identifiable international obligation or international commitment" or to receipt by the Australian Government of "a specific and identifiable recommendation of a relevant international organisation". South Australia did not rely on any recommendation. But it identified an "international commitment" in the following words in the G-20 Declaration, appearing under the heading "Actions Taken and to Be Taken":

> "Against this background of deteriorating economic conditions worldwide, we agreed that a broader policy response is needed, based on closer macroeconomic cooperation, to restore growth, avoid negative spillovers and support emerging market economies and developing countries. As immediate steps to achieve these objectives, as well as to address longer-term challenges, we will:
>
> …
>
> - Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability."

463 The defendants joined South Australia in advancing this submission. They said that the G-20 Declaration was an agreement – not an agreement "made within any formal treaty structure" and not "an enforceable agreement", but rather a "commitment to act in a particular way for international purposes." But

the defendants did not go so far as to submit that those G-20 countries which had not complied with the commitment were departing from any agreement. The defendants also submitted that s 51(xxix) extended to implementing recommendations of international bodies that are not binding under international law. They relied on certain "recommendations" as steps carried out in the implementation of the G-20 Declaration.

464 The above four submissions cannot be accepted for the following reasons.

One: origins of crisis physically external to Australia – consideration

465 *The authorities.* The defendants' submission that legislation is valid under s 51(xxix) if it relates to external causes of conditions in Australia is unsupported by authority[498]. There is authority, not challenged in this case, which holds that a place, person, matter or thing outside Australia is within the phrase "external affairs"[499]. Hence, on that authority, a law relating to a place, a person, a matter or a thing outside Australia can be a valid law pursuant to s 51(xxix) – for example, war crimes committed in Europe[500], or sexual crimes committed in Thailand[501]. But it does not follow that a law regulating matters and things within Australia falls within the external affairs power simply because a cause of the perceived need to regulate those Australian matters and things arose outside Australia. That kind of law relates not to external affairs, but to domestic affairs. A law relating to a consequence is not necessarily a law relating to its cause.

466 *The Australian orientation of the Tax Bonus Act.* The Tax Bonus Act does not relate to the external causes of the present state of the Australian economy.

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498 The defendants submitted that *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 650; [1996] HCA 5 indicated that s 51(xxix) was not limited to regulating conduct, duties or rights outside Australia. That is not so. The passage cited stated that control of "the movement of children between Australia and places physically external to Australia" is within s 51(xxix). That movement is not complete until it reaches a point physically external to Australia. Until that time the geographic externality doctrine cannot operate; from that time it does.

499 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 632; *Horta v The Commonwealth* (1994) 181 CLR 183 at 193-194; [1994] HCA 32; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 485; [1996] HCA 56; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 546 [30]; *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6] and 365 [153].

500 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

501 *XYZ v The Commonwealth* (2006) 227 CLR 532.

The Explanatory Memorandum to the Bill for the Tax Bonus Act said that the tax bonuses were part of the Commonwealth's plan:

> "to assist the Australian people [to] deal with the most significant economic crisis since the Second World War and [to] provide immediate economic stimulus to boost demand and support jobs."

Those are references to an Australian economic crisis, Australian demand and Australian jobs. The demand stimulated is demand within the Australian economy. The Tax Bonus Act is thus concerned with Australian matters and things.

467 The defendants cited the following passage from the government's "Updated Economic and Fiscal Outlook" (February 2009):

> "With national economies more closely linked today than ever before, the effectiveness of any individual country's macroeconomic policy response depends upon what other countries are doing. As many countries are looking to fiscal policy to address the macroeconomic effects of the global recession, the benefits from improved coordination of macroeconomic policy responses are clear".

468 The rights and obligations which the Tax Bonus Act creates are not created by reference to matters and things lying outside Australia. They are created by reference to persons liable to pay Australian income tax for the period 2007-2008 who are Australian residents in that year. In the ordinary course, the tax bonuses were to be paid to the credit of a financial institution account nominated in the recipient's income tax return for the 2007-2008 income year for the purposes of s 8AAZLH of the Taxation Administration Act. Hence that account was "maintained at a branch or office of the institution that is in Australia" pursuant to s 8AAZLH(2) of that Act. The legislation is thus directed to internal Australian affairs, not external affairs. As South Australia submitted, so far as the Tax Bonus Act operates in relation to persons external to Australia, as by requiring payments to be made to persons outside Australia, "that operation is entirely fortuitous and the Tax Bonus Act plainly does not take its character from that fortuitous operation."

469 *The effect of the Tax Bonus Act overseas.* The defendants submitted that the Tax Bonus Act related to external affairs because the actions it mandated in Australia had effects on the global financial crisis outside Australia. However, while an improvement in the condition of Australian affairs might have beneficial effects overseas, the legislation is not specifically structured so as to achieve those effects.

470 *Conclusion.* If the defendants' submission were correct, it would rest upon so wide a construction of s 51(xxix) as to make many of the placita in s 51

unnecessary. That is because a great many matters and things in Australia have been affected by external causes. Further, if the defendants' submission were correct, it would have implications for the federal division of powers between the Commonwealth and the States. This reveals that the contention of the defendants on the "geographic externality" aspect of s 51(xxix) involves an extension of it beyond what was contemplated in *XYZ v The Commonwealth*, which did not involve any consideration of that federal division of powers[502].

Two: matter of international concern – consideration

471 According to the defendants, in *XYZ v The Commonwealth* three judges of the Court "expressed reservations" about whether a matter of international concern was an "external affair" for s 51(xxix) purposes[503]. The defendants submitted that those reservations did not express the concluded view of any of those judges "and should be treated accordingly." The submission did not spell out quite what treatment that was. Assuming but not accepting that the views hostile to the "matter of international concern" doctrine were not concluded views, and assuming but not accepting that the global financial crisis is a "matter of international concern" in some sense of that expression, in view of the defendants' advocacy of that doctrine in this case it becomes necessary now to reach a concluded view about the merits of the supposed doctrine.

472 It has no merits.

473 It has no merits for the reasons given in *XYZ v The Commonwealth*[504]. The only additional observation which is necessary relates to the defendants' reliance on statements in various well-known cases in support of their submission. Most of those cases are discussed in *XYZ v The Commonwealth*[505]. The statements on which the defendants relied were not part of the ratio decidendi of any of the decisions in which they were made. They were seriously considered dicta, but they could not be described as conforming with long-established authority[506]. Further, some of them do not support the defendants'

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502 (2006) 227 CLR 532 at 543 [18].

503 (2006) 227 CLR 532 at 574-575 [124] and 612 [225].

504 (2006) 227 CLR 532 at 607-612 [216]-[225].

505 (2006) 227 CLR 532 at 607-608 [217] n 344.

506 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [134]; [2007] HCA 22.

submission, but rather stand for the very different proposition that a law can be supported by s 51(xxix) if it concerns Australia's relations with other states[507].

Three: pursuit and advancement of comity with foreign governments – consideration

474 The word "comity" has several meanings. The defendants did not explain which meaning they were using in submitting that the Tax Bonus Act fell within s 51(xxix) on the ground that it was enacted in "the pursuit and advancement of comity with foreign governments"[508]. The intended meaning appears to be the fostering of friendly relationships between the government of Australia and other governments. Yet many kinds of legislation may improve, or damage, the friendliness of relationships between the Australian Government and other governments. To adopt the suggested criterion would be to give s 51(xxix) a meaning far beyond anything yet recognised in the authorities[509].

Four: implementation of international commitment – consideration

475 *The need for specificity*. If legislation is to be validated by recourse to a treaty (or international commitment) that treaty or commitment must set out a

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507 For example, *R v Sharkey* (1949) 79 CLR 121 at 136; [1949] HCA 46; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 190-191 (two other passages in that case make plain Gibbs CJ's opposition to the "matter of international concern" doctrine, at 202-203 and 207). Adapting Gibbs CJ's reasoning at 202-203 to the present case, international interest in what Australia does to counter the global financial crisis domestically does not automatically convert that domestic affair into an international or "external" affair.

508 For possible meanings of "comity", see O'Connell, *International Law*, 2nd ed (1970), vol 1 at 20-21; Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 50-51; Brownlie, *Principles of Public International Law*, 7th ed (2008) at 28-29.

509 The defendants relied on *Thomas v Mowbray* (2007) 233 CLR 307 at 364 [151] where Gummow and Crennan JJ said the "pursuit and advancement of comity with foreign governments … may be a subject matter of a law with respect to external affairs." But they then said: "In *XYZ v The Commonwealth* [(2006) 227 CLR 532 at 543 [18]] Gleeson CJ noted (with evident approval) that it was accepted that the external affairs power at least includes power to make laws in respect to matters affecting Australia's relations with other countries." The sentence in which Gleeson CJ said that concluded: "and that includes matters the subject of treaties entered into by Australia." That context suggests that their Honours were discussing "comity" in a sense much stricter than the sense used by the defendants.

regime defined with "sufficient specificity to direct the general course to be taken" by the relevant states[510]. The treaty or commitment need not have the precision necessary to establish a legally enforceable agreement at common law, but it must avoid excessive generality.

476 *The G-20 Declaration – the central passage.* The high point of the defendants' argument, and the only matter to which South Australia referred, was the passage quoted above from the G-20 Declaration[511]. That language is no more than aspirational. It does not say which fiscal measures are to be used. What is stated leaves it very much open to individual governments to decide whether to use fiscal measures, and, if so, which ones. That is because of the words "as appropriate". It is also because of the reference to "maintaining a policy framework conducive to fiscal sustainability", which points against deficit spending. As New South Wales submitted, it is a qualified proposition on which governments can agree, but it "commits to nothing, because different views quite reasonably can be taken of what is sufficient to stimulate domestic demand to rapid effect as appropriate, and what is necessary to maintain fiscal sustainability." It is what might be expected of an organisation like the G-20, which concentrates on discussion, dialogue and influence, and which has a diverse membership[512]. It is highly improbable that in the ordinary course the deliberations of such a body would generate obligations in international law. In

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510 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

511 At [462].

512 The Group of Twenty is an informal body without permanent staff but made up of the finance ministers and central bank governors of 19 nations (including Australia) and the European Union. Officers of the International Monetary Fund and the World Bank attend its meetings. According to the organisation's webpage, accessed by the defendants on 28 March 2009 and entitled "About G-20", it "promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability." It continues: "By contributing to the strengthening of the international financial architecture and providing opportunities for dialogue on national policies, international co-operation, and international financial institutions, the G-20 helps to support growth and development across the globe." It also states: "The G-20's economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system." A document published online by the G-20 on 15-16 March 2008, *The Group of Twenty: A History*, stresses its role in broadening informal dialogue, cooperation, discussion, development of standards and codes, and carrying on studies on various subjects.

Victoria v The Commonwealth it was said that an "external affair" did not exist where all that was stated was a "broad objective with little precise content and permitting widely divergent policies by parties"[513]. Yet that is all the G-20 Declaration does. The defendants submitted that it went further, because the "words of commitment" given by the G-20 nations had triggered "an overall sameness about the nature of the responses." That was not demonstrated by the material the defendants referred to[514]. In any event, the existence of parallel conduct does not necessarily demonstrate a commitment to pursue it. The defendants submitted that the relevant passage was "expressed in terms as specific as one gets in international agreements." With respect, that submission is entirely incorrect. The G-20 Declaration lacks "sufficient specificity to direct the general course to be taken"[515].

477 *The Commonwealth v Tasmania.* The defendants submitted that the requirement in *Victoria v The Commonwealth* that the treaty have sufficient specificity should be read in the light of the fact that Arts 4 and 5 of the World Heritage Convention were held to be sufficient in *The Commonwealth v Tasmania*[516]. If the language in one case is to be assessed in the light of the decision in another, the appropriate process in these proceedings seems to be the opposite of that argued by the defendants. That appropriate process would be to read what was said in *The Commonwealth v Tasmania*, a case in which the Court was sharply and closely divided on many questions, in the light of the detailed treatment of specificity by five Justices in the later decision of *Victoria v The Commonwealth*. In any event, the World Heritage Convention was a solemn treaty. It was made under the auspices of the General Conference of the United Nations Educational, Scientific and Cultural Organisation. It followed the usual course for treaties of going through lengthy processes of negotiation, adoption, ratification and eventually entry into force. In those respects it is in sharp

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513 (1996) 187 CLR 416 at 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, quoting Zines, *The High Court and the Constitution*, 3rd ed (1992) at 250.

514 The material was the following passage from "Note by the Staff of the International Monetary Fund" entitled "Group of Twenty Meeting of the Deputies January 31-February 1, 2009 London, UK": "To date, the G-20 countries have adopted (or plan to adopt) fiscal stimulus measures amounting on average to around ½ percent of GDP in 2008, 1½ percent of GDP in 2009, and about 1¼ percent of GDP in 2010."

515 Cf *Victoria v The Commonwealth* (1996) 187 CLR 416 at 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

516 (1983) 158 CLR 1. The Articles are set out at 81. The defendants relied on what Mason J said at 132-133.

contrast with the G-20 Declaration. The G-20 Declaration falls more into the genre of public relations than the genre of treaties.

478 *Other parts of the G-20 Declaration.* Although the passage from the G-20 Declaration just discussed was the highlight, the defendants also relied on other passages. They relied on the whole of the section "Actions Taken and to Be Taken" from the G-20 Declaration. That contained an account of international economic problems and the actions already taken to deal with them. It also contained five bullet points reflecting agreements in addition to the one appearing as part of the passage quoted above[517]. The only one containing an agreement arguably referable to the Tax Bonus Act is an agreement to "[c]ontinue our vigorous efforts and take whatever further actions are necessary to stabilize the financial system." But an agreement that "further actions are necessary" is far too unspecific to give constitutional validity to a particular and highly specific action like enacting the Tax Bonus Act. As New South Wales correctly submitted, that "is a most unlikely, waffly or aspirational statement to engage Commonwealth legislative power." The other four bullet points do not relate to fiscal measures of the kind illustrated by the Tax Bonus Act, but to questions of monetary policy, access to finance, aid to development and provision of sufficient funds to the International Monetary Fund, the World Bank and like bodies. These passages may reveal that the financial crisis is a matter of international concern, but that, as was discussed above[518], does not render it an "external affair" for s 51(xxix) purposes.

479 *Recommendations by international agencies: the law.* Recommendations by international agencies cannot support the validity of the Tax Bonus Act. Any support they can give to a law enacted in reliance on s 51(xxix) exists only where they are pronounced in order to give effect to the terms of a treaty to which they relate[519]. The defendants relied on the following words of Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*[520]:

> "[T]he Parliament *may* well be deemed competent to legislate for the carrying out of 'recommendations' … resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations." (emphasis added)

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517 See [462].

518 See [471]-[473].

519 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 509.

520 (1936) 55 CLR 608 at 687; [1936] HCA 52.

The defendants said that that passage, which was quoted in *Victoria v The Commonwealth*[521], was actually applied in that case. That is not so. In that case the Court specifically declined to decide whether legislation enacted to carry out the recommendations of international agencies made otherwise than in order to give effect to the terms of a treaty to which they relate could be supported by s 51(xxix)[522]. The better view is that it cannot, because mere recommendations do not create international obligations. In any event, even if some recommendations could do so, the recommendations relied on in this case are too vague. The defendants gave various illustrations of their submission that "[i]nternational economic agencies have called for all countries with advanced economies to pursue policies of fiscal stimulation". The calls were in documents issued by the International Monetary Fund; the staff of the International Monetary Fund to assist a meeting of deputies of the G-20; and the Organisation for Economic Co-operation and Development. It is necessary now to assess the submission in relation to each of them.

480 *International Monetary Fund "World Economic Outlook Update"*. The defendants relied on two passages in a document dated 28 January 2009 issued by the International Monetary Fund and entitled "World Economic Outlook Update". The first was: "Monetary and fiscal policies need to become even more supportive of aggregate demand and sustain this stance over the foreseeable future, while developing strategies to ensure long-term fiscal sustainability." The other was:

> "In current circumstances, the timely implementation of fiscal stimulus across a broad range of advanced and emerging economies must provide a key support to world growth. Given that the current projections are predicated on strong and coordinated policy actions, any delays will likely worsen growth prospects. Countries that have policy room should make a firm commitment to do more if the situation deteriorates further. Fiscal stimulus packages should rely primarily on temporary measures and be formulated within medium-term fiscal frameworks that ensure that the envisaged buildup in fiscal deficits can be reversed as economies recover and that fiscal sustainability can be attained in the face of demographic pressure. Countries that have more limited fiscal space should focus their efforts on supporting the financial sector and credit flows, while ensuring that budgets adjust to less favorable external conditions." (footnote omitted)

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521 (1996) 187 CLR 416 at 483.

522 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 509.

These passages say nothing specific about tax bonuses, and they impose no obligation to grant them.

481 Further, the International Monetary Fund is established by the Articles of Agreement of the International Monetary Fund, a treaty to which Australia is a party. Article VIII ("General Obligations of Members") does not create an obligation on any party to comply with a recommendation either of the International Monetary Fund itself or of its officials. Nor does any other Article.

482 *International Monetary Fund Staff "Note".* The defendants also relied on various passages in a "Note by the Staff of the International Monetary Fund" on a meeting of G-20 deputies held in London on 31 January and 1 February 2009. Under the heading "Executive Summary" it was stated:

> "*More aggressive and concerted policy actions are urgently needed to resolve the crisis and establish a durable turnaround in global activity.* To be effective, policies need to be comprehensive and internationally coordinated to limit unintended cross-border effects. Action is needed on two fronts – to restore financial sectors to health and to bolster demand to sustain a durable recovery in global activity." (emphasis in original)

A later part of the "Executive Summary" (reflecting a passage in the body of the document) said:

> "[W]ith constraints on the effectiveness of monetary policy, fiscal policy must play a central role in supporting demand, while remaining consistent with medium-term sustainability. A key feature of a fiscal stimulus program is that it should support demand for a prolonged period of time and be applied broadly across countries with policy space to minimize cross-border leakages."

Later still, in a section headed "Fiscal Policy" to which the defendants drew particular attention, the document stated that G-20 countries had adopted (or planned to adopt) fiscal stimulus measures amounting on average to 0.5 percent of GDP in 2008, 1.5 percent in 2009 and about 1.25 percent in 2010. It then listed a variety of short-term, medium-term and long-term fiscal measures which had been adopted or planned. The document reported that many countries had announced plans "to protect liquidity-constrained or vulnerable groups". Examples of these plans were given, including Australian plans to support children and pensioners. The document then estimated that the fiscal stimulus plan would increase GDP growth by 0.5 to 1.25 percent. These passages do not envisage anything like the Tax Bonus Act and have no relevance to it. The Act does not "protect liquidity-constrained or vulnerable groups". Instead it selects them as suitable recipients of the bonus because of the expectation that they will spend it quickly.

483 *Organisation for Economic Co-operation and Development "Statement".* The defendants relied next on a document issued by the Organisation for Economic Co-operation and Development. It was a "Statement on IMF-OECD-World Bank Seminar on the Response to the Crisis and Exit Strategies". It said:

> "In parallel, there continues to be an urgent need for fiscal stimulus. The size and composition of fiscal packages should be consistent with each country's fiscal space and institutional capacity. The deepening of the downturn suggests the need for an increase in high-impact fiscal expenditures in the first half of 2009, with further support in the following quarters, by countries in a position to prudently undertake such spending. At the same time, embedding stimulus packages in a credible medium-term strategy that safeguards fiscal sustainability will also increase their impact in the short term. Due attention should be given to longer-term policy perspectives, including consideration of how stimulus policies could work to serve the objectives of climate-friendly and innovation-enhancing investment."

This creates no specific obligation on any nation. Indeed, it recommends no specific action for Australia.

484 The Organisation for Economic Co-operation and Development was created by the Convention on the Organisation for Economic Co-operation and Development, to which Australia is a party. Article 5 provides:

> "In order to achieve its aims, the Organisation may:
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> (a) take decisions which, except as otherwise provided, shall be binding on all the Members;
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> (b) make recommendations to Members; and
>
> (c) enter into agreements with Members, non-member States and international organisations."

The document relied on by the defendants is neither a decision nor an agreement. It is at most a recommendation. Since it is a statement not of the Organisation for Economic Co-operation and Development alone, but of an "IMF-OECD-World Bank Seminar", it is doubtful whether it is even an Organisation for Economic Co-operation and Development recommendation. The defendants contended that the recommendations were not made under Art 5. If the power to make them lies elsewhere, there is even greater difficulty in triggering s 51(xxix).

485 *Organisation for Economic Co-operation and Development Editorial.* Another document emanating from the Organisation for Economic Co-operation

and Development on which the defendants relied is the Editorial in a periodical named *OECD Economic Outlook*[523]. The Editorial was signed by Klaus Schmidt-Hebbel, Chief Economist, and dated 25 November 2008. The relevant passage stressed the importance of fiscal stimulus in dealing with the crisis. It continued[524]:

> "Fiscal stimulus packages, however, need to be evaluated on a *case-by-case basis* in those countries where room for budgetary manoeuvre exists. It is vital that any *discretionary action* be timely and temporary and designed to ensure maximum effectiveness. Infrastructure investment is often mentioned as a desirable instrument for stimulus. While it will boost both supply and demand, provided the investments are well chosen, infrastructure investment typically takes a long time to be brought on stream and, once begun, is difficult to wind down in line with a recovery in activity. Alternatives, such as tax cuts or transfer payments aimed at credit-constrained, poorer households, *might* prove more effective in boosting demand." (emphasis added)

The parts of this passage which have been emphasised reveal its tentative, non-mandatory character. Its provenance indicates that it cannot possibly be seen as a recommendation by an international organisation in implementation of the G-20 Declaration.

Conclusion

486 The Tax Bonus Act cannot be supported under s 51(xxix).

IMPLIED LEGISLATIVE "NATIONHOOD POWER"

Classifying the defendants' remaining arguments

487 The remaining arguments advanced by the defendants may be described without any criticism as being complex and subtle. They were also mercurial in the sense that in the course of their presentation the *Schwerpunkt* of the advocacy shifted from argument to argument often and suddenly. They had significant overlaps. Particular considerations underpinned more than one argument. It is not easy to classify them.

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523 Schmidt-Hebbel, "Editorial: Managing the Global Financial Crisis and Economic Downturn", (2008) 84 *OECD Economic Outlook* 7.

524 Schmidt-Hebbel, "Editorial: Managing the Global Financial Crisis and Economic Downturn", (2008) 84 *OECD Economic Outlook* 7 at 8.

488 It is proposed to divide them, it is hoped without undue crudeness, into three groups. They are all extreme, but in different ways. The first asserted a "nationhood power" in the Parliament as an implied head of legislative power, or a "nationhood power" in the Executive under s 61 of the Constitution, or a "power to manage the national economy" under s 61, and relied on s 51(xxxix) as a source of power for legislation on matters incidental to the execution of those powers[525]. The second saw s 61 as giving the Executive power to spend money which has been lawfully appropriated, independently of any "nationhood power" or power to manage the national economy, and relied on s 51(xxxix) as a source of power to enact legislation on matters incidental to the execution of that power[526]. The third saw s 81 as giving a legislative "power" to authorise the Executive to spend funds appropriated and relied on s 51(xxxix) as a source of power to enact legislation on matters incidental to the execution of that legislative power[527].

The defendants' arguments on the "nationhood power" and the "power to manage the national economy": outline

489 The first group of arguments proceeded on two assumptions. One was that there was a valid appropriation of sums sufficient to pay the tax bonuses[528]. The second was that the appropriation did not itself enliven a power to spend the sums appropriated or to enact legislation like the Tax Bonus Act to regulate their expenditure[529]. The arguments shared a common element: the importance of the central government possessing ample power to regulate the national economy. The defendants asserted that it was on this general power or related powers that the Tax Bonus Act rested.

490 The arguments in this first group took three forms. The first, which did not concern s 61 of the Constitution, was that there was an implied legislative "nationhood power" existing independent of s 51(xxxix). The second and third arguments did concern s 61. The second was that the executive power of the Commonwealth under s 61 included a "nationhood power" to which support could be given by legislation resting for its validity on s 51(xxxix). The third was that there was an executive power (independently of any nationhood power)

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525 See [489]-[552].

526 See [553]-[570].

527 See [571]-[612].

528 See above at [398].

529 The defendants departed from this assumption in relation to their broader s 61/s 51(xxxix) and s 81/s 51(xxxix) arguments: see [553]-[570] and [571]-[612].

to manage the national economy, in both good times and bad, or, more narrowly, in emergencies, to which support could be given by legislation resting for its validity on s 51(xxxix). The second and third forms of the argument are discussed later[530]. The first is discussed immediately[531].

Implied legislative "nationhood power"

491 Although the defendants focused almost entirely on the arguments addressed to s 61, and spent little time on the first argument orally, they did not resile from it.

The defendants' arguments: some authorities

492 The defendants pointed to certain statements by former Justices. The defendants drew succour from the submission that the statements favoured their contention even though the Justices in question thought that the power in s 81 to make appropriations was not unlimited. That is, the defendants sought to strengthen their position by presenting themselves as relying on what were suggested to be "pro-centralist statements" made by "anti-centralist judges".

493 *Gibbs J.* Thus in *Victoria v The Commonwealth and Hayden* Gibbs J thought that the expression "purposes of the Commonwealth" in s 81 extended not only to purposes for which the Commonwealth had powers to make laws under ss 51 and 52, but also to "matters incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government."[532]

494 *Starke J.* In *Attorney-General (Vict) v The Commonwealth* Starke J, while opposing the idea that the Commonwealth could appropriate monies for any purpose whatever, thought that the "purposes of the Commonwealth" in s 81 included "matter[s] arising from the existence of the Commonwealth and its status as a Federal Government."[533]

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530 At [511]-[546] and [547]-[552].

531 At [491]-[510].

532 (1975) 134 CLR 338 at 375.

533 (1945) 71 CLR 237 at 266; [1945] HCA 30.

495 *Dixon J.* And in the same case, Dixon J, while declining to accept the idea that s 81 empowered Parliament to spend money for any purpose at all that was for the benefit of the people of the Commonwealth, said[534]:

> "Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day. There is no reason why such matters should be taken to fall outside the province of Federal appropriation though ascertained and defined by reference to the legislative power of the Commonwealth."

496 *The Australian Communist Party case.* These statements of Gibbs J, Starke J and Dixon J were directed to s 81, not to the precise issue raised by the present submission: whether legislation enacted to regulate the expenditure of money which has been validly appropriated is within the legislative power of the Commonwealth. Nor was their language precise.

497 Dixon J was more specific, however, in a passage in *Australian Communist Party v The Commonwealth*[535] on which the defendants relied:

> "I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct and utterances should be placed upon s 51(xxxix) in its application to the executive power dealt with by s 61 of the Constitution or in its application to other powers. I do not doubt that particular laws suppressing sedition and subversive endeavours or preparations might be supported under powers obtained by combining the appropriate part of the text of s 51(xxxix) with the text of some other power. But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate

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534 (1945) 71 CLR 237 at 269. In *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 389; [1975] HCA 58, Gibbs J referred to those words with approval.

535 (1951) 83 CLR 1 at 187-188. In *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 94; [1925] HCA 53, Isaacs J said that there was power to enact legislation permitting "deportation as a means of self-protection in relation to constitutional functions [, for example, deportation of] some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor."

> with respect to designs to obstruct the course of government or to subvert the Constitution. History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. As appears from *Burns v Ransley*[536] and *R v Sharkey*[537], I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51(xxxix) with those of other constitutional powers. I prefer the view adopted in the United States … '… it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government …'
>
> [T]he considerations giving rise to the implied power exist in the Commonwealth Constitution."

498 The laws protecting the Commonwealth from subversion and sedition which were held valid in *Burns v Ransley* and *R v Sharkey* can be seen as an aspect of "the execution and maintenance of [the] Constitution" within the meaning of those words in s 61. Hence, although Dixon J saw this as having an artificial aspect, it is possible to support these cases as being within the executive power conferred by s 61, and s 51(xxxix) authorises the enactment of laws on that subject[538]. Legislation dealing with sedition and subversion is also within the defence power in s 51(vi), for that is not limited to external threats against the Commonwealth and the States from foreign nation states[539]. However, none of this supports the defendants' argument in relation to legislation regulating the economy. As Wilson and Dawson JJ said in *Davis v The Commonwealth*,

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536 (1949) 79 CLR 101 at 116; [1949] HCA 45.

537 (1949) 79 CLR 121 at 148 and 149.

538 *Davis v The Commonwealth* (1988) 166 CLR 79 at 101-102 and 117-118; [1988] HCA 63.

539 *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [6], 361-364 [139]-[148] and 511 [611].

"subversion, sedition and the like are matters of a very special kind, striking, as they do, at the very foundation of the Constitution"[540]. They are far removed from the field in which the Tax Bonus Act operates.

The Commonwealth v Tasmania

499 *Background.* Most of the discussions in the cases about the implied nationhood power, whether as a legislative or an executive power, are dicta. But there is one decision relevant to the defendants' argument that there is a legislative power. The defendants did not deal with this aspect of it. It may be distinguishable but it is a binding authority. It is *The Commonwealth v Tasmania*. The Commonwealth advanced an argument referred to under the title "Inherent Power of Nationhood"[541]. The detail of the argument is not stated in the report, and Dawson J said it "was but faintly put"[542]. The Court did not call on Tasmania for a reply to the Commonwealth's argument[543]. The legislation allegedly supported by the "implied power derived from nationhood" was the *World Heritage Properties Conservation Act* 1983 (Cth), ss 6(2)(e) and 9. Those provisions rendered it unlawful for numerous activities to be carried on on property which was part of the heritage distinctive of the Australian nation and in relation to which, in the language of s 6(2)(e)(ii)[544]:

> "by reason of the lack or inadequacy of any other available means for its protection or conservation, it is peculiarly appropriate that measures for the protection or conservation of the property be taken by the Parliament and Government of the Commonwealth as the national parliament and government of Australia."

A majority (Gibbs CJ, Wilson, Deane and Dawson JJ) struck those provisions down on the ground that they were not validated by the "implied power derived from nationhood". It was not necessary for Mason, Murphy and Brennan JJ to deal with the question.

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540 (1988) 166 CLR 79 at 102.

541 (1983) 158 CLR 1 at 44.

542 (1983) 158 CLR 1 at 322.

543 (1983) 158 CLR 1 at 53.

544 This sub-paragraph is set out at (1983) 158 CLR 1 at 72.

500 Gibbs CJ said[545]:

> "The implied power derived from nationhood has no possible application to the present case. The question whether and to what extent restrictions should be put on the use of lands within a State is not a matter which is peculiarly appropriate to a national government. On the contrary, it is a matter which traditionally has been considered to be within the province of the government of the State within which the lands are situated. The protection of the Parks is not so complex a matter, and does not involve action on so large a scale, that it requires national co-ordination to achieve, assuming that to be a test."

501 Wilson J said[546]:

> "The Commonwealth argues that, independently of any express legislative power conferred by the Constitution, the existence of the circumstances described in s 6(2)(e) of the Act brings into being an inherent power to legislate. The circumstances are the following: a heritage distinctive of the Australian nation, an absence or inadequacy of any other available means for its protection, and a conclusion that it is peculiarly appropriate that the Parliament and government of the Commonwealth should protect it. I am unable to accept the argument. I know of no occasion when a coercive law declaring certain conduct to be unlawful and imposing penalties has been enacted by the Parliament otherwise than pursuant to a given head of power. Such an approach to federal legislative power would in my opinion be wholly subversive of the Constitution and cannot be permitted."

502 Deane J said[547]:

> "There are many statements in judgments in this Court which support the proposition that, in the context of s 51(xxxix) and s 61 of the Constitution, each of the Commonwealth Parliament and executive is vested with certain powers which are inherent in its existence or in the fact of Australian nationhood and international personality".

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545 (1983) 158 CLR 1 at 109.

546 (1983) 158 CLR 1 at 203-204.

547 (1983) 158 CLR 1 at 252.

He then said[548]:

> "It suffices, for present purposes, to say that I consider that the inherent powers of the Commonwealth could not, on any proper approach, be seen as including the power to enact a law imposing drastic restrictions of the type contained in s 9 of the Act in respect of 'identified property' … in relation to which the requirements of sub-ss (2)(e) and (3) of s 6 of the Act are satisfied. Those restrictions would involve the potential freezing of the 'identified property' to which they were applied and would, to no small extent, override and displace the ordinary legislative and executive powers of the State, in which such property was situate, to authorize or regulate conduct thereon. The fact that particular physical property or artistic, intellectual, scientific or sporting achievement or endeavour is 'part of the heritage distinctive of the Australian nation' may well be decisive of the question whether the protection, preservation or promotion of such property, achievement or endeavour may be made the object of an appropriation of money by the Commonwealth Parliament or of Commonwealth action to assist or complement actions of a State. In the absence of any relevant grant of power to the Commonwealth however, that fact cannot constitute the basis of some unexpressed power in the Commonwealth to arrogate to itself control of such property, achievement or endeavour or to oust or override the legislative and executive powers of the State in which such property is situated or such achievement or endeavour has been effected or is being pursued."

503 And Dawson J said[549]:

> "Although it can be said that the protection or conservation of the Australian cultural and natural heritage is in the national interest (and the submission can be put no higher), that does not carry with it the implication that the Commonwealth has power to legislate with respect to the matter. There are many matters which may be said to affect the national interest – matters such as education, health, the prevention and punishment of crime – which are not the subject of Commonwealth legislative power and are consequently within the residual powers of the States. Whatever inherent legislative powers the Commonwealth may have, if any, they do not, in my view, extend to the matters dealt with by the *World Heritage Properties Conservation Act*."

504 *Dissimilarities and points of value.* That case concerned legislative restraints on the use of land in a State in order to vindicate the national interest in

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548 (1983) 158 CLR 1 at 253.

549 (1983) 158 CLR 1 at 323.

protecting the Australian heritage. This case concerns legislative measures about fiscal policy. It is true that there is no close analogy between these things. It is also true that restrictions on the use of land in a State collide much more directly with State authority than the Tax Bonus Act does. However, if an implied "nationhood power" existed, there are some measures of fiscal policy supportable by resort to it which are much more likely to collide with State authority than the Tax Bonus Act. And one aspect of the ratio decidendi on this point in *The Commonwealth v Tasmania* is that a matter of national interest does not ipso facto fall within any implied "nationhood power". Hence the mere fact that controlling economic crises is a matter of national interest does not lead to the conclusion that the Commonwealth has any power to control them apart from the powers expressly granted to it. The defendants made no application for leave to argue the correctness of *The Commonwealth v Tasmania* on this point (if leave be necessary) with a view to having it overruled. Nor did they criticise it.

Davis v The Commonwealth

505 In *Davis v The Commonwealth*, Wilson and Dawson JJ[550] and Toohey J[551] each rejected an implied legislative "nationhood power". Mason CJ, Deane and Gaudron JJ left the point open[552]. Brennan J did not discuss it.

Supposed examples of the implied legislative "nationhood power"

506 Apart from cases dealing with legislation directed at subversion and sedition, the type of legislation relating to the governmental symbols and celebrations discussed in *Davis v The Commonwealth*[553], and the *World Heritage Properties Conservation Act*, ss 6(2)(e) and 9[554], the issues relating to a "nationhood power" have generally been discussed only in dicta. But there has been little precision in what has been said. It has been said that there is a power

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550 (1988) 166 CLR 79 at 103-104.

551 (1988) 166 CLR 79 at 117-119.

552 (1988) 166 CLR 79 at 95.

553 (1988) 166 CLR 79.

554 *The Commonwealth v Tasmania* (1983) 158 CLR 1: see [499]-[504] above.

to legislate in relation to exploration[555]; science and technology[556]; research[557]; inquiries, investigation and advocacy in relation to matters affecting public health[558]; inquiries, planning and coordination on a national scale[559] and national initiatives in science, literature and the arts[560]. But how this power can be recognised has not been explained.

Which nation?

507 If any "nationhood power" (or, for that matter, any power to manage the national economy) exists, it must rest on either the "nation", in the sense of a new form of political organisation for the people living in the Australian colonies, which was created in 1901, or the nation more independent of the United Kingdom that developed after 1901. If these powers rest on the fact that a type of nation was created in 1901, they must be read as powers which are subordinate to and incapable of affecting the distribution of powers between the Commonwealth, the States and the Territories that is effected by the express language of the Constitution in ss 51, 52, 90, 107, 114, 117 and 122. For constitutional implications cannot be made in the face of express constitutional language. As Barwick CJ said in *Victoria v The Commonwealth and Hayden*[561]:

> "to describe a problem as national … does not attract power. Though some power of a special and limited kind may be attracted to the Commonwealth by the very setting up and existence of the Commonwealth as a polity, no power to deal with matters because they may conveniently and best be dealt with on a national basis is similarly derived. However desirable the exercise by the Commonwealth of power

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555 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ and 413 per Jacobs J.

556 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ and 397 per Mason J.

557 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 413 per Jacobs J.

558 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397 per Mason J.

559 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 412 per Jacobs J.

560 *Davis v The Commonwealth* (1988) 166 CLR 79 at 111 per Brennan J.

561 (1975) 134 CLR 338 at 364.

> in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained."

If, on the other hand, these powers are said to rest on the development of a more independent nation after 1901, that development, too, did not have the effect of destroying that distribution of powers. In the same case Gibbs J correctly said[562]:

> "The legislative power that is said to be incidental to the exercise by the Commonwealth of the functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution."

Dawson J agreed in *The Commonwealth v Tasmania*[563]. The points made by Barwick CJ and Gibbs J correspond with those made by Mason J in a passage quoted below from *Victoria v The Commonwealth and Hayden*[564]. They also correspond with those made in *Davis v The Commonwealth* by Wilson and Dawson JJ and Toohey J[565].

The problem of vagueness

508 A "nationhood power" of the width claimed by the defendants shares the vagueness of other constitutional "doctrines" which briefly flourished but were then rejected. One was the doctrine of the inalienable or essential functions of governments[566]. Others were doctrines resting on implications of representative government and representative democracy beyond those implications to be drawn from the text of the Constitution[567]. The vagueness of a "nationhood power" is demonstrated by the ease of a slide from asking whether activities are incidental to the existence of the Commonwealth, to asking whether they are geographically

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562 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 378. He quoted that statement in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 109.

563 (1983) 158 CLR 1 at 323.

564 (1975) 134 CLR 338 at 398: see [519] below.

565 (1988) 166 CLR 79 at 103-104 and 117-119 respectively.

566 Rejected in *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 274-276; [1959] HCA 47.

567 Rejected in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567.

nationwide, to asking whether they are activities which the central government has characterised as national, to asking whether they are activities which the central government has identified as being politic for it to engage in or regulate. In the course of this slide the central government is being permitted to characterise or define its way into legislative power of its own initiative.

Implication not necessary

509 If ultimately the defendants' arguments depend on constitutional implication, and if questions of necessity are relevant, it is not necessary to imply into the Constitution a term as broad as the defendants advocate. It is not necessary to do so in relation to sedition, by reason of s 51(vi) and s 61[568]. And it is less necessary, and, if it matters, very much less desirable, to imply a "nationhood power" of the kind advocated by the defendants in order to deal with economic problems. There are extensive express powers to do this – for example, s 51(i), (ii), (iii), (iv), (ix), (xii), (xiii), (xiv), (xvi), (xvii), (xix) (xx), (xxvii), (xxix), (xxxi) and (xxxvii), s 90, s 96 and s 115. The very specificity of these provisions negates the defendants' proposition that there is some wider power. The total of some parts is less than the total of all possible parts. Barwick CJ was, with respect, right to say in *Victoria v The Commonwealth and Hayden*[569]:

> "[I]t could not be denied that the economy of the nation is of national concern. But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget, whether it be in surplus or in deficit. The national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power."

Conclusion on implied legislative "nationhood power"

510 In summary, the wide power on which the defendants rely cannot be treated as an independent legislative power to be implied into the Constitution.

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568 See above at [498].

569 (1975) 134 CLR 338 at 362.

SECTION 61 EXECUTIVE POWER INCLUDES OR SUPPORTS A "NATIONHOOD POWER"

Mason J's test: "and which cannot otherwise be carried on for the benefit of the nation"

511 Although in oral argument the defendants exhibited some discomfort about it and made modifications to it, the defendants' initial written submissions contained a contention that the object of the Tax Bonus Act was one which the Commonwealth Government is "peculiarly" adapted to carry out. The object of the Act was a matter of national interest and concern[570]. But, more than that, it was said that the difficulties facing the Australian economy required a national response; and "the Commonwealth Government [was] the only Government with the resources, both financial and administrative, to provide it." These submissions rested on the contention that within, or perhaps alongside, s 61 there was a "nationhood power". The defendants based the s 61 "nationhood power" on what Mason J said in *Victoria v The Commonwealth and Hayden*. After referring to *Burns v Ransley* and *R v Sharkey*, Mason J said that "the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity"[571]. For that he cited what Dixon J said in *Australian Communist Party v The Commonwealth*[572]. He continued[573]:

> "So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the

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570 The defendants' written submissions cited *R v Hughes* (2000) 202 CLR 535 at 555 [39]; [2000] HCA 22, which at note 72 referred to Wilson and Dawson JJ in *Davis v The Commonwealth* (1988) 166 CLR 79 at 102-103. See below at [546].

571 (1975) 134 CLR 338 at 397. He repeated these points in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560; [1983] HCA 29.

572 (1951) 83 CLR 1 at 187-188.

573 (1975) 134 CLR 338 at 397. He then went on to give examples (the legislation creating the Commonwealth Scientific and Industrial Research Organisation, and inquiries, investigations and advocacy relating to public health). As South Australia submitted, these do not actually satisfy the requirements of the passage: it cannot be said that only the Commonwealth Government has the capacity to carry on the relevant activities. However, the legislation, the *Science and Research Act* 1951 (Cth), can probably be supported under various of the placita in s 51 of the Constitution, and the activities indicated, even if not backed by legislation, do not go beyond the fields marked out by s 51.

> existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."

Below, that last sentence will be referred to as "Mason J's test". The concluding 13 words are particularly important. Brennan J agreed with Mason J's test in *Davis v The Commonwealth*[574], and he referred to the last 13 words in saying that the criterion:

> "invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit."

And in *The Commonwealth v Tasmania*, Gibbs CJ[575] and Wilson J[576] assumed those 13 words to be part of the test.

Non-satisfaction of Mason J's test

512 The defendants relied on Mason J's test – but for the concluding 13 words, "and which cannot otherwise be carried on for the benefit of the nation." That was a significant act of jettison, but it was essential if the defendants' argument was not to be wrecked.

513 *Stimulating the economy by means other than the tax bonuses.* That is because a speedy stimulus equal in size to the tax bonuses could have been effectuated for the benefit of the nation in some other way. The Commonwealth acting alone could have given an equivalent stimulus in a different form under s 51(ii) (by granting tax rebates a little higher than the bonuses and paying them out in exactly the way the tax bonuses were paid out)[577]. The Commonwealth acting in cooperation with the States could have done it under s 96, by granting the money to the States on condition that the bonuses be paid pursuant to the formula which is set out in the Tax Bonus Act. The modification which the defendants wish to make to Mason J's test rests on a perception which contradicts, and indicates the incorrectness of, the defendants' submission that the Commonwealth Government "is the only Government with the resources, both

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574 (1988) 166 CLR 79 at 111.

575 (1983) 158 CLR 1 at 108.

576 (1983) 158 CLR 1 at 203.

577 Putting aside the individuals referred to in n 483 above.

financial and administrative, to provide it." This in turn undermines the defendants' contention that the Tax Bonus Act is supported by the need for national action in consequence of the insufficiency of the powers of the States to engage in the relevant enterprise. So framed, the question is one of insufficiency of *powers*. *Legally*, there is no bar to the States injecting monies equivalent to the total of the tax bonuses into the economy: their *powers* are "sufficient" to do this; they are not in the very constrained position that they are in, compared to the Commonwealth, in international affairs[578]. *Practically*, it may be true that the States in the year 2009 would have difficulty in raising sufficient monies for the purposes of a large fiscal injection, at least without considerable disruption to the rest of their activities: but the Special Case did not aver or deny this. It was for the defendants to demonstrate, if it were integral to their argument, that the States lack *practical* power to raise the monies by persuading the Commonwealth to engage in an act of cooperative federalism and supply them through s 96, or that they would have refused to cooperate with a Commonwealth plan to employ s 96. This the defendants did not do.

514 The defendants said that there was no material before the Court indicating that consideration was given to the employment of s 96, but said that to employ s 96 "sounds a bit silly" and was "a practical absurdity". New South Wales, on the other hand, said that to exclude the possibility of employing s 96 would be "absurd". The latter view is correct.

515 *Cooperative federalism as a response to the global financial crisis.* The Tax Bonus Act forms part of a stimulus package entitled "the Nation Building and Jobs Plan". But it is not the only stimulus package introduced by the government to deal with the global financial crisis. It is the third, following the Economic Security Strategy announced on 14 October 2008 and the Nation Building Package announced on 12 December 2008.

516 The Economic Security Strategy involved an increase in grants to first home owners building their own homes from $7,000 to $21,000. This was a fiscal stimulus worth $1.5 billion. It was administered, pursuant to an agreement between the Commonwealth and the States, by the States under State legislation. In the case of New South Wales, that legislation was enacted less than two months after 14 October 2008, namely on 10 December 2008[579].

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578 See *XYZ v The Commonwealth* (2006) 227 CLR 532 at 596-598 [184]-[188].

579 The agreement is annexed to the *A New Tax System (Commonwealth-State Financial Arrangements) Act* 1999 (Cth). The New South Wales legislation is the *First Home Owner Grant Act* 2000 (NSW), amended in 2008 to include ss 18-18B: the legislation has equivalents in all other States.

517 Further, the Nation Building and Jobs Plan involved various "public sector capital works and infrastructure projects", several of which "will be delivered in partnership with the States." The Treasurer's "Updated Economic and Fiscal Outlook", which described the Plan, said:

> "Several of these measures will be delivered in partnership with the States. It is vital that the additional funding being provided to the States flows into the economy quickly and is not used by the States to reduce their own spending effort in the relevant sectors. The Government will ensure that the States maintain their own expenditure through each State reporting to the Ministerial Council on Federal Financial Relations against benchmarks for their expenditure in each of the sectors. Where the Ministerial Council finds that a State fails to meet its expenditure benchmark, it will report that finding to COAG and consideration will be given to reallocating the funding to ensure that it flows into the economy as intended."

The statement also described a component of the stimulus package totalling $14.7 billion and entitled "Building the Education Revolution". The statement said:

> "The Building the Education Revolution program will be structured as an agreement with the States and Territories and the non-government sector to provide extra funding for capital infrastructure for schools, over and above all existing and planned investments."

The statement referred to other components of the Plan which involved agreements with the States and Territories, or the States, such as the acceleration of payments under the Trade Training Centres in Schools Program and under the Commonwealth Social Housing Initiative, and in repairing regional roads. It is true that these aspects of the stimulus do not operate immediately, whereas the payment of tax bonuses was to be made within two or three months of the statement, but, as already indicated, equivalent sums could have been paid by relying on s 51(ii)[580] or by conditional grants under s 96. As noted above, the States began implementing the grants made in relation to first home owners in less than two months.

518 *Conclusion.* Hence the concluding 13 words of Mason J's test are not satisfied. That is no doubt why the defendants chose to abandon them.

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580 Putting aside the individuals referred to in n 483 above.

Mason J's test: "peculiarly adapted to the government of a nation"

519 Apart from the concluding 13 words in Mason J's test which the defendants disavow, it is also necessary to consider some words in his test which they did not disavow: "enterprises and activities *peculiarly adapted to the government of a nation*" (emphasis added). The question: "What enterprises and activities are peculiarly adapted to the government of a nation?" cannot be answered without inquiring: "Which type of nation? Which specific nation? What form of government?" The nation in question being Australia, it is necessary to bear in mind, as South Australia submitted, that the Commonwealth Government, while in one sense a "national government", is only the central government in a federal nation. Certainly it is legally powerful. But it is not legally all-powerful. Throughout their submissions, the defendants complained that if their arguments were not accepted, the Commonwealth would be shrunken or crippled in its powers, and insufficiently equipped to deal with the problems of modern life. But an essential aspect of federalism is its concentration on the division and dilution of power. And not all federations confer the same powers on their central governments. Moreover it is inherent in the idea of a federation that the central government has less power than the central government of a non-federation. It would be fallacious, and antithetical to the Constitution which created the federation, with its central and State governments, to ascribe to the central government automatically all powers which, in a non-federal nation, might be thought to be inherent in the fact of nationhood or in the idea of national government. That is not a fallacy into which Mason J's reasoning fell. Soon after stating his test, he said[581]:

> "[T]he executive power to engage in activities appropriate to a national government, arising as it does from an implication drawn from the Constitution and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government."

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581 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398. In *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 109 Gibbs CJ said: "I completely agree with that statement."

520 Accordingly, even if Mason J's test is sound, to use Professor Winterton's phrase, "the contours of executive power generally follow those of legislative power."[582] The Australian federation rests on constitutional distinctions which are not to be discarded, "however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications."[583]

Davis v The Commonwealth

521 *Davis v The Commonwealth*[584] recognised that there is a limited "nationhood power" incidental to the creation of a new "nation" in 1901. It was a "nation" not wholly independent of the legislative power of the United Kingdom, of the power in relation to foreign policy of the United Kingdom Government, of Privy Council judicial decisions, and perhaps of United Kingdom executive decisions so far as the role of Governor-General was concerned. But it was nonetheless a nation capable of developing full independence, as it did, by reason of future events. Some of these events were external to Australia or depended on the cooperation of others (the Balfour Declaration 1926, the *Statute of Westminster* 1931 (Imp), the *Australia Acts* 1986). Some rested wholly in Australian hands (the partial abolition of appeals to the Privy Council in 1968[585] and 1975[586]). None of these changes of themselves increased federal power at the expense of the States. Nor did the "nationhood power" to the extent that it was recognised in *Davis v The Commonwealth*. It was a power of a very limited character, relating to symbolic aspects of nationhood, like the regulation of flags, emblems, national days and celebrations. The correctness of *Davis v The Commonwealth* was not challenged by the plaintiff or the interveners in this case. The limited "nationhood power" there recognised is very remote from the extensive power, claimed by the defendants although not referred to in the Constitution, to provide a national response to problems of national interest and concern.

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582 Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 30.

583 *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 115 per Kitto J.

584 (1988) 166 CLR 79.

585 *Privy Council (Limitation of Appeals) Act* 1968 (Cth).

586 *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

Competition with the powers of the States

522 The defendants also submitted:

> "[T]he fact that the fiscal stimulus provided by the Tax Bonus Act involves no competition with the powers of the States is consistent with a valid exercise of the nationhood power."

They cited the following observation by Deane J in *The Commonwealth v Tasmania*[587]:

> "Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours."

Now the present problem does not concern the "*mere* appropriation and payment of money to assist what are truly national endeavours." The present problem concerns something more: legislation to regulate the payment of money which has been appropriated. That legislation created, in s 5, a right to receive the payment. It also created, in s 7, an obligation to make it. Leaving aside s 94 of the Constitution, it may often be true that the appropriation and payment of money involves no competition with State authority. South Australia propounded examples of State laws which s 109 could render inoperative by reason of the Tax Bonus Act. One was a State law forbidding a person from receiving the tax bonus, which would be inconsistent with ss 5 and 7 of the Tax Bonus Act. Another was a State law providing that no interest was payable on monies which an overpaid recipient of the tax bonus was obliged to repay, which would be inconsistent with s 9. These examples are admittedly lacking in reality. But it is easy to imagine examples which are more likely in other fields in which an implied nationhood power might operate. Hence it does not follow that legislation regulating the payment of money involves no competition with State authority. If from the extensive but partial powers conferred on the central government it were to be inferred somehow that the central powers were not partial but complete, on the ground that regulating a "national economy" must be something peculiarly adapted to the government of a nation, then State legislation regulating economic activity within a State would often be vulnerable

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587 (1983) 158 CLR 1 at 252-253. A similar point was made by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94: "[T]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence."

under s 109. That is difficult to reconcile with the division of powers which the Constitution effects.

The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd

523 The defendants submitted that their arguments as to an executive "nationhood power" were also supported by two groups of passages in Isaacs J's judgment in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[588].

524 *The submission on the first passage.* The first passage comprised two sentences. The two sentences appear in the course of a discussion, within a single paragraph extending over three and a half pages, of a distinction drawn by Sir William Anson in these words[589]:

> "There are some things which are necessary to be done, and some rules necessary to be enforced, if a State is to be solvent and orderly at home and to maintain independence and dignity abroad. There are others which are not necessary but expedient to be done, and other rules in like manner to be observed, for the well-being of the community. The first of these represent the duty of the Executive par excellence, *the essential business of government*. The second represent the desire of the State to regulate human conduct so as not merely to secure the existence of the community, but to *promote its well-being*." (emphasis in Isaacs J's judgment)

Isaacs J applied that distinction to the question in the case before him – the validity of a contract between the Commonwealth Government and a company for the manufacturing of wool-tops. He said[590]:

> "In ordinary times of peace, the business of wool-top manufacture would prima facie fall within the second class formulated by Sir William Anson and be within executive power only when specially authorized by a competent law. But *in war time it may be – I do not need to say more –* that the emergency would so widen the application of the defence power *without intruding on the special jurisdiction of the States*, and would so enlarge the implied authority of the Executive in the exercise of the suprema potestas in the manner indicated in the authorities I have earlier quoted, as to bring the case within Anson's first class." (emphasis added)

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588 (1922) 31 CLR 421 at 446; [1922] HCA 62.

589 (1922) 31 CLR 421 at 445-446, quoting Anson, *The Law and Custom of the Constitution*, 3rd ed (1907), vol 2, Pt 1 at 145-146.

590 (1922) 31 CLR 421 at 446.

He then said that the contract was not necessarily outside s 61, which provides that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It is at this point that the two sentences relied on by the defendants appear:

> "It is another and I think a very striking instance of the impossibility of regarding the mere written words of the Constitution as affording the only test of validity. Those written words have to take into account the circumstances of the moment and the extent of constitutional development."

525 The defendants relied on the two sentences in question as capturing "the inherently fluid and evolving nature of executive power."

526 *The immateriality of the first passage.* But Isaacs J's two sentences are not material to the present problem. The "striking instance" to which he referred is an instance of how war time emergencies "may" widen "the *application* of the defence power" – not its terms. The word "may" indicates that this instance is tentatively put. It is also an instance that is remote from the present circumstances, which do not concern a war time emergency and do not attract the defence power. Further, Isaacs J was discussing wider powers based on war time emergencies which do not intrude "on the special jurisdiction of the States". From Isaacs J, that is a significant phrase. He was a party to the majority reasons in the *Engineers'* case, decided just over two years earlier[591], and, it would seem, in large part their author. Isaacs J's phrase is not one to be brushed aside as an outmoded relic of pre-1920 errors. To take what Isaacs J said about wide powers to deal with war time emergencies, which do not intrude upon the "special jurisdiction" of the States, as a warrant for recognising peace time powers, which may so intrude, is not valid reasoning.

527 *The second group of passages.* The second group of passages from Isaacs J's judgment on which the defendants relied included the following statement[592]:

> "It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and

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591 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

592 (1922) 31 CLR 421 at 438-439.

> act as a clog upon the legislative and executive departments rather than as an interpreter."

This statement was preceded by a discussion of, but was in fact not dealing with, the content of the executive powers referred to in s 61. It was part of a discussion in which Isaacs J had switched to a new subject – the doctrine of responsible government, which he saw as a common law doctrine. It was preceded by the following statement about that doctrine[593]:

> "In the development of the Federal system in the Dominions, the doctrine adapts itself to the differentiation of ministerial agents for different purposes in the same locality."

Isaacs J then cited cases "which illustrate the flexibility of the common law and its capacity to adapt its principles to the changing circumstances of the life of the community no less than to that of the individuals who compose it."[594]

528 It does not follow from the flexibility and adaptability of common law doctrines that the language of s 61 of the Constitution can change its meaning. And in any case what Isaacs J advocated was the application of "established" principles to new positions – not the invention of new principles.

Barton v The Commonwealth

529 *The defendants' submissions.* The next authority on which the defendants relied was *Barton v The Commonwealth*. In that case Mason J said[595]:

> "[The executive power of the Commonwealth under s 61] enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution."

The defendants submitted that the expression "spheres of responsibility" is a broad concept. Its breadth was demonstrated by the "spheres of responsibility … legislatively articulated" in s 10(2) of the *Reserve Bank Act* 1959 (Cth) ("the

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593 (1922) 31 CLR 421 at 438.

594 (1922) 31 CLR 421 at 438.

595 (1974) 131 CLR 477 at 498; [1974] HCA 20.

Reserve Bank Act")[596] and in the *Charter of Budget Honesty Act* 1998 (Cth) ("the Charter of Budget Honesty Act")[597].

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596 It provides:

> "It is the duty of the Reserve Bank Board, within the limits of its powers, to ensure that the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia and that the powers of the Bank under this Act and any other Act, other than the *Payment Systems (Regulation) Act* 1998, the *Payment Systems and Netting Act* 1998 and Part 7.3 of the *Corporations Act* 2001, are exercised in such a manner as, in the opinion of the Reserve Bank Board, will best contribute to:
>
> (a) the stability of the currency of Australia;
>
> (b) the maintenance of full employment in Australia; and
>
> (c) the economic prosperity and welfare of the people of Australia."

597 Schedule 1, cl 1 provides:

> "The Charter of Budget Honesty provides a framework for the conduct of Government fiscal policy. The purpose of the Charter is to improve fiscal policy outcomes. The Charter provides for this by requiring fiscal strategy to be based on principles of sound fiscal management and by facilitating public scrutiny of fiscal policy and performance."

Schedule 1, cl 2(1) provides:

> "The Government's fiscal strategy is to be based on the principles of sound fiscal management (see Part 3)."

In Pt 3, cl 5 provides:

> "(1) The principles of sound fiscal management are that the Government is to:
>
> (a) manage financial risks faced by the Commonwealth prudently, having regard to economic circumstances, including by maintaining Commonwealth general government debt at prudent levels; and
>
> (b) ensure that its fiscal policy contributes:
>
> (i) to achieving adequate national saving; and
>
> (ii) to moderating cyclical fluctuations in economic activity, as appropriate, taking account of the economic risks

(Footnote continues on next page)

530 The defendants submitted that if the legislature could, through the banking power in s 51(xiii) of the Constitution, confer on a statutory agency like the Reserve Bank the duty and the power to carry out the purposes listed in the Reserve Bank Act, it would be surprising if the Executive could not have the power to fulfil those purposes itself.

531 The defendants also submitted that recourse to the Reserve Bank Act and the Charter of Budget Honesty Act was a legitimate means of establishing the meaning of s 61. How could an Act enacted in 1959 and another Act enacted in 1998 cast light on s 61, which was approved in the Australian colonies in the 1890s and enacted at Westminster in 1900? The defendants submitted that this course was legitimated by what O'Connor J said in the *Jumbunna* case[598]. They also submitted that the words of s 61 had to be read as "subject to the understanding that in 1900 [executive power] was an evolving concept and it continued to evolve through time … because the Constitution was established for the government of the nation into the future, in good times and in bad."

532 There are several difficulties with the defendants' submissions.

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facing the nation and the impact of those risks on the Government's fiscal position; and

(c) pursue spending and taxing policies that are consistent with a reasonable degree of stability and predictability in the level of the tax burden; and

(d) maintain the integrity of the tax system; and

(e) ensure that its policy decisions have regard to their financial effects on future generations.

(2) The financial risks referred to in paragraph (1)(a) include risks such as:

(a) risks arising from excessive net debt; and

(b) commercial risks arising from ownership of public trading enterprises and public financial enterprises; and

(c) risks arising from erosion of the tax base; and

(d) risks arising from the management of assets and liabilities."

598 (1908) 6 CLR 309 at 367-368. See above at [405] and [413].

533 *"Spheres of responsibility".* First, the defendants' submission that Mason J, in the passage quoted from *Barton v The Commonwealth*, meant to use the expression "spheres of responsibility" in a broad sense – let alone in as broad a sense as the defendants went on to advocate – must be rejected. As noted earlier, he made it plain in *Victoria v The Commonwealth and Hayden*[599] that the "broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers" caused the "executive power to engage in activities appropriate to a national government" not to have a "wide operation", but to be "limited".

534 *Organic changes contrasted with revolutions.* Secondly, it may be accepted that some find merit in "organic" or "living tree"[600] or "living force"[601] approaches to the Constitution, free from the "dead hands" of the framers[602], insulated from the cryogenic effects of their language[603], and emancipated from enslavement to their mental world[604]. It may be assumed but not conceded that in particular instances those approaches, depending on what is meant by them, can have value. However, they do not work validly when applied to developments in governmental practices, whether "organic" or not, which led to legislation that was not within legislative power as originally understood. So to apply them would be to espouse a theory of continuous constitutional revolution, in which successive usurpations would be constantly seeking to legitimise themselves by claiming de jure status from their de facto position. Some of the defendants' submissions suggested that it is appropriate to take into account the individual mental attitudes of the framers. That is not correct. But even if it were, there is little doubt that it would have come as a grave shock to O'Connor J, who thought that the meaning of the Constitution in 1900 would

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599 (1975) 134 CLR 338 at 398, quoted above at [519].

600 Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?", (2000) 24 *Melbourne University Law Review* 1 at 6.

601 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 173 per Deane J; [1994] HCA 46.

602 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J.

603 *McGinty v Western Australia* (1996) 186 CLR 140 at 200 per Toohey J; Mason, "The Role of a Constitutional Court in a Federation – A Comparison of the Australian and the United States Experience", (1986) 16 *Federal Law Review* 1 at 23.

604 *Eastman v The Queen* (2000) 203 CLR 1 at 50 [155] per McHugh J; [2000] HCA 29.

remain its meaning thereafter[605], to be told, if the Reserve Bank Act and the Charter of Budget Honesty Act had been enacted in 1903, that these statutes demonstrated the existence of a power in the Commonwealth Executive and the Commonwealth legislature to manage the economy fiscally, even though three years earlier no express language to that effect had been inserted in s 51 or in any other part of the Constitution. If, as the defendants suggested, O'Connor J's principles could be used to that end, they would be profoundly damaging to the position of the States. For the wider the Commonwealth's power to manage the economy by legislative means the less is the power of the States to enact valid legislation to control economic problems as they perceive them. That is inverting O'Connor J's principles, not applying them.

535 *Risk of abuse.* Thirdly, if it were perceived that the legislation actually enacted by the Commonwealth were capable of being used as a means of establishing what the executive (or the legislative) power of the Commonwealth is, there would soon be an increase of appetite which grows with what it feeds on. Satiation of that appetite, if it were ever possible to achieve it, would only come at a point when the distribution of power which the thinking of O'Connor J and Mason J was astute to preserve had been annihilated[606]. That consequence points strongly against the validity of that approach to construction.

536 *Limited character of legislation relied on.* Fourthly, the Charter of Budget Honesty Act can scarcely support a wide constitutional power in the Commonwealth Executive: it gives rise to no enforceable obligations (Sched 1, cl 3(2)). Nor does the Reserve Bank Act, for it did not cut down the power of the States to conduct their own fiscal policies, ie their expenditure policies.

537 *"Evolving concept".* Finally, the defendants' submission that in 1900 "executive power" was an "evolving concept" appeared to rest on a silent appeal to recent authorities. Those authorities recognise a principle of construction that applies where a constitutional expression relates to doctrines "still evolving in 1900"[607] or "in a condition of continuing evolution"[608] or "in a state of

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605 See above at [423].

606 See above at [414] and [519].

607 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 629 [100] per Gummow J; [2000] HCA 11.

608 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

development"[609] or subject to "cross-currents and uncertainties"[610] or subject to "dynamism"[611]. In these circumstances, where it is possible to establish the meaning which skilled lawyers and other informed observers of the federation period considered a constitutional expression bore, or would reasonably have considered that it might bear in future, it might be right to apply that meaning[612]. In argument no detailed attempt was made to employ that approach here. Even if it had been applied, however, it would not have overcome the difficulty identified by Mason J – that expanded meanings of "executive power" to include a "nationhood power" cannot disturb "the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers" in the Constitution[613].

Jacobs and Brennan JJ: "the idea of Australia as a nation"

538 *The defendants' submissions.* The defendants relied on the following statement of Jacobs J in *Victoria v The Commonwealth and Hayden*[614]:

> "Primarily [the] exercise [of the prerogative] is limited to those areas which are expressly made the subject matters of Commonwealth legislative power. But it cannot be strictly limited to those subject matters."

That statement was followed by these further remarks[615]:

> "The prerogative is now exercisable by the Queen through the Governor-General acting on the advice of the Executive Council on all matters which are the concern of Australia as a nation. Within the words 'maintenance of this Constitution' appearing in s 61 lies the idea of

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609 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97 [34] per Gaudron and Gummow JJ; [2000] HCA 57.

610 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 501 [41] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

611 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

612 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 583-584 [153].

613 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398.

614 (1975) 134 CLR 338 at 405.

615 (1975) 134 CLR 338 at 405-406.

> Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States."

As the defendants pointed out, in *Davis v The Commonwealth*[616] Brennan J approved the entirety of that not wholly clear statement. Brennan J said[617]:

> "I respectfully agree with Jacobs J that the phrase 'maintenance of this Constitution' imports the idea of Australia as a nation. I would briefly state my reasons for holding that the function which that phrase assigns to the Executive Government relates not only to the institutions of government but more generally to the protection and advancement of the Australian nation."

Among the reasons he gave were the following[618]:

> "With great respect to those who hold an opposing view, the Constitution did not create a mere aggregation of colonies, redistributing powers between the government of the Commonwealth and the governments of the States. The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power."

There are four difficulties with the approach of Jacobs and Brennan JJ.

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616 (1988) 166 CLR 79 at 109-110.

617 (1988) 166 CLR 79 at 110.

618 (1988) 166 CLR 79 at 110. See *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 at 853 (1992) per O'Connor, Kennedy and Souter JJ. Cf *Lawrence v Texas* 539 US 558 at 589 (2003) per Scalia J (Rehnquist CJ and Thomas J concurring).

539 First, in one sense there was an "Australian nation" well before 1901. It was not "summoned … into existence" in 1901, any more than the Polish nation was summoned into existence in 1918. What happened in 1901 was that the political organisation of the people making up the existing nation was reorganised from six colonies to a single Commonwealth divided into six States, with governmental responsibilities being divided between those seven polities and any States or Territories created in future. Even if that reorganisation of itself involved "melding the history of the people", or "embracing their cultures", or "synthesizing their aspirations and their destinies", which may be doubted, the melding, the embrace and the synthesis are not legally relevant to the present problem.

540 *Definitional difficulties.* Secondly, defining what "matters … are the concern of Australia as a nation", what is involved in "the idea of Australia as a nation" and what is meant by "the protection and advancement of the Australian nation" are impossibly difficult tasks. Defining what matters are of "national concern" is as difficult as defining what matters are of "international concern" in relation to s 51(xxxix), for the concept is equally nebulous.

541 *Federal structure.* Thirdly, even if Brennan J is correct in saying that the Constitution did more than redistribute the powers of the former colonies between the new States and the new Commonwealth, it did do at least that. That explicit distribution cannot be undermined by the more general possibilities to which Brennan J pointed.

542 *Risk of aggrandisement.* Fourthly, Jacobs J's reasoning invites uncontrollable aggrandisement on the part of the Commonwealth. It is a truism that Commonwealth legislation cannot "recite" itself into validity. Similarly, if matters of "national concern" are those about which the Commonwealth wishes to hold discussions with the States, to encourage the States to enact uniform legislation, to enact legislation complementary with State legislation, or to develop any other national approach of a non-legislative kind, like conducting inquiries and taking initiatives, the Commonwealth is, merely by developing those desires, giving itself a basis on which to engage in executive conduct. It is thus elevating its conduct into validity. This suggests that Jacobs J's reasoning is wrong.

543 *Other arguments.* Some of the problems in the path of an implied legislative "nationhood power" also exist in relation to an executive "nationhood power". It is not necessary to repeat the exposition of these[619].

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619 See above at [507]-[509].

544 *Conclusion.* Professor Zines was correct to conclude[620]:

> "The concept of 'nationhood' is an extremely vague notion from which to draw principles and rules relating to governmental power where the conflicting notion of a 'federal state' is always present."

Correctness of Mason J's test

545 In *The Commonwealth v Tasmania* the majority assumed, but did not investigate, the correctness of Mason J's test in *Victoria v The Commonwealth and Hayden*[621]. Apart from the defendants' refusal to accept the last 13 words of Mason J's test, and apart from debates about its precise meaning, there was no criticism of it except from New South Wales. New South Wales submitted that Mason J's test did "little to avoid the uncertainty, and lack of textual foundation, of the notion of nationhood." It submitted:

> "There are few if any activities which cannot be carried on for the benefit of the nation by either the Commonwealth, the States, or the Commonwealth and States combined, except those activities precluded by constitutional guarantees."

And there have been other critics[622]. But even if Mason J's test were correct, the defendants have failed to establish that it has been satisfied[623]. In view of that fact, it is not necessary to consider whether the criticisms made of Mason J's test are valid.

R v Hughes

546 Finally, although the defendants relied on *R v Hughes*[624], what was said in that case is entirely against the defendants' submission. That is because six Justices expressed reluctance to accept that s 51(xxxix) authorised legislation in aid of any subject regarded by the Executive Government as of national

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620 Zines, *The High Court and the Constitution*, 5th ed (2008) at 417.

621 See above at [511].

622 For example, Winterton, "The Limits and Use of Executive Power by Government", (2003) 31 *Federal Law Review* 421 at 426-427. Further, the exceptions to the power recognised by Mason J tend to destroy the power itself.

623 See above at [512]-[518].

624 (2000) 202 CLR 535 at 555 [39] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

interest and concern. In doing so they approved what two Justices had said in *Davis v The Commonwealth*[625].

SECTION 61 EXECUTIVE POWER TO MANAGE NATIONAL ECONOMY

The broad argument: management of national economy in good times and bad

547 The defendants pointed to the many express powers of the Commonwealth having a potential impact on the economy and the effect of ss 88, 90, 92 and 99 in creating a free trade area. It was submitted that "[w]hen all the powers of the Commonwealth are aggregated, the conclusion is irresistible that the Commonwealth has constitutional responsibility for management of the national economy." It was not clear whether the argument went so far as to claim that the Commonwealth had a specific (although unexpressed) legislative power of this kind. It did seem to claim that the Commonwealth had an executive power to manage the national economy, and that legislation could be enacted under s 51(xxxix) incidentally to the execution of that power.

The narrow argument: national fiscal emergency

548 A narrow version of the defendants' submission was that there is a power in the Executive to deal with a national fiscal emergency only capable of being promptly and appropriately met out of the resources of the Commonwealth, both financial and administrative. They also said that legislation based on s 51(xxxix) could be enacted incidentally to the execution of that power.

The broad argument considered

549 Many of the specific arguments advanced to support the existence of a s 61 executive power to manage the national economy were employed by the defendants for other purposes and have already been rejected[626]. For example, although the Constitution confers extensive express powers on the Commonwealth to deal with economic problems, their very specificity suggests that no wider power exists[627], and any wider power would alter the federal structure radically by reason of s 109 of the Constitution[628]. There is no point in repeating those refutations. It is sufficient to deal specifically here only with the

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625 (1988) 166 CLR 79 at 102-103 per Wilson and Dawson JJ.

626 At [509]-[546].

627 See at [509].

628 See at [522].

narrow argument for a power to manage the economy in times of national fiscal emergency. It does not exist, and hence the wider power cannot exist either.

The narrow argument considered

550 *Non-establishment of factual pre-condition.* First, the alleged power to deal with a national fiscal emergency depends on satisfaction of a factual pre-condition. That pre-condition is that the emergency is only capable of being promptly and appropriately met by Commonwealth action. The pre-condition has not been satisfied. There were many ways in which the Commonwealth could have stimulated consumer spending by reducing taxation. While the defendants may be correct in saying that some of those methods could not have operated as quickly and effectively as a direct payment via the "tax bonuses", the Commonwealth did have power to act by paying genuine tax rebates by way of direct payment and by employing s 96 as speedily as it paid the "tax bonuses"[629].

551 *No constitutional warrant.* Secondly, there is no constitutional warrant for the supposed power to deal with a national fiscal emergency. There is no express warrant for it. The claim that it exists is entirely novel. Its existence is doubtful because of its potential for abuse. Let it be assumed that, whatever conclusions historians writing in the future may come to, the current economic crisis is as severe as the Special Case says. The truth is that the modern world is in part created by the way language is used. Modern linguistic usage suggests that the present age is one of "emergencies", "crises", "dangers" and "intense difficulties", of "scourges" and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, "wars" must be waged, "campaigns" conducted, "strategies" devised and "battles" fought. Often these problems are said to arise suddenly and unexpectedly. Sections of the public constantly demand urgent action to meet particular problems. The public is continually told that it is facing "decisive" junctures, "crucial" turning points and "critical" decisions. Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use. The great maxim of governments seeking to widen their constitutional powers would be: "Never allow a crisis to go to waste."

552 *Definitional difficulties.* Thirdly, it is far from clear what, for constitutional purposes, the meanings of the words "crises" and "emergencies" would be. It would be regrettable if the field were one in which the courts

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629 See [513] above.

deferred to, and declined to substitute their judgment for[630], the opinion of the Executive or the legislature. That would be to give an "unexaminable" power to the Executive, and history has shown, as Dixon J said, that it is often the Executive which engages in the unconstitutional supersession of democratic institutions[631]. On the other hand, if the courts do not defer to the Executive or the legislature, it would be difficult for the courts to assess what is within and what is beyond power. It is a difficulty which suggests that the power to deal with national fiscal emergencies does not exist.

SECTION 51(xxxix) READ WITH SECTION 61 INDEPENDENTLY OF A "NATIONHOOD POWER" OR POWER TO MANAGE THE NATIONAL ECONOMY

The defendants' argument

553 *Outline.* The defendants advanced a wider argument which did not depend in terms on any "nationhood power" or "power to manage the national economy"[632]. Nor did it depend on the "power" to appropriate in ss 81 and 83, which, according to the last group of the defendants' arguments to be considered below[633], carries with it a power to authorise the Executive to spend independently of s 61. It did assume, however, that Parliament could appropriate for any purpose whatever by an appropriation law. The argument was put thus:

> "[I]f the Constitution is not to contradict itself and if Parliament's power of appropriation for national purposes or for those broad purposes of the polity is not to be stultified, then the limited authority that Parliament gives to the Executive in an appropriation must be capable of being exercised by the Executive, that is … the executive power of the Commonwealth must extend to expending money that is lawfully appropriated."

The argument was that when the Parliament appropriates money, s 61 authorises its expenditure. Hence, the defendants submitted, the Tax Bonus Act was validly enacted under s 51(xxxix) as incidental to the execution of that executive power. The defendants submitted that there were three ways to this destination, despite saying that they were overlapping and that "they may [constitute] the one way in the end".

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630 See *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 125.

631 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188.

632 See above at [511]-[552].

633 At [571]-[612].

554 *Scope of s 61: broad connection with legislative powers.* The first way was that the scope of the executive power of the Commonwealth, considered as a "unitary concept" independently of its extension in s 61, "is one that in some way conforms to or is moulded to the scope of the Commonwealth's legislative powers." The defendants submitted that the connection between s 61 and those legislative powers was not close but broad – how broad, they said, need not be examined in this case. They relied on what Isaacs J said in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[634]. The defendants submitted that if there is an appropriation, the scope of the executive power to spend was coextensive with the scope of the legislative power to appropriate, and that this proposition was entirely consistent with the scope of the Commonwealth's executive power in an area being no narrower than the scope of Commonwealth legislative power in that area.

555 *Scope of s 61: taking action authorised by legislature.* The second way was that s 61, in extending expressly to the execution of the laws of the Commonwealth, must be taken to extend to taking action which the Commonwealth Parliament authorises to be taken. That is, where the Parliament has made an appropriation, the Executive has power to spend the money appropriated. The defendants relied on Williams J's observation in *Australian Communist Party v The Commonwealth*[635] that the execution and maintenance of the laws of the Commonwealth "must mean the doing and the protection and safeguarding of something authorized by some law of the Commonwealth made under the Constitution." The defendants submitted that withdrawing and expending money "pursuant to an appropriation Act involves the doing of something authorised by a law of the Commonwealth and, accordingly, falls within the executive power of the Commonwealth under s 61 of the Constitution."

556 *Scope of s 61: prerogative power to determine whether and how to spend appropriated monies.* The third way centred on the process by which the Executive expended money. The process began with its request, through a message from the Governor-General recommending the purpose of the appropriation pursuant to s 56 of the Constitution, continued with appropriation under s 81, and was followed by expenditure by the Executive of the monies appropriated by the legislation. The defendants relied on the following words of Jacobs J in *Victoria v The Commonwealth and Hayden*[636]:

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634 (1922) 31 CLR 421 at 437ff. See [524] above.

635 (1951) 83 CLR 1 at 230, cited in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464; [1997] HCA 36.

636 (1975) 134 CLR 338 at 404-405.

> "When moneys are voted to the Queen by Parliament for the purposes declared by the Parliament, it falls within the prerogative to determine whether or not those moneys will be expended for that purpose and how, within the expression of the purpose to which the moneys have been appropriated, the expenditure will be made."

557 *Section 51(xxxix).* The defendants then submitted that a statute like the Tax Bonus Act, which, by s 7, created a duty on a Commonwealth officer to pay the money appropriated in a particular way, was incidental to the execution of the power vested in the Executive by s 61 to spend it. They invoked some further words of Jacobs J in *Victoria v The Commonwealth and Hayden*[637]:

> "The power to legislate in respect of matters falling within the prerogative arises under s 51(xxxix) in so far as it does not arise under any other particular head of power. … The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament."

The defendants also submitted that there was "an almost identical statement" by Mason CJ, Brennan, Deane, Dawson and Toohey JJ in *Brown v West*[638]: "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute." These passages, of course, say nothing about what the precise scope of the executive power actually is.

558 *No excessive regulation.* The defendants submitted that imposing a duty by s 7 of the Tax Bonus Act, creating an entitlement in recipients by s 5, and authorising recovery of overpayments by s 8, fell well short of the regulation of pharmacists' conduct which invalidated the legislation in *Attorney-General (Vict) v The Commonwealth*[639] and well short of the "activities" that Mason J considered fell outside s 61 read with s 51(xxxix) in *Victoria v The Commonwealth and Hayden*[640]. The defendants said that it was not necessary to decide what further provisions would or would not fall within s 51(xxxix). These emollient observations tend to cloak the very radical nature of the core submission.

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637 (1975) 134 CLR 338 at 406.

638 (1990) 169 CLR 195 at 202; [1990] HCA 7.

639 (1945) 71 CLR 237.

640 (1975) 134 CLR 338 at 396.

The argument of New South Wales

559 *The issue is legislation.* New South Wales pointed out that the Court was not asked to adjudicate on the lawfulness of the Commonwealth merely making grants to members of the public, unaffected by the creation of any rights in the members of the public to receive the grants or duties on any officer to make them. It noted that these proceedings, unlike those in *Victoria v The Commonwealth and Hayden*, did not involve the mere invocation of the executive power. They involved the enactment of legislation, the Tax Bonus Act – allegedly as an incident to the execution of that power. While it was unlikely that there would be any State legislation which was inconsistent with the Tax Bonus Act and thereby rendered inoperative by s 109 of the Constitution, invocation of the reasoning proffered by the defendants in other fields might create widespread inconsistency between State and Commonwealth statutes. New South Wales cited Latham CJ's words[641]: "The grant of money is one thing: the creation of a right which will prevail over State laws is an entirely different thing." The complaint of New South Wales was that if the defendants' broad view of executive power under s 61 and the broad view of s 51(xxxix) were adopted, the effect of s 109 would in many fields be injurious to the validity of State legislation. Even if the executive power to draw money from the Consolidated Revenue Fund under an appropriation pursuant to ss 81 and 83 and to spend it under s 61 were broad, it was not simply "incidental" to the execution of that non-coercive power to enact legislation creating rights and duties in relation to the expenditure enforceable by legal action.

560 *Distinction between expenditure of money and creation of rights and obligations.* New South Wales accepted that in these particular proceedings the problem was a narrow one in the sense that the right to be paid conferred by s 5 and the duty to pay imposed by s 7 were not in substance very different from the actual payments, which the defendants were very eager to make. New South Wales agreed with the defendants that there was no regulation, of the kind which was found fatal to the legislation in *Attorney-General (Vict) v The Commonwealth*[642]. No condition was imposed that the payments be applied in a particular way, let alone a condition breach of which would attract legal sanctions. But, said New South Wales, that did not matter: expenditure of money by itself was one thing, control of that expenditure by the creation of legal rights and coercive obligations was another, and there was no dividing line between the "richly encrusted series of rights and criminal obligations, as well as civil obligations," created by legislation like the *Pharmaceutical Benefits Act* and the much more modest framework of the Tax Bonus Act.

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641 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 259-260.

642 (1945) 71 CLR 237.

561 *Narrowness of "incidental" in s 51(xxxix).* New South Wales submitted that a merely declaratory or aspirational law like the Charter of Budget Honesty Act could be within s 51(xxxix) because Sched 1, cl 3(2) specifically provided that it did not create enforceable rights or duties. Legislation creating rights and obligations in relation to spending is not "incidental" to that spending, but something additional and outside the quality of being "incidental".

562 *Non-paramountcy of Commonwealth executive power over State executive power.* New South Wales said that the crux of its submission was that just as executive power was subservient to legislative power in the United Kingdom and in the Australian colonies before 1901, after 1901 the effect of s 51 and other sections was to ensure not only that State executive power remained subservient to State legislative power, and Commonwealth executive power remained subservient to Commonwealth legislative power, but that Commonwealth executive power could not override State legislative or executive power. State and Commonwealth legislative power was allocated in a particular way by ss 106-109 of the Constitution. But there was no equivalent for conflicts between Commonwealth executive power and State executive power to the function s 109 played in relation to conflicts between Commonwealth legislative power and State legislative power. To treat s 51(xxxix) in conjunction with s 61 as justifying the Tax Bonus Act would be to render Commonwealth executive power paramount over State executive power in the absence of any constitutional provision justifying this course for executive power equivalent to s 109 for legislative power.

The key question

563 Contrary to the submissions of New South Wales, let it be assumed, without deciding, that the States do not have legislative or executive powers that affect the powers of the Executive Government of the Commonwealth. That leaves open the question of what those latter powers are.

Width of s 61

564 There is a fallacy in the defendants' submission that there is a wide executive power which is capable of resulting in the enactment of valid Commonwealth legislation pursuant to s 51(xxxix) of a kind more extensive than that which could have been enacted under s 51(i)-(xxxviii). The fallacy lies in the excessive width it attributes to the executive power.

565 *"Extends".* The language of s 61 suggests that its scope is not particularly broad. The executive power "extends" to the execution and maintenance of the Constitution, and of the laws of the Commonwealth. The verb "extends" implies that but for the extension, the meaning of "executive power" would be narrower.

566 *No power to legislate on subjects of national interest and concern.* The defendants' submission at its most extreme – as seen in its advocacy particularly of the second and third ways to its destination[643] – was that s 51(xxxix) authorises the Parliament to legislate in aid of any subject which it wished to. They submitted, it will be remembered, that Parliament could appropriate for any purpose whatever by an appropriation law, that it was within the executive power of the Commonwealth to spend the appropriated funds for that purpose, and that legislation could be enacted under s 51(xxxix) incidentally to that power[644].

567 *Section 61 limited by legislative competence of Commonwealth.* Gibbs J was, with respect, correct to say[645]:

> "According to s 61 of the Constitution, the executive power of the Commonwealth 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth."

Isaacs J was of a similar opinion[646], as was Barwick CJ[647]. And, as has been seen, Mason J, too, said that the executive power of the Commonwealth is a power which enables, and does no more than enable, "the Crown to undertake all

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643 At [553]-[570] and [571]-[612].

644 See above at [553].

645 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 378-379 per Gibbs J.

646 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441 and 443 (contract entered by the Commonwealth Executive beyond power in part because it related to intrastate trade). See also *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 9 per Knox CJ, Gavan Duffy, Rich and Starke JJ; [1926] HCA 39 ("There is no power which enables the Parliament or the Executive Government to set up manufacturing or engineering businesses for general commercial purposes"); and *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 320-322 per Evatt J; [1940] HCA 13 (subject to statute, executive prerogatives as distinct from preferences, immunities and exceptions enjoyed at common law by the Executive and not the subject, and as distinct from prerogatives in the nature of property, are vested in the Executives of the States if the subject-matter to which they relate is outside ss 51 and 52).

647 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362.

executive action which is appropriate to the position of the Commonwealth under the Constitution and *to the spheres of responsibility vested in it by the Constitution*" (emphasis added)[648]. The Crown inherited the executive power as exercisable in the United Kingdom and in the Australian colonies in 1900, but subject to a qualification deriving from the federal nature of the constitutional compact. Since the creation of a right to receive and a duty to pay tax bonuses is a matter falling outside the legislative competence or spheres of responsibility of the Commonwealth[649], it falls outside s 61 also.

568 *Mason J's additional propositions.* It is true that Mason J put additional propositions. One was that among the powers conferred by s 61 were those effected by "the character and status of the Commonwealth as a national government."[650] Another was that from s 51(xxxix) and s 61 could be deduced "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."[651] As was stated above[652], it is not necessary in these proceedings to decide on the correctness of these latter propositions, since the Tax Bonus Act did not satisfy these criteria.

569 *Consequences of the defendants' approach for federalism makes it improbable.* If the executive power of the Commonwealth could be used to make payments independently of s 96 in relation to matters outside the legislative competence of the Commonwealth, there would exist a means of bypassing the restrictions on that legislative power in ss 51 and 52, and bypassing the need to ensure, in effect, State consent to s 96 payments. The Commonwealth could make conditional grants to or contracts with corporations or non-corporations inducing them by douceurs to do what it could not compel them to do by legislation. That would read the Constitution in such a fashion as to be internally inconsistent. The question is not whether State legislation can affect the capacities of the Commonwealth. It is rather a question of assessing what the boundaries of Commonwealth capacities are.

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648 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498: see [529] above. See also *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 396 and 398.

649 See [603]-[605] below.

650 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 396.

651 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397, quoted above at [511], and accepted by Brennan J in *Davis v The Commonwealth* (1988) 166 CLR 79 at 111.

652 See [512]-[518] and [545].

570 *Conclusion.* Even assuming that Parliament could appropriate for any purpose whatever by an appropriation law, including the purpose of paying tax bonuses, it was not within the power of the Executive under s 61 to expend the appropriated funds to pay tax bonuses.

SECTION 51(xxxix) READ WITH SECTION 81

The defendants' arguments: outline

571 The final category of arguments advanced by the defendants proceeded on the assumption that there had been a valid appropriation within the meaning of ss 81 and 83[653].

572 *Section 81 as a grant of legislative "power".* The defendants argued that s 81 is a grant of legislative "power" to the Commonwealth Parliament to make laws appropriating the Consolidated Revenue Fund for the "purposes of the Commonwealth". The defendants' argument was that under s 81 the Parliament had a power to earmark or segregate funds for a purpose and a power to authorise the Executive to spend those funds. These powers, together, constituted the "power of appropriation" in s 81. If the power to authorise expenditure by the Executive were exercised, the authority so conferred on the Executive to spend what had been appropriated was independent of s 61.

573 *The "purposes of the Commonwealth".* The only limit on this power of expenditure which accompanied the "power" to appropriate was the requirement that the appropriation be for the "purposes of the Commonwealth". It was submitted that that expression had one of two meanings. The first meaning was "the purposes of the Commonwealth as a nation as determined by the Parliament itself acting under section 81". On the second, and alternative, meaning, "the expression extends to such purposes in the sense of goals or objectives as the Commonwealth as a polity in fact has and pursues from time to time in the exercise of its legislative and executive powers."

574 *Section 51(xxxix).* The defendants then submitted that s 51(xxxix) is a source of power incidental to the execution of the power of appropriation vested in the Parliament by s 81 to enact legislation imposing an obligation on the Executive to expend money appropriated under s 81 "and, if needs be, a correlative entitlement on a recipient to receive such money."

575 *Avoidance of s 61 problems.* The central point in the defendants' argument was that the executive power to spend was coterminous with the

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653 These provisions are set out at [161]-[162] and [279]-[280].

legislative power to appropriate: if there were a power to appropriate, there was power to spend within the purpose for which the appropriation was made, and s 51(xxxix) supported legislation incidental to the appropriation. The advantage of this argument over arguments relying on s 61 was that it endeavoured to avoid any adverse consequences for the defendants of any possibly narrow view of what the executive power was under s 61.

576 *Width of submission.* This is a very wide submission. The Executive – in the sense of the Cabinet – almost always controls the House of Representatives, and, while it does not always control the Senate, after appropriate payments of Danegeld at the behest of Senators in minor parties and independent Senators, it usually gets its way in that place to a substantial extent. The Executive's power, through its control of the legislature, to raise taxes pursuant to s 51(ii) is not limited to taxes only to be spent on purposes within other heads of legislative power. The Executive initiates appropriation and controls the legislature which grants appropriation. If appropriation can be for any purpose thought fit by the legislature, which rarely has a will different from that of the Executive, if an appropriation confers power on the Executive to spend on those purposes, and if s 51(xxxix) confers power to control that expenditure by legislation, the legislative restrictions on the Commonwealth to be found in ss 51 and 52 are not merely outflanked but destroyed. Thus the defendants' submission means that if the Executive thought it was for the purposes of the Commonwealth to pay pensions, it could procure the legislature to appropriate money for that purpose. That would give the Executive power to spend the money on pensions. And s 51(xxxix) would then give the legislature power to impose conditions in relation to the payments of pensions. On the defendants' submission in its application to pensions, there would have been no need for s 51(xxiii) and (xxiiiA).

577 On what basis did the defendants seek to justify this very wide submission?

The defendants' arguments: authorities

578 *Attorney-General (Vict) v The Commonwealth.* The defendants contended that the proposition that s 81 contained "no substantive grant of power at all" had been advanced by the plaintiff in *Attorney-General (Vict) v The Commonwealth*[654], denied by the Commonwealth in that case[655], rejected by

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654 (1945) 71 CLR 237 at 240-241.

655 (1945) 71 CLR 237 at 242.

three judges – Starke J[656], Dixon J[657] and McTiernan J[658] – and perhaps rejected also by Latham CJ[659]. However, it is far from clear that the Court understood the plaintiff as having argued that s 81 contained "no substantive grant of power at all" or that it dealt specifically with that argument. Further, whatever was said on the point was dicta: the actual ground of decision was that the legislation fell outside s 51(xxxix) because regulation of the activities of chemists was not incidental to any power to appropriate, whatever its nature and scope.

579 More significantly, it is not true to say that Starke J supported the defendants' position. He said that the "Commonwealth power of appropriation"[660] did not authorise the Commonwealth appropriating its revenues for any purpose whatsoever "without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government"[661]. He did not say that legislation could be validly enacted under s 51(xxxix) as an incident to an appropriation under s 81.

580 Latham CJ said the legislation could be enacted under s 51(xxxix) as an incident to an appropriation under s 81, but only of a limited kind[662]:

> "[Section] 51(xxxix) authorizes the making of laws for the purpose of securing that public money is applied to the purposes for which it is appropriated and not otherwise. But s 51(xxxix), applied to the power to make laws for the appropriation of money, though it authorizes legislation with respect to matters incidental to the expenditure of the money, does not authorize legislation which is incidental only to the purposes for which the money appropriated is to be expended, unless there is power to make laws for such purposes."

581 Dixon J (Rich J concurring) certainly said that s 81 conferred a power of appropriation. But he declined to hold, as distinct from assume, that it gave a

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656 (1945) 71 CLR 237 at 265-266.

657 (1945) 71 CLR 237 at 269.

658 (1945) 71 CLR 237 at 273.

659 (1945) 71 CLR 237 at 253-256.

660 (1945) 71 CLR 237 at 265.

661 (1945) 71 CLR 237 at 266, citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 523-527.

662 (1945) 71 CLR 237 at 250.

"power to spend money … independent of the limitations which affect the other powers of the Commonwealth"[663]. And he, like Starke J, did not say that legislation could be validly enacted under s 51(xxxix) as an incident to an appropriation under s 81.

582 *Australian Woollen Mills Pty Ltd v The Commonwealth.* The next case on which the defendants relied was *Australian Woollen Mills Pty Ltd v The Commonwealth*. There Dixon CJ, Williams, Webb, Fullagar and Kitto JJ said[664]:

> "Section 81 of the Constitution authorizes the appropriation of the revenues and moneys of the Commonwealth for the purposes of the Commonwealth."

However, depending on the meaning of "appropriation", that is a proposition as compatible with the idea that s 81 empowers the segregation of money from the Consolidated Revenue Fund (but not the authorisation of expenditure) as it is with the idea that s 81 empowers not only the segregation of money but also the authorisation of expenditure.

583 *Victoria v The Commonwealth and Hayden.* The defendants then referred to the following sentences in the argument of Victoria in *Victoria v The Commonwealth and Hayden*[665]:

> "The power to appropriate moneys is not found in s 81 of the Constitution. It arises as an incident of the other powers conferred by the Constitution and is also incidental to the execution of those powers."

The defendants submitted that the contention in the first sentence was rejected by Barwick CJ[666], McTiernan J[667], Gibbs J[668], Mason J[669], Jacobs J[670] and

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663 (1945) 71 CLR 237 at 269.

664 (1954) 92 CLR 424 at 454; [1954] HCA 20.

665 (1975) 134 CLR 338 at 340.

666 (1975) 134 CLR 338 at 354.

667 (1975) 134 CLR 338 at 367.

668 (1975) 134 CLR 338 at 371.

669 (1975) 134 CLR 338 at 392.

670 (1975) 134 CLR 338 at 410.

Murphy J[671], whilst Stephen J did not decide the point. Whether or not all the passages relied on support the defendants' submission, the key weakness in that submission is that even if the proposition advocated by Victoria in *Victoria v The Commonwealth and Hayden* was rejected by the Court in that case, the proposition is not identical with the contrary of the defendants' contention here. The defendants' contention here is that s 51(xxxix) is a source of power to enact legislation imposing an obligation on the Executive to expend money appropriated under s 81. The proposition advocated by Victoria was that s 81 assumes the existence of a legislative power to appropriate conferred by the Constitution in other provisions such as ss 51, 52 and 122[672]. Rejection of Victoria's proposition did not entail acceptance of the defendants' present contention.

The defendants' arguments: the Constitutional Commission

584 The defendants then relied on passages in the *Final Report of the Constitutional Commission* in 1988[673]. However, while the passages relied on support the view that a law is validly made pursuant to s 83 if the appropriation made by it is authorised by s 81, they do not support the view that an appropriation not only earmarks funds but also confers authority on the Executive to expend those funds, or the view that a law regulating that expenditure is valid in the absence of any constitutional power other than that found in s 51(xxxix). Like the passages in the three authorities to which the defendants referred, they were not directed to the present question. The Commission recommended only that s 81 "be amended to allow the appropriation of the Consolidated Revenue Fund for any purpose that the Parliament thinks fit"[674]. The Commission did so because it saw the present operation of s 81 as affected by uncertainty. It was troubled by difficulties arising from challenges to appropriation Acts[675]. It pointed to legislative practice conformable with a wide

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671 (1975) 134 CLR 338 at 418.

672 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 340, citing *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 454.

673 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 831 and 834, and particularly at 832 [11.299].

674 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 831 [11.296].

675 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.311]:

> "To leave the necessarily wide statements of purpose in appropriation Acts open to challenge could bring the operations of government to a halt. Again,

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view of s 81[676]. It stated: "Adoption of our recommendation is unlikely to have any major consequences for the distribution of powers between the Commonwealth and the States."[677] These are all points which, as the recommendation itself and the terms in which the key issue was stated[678] suggest, go to the meaning of "purposes of the Commonwealth", not to the question of how any legislation in addition to the appropriation Act itself can be validly enacted. That is supported by the following passage[679]:

> "We would add that the effect of an appropriation is financial, not regulative, and neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except that the declared willingness of the Parliament that public moneys should be applied, and funds appropriated, for the purpose is a legal condition of the transaction."

> to treat the purposes stated in appropriation Acts (when often the details of expenditure have not been worked out) as supportable only if answering some one or more of the legislative powers of the Commonwealth would leave the courts with a difficult, if not impossible, task. How would the not fully articulated purpose be proved? What evidence would be admissible? What material supplementary to the Act could be considered by the Court?"

676 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.312]:

> "[T]he Parliament has for many years made appropriations to persons or bodies for purposes having little or any apparent connection with the powers or functions of the Commonwealth. If, as some of the Justices have said, the extent of the appropriation power is to be measured by that of the legislative power, many of such payments have been illegally made and likely to be so made in the future."

677 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.315].

678 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 832 [11.300].

679 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.314]. The Commission cited *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-225; [1924] HCA 5 and *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 392-393.

That passage is based on a part of Mason J's judgment in *Victoria v The Commonwealth and Hayden*[680] in which his Honour was discussing the meaning of "for the purposes of the Commonwealth".

The defendants' arguments: "purposes of the Commonwealth": seven factors

585 The defendants then turned to a consideration of the meaning of "purposes of the Commonwealth" in s 81. They submitted that, pursuant to O'Connor J's statement in the *Jumbunna* case[681], the wider of the two meanings they postulated should be preferred. They also advanced seven other factors to that end. The first and second assumed that s 81 was to be read as a grant of power to authorise expenditure. The last five factors were also said to point to the correctness of that assumption.

586 *Section 81 read with ss 51 and 52.* The first factor was: to read the expression "Commonwealth" in s 81 as meaning "nation" was to read it in the same way as the expression "Commonwealth" is used in ss 51 and 52, as part of the phrase "power to make laws for the peace, order, and good government of the Commonwealth".

587 *Section 81 read with s 51(xxxi).* The second factor was that if "purposes of the Commonwealth" meant only purposes otherwise within Commonwealth legislative power, the expression was inapt. Instead one would have expected a formula like that used in s 51(xxxi) – "for any purpose in respect of which the Parliament has power to make laws".

588 *Power to tax correlative with power to appropriate.* The third factor was that the power to tax was correlative with the power to appropriate[682]. The power to tax involved the collection of money and the placing of it into the Consolidated Revenue Fund pursuant to the opening words of s 81. The power to appropriate involved approving the taking of money out of the Consolidated Revenue Fund and the authorising of its expenditure. The power to tax was not limited to purposes that could be pursued by the Commonwealth Parliament[683].

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680 (1975) 134 CLR 338 at 392-393.

681 See above at [405] and [413].

682 For this *South Australia v The Commonwealth* (1942) 65 CLR 373 at 414-415; [1942] HCA 14 was cited.

683 For this the defendants relied on *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 569 per Mason CJ, Deane, Toohey and Gaudron JJ ("If a law, on its face, is one with respect to taxation, the law does not cease to have that character simply because Parliament seeks to

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It was submitted that in those circumstances it would be "somewhat odd and asymmetrical to say that the power to spend is limited as to purpose." It was submitted that the oddness and asymmetry were even greater when it was remembered that fiscal policy as a means of managing a national economy can only be implemented in two ways, adjusting taxation and adjusting spending, and it would be "odd, not inconceivable, but odd and unfortunate, if one of the two fiscal hands was tied behind Parliament's back."

589 *Difficulties created by constitutional limit on power of appropriation.* The fourth factor was that if there were a constitutional limit on the power of appropriation, it would create difficulties both for the Court and for Parliament. It would create "extraordinary practical difficulties of judicial determination" in adjudicating on the constitutional limit[684]. It would cause Parliament constantly to be "looking over its shoulder and being fearful of the long-term consequences" if it made an appropriation outside power[685].

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achieve, by its enactment, a purpose not within Commonwealth legislative power") and 572; [1993] HCA 12.

684 They relied on *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 394, where Mason J said:

> "It has been the practice, born of practical necessity, in this country and in the United Kingdom, to give but a short description of the particular items dealt with in an Appropriation Act. No other course is feasible because in many respects the items of expenditure have not been thought through and elaborated in detail. How is the short description of an item contained in the schedule to the Act to serve as the fulcrum of constitutionality? If it fails to throw sufficient illumination on the area of doubt, is the Court to have regard to supplementary material, as it has been invited to do in this case, and if so, to what material will it have recourse? These questions, which to my mind admit of no satisfactory solution, illustrate the problems inherent in the narrow construction offered by the plaintiffs and the hazards attending the processes of Parliament if that construction is accepted."

They also relied on Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 834 [11.311], quoted above at [584] n 675.

685 They relied on *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 418, where Murphy J said a narrow construction of s 81 would have a "chilling effect … on governmental and parliamentary initiatives", and would be a formula for "stultifying government". They also relied on Sir Robert Garran's views to similar effect, cited by Murphy J, in Australia, *Report of the Royal Commission on Child Endowment or Family Allowances*, (1929) at 10, pars 5 and 6; Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 1 at 69 and 71.

590 *Drafting changes.* The fifth factor related to the drafting history of s 81. In the original drafts the expression "the public service of the Commonwealth" was employed; that was an expression used in colonial constitutions in a broad way; and the ultimate change to "the purposes of the Commonwealth" was not meant to have a narrowing effect.

591 *Broad view of s 81 has no impact on States.* The sixth factor was that reading s 81 broadly had no practical impact on the exercise of State legislative power, because it would be unlikely that any State Act could be enacted which would be inconsistent with appropriation legislation under s 109 of the Constitution. Nor would it have any other impact on the States. It would have no impact via s 94, partly because the Commonwealth had for a long time taken care to ensure that there was no surplus revenue which Parliament might pay to the States and partly because, even if there were surplus revenue, there was no duty on Parliament to pay it to the States. In response to a submission by New South Wales suggesting that a wide view of s 81 would undermine the ability of the Commonwealth to make conditional grants to the States under s 96, the defendants submitted that since s 96 grants could be made on conditions not limited to purposes otherwise within Commonwealth power, s 96 was in fact consistent with a wide construction of s 81.

592 *Legislative practice.* Seventhly, it was relevant to the construction of s 81 to consider longstanding legislative practice. It had been the practice of the Executive and the legislature since 1901, although at times the practice had been controversial, to act on the wide view of s 81[686]. That is, the defendants submitted that much legislation assumed both that s 81 contained an independent grant of legislative power and that it could be exercised for the purposes of the nation as determined by Parliament itself under s 81. The defendants submitted that the States had always had standing to challenge the relevant legislation, but had never chosen to do so. The defendants denied that the argument involved advancing a particular construction on the ground that the Commonwealth had always acted on that construction, but said, in a further instance of reliance on

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686 The defendants gave the following examples of legislation containing appropriations where, it was said, there were no specific heads of legislative power that comprehensively corresponded to the purposes of the appropriation: *Trans-Pacific Flight Appropriation Act* 1934 (Cth); *Wool Publicity and Research Act* 1936 (Cth); *National Fitness Act* 1941 (Cth); *Home Deposit Assistance Act* 1982 (Cth); *Farm Household Support Act* 1992 (Cth); *Dairy Industry Adjustment Act* 2000 (Cth); and *Nation-building Funds Act* 2008 (Cth). In argument reference was also made to the *Special Annuity Act* 1934 (Cth). These are discussed below at [598] n 693.

what O'Connor J said in the *Jumbunna* case[687], that since the Constitution was a document drawn up for the practical working of government through the centuries, and the practical working of government in the last century had proceeded beneficially on a wide view of s 81, it would be surprising if the Constitution were to be construed as forbidding the construction on which that practical and beneficial working rested.

593 The defendants accepted that "the Commonwealth has no specific power to manage the national economy"[688], but submitted that this was nevertheless what it had increasingly been doing over the last century. Thus the purposes stated in s 10(2) of the Reserve Bank Act were purposes of the Commonwealth, even before 1959.

The defendants' seven factors considered

594 *The first and second arguments put aside.* The first and second arguments assume that s 81 is a source of legislative power to confer on the Executive power to spend. Thus they have no significance if the conclusion is reached that s 81 is not a source of that legislative power. In this event, the question of what "the purposes of the Commonwealth" means does not arise. If that question, which is dealt with below[689], does arise, the defendants' arguments are no more than claims that s 81 could have been more clearly drafted. Claims of that kind in this instance are weak and not determinative.

595 *The third argument: asymmetry between s 51(ii) and s 81.* The third argument appealed to an asymmetry which would arise from the fact that s 51(ii) contained a power to tax for purposes wider than those which the legislature could pursue if the power to spend were limited only to those purposes within the power of the Parliament conferred otherwise than by s 81. This exaggerates the asymmetry: for example, the Commonwealth is entitled to spend under s 96, in cooperation with the States, in relation to matters on which it has no legislative power. And the question: "For what purposes may taxation be raised?" is distinct from the question: "For what purposes may legislation in relation to the money so raised be enacted?" While it may now be unlikely that there will ever be scope for s 94 to operate in the future, it was not necessarily unlikely in 1901. Section 90 denied the States those powers formerly enjoyed by the colonies to raise monies by duties of customs and excise. It deprived them of what had

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687 (1908) 6 CLR 309 at 368: see above at [405] and [413].

688 See *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ.

689 At [608].

formerly been their main source of income. That meant that other sources of income would have to be found. Two of those sources of income were s 94 and s 96. Those sections pointed to the possibility that what the Commonwealth raised by taxation might legitimately be more than it would need for its limited purposes[690].

596 *Difficulties created by constitutional limit on power of appropriation.* The fourth factor relied on the difficulties facing the Court in determining whether an appropriation had exceeded constitutional power, and the difficulties facing the legislature in seeking to avoid constitutional invalidity. Difficulties though they may be, they were not shown to be greater than those which face the Court in deciding whether non-appropriation legislation was valid, and those which face the legislature in seeking to avoid enacting non-appropriation legislation which was invalid. The occasional declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified. In any event, this fourth consideration, like the fifth, which in itself is not decisive, goes more to the question of what the expression "the purposes of the Commonwealth" means than to the question of whether s 81 confers an independent legislative power to confer on the Executive a power to expend monies appropriated.

597 *Impact on States.* The sixth factor related to the impact on State legislative power if s 81 were construed as giving an independent legislative power to confer on the Executive a power to expend monies appropriated. If the federal power were widely used, the impact on State legislative power would be considerable. Further, as New South Wales said, there would be an impact on the operation of s 96. The defendants' submission that s 96 was consistent with a wide construction of s 81 as a source of legislative power, because s 96 grants could be made for purposes not limited to purposes otherwise within the power, is flawed. The making of s 96 grants depends on consultation with, and the cooperation of, the States. If s 81 created a wide power to authorise expenditure and s 51(xxxix) permitted enactment of legislation incidental to it so as to constitute an independent head of legislative power much wider than those in ss 51 and 52, it is a head of power which would be exercisable whether or not the States agreed.

598 *Legislative practices.* As to the seventh factor, the defendants' reliance on longstanding legislative practices brought about by the conduct of the Executive in choosing what kinds of Bill to introduce must be wholly rejected. They are practices which have often been controversial[691]. When they have not been

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690 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 354-356.

691 For examples, see Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 381-386.

controversial, that is partly because they are practices which have been devoted to relatively minor but beneficial ends. And to construe the Constitution in the light of actual executive and legislative practices involves a misconception of the correct relationship between the Court on the one hand and the Executive and the legislature on the other. It inverts the correct approach. The Court decides what the Constitution means in the light of its words. It does not infer what the Constitution means from the way the Executive and the legislature have behaved. The development of particular legislative practices in reliance on particular decisions of the Court construing the Constitution in a certain way may be a consideration militating against the overruling of those decisions[692]. But there are no decisions of that kind relevant to the present problem. Executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional. Practice must conform with the Constitution, not the Constitution with practice. The fact that the executive and legislative practices may have generated benefits does not establish that they are constitutional; for it has not been shown that the same benefits could not have been generated on a different view of s 81 from that which the defendants propound. Nor has it been shown that they could not have been based on the legislative powers set out in s 51[693].

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692 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600; [1977] HCA 60.

693 This may be seen from the examples given by the defendants. The *Trans-Pacific Flight Appropriation Act* 1934 (Cth) made a grant of £5,000 to the widow of Charles Ulm, who flew across the Pacific with Charles Kingsford Smith in 1928 and died while attempting a crossing of the Pacific 14 days before the Act was given royal assent: it may have been supportable by s 51(xxiii). See McCarthy, "Charles Thomas Philippe Ulm", in Ritchie (ed), *Australian Dictionary of Biography, Volume 12: 1891-1939*, (1990) 302 at 302. So may the *Special Annuity Act* 1934 (Cth): it provided for payment of an annuity of £156 per annum to the widow of D C McGrath, who had been a member of the House of Representatives for 21 years and whose estate was valued for probate at only £944 (Love, "David Charles McGrath", in Nairn and Serle (eds), *Australian Dictionary of Biography, Volume 10: 1891-1939*, (1986) 275 at 275). That Act may also have been supportable by the head of power discussed in *Brown v West* (1990) 169 CLR 195. The *Wool Publicity and Research Act* 1936 (Cth) may have been supportable under s 51(i) (see s 13(b), which stated one of the Act's purposes to be the increasing and extending of the use of wool throughout the world). The *National Fitness Act* 1941 (Cth) may have been supportable by the defence power. The *Home Deposit Assistance Act* 1982 (Cth) may have been supportable, at least in its operation in relation to married persons, by s 51(xxi). The *Farm Household Support Act* 1992 (Cth) and the *Dairy Industry Adjustment Act* 2000 (Cth) may have been supportable under s 51(xxiiiA). The *Nation-building Funds Act* 2008 (Cth) may be supportable under s 96.

599 Although South Australia advocated a wide view of s 81, it declined to align itself with the defendants' submission so far as it depended on the contrary legislative practice of the Commonwealth. There is force in the language it used in that regard:

> "The Commonwealth cannot now turn to its advantage, as a factor tending in favour of an expanded view of Commonwealth power, the fact that it has acted in disregard of the clearly expressed views of a majority of this Court for over 60 years[694]. No encouragement should be [given] to the Commonwealth to ignore the decisions and reasoning of this Court as to the limits of its powers, by attaching significance to the fact that the Commonwealth has acted on the assumption that the views expressed by the Court are wrong."

The defendants countered this submission by referring to supposed contrary legislative practice before 1945, but that does not improve their position.

No independent head of legislative power in s 81

600 It is necessary to reject the defendants' submission that s 81 creates an independent head of legislative power in the sense that the "legislative power" to appropriate carries with it a power to authorise the Executive to spend the funds appropriated.

601 *The important but narrow function of appropriation.* Statutory language effectuating an appropriation merely creates a capacity to withdraw money from the Consolidated Revenue Fund and set it aside for a particular purpose. The appropriation regulates the relationship between the legislature and the Executive. It vindicates the legislature's long-established right, in Westminster systems, to prevent the Executive spending money without legislative sanction. The appropriation of public revenue operates as a grant by the legislature to the Executive giving the Executive authority to segregate the relevant money issued from the Consolidated Revenue Fund and to dedicate it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out[695]. It also operates so as to restrict any

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694 This is a reference to *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 265-266 per Starke J, 271-272 per Dixon J (with whom Rich J agreed at 264) and 282 per Williams J.

695 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190 and 200; [1908] HCA 68. See also *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 248.

expenditure of the money appropriated to the particular purpose for which it was appropriated[696]. That is, it creates a duty – a duty not to spend outside the purpose in question. Beyond that it creates no rights and it imposes no duties[697]. Nor does it create any powers. It fulfils one pre-condition to expenditure. It does not do away with other pre-conditions to expenditure. Of itself it gives no untrammelled power to spend.

> "[Appropriation] neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction. It does not annihilate all other legal conditions."[698]

One relevant legal pre-condition which must be satisfied is the existence of power to spend what has been appropriated. Whether the Executive has power to spend the money will depend on there being either a conferral of that power on it by legislation or some power within s 61 of the Constitution.

602 Hence the effect of an appropriation is to operate as an "earmarking"[699] or a means of "legally segregating"[700] or a "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated"[701]; to prevent the money from being used for any purpose other than the purpose for which it was appropriated; and to prevent it from being treated as "surplus revenue of the Commonwealth" for the purposes of s 94 of the Constitution[702]. Having regard to

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696 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 222 and 224-225.

697 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 386-387, 392-393 and 411.

698 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-225 per Isaacs and Rich JJ.

699 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 411 per Jacobs J.

700 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 200 per Isaacs J.

701 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190-191 per Griffith CJ.

702 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179. Section 94 is set out at [291] n 314.

the received meaning of "appropriation", the greatest power that s 81 could confer on the legislature is a power to earmark funds in the Consolidated Revenue Fund. By its terms, s 81 could go no further than giving Parliament a power to appropriate. It does not confer a power on the Parliament to authorise the Executive to expend the appropriated funds. And it does not confer a power on the Parliament to regulate expenditure made, by imposing a duty on the Executive or imposing a right in a third party, or otherwise.

603 *The creation of rights, duties and powers.* Even though there may be legislation giving a power to spend the money appropriated, or even though an aspect of the executive power permits expenditure, the Commonwealth may desire the expenditure of the money appropriated to be carried out in conformity with particular rights, duties or powers. The creation of a power beyond the power to spend will almost always involve the creation of a duty. That is because if the power is to be exercised, someone against whose interests it is exercised will have to be compelled to comply with the exercise of the power through the creation of an enforceable duty to obey the person exercising it. If a provision in an enactment creates rights or imposes duties or confers powers, it is not an appropriation provision. Hence the creation of rights, the imposition of duties and the conferral of powers cannot be effected by the statutory words effecting the appropriation. Those acts of creation, imposition and conferral can only be effected by some legislation other than the statutory words making the appropriation[703]. A provision in an enactment creating rights, imposing duties or conferring powers cannot rest on ss 81 and 83, for it goes beyond mere appropriation. The validity of such a provision must find its source, if anywhere, in some other head of Commonwealth legislative power.

604 A decision of the Executive to spend the monies appropriated will be invalid if it is beyond executive power and unsupported by a valid enactment. It follows that the defendants' submission that the Executive's power to spend is necessarily coterminous with the legislature's "power" to appropriate is erroneous. The Executive's power to spend depends on finding legislation permitting the expenditure or on finding support for the expenditure in s 61. If the latter course is embarked on, it must be remembered that, for reasons given earlier, the executive power is no wider than the legislative[704], subject to the possibility of a small extension if Mason J's test in *Victoria v The Commonwealth and Hayden*[705] is correct. Since s 81 does not confer a legislative power to

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703 Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 161-162.

704 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398: see [519] above.

705 (1975) 134 CLR 338 at 397: see above at [511].

authorise expenditure, s 51(xxxix) cannot be a source of power to enact laws as an incident of any such power. The power to spend appropriated money does not extend beyond the limits of authority conferred by legislation empowered otherwise than by s 81 and the limits of the executive power of the Commonwealth under s 61. Hence, s 51(xxxix) cannot be a source of power to enact laws as an incident of the execution of any wider power to spend.

605 If the defendants' submission were correct (and if the words "for the purposes of the Commonwealth" had a wide meaning), Commonwealth legislative power would extend well beyond the boundaries marked elsewhere in the Constitution. Accordingly, on the principles of construction stated by O'Connor J in the *Jumbunna* case[706], the narrower view of s 81 is to be preferred – it creates no "legislative power" to confer on the Executive a power to spend what is appropriated.

606 *Constitutional language.* That conclusion – that ss 81 and 83 do not create a grant of legislative power to authorise expenditure – is supported by the following parts of the Constitution. Chapter I Pt V is headed "Powers of the Parliament". It would be expected that the grants of legislative power are to be found in that Part. In that Part, ss 51 and 52 set out many legislative powers, and the succeeding sections set out various powers and restrictions on powers of the Parliament and its two Houses. The defendants submitted that that was not conclusive, since powers could also be found in the Chapter in which ss 81 and 83 were placed, namely Ch IV, which is headed "Finance and Trade". They gave ss 94 and 96 as examples. But the power to provide in the manner described in s 96 is actually found in Ch I Pt V, particularly s 51(xxxvi)[707]. Section 94 is not, or at least not primarily, a power to legislate. And in other parts of their argument the defendants treated s 94 as obsolete. Further, the defendants' argument does not confront the difficulty that the only words which can support a power in s 81 are the words "to be appropriated". Even if those words confer a power, it must be limited to a power of appropriation. But the authorities say that an appropriation of money is simply the earmarking or segregating of it from the

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706 (1908) 6 CLR 309 at 367-368: see [405] and [413] above.

707 Section 96 provides:

> "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." (emphasis added)

Section 51(xxxvi) gives the Parliament power to make laws with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides".

Consolidated Revenue Fund. Hence, at most, s 81 could confer a power so to earmark or segregate.

607 *Conclusion.* Section 81 does not create a "legislative power" to confer on the Executive the power to spend what is appropriated.

"For the purposes of the Commonwealth" has a narrow meaning

608 Even if, contrary to what has just been said, an appropriation under s 81 and s 83 does give the Executive power to spend the money appropriated, the defendants' submission must be rejected on a separate ground. It relates to the construction of the words "for the purposes of the Commonwealth" in s 81. Those words do not have the wide meaning urged by the defendants. Section 81 does not give the Commonwealth a power to make appropriations for the general welfare. That is because if it did, it would, taken with the executive power to spend (which for the purposes of considering the present argument is assumed to be conferred by the appropriation) and a power to legislate under s 51(xxxix) as an incident to it, make the Commonwealth a government of general and unlimited legislative powers, despite the enumeration in other sections of the Constitution of specific powers. On O'Connor J's principles of construction, again, the narrower construction must be preferred. In *Attorney-General (Vict) v The Commonwealth* Dixon J said that to read s 81 as giving the Commonwealth a power to enact laws for the general welfare "would be to amend the Constitution, not to interpret it."[708] The power of appropriation is limited by s 83. Of that limitation, Dixon J said[709]:

> "[Section] 83, in using the words 'by law' limits the power of appropriation to what can be done by the enactment of a valid law. In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and … to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States."

In the same case[710] Starke J rejected the view that the appropriation power authorised the Commonwealth to appropriate its revenues and monies for any purpose whatsoever, and suggested that the expenditure had to be for the purpose of and incidental to some other matter which belongs to the federal government.

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708 (1945) 71 CLR 237 at 271.

709 (1945) 71 CLR 237 at 271-272.

710 (1945) 71 CLR 237 at 265-266.

Williams J was of a similar opinion[711]. Rich J agreed with Dixon J[712]. Now it is true, as the defendants submitted, that Dixon J said that the controversy in *Attorney-General (Vict) v The Commonwealth* did not require the Court to choose between his view and the wider view advocated by the present defendants[713]. But he did say that the view he expressed was what his view had always been[714], and that he had not yet seen any reason to desert that opinion[715]. Barwick CJ agreed with it[716]. So did Gibbs J[717]. On the other hand, various other judges have not[718]. The statement of Dixon J quoted above has been criticised as unclear[719]. After allowances have been made for the inherent difficulty of the subject matter, and for a compressed manner of expression, that criticism must be rejected. When Dixon J said that s 83, in using the words "by law", limits the power of appropriation to what can be done by the enactment of a valid law, he meant that it was not possible to appropriate money for purposes beyond those which could be achieved by enacting legislation validly under Commonwealth legislative power. That was the position he had taken up in his evidence to the Royal Commission on the Constitution[720]. That is what he meant when he said that the view he expressed in that passage was what his view had always been and that he had not yet seen any reason to desert it. The defendants submitted that Dixon J's approach "requires the bare reference to 'law' in s 83 to do too much work." They did not explain why.

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711 (1945) 71 CLR 237 at 282.

712 (1945) 71 CLR 237 at 264.

713 (1945) 71 CLR 237 at 269.

714 (1945) 71 CLR 237 at 271.

715 (1945) 71 CLR 237 at 272.

716 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 356 and 363.

717 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 371 and 373-375.

718 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 256 per Latham CJ and 273 per McTiernan J; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 369 per McTiernan J, 396 per Mason J, 411 per Jacobs J and 417 per Murphy J.

719 Australia, *Final Report of the Constitutional Commission*, (1988), vol 2 at 832 [11.300].

720 See above at [309].

The Tax Bonus Act is not incidental to the appropriation

609 Section 51(xxxix) gives power to make laws with respect to matters incidental to the "execution" of a power vested in Parliament or the Executive. An appropriation merely authorises the withdrawal of money from the Consolidated Revenue Fund, not the expenditure of that money[721]. Hence a statute creating rights or imposing duties in relation to the money withdrawn from the Consolidated Revenue Fund goes beyond being merely incidental to the withdrawal. The rights and duties are not just an incident of the execution of the power to withdraw the money from that Fund – something naturally appertaining or attaching to it, or subordinate, subsidiary, or ancillary to it, or consequential on it, or "something which attends or arises in its exercise"[722]. The creation of rights or duties in relation to the expenditure of appropriated monies is something outside that which attends or arises in the exercise of the executive power to withdraw money from the Fund.

610 If s 81 is limited solely to a power to withdraw or segregate or earmark money from the Consolidated Revenue Fund, and confers no power to spend, there is no scope for s 51(xxxix) to operate. This is because the appropriation is complete as soon as the funds are withdrawn or segregated or earmarked. There is nothing further to *execute*. Hence, there is nothing incidental to the execution of the legislative power to withdraw or segregate or earmark which can be done once the withdrawal or segregation or earmarking has taken place.

611 Further, to paraphrase the language of Dixon J in *Attorney-General (Vict) v The Commonwealth*[723], in this case appropriation of the necessary money is the consequence of the plan to create rights and duties in relation to the bonuses; the plan is not consequential upon or incidental to the appropriation of money. The following words of Latham CJ are also relevant[724]:

> "The result of a contrary view would be that, by the simple device of providing for the expenditure of a sum of money with respect to a particular subject matter, the Commonwealth could introduce a scheme which in practice would completely regulate and control that subject matter. The Commonwealth Parliament would thus have almost unlimited

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721 See above at [601].

722 *Le Mesurier v Connor* (1929) 42 CLR 481 at 497 per Knox CJ, Rich and Dixon JJ; [1929] HCA 41.

723 (1945) 71 CLR 237 at 270.

724 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 263.

> legislative power. The careful delimitation of Commonwealth powers made by the Constitution prevents the adoption of such an opinion."

612 Here the rights of intended recipients to be paid the tax bonuses and the obligation on the Commissioner to pay them arise from the Tax Bonus Act. The point of seeking to appropriate the necessary monies by the standing appropriation in s 16 of the Taxation Administration Act was to enable those rights to be vindicated and that obligation to be carried out. The rights to be paid and the obligation to pay cannot be incidental to the appropriation which enables the rights to be vindicated and the obligation to be fulfilled.

VALID APPROPRIATION

613 Question 3 in the Special Case is set out above[725]. Since it cannot be said that the plaintiff was "entitled" to payment of the tax bonus under the Tax Bonus Act, because that Act is invalid, this question does not arise.

CONCLUSION

614 The questions in the Special Case should have been answered:

1. Yes.

2. No.

3. Does not arise.

4. In accordance with the agreement of the parties announced on the second day of the hearing of the Special Case, there is no order for costs.

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725 At [269].