THE RAMIFICATIONS OF *PAPE v FEDERAL COMMISSIONER OF TAXATION* FOR THE SPENDING POWER AND LEGISLATIVE POWERS OF THE COMMONWEALTH†

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I INTRODUCTION

There is nothing quite like money to divide families, friends, or the High Court it seems. *Pape v Federal Commissioner of Taxation*,[1] the third case in which the High Court has directly considered the constitutional basis of the federal executive's general capacity to spend money, has, on the one hand, provided important clarification as to the basis of the power, but, on the other, has again given rise to a multiplicity of reasoning between the Justices of the Court as to the exact breadth of the power. The Court accepted a more limited basis for the spending power than had previously been assumed by many in government. This conclusion serves to highlight the importance of the breadth of the *other* heads of Commonwealth power to the Commonwealth's ability to engage in spending activities.

In Part II of this case note we describe the constitutional background of the issue of federal spending and introduce the facts of *Pape*. In Part III we consider the approach taken by each of the judgments in *Pape* to the basis and limits of the power of the federal executive to spend money in the Australian constitutional system outside the express heads of power in *Constitution* ss 51 and 52. First, we identify the Court's conclusions about the extent to which this general spending power rests on the appropriations provisions in *Constitution* ss 81 and 83 and the executive power of the Commonwealth in *Constitution* s 61. We then discuss the extent to which the different judgments considered that the particular statutory regime under challenge could be supported by the legislative power to make laws incidental to the execution of powers conferred upon the Commonwealth Parliament or executive. Part III concludes that while the case provides clarification that ss 81 and 83 themselves do not provide a federal spending power, it does little to clarify the extent to which spending is supported by s 61. This is so for two reasons. First, there appears to be a rift between French CJ, Hayne, Kiefel and Heydon JJ, on the one hand, and Gummow, Crennan and Bell JJ, on

† This case note was accepted for publication in January 2011. Since that date, the High Court has handed down its decision in *Williams v Commonwealth* [2012] HCA 23, which substantially modified previous assumptions about the nature of the Commonwealth executive's spending power in circumstances where there is no legislative backing. The views expressed here are those of the authors only.

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1 (2009) 238 CLR 1 ('*Pape*').

the other, in relation to the theoretical approach to determining the breadth of the executive power of the Commonwealth. Secondly, while this theoretical rift did not manifest itself in any verbal difference in the expression of the final legal test to be applied to determine whether particular action is within Commonwealth executive competence, the result of the application of the test again reveals substantial divergences of opinion between the judges. In a different split of the Court, the judgments of French CJ, Gummow, Crennan and Bell JJ indicated an approach to the interpretation of the test that takes into account the practical exigencies of the contemporary federation, whereas Hayne, Kiefel and Heydon JJ adopted a much more conceptual approach. We suggest that the divisions may reflect different approaches to federalism.

Pape was not argued only upon the basis that the spending was supported by a general spending power; express heads of legislative power were also advanced as supporting the measure. In Part IV we consider the answers given by the Court to questions concerning the extent to which the expenditure provided for in the legislation could be supported by the tax power (*Constitution* s 51(ii)), the external affairs power (*Constitution* s 51(xxix)), or the trade and commerce power (*Constitution* s 51(i)). In each instance, some judges provided clarification on the outer limits of these powers. Part IV will also consider the approach of some of the judges to the question of 'reading down'. This is an important aspect of the case both because issues concerning reading down, while sometimes technical, commonly arise when legislation is held invalid, and because in the present case it gave rise to a difference of opinion between the two joint judgments. We conclude with a comment about the potential ramifications of the case's conclusions regarding both the spending power and the other heads of power on current and future Commonwealth spending programs.

II BACKGROUND

A *The Constitutional Landscape*

The power of the federal executive to spend money in Australia has been contested for decades. The decision in *Pape* therefore provided an opportunity for the Court to clarify its source and scope.[2] Unfortunately, only the former was achieved.

A general 'spending power' was previously thought to arise from a combination of ss 81 and 83, perhaps in conjunction with s 61 (the executive power).[3] To provide the necessary context, these provisions are set out below:

2 Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 260.

3 See a further analysis of the earlier positions in Gabrielle Appleby, 'There Must Be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93, 117–21.

> s 81 All revenues or moneys raised or received by the executive government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for *the purposes of the Commonwealth*.[4]
>
> s 83 No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.
>
> s 61 The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

It was not always made clear in previous cases how these powers were said to interact. Implicit in some of the previous judgments was the notion that the power of appropriation in s 81 carried with it some correlative executive power to spend the money appropriated.[5] However, in other judgments, the expenditure of money appropriated by law was seen as the 'execution' of the appropriation law and therefore the power was found in s 61.[6]

In determining the scope of the executive power, the distinction, developed by Professor Winterton,[7] between the 'depth' and the 'breadth' of the power is helpful. The 'depth' of executive power describes the kinds of activities which the executive may undertake, such as spending, contracting, or more coercive activities like enforcing laws which prescribe conduct or penalise individuals. The question of depth is essentially one of representative and responsible government and the transparency and accountability of executive action to the Parliament. The 'breadth' of the executive power describes the range of subject matters in relation to which those permissible activities may be performed.[8] The question of breadth is essentially a federal one that relates to the federal divisions of powers under the *Constitution*; limitations on federal power giving rise to areas of exclusive state competence.[9] Winterton's thesis was that the breadth of the executive power ought to be limited to the legislative powers of the national Parliament, including a 'nationhood' power. For Winterton, the question of depth was appropriately answered by reference to those powers that fell within the Crown's prerogatives, a thesis he proposed gave greater certainty than the tests being developed and

4 Emphasis added.

5 This approach may be seen in the judgments of McTiernan J in *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 273–4 ('*Pharmaceutical Benefits*') and of McTiernan and Murphy JJ in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 367–70 (McTiernan J), 417–19, 423–4 (Murphy J) ('*AAP*').

6 This view accords with that expressed by Latham CJ in *Pharmaceutical Benefits* (1945) 71 CLR 237, 256–7 and by Mason J in *AAP* (1975) 134 CLR 338, 392–3, 396. See further analysis in Appleby, above n 3, 117ff.

7 George Winterton, *Parliament, The Executive and the Governor-General — A Constitutional Analysis* (Melbourne University Press, 1983); George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 428.

8 Winterton, *Parliament, The Executive and the Governor-General*, above n 7, 29–30, 40–4.

9 For a fuller discussion of the democratic and federal critiques of the breadth and depth of the executive spending power, see Appleby, above n 3, 98–104; Saunders, above n 2, 259.

used by the High Court.[10] However, even Winterton acknowledged that this has not been reflected in the constitutional jurisprudence[11] and this approach was not adopted in *Pape*. Nonetheless, Winterton's two components of the executive power remain helpful as descriptors and will be adopted in this case note.

There is no doubt that the 'depth' of the federal executive power extends to spending where that spending is pursuant to legislation validly made under ss 51 and 52 or s 96.[12] However, the 'breadth' of the spending power beyond these areas has been a heavily contested element of the division of powers in the federal system and, as shown below, was previously thought to depend upon the interpretation of the words 'purposes of the Commonwealth' in s 81.

The reliance on s 81 as the source of the spending power can be traced back to the early years of federation[13] and this origin was reaffirmed in the only two previous High Court decisions that directly considered the spending power — the *Pharmaceutical Benefits* case and the *AAP* case.[14] These revealed three possible views of the source and breadth of the federal spending power which have been summarised by Professor Zines as follows:[15]

> (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 J) 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

10 Winterton, *Parliament, The Executive and the Governor-General*, above n 7, 29–30, 40–4; Winterton, 'The Limits and Use of Executive Power by Government', above n 7, 428, 433.

11 Winterton, 'The Limits and Use of Executive Power by Government', above n 7, 428, 432; George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 30.

12 Section 96 gives the Parliament the power to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. A series of High Court decisions have clarified the meaning of the provision giving it 'a very wide construction in which few if any restrictions can be implied' — *Victoria v Commonwealth* (1957) 99 CLR 575, 605 (Dixon CJ) ('*Second Uniform Tax Case*'), commenting on the combined effect of *Victoria v Commonwealth* (1926) 38 CLR 399, *Deputy Federal Commissioner of Taxation (NSW) v Moran* (1939) 61 CLR 735 and *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*'). Relevantly, the Commonwealth may attach almost any conditions it wishes to s 96 grants and they may be within an area of non-federal jurisdiction, subject to some overriding constitutional limitations — see, eg, *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 ('*DOGS*'). The basis of such a wide scope lies in the interpretation of the power by the judges as voluntary and non-coercive, distinct from an exercise of regulative legislative powers — see, eg, *Second Uniform Tax Case* (1957) 99 CLR 575, 605 (Dixon CJ).

13 For example, the former Commonwealth Solicitor-General, Sir Robert Garran, indicated as early as 1927 that he had always considered s 81 'an absolute power of appropriation for general purposes, and the Commonwealth Parliament has always acted on that supposition' — Commonwealth, Royal Commission on the Constitution of the Commonwealth, *Report of Proceedings and Minutes of Evidence* (1927) vol 1, 69 [383].

14 *Pharmaceutical Benefits* (1945) 71 CLR 237; *AAP* (1975) 134 CLR 338.

15 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 353. Note that the judges referred to in this quotation are those who took the respective positions in the *AAP* case. For further discussion of the earlier cases see, eg, Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369; Appleby, above n 3.

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 to be ascertained as in (b) above: Mason J.

In the view of Mason J, moneys appropriated in accordance with s 81 could be spent by the Commonwealth executive, but a further source of power (including the enumerated legislative powers or s 61) would be required if the executive wished to engage in any sort of activities beyond spending itself (for example, engaging in enterprises).[16] Notably, each of the positions assumed that to some extent, *Constitution* ss 81 and 83 empower the executive to engage in spending. It was against this background of divided jurisprudence that *Pape* fell for decision.

B Pape*: Facts*

Pape involved a constitutional challenge to the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('*Tax Bonus Act*'). The *Tax Bonus Act* set out a scheme of payments, referred to as 'tax bonuses', which ranged from $250 to $900, to persons who met the eligibility criteria.[17] The total package was estimated to cost $7.7 billion.[18] Section 3 of the *Tax Bonus Act* engaged a standing appropriation in s 16 of the *Taxation Administration Act 1953* (Cth) by making the *Act* a 'taxation law'.[19] Section 16 provided a standing appropriation for expenditures the Commissioner is required to make under a 'taxation law'.[20]

The tax bonus 'stimulus package' was one aspect of the Commonwealth government's response to the Global Financial Crisis. In the environment of global recession, the management of national economies became increasingly important; there were several international responses by the G20 group of nations and also the Organisation for Economic Co-operation and Development ('OECD'), regarding appropriate national responses, including use of fiscal stimulus packages.[21]

16 *AAP* (1975) 134 CLR 338, 396.

17 The criteria for the payment of the tax bonus appear in the *Tax Bonus Act* s 5.

18 Explanatory Memorandum, Tax Bonus for Working Australians Bill (No 2) 2009 (Cth) 5.

19 Within the definition in the *Income Tax Assessment Act 1997* (Cth) s 995-1(1). See *Pape* (2009) 238 CLR 1, 30 [34] (French CJ), 97 [267] (Hayne and Kiefel JJ).

20 The judges in the majority took the opinion that there was a valid appropriation supporting the purported expenditure on the basis of the operation of these provisions: *Pape* (2009) 238 CLR 1, 40 [64], 64 [135] (French CJ), 70–1 [168], [170]–[171] (Gummow, Crennan and Bell JJ).

21 These included a Declaration of the G20 of 15 November 2008, an OECD publication entitled 'OECD Economic Outlook' and dated December 2008, a note from the IMF staff on a meeting of the Deputies of the Group of 20 held between 31 January 2009 and 1 February 2009 and statements by the IMF-OECD-World Bank seminar held in February 2009. For a further description of these instruments see *Pape* (2009) 238 CLR 1, 27–9 [21]–[28] (French CJ).

The plaintiff, Bryan Pape, was eligible to receive a $250 payment under the *Act*. The challenge was brought in the original jurisdiction of the High Court.[22] A special case was stated to the Full Court by Gummow J on the basis of agreed facts (including facts regarding the financial crisis).[23] A question arose as to Mr Pape's standing to challenge the validity of the *Tax Bonus Act*. The Court unanimously held that he did have standing.[24] We shall say no more about this aspect of the case.

The primary submission of the Commonwealth was that the legislation was supported by the incidental power, *Constitution* s 51(xxxix), because it was incidental to the execution of the 'appropriations power', to be found in ss 81 and 83. In the alternative, the Commonwealth relied upon s 51(xxxix) read with s 61 — it was submitted that the *Tax Bonus Act* was a law with respect to matters incidental to the executive power conferred by s 61 — and upon the trade and commerce power (*Constitution* s 51(i)), the external affairs power (*Constitution* s 51(xxix)) and the taxation power (*Constitution* s 51(ii)).

By a 4:3 majority the Court held that the *Tax Bonus Act* was valid on the basis that it was supported by s 51(xxxix) in connection with the executive power, s 61. The majority was comprised of French CJ, who wrote a separate judgment, and Gummow, Crennan and Bell JJ. Hayne and Kiefel JJ would have upheld the validity of the *Tax Bonus Act* in part, on the basis of the taxation power. Heydon J would have held the *Tax Bonus Act* invalid in its entirety.

III THE POWER OF THE COMMONWEALTH TO SPEND

A *Sections 81 and 83 of the* Constitution*: The 'Appropriations Power'*

Clarifying the fundamental division which had plagued the earlier decisions, all of the judges in *Pape* accepted that ss 81 and 83 do not confer a 'power' on the Commonwealth Parliament to enact legislation authorising expenditure by the

22 Under the *Constitution* s 76(i) and the *Judiciary Act 1903* (Cth) s 30(a).

23 The special case in *Pape* (2009) 238 CLR 1, 24–5 [11] (French CJ), stated the following questions:

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?

24 Ibid 34–6 [45]–[52] (French CJ), 68–9 [150]–[159] (Gummow, Crennan and Bell JJ), 98–9 [271]–[274] (Hayne and Kiefel JJ), 137–8 [399]–[401] (Heydon J). See also our observations in text accompanying below n 142.

executive. It was held to be a parliamentary supervision mechanism, not a source of substantive power.[25]

The effect of this decision was that the question which had previously assumed importance — the scope of the expression 'the purposes of the Commonwealth' in s 81 — appeared to have become a moot point. Nevertheless, some members of the Court considered the issue.

French CJ thought that the phrase was one of limitation, adopting the view expressed by McHugh J in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*,[26] that the Commonwealth must have power to enact an appropriation law under another source of power. Thus s 81 was in fact limited to appropriations with respect to one or more of the other heads of Commonwealth legislative power, which would include s 51(xxxix) coupled with s 61.[27] This position is consistent with French CJ's ultimate conclusion that the spending power was limited by reference to the federal heads of legislative power (see further discussion below), so the limits of the Parliament's ability to appropriate and the executive's ability to spend are concomitant. Heydon J adopted a similar position.[28]

However, French CJ did not explain how this requirement that appropriations must have a sufficient connection to a head of power could be reconciled with *Combet v Commonwealth*.[29] In *Combet*, the majority of the Court held that appropriations could be expressed in broad terms (for example, appropriations expressed for the purposes of 'higher productivity, higher pay workforces').[30] Applying the accepted principles of 'characterisation', it is difficult to see how an appropriation expressed by reference to purposes in this way could ever be held to be a law 'with respect to' a subject matter of Commonwealth legislative power.

Gummow, Crennan and Bell JJ took a broad view of the phrase 'purposes of the Commonwealth' — the words did not require that appropriations be referable to the enumerated legislative powers of the Commonwealth.[31] The broad interpretation of this phrase may hold greater significance than initially seems evident and we shall return to this later.[32]

25 *Pape* (2009) 238 CLR 1, 23 [8.5], 36–7 [53]–[54], 55–6 [113] (French CJ), 73 [178], 75 [184], 80 [202], 81 [204] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [600]–[602] (Heydon J).

26 (1993) 176 CLR 555, 601.

27 *Pape* (2009) 238 CLR 1, 55–6 [111], [113]. See also the comments at 36[53].

28 Ibid 213–14 [608].

29 See discussion to this effect in: *Pape* (2009) 238 CLR 1, 111 [317] (Hayne and Kiefel JJ); *Combet v Commonwealth* (2005) 224 CLR 494 ('*Combet*').

30 See, eg, *Combet* (2005) 224 CLR 494, 530 (Gleeson CJ). Gummow, Hayne, Callinan and Heydon JJ upheld the appropriations expressed in this broad form and went so far as to say that they may not even have to be binding upon the executive: at 566–7.

31 *Pape* (2009) 238 CLR 1, 75 [185], 82–3 [210].

32 See text accompanying below n 83.

Hayne and Kiefel JJ indicated that they did not need to decide precisely what 'purposes of the Commonwealth' meant.[33] This followed from their conclusion as to the nature of s 81:

> 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 a 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.[34]

However, Hayne and Kiefel JJ noted that the 'purposes of the Commonwealth' were unlikely to be limited to purposes in respect of which the Parliament has express power to make laws and would likely extend, at least, to purposes associated with the executive power and powers that were inherent in Australia's nationhood.[35] Emphasising the concerns outlined above regarding French CJ's interpretation, they observed that the phrase 'purposes of the Commonwealth' did 'not yield a criterion easily applied as a measure of constitutional validity of an appropriation'.[36]

In summary, each of the judges accepted that ss 81 and 83 alone did not confer a power to spend, but set out in the *Constitution* the historical requirement that any expenditure required authorisation by Parliament. Whether an appropriation could be enacted outside the legislative powers of the Commonwealth was not definitively decided by the majority, but it is clear that appropriations could *at least* be enacted if there was a sufficient connection with one of these heads or the executive power (when supporting the incidental legislative power in s 51(xxxix)).

B *Section 61 — The Executive Power*

Having come to the conclusion that the appropriations provisions in the *Constitution* did not support the *Tax Bonus Act*, all Justices considered whether the incidental power in s 51(xxxix) of the *Constitution*, in its application to the executive power conferred by s 61, could support the *Act*. Two main positions can be extracted from the judgments: that of French CJ, Hayne and Kiefel JJ and that of Gummow, Crennan and Bell JJ. Heydon J did not necessarily accept the test applied by French CJ, Hayne and Kiefel JJ regarding the scope of the executive power, but nonetheless found that it was not satisfied in the present case.[37]

33 *Pape* (2009) 238 CLR 1, 103 [290].

34 Ibid 111 [316] (emphasis added).

35 Ibid 103 [290].

36 Ibid 111 [316].

37 See further explanation of his position in the text accompanying below nn 66–70.

1 *French CJ*

French CJ, Hayne and Kiefel JJ concluded that the breadth of the executive power in s 61 included:

> the area of responsibilities allocated to the Commonwealth by the Constitution, 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.[38]

The latter category extended to the power that was referred to by Mason J in the *AAP* case,[39] namely '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' — for convenience, we shall refer to this formula as 'the Mason J test'. However, of these judges, French CJ was the only one who held that the Mason J test was satisfied in the circumstances of the case.

French CJ found that the executive power in s 61 extended 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.[40]

A law requiring the Commissioner of Taxation to pay the tax bonus was incidental to the execution of that power. Thus s 51(xxxix), together with s 61, supported the *Tax Bonus Act*.[41]

The Chief Justice cautioned against drawing from his conclusions broad implications for the executive power that would undermine the federal division of powers.[42] He expressly stated that the conclusion that the executive power must be 'capable of serving the proper purposes of a national government' did not mean that the executive power could expand under the general rubric of 'national concern' or 'national emergency' — 'the exigencies of 'national government' cannot be invoked to set aside the distribution of powers between the Commonwealth and States'.[43] For French CJ, a key feature of the present case appears to have been the short term nature of the measure, meaning it would not

38 *AAP* (1975) 134 CLR 338, 396 (Mason J), quoted in *Pape* (2009) 238 CLR 1, 124.

39 *AAP* (1975) 134 CLR 338, 397 (Mason J). This test has its provenance in a number of earlier judgments of the High Court and was adopted as correct by Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79, 107 (Brennan J). See also the statements of Mason CJ, Deane and Gaudron JJ: at 92–4.

40 *Pape* (2009) 238 CLR 1, 23 [8]. See also the comments at 60 [127], 63–4 [133].

41 Ibid 23 [8] (French CJ). Because of his conclusions to this effect, French CJ found it unnecessary to consider the existence of a separate area of legislative competence in the form of a 'nationhood' power: at 63–4 [133]. Hayne and Kiefel JJ rejected an argument that there existed an implied area of legislative competence over the national economy, but did not rule out the existence of an implied head of legislative power to, for example, '[put] down subversive activities and endeavours': at 125 [363]–[364].

42 Ibid 24 [9]. See also comments at 60 [127].

43 Ibid 60 [127].

'in any way' interfere with the federal distribution of powers.[44] He also indicated that the executive power should not be equated with a 'general power to manage the national economy'.[45] In these ways, he attempted to limit any great expansion of the 'breadth' of the executive power.

French CJ's judgment seems to have been intended to give effect to 'federal' considerations by providing support for Commonwealth schemes that are short term responses to a national emergency where it is perceived that they will not, at least not with any permanency, interfere with the operation of the federal distribution of powers.

French CJ indicated that he had considered whether the measures chosen by the Commonwealth were directed to the purpose of addressing the adverse effects of the relevant crisis. He said that they were:

> on the undisputed facts, rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries.[46]

This statement appears to incorporate notions of rationality and proportionality. Such questions are not foreign to judicial review of legislative action in the exercise of, for example, the defence power (*Constitution* s 51(vi)).[47] However, French CJ's judgment in *Pape* gave no clear indication regarding: (a) whether this was the standard to which he was referring; (b) why it was appropriate to invoke it in this context; or (c) the manner in which it might be applied in subsequent cases.

French CJ also warned there were limits to the 'depth' of the executive power, although he did not rule out instances where coercive legislation may be supported by s 51(xxxix) operating upon the executive power:

> 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.[48]

Despite this warning dictum, the judgment of French CJ appears to provide limited guidance for future determinations as to the breadth of s 61. This is due to the combination of the emphasis on the limited nature of the power and the importance of not drawing wider conclusions from French CJ's ruling as to the validity of the *Tax Bonus Act*, coupled with his approach to the application of the Mason J test, which focused upon the very practical specifics of the particular spending measure. We will return to an analysis of the pragmatic manner in

44 Ibid.

45 Ibid 63–4 [133].

46 Ibid.

47 *Polyukhovich* (1991) 172 CLR 501, 592 (Brennan J) ('*Polyukhovich*').

48 *Pape* (2009) 238 CLR 1, 24 [10]. See also the comments of Gummow, Crennan and Bell JJ: at 87 [227], 92 [244]–[245].

which French CJ applied the Mason J test and the implications of this for the constitutional structure later in this Part.[49]

2 *Hayne and Kiefel JJ*

In considering the limits of the executive power, Hayne and Kiefel JJ made it clear that the boundaries needed to be set by reference to the structural considerations which formed the basis of the decision in *Melbourne Corporation*,[50] ie the maintenance of the distinct polities of the Commonwealth and the states. These boundaries necessarily require reference to the division of legislative powers in the *Constitution* and any consideration of the breadth of the executive power in s 61 must be tempered having regard to the incidental legislative power that would accompany it by reason of s 51(xxxix).[51] Hayne and Kiefel JJ emphasised that it must always be remembered that the power under consideration is 'the executive power of a polity of limited powers'.[52] To give the Commonwealth executive powers corresponding to those of the British Crown at the time of federation (the approach supported by Gummow, Crennan and Bell JJ and discussed in more depth below) would be to undermine the federal limitations placed on Commonwealth legislative power.[53]

Also relevant to their decision was the necessity of maintaining the proper roles of the executive and Parliament under the system of responsible government, in which the federal Parliament (of limited powers) controls both taxation and expenditure.[54] This emphasised the importance of maintaining the balance of the compromise that the *Constitution* embodies between the principles of responsible government and federalism.[55]

Hayne and Kiefel JJ accepted that the executive power included the ability of the Commonwealth executive to engage in those activities necessarily implied in the fact of Australia's nationhood, to be determined through the application of the Mason J test.[56] However, they rejected an approach that would allow the implementation of any measures, in a time of crisis, that were otherwise

49 See text accompanying below nn 86–97.

50 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, cited in *Pape* (2009) 238 CLR 1, 118 [335] (Hayne and Kiefel JJ).

51 *Pape* (2009) 238 CLR 1, 119 [338] (Hayne and Kiefel JJ). See also the discussion of the scope of the incidental power in its operation on s 61: at 120–1 [342] (Hayne and Kiefel JJ), where they reject the distinction drawn by Mason J in the *AAP* that the incidental power would support spending of money appropriated pursuant to s 81, but not the engagement in activities by the Commonwealth. The incidental power, they conclude, could not be given a narrow or confined application and would include the power to facilitate and control expenditure and its application, including terms and conditions regulating the manner and circumstances of application of money provided by the Commonwealth. For a more detailed discussion of the idea that 'the contours of executive power generally follow those of legislative power', see Winterton, *Parliament, The Executive and the Governor-General*, above n 4, 30.

52 *Pape* (2009) 238 CLR 1, 118 [335] (Hayne and Kiefel JJ). See also Heydon J's comments referred to in text accompanying below n 69: at 180–1 [519].

53 Ibid 119 [336] ff.

54 Ibid 119 [338].

55 See further discussion in Saunders, above n 2, 263.

56 *Pape* (2009) 238 CLR 1, 116 [328]–[329].

unsupported by heads of legislative power. Such an approach, they held, conflated 'ends and means'.[57] To say that there was a crisis and that the Commonwealth was the only government with the resources to respond, did not necessarily mean that the Commonwealth executive might therefore engage in any means to meet that end, disregarding the otherwise limited nature of its powers.[58]

Hayne and Kiefel JJ appeared to reject the proposition that the executive power of the Commonwealth extended to *any* spending directed to an end that could be described as addressing a national emergency.[59] They pointed out that a conclusion that the power did extend thus, would give rise to 'fundamental questions about the relationship between the judicial and other branches of government'[60] and, in particular, questions about the appropriateness of the judiciary determining:

(1) Whether such a crisis exists. This might generally be considered an essentially political question. However, it must be subject to (possibly deferential) oversight by the courts, lest the power become 'self-defining'.[61] This then raises a number of evidential difficulties given the nature of the type of evidence likely to be involved.[62]

(2) Whether the actions chosen to achieve this purpose are permissible. Hayne and Kiefel JJ stressed that the Parliament's assessment that its response was appropriate must be subject to judicial oversight.[63] Such a power raises many of the same questions that the Court confronts when reviewing the exercise of the defence power, particularly in times of war,[64] and in other constitutional contexts where questions of purpose arise and must be assessed objectively.[65]

3 *Heydon J*

Heydon J's judgment is also laden with a very strong sense of the importance of the federal constitutional system in the interpretation of the *Constitution*.[66] His

57 Ibid 122 [349].

58 Ibid 121–2 [346]–[351].

59 Ibid 121 [345] ff.

60 Ibid 122–3 [352].

61 Ibid 123 [353] (Hayne and Kiefel JJ).

62 Ibid. In contrast, French CJ was content to observe that 'the question of 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': at 63–4 [133].

63 Ibid 122 [350].

64 On this point, see ibid 122 [347]–[348] (Hayne and Kiefel JJ). Their Honours appeared to indicate that if it were accepted that certain emergencies or crises may require response at a federal level, there must still be an avenue for the judiciary to review the means of addressing the issue in a similar manner to the defence power.

65 The association of the Mason J test with political questions is something that concerned Winterton: Winterton, 'The Limits and Use of the Executive Power by Government', above n 7, 427. See further analysis in text accompanying below nn 86 and 87.

66 See, eg, Heydon J's discussion of the proper application of the principle identified by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8 cited in *Pape* (2009) 238 CLR 1, 140–2 [412]–[417].

Honour emphasised the importance of the final words in the Mason J test: 'and which cannot otherwise be carried on for the benefit of the nation'.[67] This part of the test was not satisfied due to the existence of other means by which the economy could be stimulated by the federal government, both alone and in cooperation with the states.[68] Considering the remainder of the test, Heydon J also pointed out that in applying the Mason J test and asking what activities are 'peculiarly adapted to the government of a nation', it must be remembered that 'the Commonwealth Government, while in one sense a 'national government', is only the central government in a federal nation'.[69] In conclusion, his Honour did not unambiguously accept the correctness of the Mason J test, but found that in any event it was not satisfied for reasons broadly similar to those given by Hayne and Kiefel JJ.[70]

4 *Gummow, Crennan and Bell JJ: Theoretical Approach to Executive Power*

Gummow, Crennan and Bell JJ appear to have taken a different approach from the other four judges. The judgment itself is not always clearly structured and includes broad statements of principle which are not, to us at least, self-evident, with little explanation to support them. In this section we therefore attempt to identify the logic of the judgment, highlighting inconsistencies and insufficiencies we perceived within the reasoning. The final section in this part will then consider the extent of the similarities and differences between the approach of Gummow, Crennan and Bell JJ and that in the other judgments.

Gummow, Crennan and Bell JJ held that s 61 of the *Constitution* included the powers of the British Crown at the time of federation, subject to any necessary limitations deriving from the nature and existence of the executive governments of the states:

> 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.[71]

67 *Victoria v Commonwealth* (1975) 134 CLR 338, 357.

68 *Pape* (2009) 238 CLR 1, 178–80 [512]–[518] (Heydon J). Note that the other majority judgments do not abandon this final part of the test.

69 Ibid 181 [519]. See also the criticism by Hayne and Kiefel JJ of the equation of the federal executive power in s 61 with that of the power of the British Crown, referred to in text accompanying above n 52.

70 *Pape* (2009) 238 CLR 1, 191 [545].

71 Ibid 85 [220] (Gummow, Crennan and Bell JJ).

Evidently, this passage relates to the *breadth* of the executive power to spend.[72] That is, their Honours were suggesting that, apart from implications to be drawn from 'the position of the Executive Governments of the States', there may be no limits on the subject matters in respect of which the Commonwealth executive may spend money.

They went on to refer to the relationship between the spending power and the taxation power:

> to say that the power of the Executive Government of the Commonwealth to expend moneys appropriated by the Parliament is constrained by matters of 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)).[73]

Gummow, Crennan and Bell JJ did not elucidate precisely the weight that ought to be given to the 'significant place in s 51 of the power to make laws with respect to taxation' when determining the breadth of the spending power. This may have been a veiled reference to the idea that the breadth of the spending power should match that of the taxation power.[74] However, it is difficult to see any basis in the constitutional text or structure for holding that the scope of the spending power must necessarily bear any connection with that of the taxation power.

The taxation power in s 51(ii) is broad and express.[75] Its terms, however, do not contain any indication that there exists a concomitant power to spend. The spending power is part of the executive power contained in s 61 of the *Constitution*. Its limits are not expressly defined, but must be set by reference to the constitutional structure, so as not to undermine its fundamental principles, especially the creation of a federal polity, the separation of powers and the responsibility of the executive to Parliament. This is particularly so where the Commonwealth is able to achieve policy outcomes and de facto regulation through federal spending programs, giving rise to the capacity to undermine the federal division of legislative powers.[76]

72 We draw this conclusion on the basis that their Honours have clearly identified the *depth* aspect of the executive power to which they are referring: expenditure.

73 *Pape* (2009) 238 CLR 1, 91 [240]. See also the comments referring to the statement of Sir Robert Garran to the Royal Commission on the Constitution: at 90 [236]. However, note the rejection of the interpretation of spending power as equivalent to the almost unlimited federal taxation power earlier in the reasons: at 74 [182]–[183].

74 See, eg, Saunders, above n 2, 262.

75 Note, however, that *Constitution* s 51(ii) is limited by its terms ('taxation; but so as not to discriminate between States or parts of States'), by other constitutional prohibitions, such as ss 99, 117 and 51(iii) and by the principle that the taxation to which s 51(ii) refers is taxation *by the Commonwealth*: see *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 325 (Evatt J).

76 See further discussion in Appleby, above n 3, 97ff.

Further, conflating the breadth of the spending power with that of the taxation power raises the ghost of comparisons in some of the earlier cases between the federal spending power in Australia[77] and in the United States.[78]

The fundamental differences in the text, context and history of the relevant provisions of the United States and Australian Constitutions suggest that any comparison between the two is weak. If anything, the lack of any clause that expressly extends the spending power so that its breadth is coterminous with that of the taxation power may evidence 'a discriminating appreciation of American experience' and tend towards the opposite conclusion.[79] The rejection of s 81 as the basis for the spending power has at least removed the temptation to compare the phrase 'purposes of the Commonwealth' with the 'general welfare' clause.[80]

As a matter of principle, it is difficult to see why the conferral of a power on the Commonwealth Parliament to raise money by any kind of taxation should give rise to an implication that the Commonwealth executive may spend the money in whatever way, or on whatever cause, it thinks fit.[81] Correspondingly, it is difficult to imagine how limits on a taxing power would themselves serve to identify limits on the power to spend money raised by taxation.

As indicated above, the approach of Gummow, Crennan and Bell JJ would apparently allow the Commonwealth executive a broad executive power not

77 See, eg, *AAP* (1975) 134 CLR 338, 395–6 (Mason J), 420 (Murphy J). *Contra A-G (Vic) v Commonwealth* (1935) 52 CLR 533, 568 (Starke J) ('*Clothing Factory*'). Starke J discussed the breadth of the spending power in the United States before distinguishing it from the Australian position in three respects: (1) the difference in the text of the provisions; (2) the inclusion of s 96 in the Australian *Constitution*, which provided expressly for unlimited grants to the states; and (3) the reference in s 83 to appropriations to be made 'by law', which his Honour took to mean 'in accordance with law'. This restricted the power to appropriate in subjects assigned to the federal government by the *Constitution*. Starke J reaffirmed his position in *Pharmaceutical Benefits* (1945) 71 CLR 237, 265. Latham CJ held in that case that the interpretation of the unlimited nature of the spending power in the US rested upon its association with the taxing power in art 1 § 8, which was also unlimited. His Honour said that the argument did not apply to the Australian context 'because there is not the same collocation and association of words': at 255. Dixon J warned against reading the words 'purposes of the Commonwealth' as embodying the same meaning or doing the 'same work' as the words 'general welfare' in the United States: at 271. In *AAP* (1975) 134 CLR 338, 359–60, Barwick CJ agreed with the points of distinction made by Latham CJ and Dixon J in *Pharmaceutical Benefits*, adding that the history of the two provisions were notably different. The United States cases related to the spending of taxes collected, while the Australian provision embodied a British convention of parliamentary scrutiny of expenditure. In *Pape* (2009) 238 CLR 1, 43 [76] French CJ referred without disapproval to the contrast of the Australian provisions with the United States provision.

78 In the *United States Constitution*, the spending power is sourced in the same clause as the taxation power which provides: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to … provide for the … general welfare of the United States': art 1 § 8 cl 1. This power to 'provide for' the general welfare has been interpreted to mean spending money generated through taxation, limited by, inter alia, the requirement that the spending not be for local purposes: see *South Dakota v Dole* 483 US 201 (1987).

79 The words were used in a different, but we would suggest analogous, context in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1955) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

80 See, eg, Appleby, above n 3, 120.

81 That is particularly so when it is remembered that excess moneys raised were to be returned to the states: *Constitution* s 94. *Contra* the suggestion of Sir Robert Garran that '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': Commonwealth, above n 13, 72 [396].

limited by reference to the distribution of legislative powers under the *Constitution* and limited only by necessary implication derived from the powers of the state executive governments.[82] However, those powers are not readily identified from the text of the *Constitution*, making it difficult to foresee how such limits on the Commonwealth executive power might be ascertained. The approach also has the capacity to produce tension between the limited grants of *legislative* power expressly provided for in the *Constitution* and the allocation of *executive* power to the Commonwealth. The approach of Gummow, Crennan and Bell JJ appears to turn the conventional understanding of the federal distribution of powers in Australia (with limited enumerated powers given to the Commonwealth and plenary concurrent power remaining with the states) on its head, as far as the executive power is concerned. As Hayne and Kiefel JJ explained, this approach to executive power also has the potential to erode the *Constitution*'*s* deliberate distribution of *legislative* power to the Commonwealth, because s 51(xxxix) confers a power to legislate with respect to matters incidental to the power conferred by s 61.[83] This approach, coupled with Gummow, Crennan and Bell JJ's wide view of the 'purposes of the Commonwealth' for which appropriations might be made under s 81, could potentially result in a spending power of far greater breadth, extending to subject matters not within the legislative competence of the Commonwealth (even including within those subject matters the status of the Commonwealth as a national polity).

While there are therefore fundamental federalism-based concerns with the breadth of the approach to the executive power as it is expressed in the initial parts of their Honours' judgment,[84] Gummow, Crennan and Bell JJ ultimately came to the conclusion that the legislation was valid by asking whether the tax bonus was a measure that was 'peculiarly adapted to the government of the nation' — the same test adopted by French CJ and Hayne and Kiefel JJ.[85] The relationship between this test and their earlier statements as to the breadth of the executive power was not explained. Spending by the executive government of the United Kingdom (with which their Honours had suggested spending by the Commonwealth executive was analogous) is subject to no requirement to satisfy this test. The application of the test appears inconsistent with the proposition that

82 Despite their reference to constraints on the spending power of the executive having their source in the executive governments of the states, it is notable that the limitations on the Commonwealth executive power that Gummow, Crennan and Bell JJ actually identified in their judgment are not obviously referrable to the nature or powers of the executive governments of the states: *Pape* (2009) 238 CLR 1, 87 [227] (executive cannot extradite fugitive offenders without legislative support; executive cannot dispense with obedience to the law), 92 [244] (executive cannot create new offences).

83 Ibid 119 [338]. See text accompanying above n 51. It should also be noted that Gummow, Crennan and Bell JJ regarded the extent to which s 51(xxix) empowers the Commonwealth to legislate on matters incidental to the execution of s 61 as limited. They adopted the position taken by Latham CJ in *Pharmaceutical Benefits* (1945) 71 CLR 237, 256–60, that the power to make laws creating rights and imposing duties in support of the executive power is limited. However, they found the entitlement to a payment under the *Tax Bonus Act* was not a law of that kind: *Pape* (2009) 238 CLR 1, 92 [244]–[245].

84 It should be noted that these concerns arise from the requirement of coherence of the constitutional text itself and not from any assumed notion of 'federal balance'. Cf *New South Wales v Commonwealth* (2006) 229 CLR 1, 116–21 [183]–[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices*').

85 See *Pape* (2009) 238 CLR 1, 87–8 [228], applying the Mason J test from *AAP* (1975) 134 CLR 338, 396.

the breadth of the taxation power should influence the breadth of the executive spending power.

5 *French CJ and Gummow, Crennan and Bell JJ: Application of the Mason J Test*

Despite an apparently fundamental difference in conceptual approach, the acceptance of the Mason J test by Gummow, Crennan and Bell JJ was, at least in terms of verbal formula, consistent with the approach of French CJ and Hayne and Kiefel JJ. However, the judgments reveal further divisions about the application of the stated test. This division in application was predicted by Winterton in his own analysis of the executive power. After criticising the test as requiring the Court to become involved in 'political questions unsuited to judicial determination',[86] Winterton continued:

> Opinions may justifiably differ as to whether a particular activity must be conducted by the Commonwealth if the nation is to derive benefit, and opinions will also differ on the question of whether activities are to Australia's benefit or detriment.[87]

Against the background of the global financial environment,[88] Gummow, Crennan and Bell JJ compared the economic crisis to a state of emergency in circumstances of a natural disaster. Having made that analogy, their Honours stated that:

> 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.[89]

Gummow, Crennan and Bell JJ went on to refer to previous judicial statements to the effect that the executive power is clearest when it is not used in areas where competence is also held by the states.[90] They concluded that the *Tax Bonus Act*, because of the aggregation of fiscal power in the hands of the Commonwealth over the last century, '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'.[91]

86 Winterton, 'The Limits and Use of Executive Power by Government', above n 7, 427.

87 Ibid.

88 Gummow, Crennan and Bell JJ based their conclusions regarding the existence of the global financial crisis and its impact on the domestic economy on the agreed facts placed before the Court, therefore avoiding the difficult question that Hayne and Kiefel JJ raised about the extent to which such matters must be proven to the satisfaction of the Court: *Pape* (2009) 238 CLR 1, 88 [229]–[230].

89 Ibid 89 [233].

90 For example *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J), cited in *Pape* (2009) 238 CLR 1, 90–1 [239] (Gummow, Crennan and Bell JJ).

91 *Pape* (2009) 238 CLR 1, 91–2 [242].

Two matters should be noted regarding the way in which French CJ and Gummow, Crennan and Bell JJ appear to have applied the Mason J test. First, the question of whether an activity is 'peculiarly adapted to the government of the country' and 'cannot otherwise be carried on for its benefit', was assessed in a practical way[92] — the Chief Justice and Gummow, Crennan and Bell JJ were not concerned with the *legal* capacity of the states to act, but purely with their *practical* capacity. Thus, Gummow, Crennan and Bell JJ held that '[t]he 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'.[93] Similarly, French CJ referred to 'the *resources and the capacity* of the Commonwealth Government' as an important consideration.[94]

The second matter is that French CJ and Gummow, Crennan and Bell JJ seem to have confined themselves to a consideration of the *particular* measure chosen to combat the effects of the global financial crisis. Only the Commonwealth was in a position to make payments to taxpayers based on their adjusted tax liabilities, because only the Commonwealth administered the assessment of income tax. But, as Hayne, Kiefel and Heydon JJ pointed out,[95] a comparable injection of funds into the Australian economy could have been achieved by other means, including by means of payments made by each state following the receipt of a substantial grant from the Commonwealth pursuant to s 96, or the use of other fiscal measures within, for example, the taxation power (s 51(ii)) or the social welfare benefits powers (ss 51(xxiii) and (xxiiiA)).

Given that all seven judges ultimately applied the Mason J test to determine the question of whether the *Tax Bonus Act* fell within the executive power, the differences in outcome are telling.[96] The executive power has always been one that the Court has been wary to define, advocating a case-by-case approach.[97] The application of the executive power in this case reveals divisions in the Court as to the nature of the Australian federal constitutional system.[98] These divisions may be demonstrative of disagreement within the Court over the approach to the core underlying principle of federation in the *Constitution* and how this is to be applied to developments in the Australian economy and society which are wholly distinct from the constitutional text. In *Pape* such divisions had ramifications for the scope of the Commonwealth spending power, but they are likely to also be felt in cases concerning the scope of the executive power more generally.

92 Ibid 91 [241].

93 Ibid 91 [242] (emphasis added).

94 Ibid 63 [133] (emphasis added). This emphasis on the practical realities of modern Australian society and government may be thought to resonate with the focus on the event of e-commerce and the 'new economy' in elucidating the applicable constitutional principle under s 92 of the *Constitution*: see *Betfair v Western Australia* (2008) 234 CLR 418, 452 [14]–[15] (Gleeson CJ, Kirby, Hayne, Crennan and Kiefel JJ).

95 *Pape* (2009) 238 CLR 1, 122 [349]–[350], 123–4 [355]–[356] (Hayne and Kiefel JJ), 178–80 [513]–[517] (Heydon J).

96 Even if they were predicted in Winterton, 'The Limits and Use of Executive Power by Government', above n 7, 427.

97 See, eg, *Pape* (2009) 238 CLR 1, 55 [112] (French CJ).

98 See Saunders, above n 2, 260.

IV THE TAX BONUS AND THE OTHER LEGISLATIVE POWERS OF THE COMMONWEALTH

Given their conclusions on the executive power, not all of the judges considered the remaining arguments. All the judges, other than French CJ, considered whether the expenditures in the legislation were supported in part by the taxation power and only Hayne, Kiefel and Heydon JJ considered whether the legislation was supported by the external affairs or trade and commerce power. Because of their Honours' conclusions on the limited breadth of the general spending power, these conclusions about the heads of power — together of course with the other jurisprudence on these topics, an analysis of which is beyond the scope of this case note — will be relevant to any analysis of the constitutionality of current and future expenditure programs. The extent to which their judgments shed light on or raise questions about these areas of constitutional law will briefly be examined.

A *The Taxation Power and Reading Down*

In relation to s 51(ii), the taxation power, the basic argument advanced by the Commonwealth and interveners was that a payment of money under the *Tax Bonus Act* was equivalent to a refund of tax. According to this argument the *Act* was, for the most part, identical in substance to a law that retrospectively reduced taxpayers' tax liabilities for the previous year by the amount of the tax bonus and required excess tax that had already been paid to be refunded.

There were considerable difficulties in characterising the tax bonus as a refund of income tax. In order to appreciate those difficulties it is necessary to explain the scheme of the *Tax Bonus Act* in greater detail. Section 5(1) provided that a person was 'entitled to a payment (known as the tax bonus) for the 2007–08 income year' if he or she satisfied various requirements. The most important of those requirements were that a taxpayer have an 'adjusted tax liability' for the 2007–08 year that was greater than nil and have a taxable income that was less than $100 000.

Section 6 of the *Tax Bonus Act* specified the *amount* of the tax bonus and this depended solely upon the taxable income of taxpayers who were entitled to the tax bonus. For example, a person whose taxable income was less than $80 000 was entitled to be paid a tax bonus of $900. The effect of ss 5 and 6 was, therefore, that there could exist a class of persons — those whose tax liability was greater than nil but less than $900 — who would be entitled to receive a tax bonus in an amount greater than the amount of tax they had paid in the 2007–08 income year. The Commonwealth's modelling suggested there would be 820 880 taxpayers in that class — about 11 per cent of those entitled to be paid the tax bonus.[99]

The Commonwealth accepted that the taxation power did not support the *Tax Bonus Act* in its entirety, but submitted that the *Act* could be supported by the

99 *Pape* (2009) 238 CLR 1, 92 [246] (Gummow, Crennan and Bell JJ).

taxation power to the extent that it provided for the payment of a tax bonus in an amount that would not exceed the recipient's adjusted tax liability.[100]

Hayne and Kiefel JJ accepted that in some, but not all, of its operations the *Act* was equivalent to a refund of tax.[101] Heydon J rejected the submission that the *Tax Bonus Act* could be upheld as being with respect to the taxation power, in any of its operations. The payment of the tax bonus did not correlate in any way with taxpayers' tax liabilities and did not operate to change taxpayers' liability to pay tax. Accordingly, his Honour held that '[i]t [did] not change, regulate or abolish any right, duty, power or privilege with respect to taxation'.[102] Gummow, Crennan and Bell JJ also held that the *Tax Bonus Act* could not be characterised as providing for a tax refund.[103] However, in context, that statement may have been intended to apply only to the *Act* considered as a whole, ie it did not provide for a tax refund in *all* of its operations. It is not clear whether Gummow, Crennan and Bell JJ would have accepted that the *Act* was, in substance, a refund of tax insofar as it applied to taxpayers whose taxable income was equal to or greater than the amount of the tax bonus to which the *Act* entitled them. This appears the more likely interpretation since they went on to consider whether the *Tax Bonus Act* could be read down in this way.

For Gummow, Crennan and Bell JJ and for Hayne and Kiefel JJ, the central issue in relation to the taxation power was whether it was legitimate to read down the *Tax Bonus Act* so that persons entitled to a $900 tax bonus would receive the lesser of $900 or their adjusted taxation liability. This reading down, if it could be achieved, would ensure that no one received more, in the form of a tax bonus, than they had had to pay in tax in the 2007–08 income year.

The Commonwealth proposed that s 6 of the *Tax Bonus Act* should be read down by, in effect, inserting the italicised words 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.[104]

100 All the intervening states supported the Commonwealth's submission that the *Tax Bonus Act* could be (at least) partially supported by the taxation power: see ibid 13–20 for a brief summary of the arguments put forward by the states.

101 Ibid 131 [387]–[388].

102 Ibid 155 [453].

103 Ibid 94 [254].

104 Ibid 92–3 [247] (Gummow, Crennan and Bell JJ) (emphasis in original).

Gummow, Crennan and Bell JJ held that the *Act* could not legitimately be read down in the manner suggested by the Commonwealth. It was said that to read the legislation down in that way would introduce 'a foreign integer' in the calculation of the tax bonus by making the amount payable to those in the nil to $80 000 group vary according to the adjusted tax liability of the particular recipient.[105] They considered it significant that the *Tax Bonus Act* was evidently intended to be paid to those taxpayers with lower taxable incomes — the proposed reading down would have excluded those with the lowest incomes and so would have given a result contrary to the evident purpose of the *Act*.[106]

Hayne and Kiefel JJ also appeared to recognise the difficulties inherent in the reading down proposed by the Commonwealth. They observed — we think correctly — that 'in fact the reading down that is required concerns the entitlement to a tax bonus, not its amount'.[107] What was necessary was a reading down of s 5, rather than of s 6. Hayne and Kiefel JJ indicated that they were prepared to read down the 'class of persons' identified in s 5(1)(c), being persons with an adjusted tax liability greater than nil.[108] They commented:

> The class of persons that s 5(1)(c) identified is larger than the legislative power with respect to taxation allows, 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.[109]

Hayne and Kiefel JJ accepted that s 5(1)(c) could be read down 'in the manner indicated' but, unfortunately, their honours did not explicitly identify 'the manner' in which the *Act* was to be read down. To our minds, the observation that the class of persons identified in s 5(1)(c) is broader than the class of persons to whom payment of a tax bonus could legitimately be made under a law supported by s 51(ii) does not, by itself, indicate the manner in which s 5 should be read down.

We have found it difficult to understand how s 5(1)(c) could itself be read down to achieve the result identified by Hayne and Kiefel JJ, namely: 'payment to taxpayers … 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'.[110] It appears to us that in order to achieve that result it would have been necessary to read down either s 6 (as suggested by the Commonwealth) or, alternatively, the chapeaux of s 5(1), so that it read: 'A person is entitled to *the lesser of their adjusted tax liability or* a payment (known as the tax bonus) for the 2007–08 income year if: …' However, this, like the Commonwealth's suggested reading

105 Ibid 94 [251].

106 Ibid 93 [248].

107 Ibid 133 [391].

108 Stated in the abstract, this is a generally accepted method of 'reading down'. See, eg, *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634, 652 (Dixon J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371 (Dixon J); *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act*').

109 *Pape* (2009) 238 CLR 1, 133 [392]. The language used derives from the judgment of Dixon J in *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634, 652.

110 *Pape* (2009) 238 CLR 1, 133 [393].

down of s 6, appears to us to involve, in truth, a reading down of the *amount* of the tax bonus rather than the *class of persons* to whom it was payable.

Hayne and Kiefel JJ proposed the following answer to the third question in the special case:[111]

> 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.[112]

Expressed in that way, the flaw in the proposed reading down becomes apparent: there is *no* 'extent' to which the *Tax Bonus Act* provided for the payment of a tax bonus of less than the amount of the bonus fixed in accordance with that *Act*. The reading down proposed, although addressed to the terms of s 5 rather than s 6, does not limit the operations which the law has by narrowing the class of person to which the *Act* applies. Rather, it gives the law an entirely different operation which is, in substance, identical with that proposed by the Commonwealth.

It may be noted that, strictly speaking, the relevant 'class of persons' that was required to be read more narrowly, if the *Tax Bonus Act* was to be saved as a law with respect to taxation, was not that identified in s 5(1)(c) alone, but was in fact persons who met each of the five cumulative criteria in s 5(1). An alternative approach to reading down would have been to add one additional criterion to those listed in s 5(1), namely that the person's adjusted tax liability for the 2008–09 income year had to be at least $900.[113] This would have been more consistent with Hayne and Kiefel JJ's observations that 'the reading down that is required concerns the entitlement to a tax bonus, not its amount' and that 'it is not to be supposed that none were to receive unless all did'.[114]

The reading down issue which presented itself in this case provides a noteworthy instance of a general problem that frequently arises when a law is not fully supported by a head of power. The Parliament intends all its laws to operate according to their terms. Usually the Parliament does not say what it intends in the event that a particular law is held to be invalid in some of its operations. A general statement of intention is to be found in s 15A of the *Acts Interpretation Act 1901* (Cth), but those general words rarely, if ever, provide guidance about the *particular* statute that the Parliament would have wished to operate in the event that the one that it actually enacted was invalid.

New South Wales went further than the Commonwealth and the other intervening states and submitted that the law in its entirety — that is, *in all its operations* —

111 Such a criterion would, of course, have sat uneasily with the express criterion that the person's tax liability be greater than nil.

112 *Pape* (2009) 238 CLR 1, 134 [395].

113 Ibid 98 [270], 134 [395].

114 Ibid 133 [391]. To similar effect was the remark in the previous paragraph that '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'.

was supported by s 51(ii). The New South Wales argument was rejected by all six of the Justices who considered it.[115]

As we understand it, this submission of New South Wales was advanced on two bases that were said to operate together to bring the law within s 51(ii).[116] First, the criterion for payment of the tax bonus was the existence of a taxation liability in the 2007–08 income year. This meant that '[t]he only persons who qualify under s 5 had obligations under what is undoubtedly a s 51(ii) law'.[117] To our minds, the argument impermissibly relies upon a blurring of the distinction between 'taxation' (a head of Commonwealth legislative power) on the one hand, and a 'taxpayer' (not a head of legislative power), or, perhaps, a calculation already performed for different purposes pursuant to a different law enacted under s 51(ii), on the other.[118]

The second basis on which New South Wales submitted that the *Tax Bonus Act* was supported under s 51(ii) was that, because the practical operation of the *Tax Bonus Act* was, for *most* persons entitled to receive a tax bonus, equivalent to a refund of tax, the *Act* should be characterised *as a whole* as one with respect to taxation.[119] A similar argument is discussed in greater detail below under the heading 'The Trade and Commerce Power'.

B *The External Affairs Power*

The Commonwealth relied upon several distinct arguments in relation to the external affairs power, s 51(xxix). The external affairs power has, in the past, been a source of great breadth of legislative power for the Commonwealth. The judges that considered this argument in *Pape*, however, rejected any further expansion of it. Heydon J considered, and rejected, each of the Commonwealth's submissions on the external affairs power. The fact that the conditions giving rise to the global financial crisis had originated overseas provided no basis for the invocation of the external affairs power.[120] Heydon J rejected a faint submission that the *Tax Bonus Act* could be supported on the basis that it addressed a subject of 'international concern'.[121] He rejected an argument that the pursuit and advancement of comity with foreign governments might attract the external affairs power.[122] Finally,

115 The argument is dealt with most thoroughly at ibid 129–31 [380]–[388] (Hayne and Kiefel JJ).

116 See Transcript of Proceedings, *Pape v Federal Commissioner of Taxation* [2009] HCATrans 60 (31 March 2009) 15074–7, 5096–8 (Leeming SC).

117 The argument is reported in these terms in *Pape* (2009) 238 CLR 1, 17. See also ibid 4873–9 (Leeming SC).

118 It is, in some respects, reminiscent of the old debate about whether the power to make laws with respect to immig*ration* could support laws with respect to immig*rants*. See, eg, *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36.

119 We understand this argument to have been advanced in Transcript of Proceedings, *Pape v Federal Commissioner of Taxation* [2009] HCATrans 60 (31 March 2009) 5048–53 (Leeming SC).

120 *Pape* (2009) 238 CLR 1, 159 [465].

121 Ibid 161 [471]–[473]. See also *XYZ v Commonwealth* (2006) 227 CLR 532, 607–12 [216]–[225] (Callinan and Heydon JJ).

122 *Pape* (2009) 238 CLR 1, 161–2 [474].

Heydon J rejected several forms of a submission to the effect that the *Tax Bonus Act* implemented an international obligation or expectation. None of the international instruments relied upon — a declaration by the G20 and recommendations and statements issued by the International Monetary Fund and the OECD — created binding obligations and none were sufficiently specific.[123]

Hayne and Kiefel JJ rejected arguments that the *Tax Bonus Act* related to a matter 'geographically external' to Australia and was thus a law with respect to external affairs, and that it implemented an international agreement or understanding.[124]

In rejecting the treaty implementation aspect of the external affairs power as supporting the *Act*, each of the judges followed a two-step approach.[125] First, there must be an identifiable 'obligation' or commitment, although it may be difficult in a particular case to draw the line between an international 'obligation' and a mere recommendation or expectation falling short of an obligation.[126] Secondly, the identified international obligation must be sufficiently 'specific' 'to direct the general course to be taken'.[127]

However, if the first condition — that there be an international obligation — is fulfilled, then it is hard to see why the Commonwealth should be unable to implement its obligations simply because they are not specific in directing the nature of the action to be taken. For example, as Hayne and Kiefel JJ said, the G20 documents relied upon by the Commonwealth made it clear that 'it was for each nation to chart its own course in responding to the circumstances that have arisen'.[128] Nevertheless, plainly the G20 expected some action to be taken by each country. By leaving it to Australia to 'chart its own course', the G20 seems to have deprived the Commonwealth (in the sense of the central government) of the power to chart any course at all.

The Commonwealth had also argued that because the *Tax Bonus Act* was a response to the global financial crisis and because that crisis was caused by events which occurred externally to Australia, the *Act* was a law with respect to 'matters or things external to Australia'. In the case of the *Tax Bonus Act* this argument failed because, as Heydon J said, the *Act* was 'directed to internal Australian affairs, not external affairs' and any operation in relation to individuals outside Australia was 'entirely fortuitous and the *Tax Bonus Act* plainly does not take its character from that fortuitous operation'.[129] Although the argument based on the 'geographical externality' doctrine was unsuccessful in *Pape*, the Commonwealth's reliance upon it in a case involving legislation with predominantly intra-territorial

123 Ibid 164–8 [479]–[485].

124 Ibid 126 [369], 127 [371].

125 Following the decision in *Industrial Relations Act* (1996) 187 CLR 416.

126 That is particularly so when it is remembered that many international 'obligations' may not actually be practically enforceable.

127 *Industrial Relations Act* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

128 *Pape* (2009) 238 CLR 1, 127 [372].

129 Ibid 160 [468].

operation, tends to highlight the potential scope of this aspect of the external affairs power.

One of the central arguments in favour of the 'geographic externality' approach to s 51(xxix), which was expressly referred to by each of the majority judges in *XYZ v Commonwealth*[130] (with the exception of Kirby J, who ultimately decided the case on grounds other than the 'geographic externality' principle), was that the 'geographic externality' aspect of the external affairs power raised no issue of intrusion into areas otherwise occupied by the states.[131] Arguments of the kind advanced in *Pape* illustrate that the accuracy of this assumption must be open to doubt, particularly when it is borne in mind that, in accordance with orthodox constitutional principle, a single law may bear multiple characters.[132] It is not hard to imagine circumstances where the one law might be properly characterised both as a law with respect to a place, person, matter or thing geographically external to Australia and also as a law with respect to places, persons, matters or things geographically located within Australia.

C *The Trade and Commerce Power*

Heydon, Hayne and Kiefel JJ also considered whether the legislation was supported by the trade and commerce power, s 51(i). The Commonwealth submitted that the spending of the tax bonus money would produce a substantial increase in the flow of commercial goods, services, money and credit among the states and also with other countries. Such an argument, if accepted, could potentially support many federal expenditure programs and therefore the attention given to it by the minority is important. Hayne and Kiefel JJ found there was no evidence to support this submission.[133] Heydon J also rejected the Commonwealth's submission on the ground of insufficient evidence.[134]

Even putting aside the lack of evidence regarding the overall effect of the *Tax Bonus Act* on the economy as a whole, and particularly on the demand side of interstate and international trade and commerce, it seems to us that the argument of the Commonwealth[135] that the *Tax Bonus Act* could be supported under s 51(i), overlooked an important element of the process of 'characterisation'. That element is as follows: in order to be characterised as a law 'with respect to' a given subject

130 (2006) 227 CLR 532, 543 [18] (Gleeson CJ), 549–50 [39]–[40] (Gummow, Hayne and Crennan JJ).

131 See also *Polyukhovich* (1991) 172 CLR 501, 602–3 (Deane J), 638 (Dawson J). Cf Mason CJ: at 530.

132 See, eg, *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 103–4 (Dixon J); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 6–7, 11–13 (Kitto J), 15–16 (Taylor J); *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, 434 (Kitto J), Windeyer and Owen JJ agreeing; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 8 (McTiernan J), 11–12, 14 (Stephen J), Barwick CJ and Gibbs J agreeing, 19–23 (Mason J), Gibbs J agreeing; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 190–4 (Stephen J); *Re F; Ex parte F* (1986) 161 CLR 376, 387–8 (Mason and Deane JJ).

133 *Pape* (2009) 238 CLR 1, 128–9 [377]–[378].

134 Ibid 153 [446].

135 As well as the argument of New South Wales in respect of the connection with the taxation power, referred to in text accompanying above n 119.

matter, the law must have a sufficient connection with that subject matter in *every* operation that the law has. One cannot just look at the 'overall' operation of the law to discern its character. The 'overall' operation of a law, properly understood, is only the sum of each of its individual operations.

In order to ensure that a law has a sufficient connection with a subject of Commonwealth legislative power, it will therefore ordinarily be necessary to demonstrate either that:

(1) The law in its terms (ie in its legal operation) draws the relevant constitutional distinction (in the case of s 51(i), the distinction between interstate and overseas trade and commerce, and intrastate trade and commerce), so that it is impossible for the law to have any operations in which it lacks a sufficient connection with a subject matter of Commonwealth legislative power; or

(2) That the law, as a matter of practical effect, only has operations in which it does in fact bear a sufficient connection with a subject matter of Commonwealth power (in the case of s 51(i), a sufficient connection with interstate or overseas trade and commerce).

At least in relation to heads of power other than s 51(i), this proposition seems to be regarded as axiomatic. For example, in the *Work Choices* case,[136] the provisions of the *Workplace Relations Act 1996* (Cth) were expressed to apply only to certain employers and employees, such as foreign, trading and financial corporations and their employees. According to the Explanatory Memorandum for the Work Choices amendments, the *Workplace Relations Act* was able to cover 'up to 85% of Australian employees'.[137] Notwithstanding that substantial coverage, had the *Workplace Relations Act* purported to apply indiscriminately to *all* employees in Australia then it would plainly have been invalid. A law which failed to draw the relevant constitutional distinction identified in s 51(xx), between constitutional corporations and other persons, was held invalid in *Strickland v Rocla Concrete Pipes Ltd*.[138] Even in that case, it was not argued that the law was valid under s 51(xx) in its application to entities that were not constitutional corporations; only that the law could be read down so as to have that valid application.

The same principle was identified by Hayne and Kiefel JJ in *Pape*, in their reasons relating to the tax power. They observed that the *Tax Bonus Act* was 'not, in all its operations, a law with respect to taxation'.[139] It was not sufficient that the law had a sufficient connection with taxation in 89 per cent of cases to which it applied. The remaining 11 per cent of cases meant that the law, considered in its entirety as enacted, was unsupported by the tax power. It could only be supported by s 51(ii) if it could be read down.

There is no reason why the principle of characterisation identified should not be applied when s 51(i) is relied upon to support the validity of a law, in the same way

136 (2006) 229 CLR 1.

137 Ibid 69 [45] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

138 (1971) 124 CLR 468.

139 *Pape* (2009) 238 CLR 1, 129 [380].

that it is applied in relation to other heads of legislative power. The *Tax Bonus Act* was designed to inject $42 billion into the Australian economy. It seems almost certain that much of that money would be spent on international or interstate trade and commerce. But in many individual operations of the *Tax Bonus Act*, it would have no connection whatsoever, or only the most tenuous and distant connection, with interstate or international trade and commerce.

The *Tax Bonus Act* made no attempt on its face to distinguish between the possible uses that might be made by taxpayers of the tax bonus which they received and imposed no limits whatsoever on the use that might be made by taxpayers of the tax bonus paid to them. The only asserted connection with interstate trade and commerce was that taxpayers were at liberty to choose to spend their tax bonus in interstate trade or commerce and that it was likely that many taxpayers would in fact choose to spend their tax bonus in that way. The provisions of the *Tax Bonus Act* did not operate by reference to any criterion which would ensure that the recipients of the payments would spend them in international or interstate trade and commerce.[140]

V CONCLUSION: RAMIFICATIONS FOR COMMONWEALTH SPENDING

The rejection of s 81 as the basis for the federal executive spending power has removed a key assumption underlying much federal spending over the last three decades and, indeed, probably since federation. The extent to which some of these programs, or aspects of them, are constitutionally invalid is likely to turn upon a combination of two factors: first, the extent to which those measures fall within the scope of s 61 as expounded in *Pape* and, second, the capacity of the Commonwealth to convincingly point to other heads of legislative power to support particular spending measures.[141]

The orthodox liberal approach to the interpretation of federal heads of legislative competence, particularly the corporations power and external affairs power, means that many federal spending schemes may fall within these express grants of power.[142] However, as *Pape* demonstrates in relation to the taxation, external

140 Ibid 152 [444] (Heydon J).

141 For example, Hayne and Kiefel JJ in *Pape* (2009) 238 CLR 1, 116 [329] mentioned the possibility that the establishment of the CSIRO might be supported as an exercise of the patents power (*Constitution* s 51(xviii)). The authors note that after the most recent decision in *Williams v Commonwealth*, expenditure of moneys that does not fall within the ordinary administration of a department, within the royal prerogatives possessed by the Commonwealth, or the executive nationhood power, will require statutory backing.

142 For example, grants to local councils may fall within the corporations power if they are trading corporations. Cf *Mid Density Development Pty Ltd v Rockdale Municipal Corporation* (1992) 39 FCR 579, 584–5 (Davies J); *Jazabaz Pty Ltd v Botany Bay Council* [2000] NSWSC 58 (24 February 2000) [192]–[209] (Rolfe J); *Ritchie v Mosman Municipal Council* [2000] NSWSC 143 (10 March 2000) [22] (Grove J); *Pavlakis v Council of the City of Shoalhaven* [2005] NSWSC 436 (9 June 2005) [108]–[117] (Bergin J); *Australian Worker's Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102 (Spender J).

affairs and trade and commerce powers, the High Court remains willing to enforce limits on the subject matter of federal legislative power.

Two major issues arise for the Commonwealth with respect to determining the breadth of s 61 after *Pape*. The first is the extent of the differences between the conceptual approach to the power to spend identified in the judgments of French CJ, Hayne, Kiefel and Heydon JJ on the one hand, and of Gummow, Crennan and Bell JJ on the other. The ostensibly broader basis for the power in s 61 identified in the latter judgment did not come to the fore in *Pape*, because, in the end, each judgment turned on the satisfaction of the Mason J test in relation to powers necessary for the nation. The second issue is the dramatic split over the application of the Mason J test, perhaps demonstrating quite different approaches to the federal division of powers within the current Court. So, while healing many previous rifts over the basis and extent of the spending power, *Pape* has demonstrated that money remains an incredibly divisive issue for this Court.

The practical effects of the decision may not be felt for some time. It may be reasonably expected that challenges to Commonwealth funding schemes by the beneficiaries of Commonwealth spending will be rare and those who do oppose government spending may lack the requisite special interest to initiate a challenge.[143] In the meantime, the decision in *Pape* does not seem to have dampened the Commonwealth's enthusiasm for spending in a number of areas, including local government, sporting endeavours, the environment, the arts and scientific research, which are not obviously immediately referable to express heads of legislative power.

143 It seems probable that state Attorneys-General may have standing to challenge spending by the Commonwealth government, but in many cases it may not be politically advisable to impugn popular spending programs.