

Case Note

The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation

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Introduction

In *Pape v Commissioner of Taxation*,¹ the High Court addressed two important constitutional issues that have hitherto been shrouded in uncertainty. The first concerns the ‘spending power’² of the Commonwealth; the second, its executive power.

The *Constitution* establishes for Australia a federal system of government that divides power between the Commonwealth, a polity of limited powers, and the States, polities of residual power. In such a federation, the scope of the central polity’s capacity to spend public moneys holds critical significance: through money comes might. Where the expenditure relates to a matter within the express legislative power of the central government, little controversy can arise. But where there is no clear head of legislative power to support the expenditure, complex questions surface. Yet the framers of the *Constitution* provided only equivocal indications of the constitutional source for the Commonwealth’s spending power in such a situation: there is no provision that explicitly sanctions Commonwealth spending outside Commonwealth legislative competence. In that they were not alone, for Canada and the United States possess similarly obscure constitutional foundations for their central governments’ authority to spend.³ Where Australia diverges from its federated cousins is in the uncertainty that has remained concerning this constitutional question: the 1930s saw the highest courts of both North American countries address the issue,⁴ while the High Court of Australia has, until now, provided no definitive exposition of the area.

Like the issue of Commonwealth spending, the scope and nature of the executive power of the Commonwealth has received meagre judicial attention.⁵ It too has a bearing on the distribution of powers between the integers of the Australian federation. The sparse and

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¹ (2009) 238 CLR 1 (*‘Pape’*).

² Cheryl A Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11 *Melbourne University Law Review* 369.

³ *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, s 91(1A); *United States Constitution* art I, §8, cl 1.

⁴ *A-G (C) v A-G (O)* [1937] AC 355; *United States v Butler*, 297 US 1 (1936).

⁵ George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983) vii. Little has changed in the quarter century since Professor Winterton’s treatise was published.

sometimes cryptic wording of s 61,⁶ the constitutional provision that vests executive power, has rendered elusive the goal of identifying a unified and judicially accepted theory for executive power. Of greatest difficulty has been the task of construing the investiture of power to ‘maintain’ the *Constitution*.⁷

Pape represents a radical reappraisal of the constitutional requirements for the valid appropriation and expenditure of Commonwealth funds. In addition, the majority’s re-examination of the executive power points to a new methodology in construing s 61. Both are likely to be of enduring significance.

Preliminary Matters

It has become something of a pattern for cases concerning the validity of Commonwealth appropriation and expenditure to lack a clear ratio decidendi and, in this respect, *Pape* is no exception. The High Court has on two prior occasions examined the scope of the Commonwealth’s power to spend.

*Attorney-General (Vic) ex rel Dale v Commonwealth*⁸ concerned the validity of legislation that sought to establish and fund a scheme by which certain prescription medicines were provided to the public without charge. The statute purported both to appropriate the necessary funds for the scheme and to impose duties on pharmacists and medical practitioners with respect to the prescription and supply of medicine. It was held invalid (with McTiernan J dissenting)⁹ on the basis that either the degree of regulation it involved was not sufficiently incidental to the appropriation to fall within s 51(xxxix) (Latham CJ, Rich and Dixon JJ)¹⁰ or the appropriation was beyond the scope of s 81 on account of it not being for a purpose of the Commonwealth (Starke and Williams JJ).¹¹

In *Victoria v Commonwealth*,¹² a portion of one of the annual appropriation Acts and its intended expenditure by the Executive Government were impugned. Parliament had purported to appropriate funds for the establishment of regional councils that were intended to investigate, plan and provide welfare services around Australia. The appropriation was held valid (McTiernan, Mason, Jacobs and Murphy JJ) but the expenditure itself lacked a majority supporting validity (McTiernan, Jacobs and Murphy JJ). The action was dismissed because Stephen J held that Victoria had no standing.

Pape concerned the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (‘the Act’), which came into force on 18 February 2009. It formed a part of the

⁶ See George Winterton, ‘The Limits and Use of Executive Power by Government’ (2003) 31 *Federal Law Review* 421, 422.

⁷ Winterton, above n 5, 31–2.

⁸ (1945) 71 CLR 237 (‘*Pharmaceutical Benefits Case*’).

⁹ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 273.

¹⁰ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 250, 263 (Latham CJ), 264 (Rich J), 268–70 (Dixon J).

¹¹ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 282 (Williams J).

¹² (1975) 134 CLR 338 (‘*AAP Case*’).

Commonwealth Government's response to a period of international economic instability, the Global Financial Crisis. The Act sought to distribute \$7.7 billion among 8.7 million taxpayers so as to provide a rapid fiscal stimulus to the Australian economy.¹³ It did so by purporting to create an entitlement to a payment of a fixed sum (\$250, \$600 or \$900) by the Commissioner of Taxation for a limited class of individual Australian resident taxpayers who had lodged an income tax return for 2007–08.¹⁴ Membership of that class was defined by reference to a person's adjusted tax liability (which had to be greater than nil) and taxable income (which had to be less than or equal to \$100 000).¹⁵ Which of the three fixed sums such a person received was determined solely by reference to that person's taxable income for the 2007-08 income year.¹⁶ Section 3 of the Act sought to appropriate the moneys required to cover the payments by engaging a standing appropriation in the *Taxation Administration Act 1953* (Cth).¹⁷

From the ranks of the inexcusably remunerated emerged Bryan Pape, a taxpayer putatively entitled to a payment of \$250.¹⁸ Eight days after the Act received the Royal Assent, he commenced proceedings in the High Court seeking declarations that the Act was invalid and that the payment to which he was entitled would be unlawful if effected. The Commonwealth relied on six grounds to support the validity of the Act.¹⁹ It submitted that the Act was within power by virtue of any or all of the following:

- (a) a substantive legislative power, founded in s 81 of the *Constitution*, to authorise the spending of appropriated funds, combined with s 51(xxxix), the express incidental power;
- (b) the executive power (s 61) read with ss 51(xxxix), 81 and 83;²⁰
- (c) an implied 'nationhood' power;
- (d) the trade and commerce power (s 51(i));
- (e) the taxation power (s 51(ii));
- (f) the external affairs power (s 51(xxix)).

The first three grounds formed the core of the Commonwealth's argument, though the principles that supported them were complex and elusive. To Heydon J, who held a

¹³ Explanatory Memorandum, Tax Bonus for Working Australians Bill (No 2) 2009 (Cth) 5.

¹⁴ The Act ss 5, 6. Through a circuitous definitional route, an Australian resident for the purposes of the Act holds the same meaning as in s 6(1) of the *Income Tax Assessment Act 1936* (Cth): see the Act s 4(1); *Income Tax Assessment Act 1997* (Cth) s 995.1(1).

¹⁵ The Act s 5(1)(c), (d).

¹⁶ The Act s 6.

¹⁷ *Taxation Administration Act 1953* (Cth) s 16.

¹⁸ He later received it: Bryan Pape, 'The Tax Bonus Case or Did the Commonwealth Cry "Wolf"?' (Speech delivered at the 21st Annual Conference of the Samuel Griffith Society, Adelaide, 28–30 August 2009) 2.

¹⁹ The Commonwealth also contended that Pape lacked standing to seek a declaration that the Act was invalid in its application to other taxpayers. The contention was unanimously and compendiously rejected: *Pape* (2009) 238 CLR 1, [45], [52] (French CJ), [150]–[159] (Gummow, Crennan and Bell JJ), [273]–[274] (Hayne and Kiefel JJ), [399]–[402].

²⁰ Two bases for this ground were advanced: that s 61 encompassed (i) a power to engage in activities peculiarly adapted to the position of a national polity; and (ii) a power to manage the national economy.

generally low opinion about the merit of the Commonwealth's submissions,²¹ they were also 'extreme' and 'mercurial'.²²

The court unanimously rejected ground (a). By majority (consisting of French CJ, Gummow, Crennan and Bell JJ; Hayne, Heydon and Kiefel JJ dissenting), the court upheld the Act on the basis of ground (b). Hayne and Kiefel JJ held that the Act was invalid but could be read down to fall within s 51(ii) (ground (e)); Heydon J held the Act invalid in its entirety.

The analysis that follows examines those grounds that were considered by a majority of the court: (a),²³ (b)²⁴ and (e).²⁵ As a result, the desire to provide an exhaustive treatment of each of the judgments in their entirety has been resisted. In any event, on existing authority, the Commonwealth's reliance on grounds (c), (d) and (f) during the course of argument was tenuous; a fact reflected in their rejection by those justices who considered them.²⁶

Appropriation

The Act impugned in *Pape* was different from those considered previously in the *Pharmaceutical Benefits Case* and in the *AAP Case*. This was because s 3 sought to engage words of appropriation contained in another Act. Thus, one question that arose was whether the Act was in fact an appropriation. Relying to a significant degree on established parliamentary practice,²⁷ Gummow, Crennan and Bell JJ held that the Act was itself an appropriation.²⁸ French CJ concurred with their Honours on this point.²⁹ As a result, an Act will still answer the description of an appropriation if it enlarges the appropriation made by another valid Act.

Two issues arose in relation to the constitutional basis for appropriation. The first concerned the proposition advanced by the Commonwealth that s 81 was the source of a substantive 'spending power' that, when combined with s 51(xxxix), provided constitutional authority for the Act. The second concerned *Pape*'s submission that the Act was invalid for failing to satisfy the stipulation in s 81 that appropriations be 'for the purposes of the Commonwealth'.

²¹ See *Pape* (2009) 238 CLR 1, [411]–[420], [424], [435], [487].

²² *Pape* (2009) 238 CLR 1, [487], [488].

²³ See below Part 3.

²⁴ See below Part 4.

²⁵ See below Part 5.

²⁶ Implied 'nationhood': *Pape* (2009) 238 CLR 1, [358]–[367] (Hayne and Kiefel JJ), [487]–[510] (Heydon J); trade and commerce: *Pape* (2009) 238 CLR 1, [375]–[378] (Hayne and Kiefel JJ), [436]–[448] (Heydon J); external affairs: *Pape* (2009) 238 CLR 1, [368]–[374] (Hayne and Kiefel JJ), [458]–[486] (Heydon J).

²⁷ See *Pape* (2009) 238 CLR 1, [199] (Gummow, Crennan and Bell JJ) quoting IC Harris (ed), *House of Representatives Practice* (5th ed, 2005) 409.

²⁸ *Pape* (2009) 238 CLR 1, [168]–[171].

²⁹ *Pape* (2009) 238 CLR 1, [135].

The Nature of s 81

The Commonwealth's submission was rejected unanimously. Its rejection turned on the court's characterisation of the nature of appropriation and was based on three strands of authority. Each emphasised the constraining nature of the appropriation provisions; none supported the existence of a substantive power. First, there was no textual support for interpreting s 81 as a conferral of power.³⁰ Unlike ss 51, 61 and 71, which vest legislative, executive and judicial power in the respective branches of government, s 81 uses no words denoting an investiture.³¹ It appears in a chapter that is not concerned with the bestowal of powers³² alongside provisions that stipulate the manner in which public moneys may be expended.³³ Moreover, to construe s 81 as regulating the relations between Parliament and the Executive concerning appropriation provides an elegant correlative to the provisions governing the relations between the Houses of Parliament on the same subject.³⁴ Second, British and colonial practice prior to Federation established, as a fundamental tenet in matters of public finance, that 'parliamentary appropriation conditions the lawfulness of executive expenditure'.³⁵ In other words, appropriation acts as a parliamentary control on the allocation and expenditure of public funds. This was underlined by dicta scattered throughout the court's constitutional jurisprudence: appropriation has been variously described as 'a provisional setting apart'³⁶ and 'no more than the earmarking'³⁷ of a sum from the Consolidated Revenue Fund; it amounted to 'legally segregating it from the general mass'.³⁸ These statements, which were approved by most members of the court, emphasised the limited effect of an appropriation. Finally, the Convention Debates indicated no more than that ss 81 and 83 were intended to incorporate these established principles of responsible government into the *Constitution*.³⁹

The analysis undertaken by the court is significant in several respects. The premise that the Commonwealth has a broad spending power sourced in s 81, which underlies the *AAP Case* and was assumed in the *Pharmaceutical Benefits Case*, has been overturned.

³⁰ *Pape* (2009) 238 CLR 1, [81] (French CJ) ('These are not words of legislative power in the ordinary sense. They are words of constraint.'). [178] (Gummow, Crennan and Bell JJ), [289] (Hayne and Kiefel JJ) ('[s 81] is not cast in its terms as a grant of legislative power'), [601] (Heydon J) ('Of itself [s 81] gives no untrammelled power to spend.').

³¹ Compare *Constitution* s 105A(2); see Transcript of Proceedings, *Pape v Commissioner of Taxation* (High Court of Australia, 31 March 2009) 44.

³² *Pape* (2009) 238 CLR 1, [606] (Heydon J).

³³ In particular, *Constitution* ss 83, 94, 97. See *Pape* (2009) 238 CLR 1, [291] (Hayne and Kiefel JJ).

³⁴ *Constitution* ss 53, 54, 56. See *Pape* (2009) 238 CLR 1, [175] (Gummow, Crennan and Bell JJ), [291] (Hayne and Kiefel JJ).

³⁵ *Pape* (2009) 238 CLR 1, [66], [80] (French CJ); see also [296] (Hayne and Kiefel JJ).

³⁶ *New South Wales v Commonwealth* (1908) 7 CLR 179, 191 (Griffith CJ) cited with approval in *Pape* (2009) 238 CLR 1, [78] (French CJ), [292] (Hayne and Kiefel JJ), [602] (Heydon J).

³⁷ *AAP Case* (1975) 134 CLR 338, 411 (Jacobs J) cited with approval in *Pape* (2009) 238 CLR 1, [177] (Gummow, Crennan and Bell JJ), [177] (Hayne and Kiefel JJ), [602] (Heydon J).

³⁸ *New South Wales v Commonwealth* (1908) 7 CLR 179, 200 (Isaacs J) cited with approval in *Pape* (2009) 238 CLR 1, [79] (French CJ), [176] (Gummow, Crennan and Bell JJ), [292] (Hayne and Kiefel JJ), [602] (Heydon J).

³⁹ *Pape* (2009) 238 CLR 1, [77] (French CJ), [187], [203] (Gummow, Crennan and Bell JJ), [305] (Hayne and Kiefel JJ).

Interestingly, the interpretation bestowed upon s 81 is that urged by the plaintiff in the *Pharmaceutical Benefits Case*.⁴⁰ In no small measure, this is a result of the court considering extrinsic historical materials for the first time in this area.⁴¹ That s 81 is to be interpreted as a constraint on power rather than its source means that the proper approach to future disputes requires a conceptual division of public spending into two parts. The first is the allocation of funds by Parliament (appropriation). The second is the utilisation of those funds (expenditure) through legislative or executive action to achieve some end (for example, the making of payments to taxpayers or the construction of school halls). The inquiry the court will now undertake thus comprises two separate questions: (a) is there a valid appropriation?; and (b) if so, does the particular legislative or executive action utilising the moneys appropriated fall within Commonwealth legislative or executive power?⁴² An affirmative answer to the former requires that the impugned enactment contain words of appropriation and that the conditions in ss 53, 54, 56, 81 and 83 be met.⁴³ An affirmative answer to the latter will mean either that the enactment is within a head of power in s 51 or s 52, or that the executive action is within the power vested by s 61. It is thus accurate to speak of an ‘appropriations power’ only in the sense of the Parliament’s ability to confer authority on the Executive to spend moneys from the Consolidated Revenue Fund.⁴⁴ In relation to the Act, all s 81 could support was s 3. Nevertheless, according to dicta from a majority of the court, the scintilla of power contained in s 81, when combined with s 51(xxxix), is sufficient to support enactments that provide for the audit and review of public expenditure.⁴⁵

‘For the Purposes of the Commonwealth’

The second appropriation issue concerned the stipulation in s 81 that the Consolidated Revenue Fund be appropriated ‘for the purposes of the Commonwealth’: an expression that may neatly be abbreviated to ‘the purposive proviso’. Both the *Pharmaceutical Benefits Case* and the *AAP Case* were argued and decided on the basis that this phrase was the

⁴⁰ (1947) 71 CLR 237, 240 (‘Section 81 contains no substantive grant of power at all.’), 241 (‘If s 81 had been intended to give added power, it could have been much more aptly expressed.’); *contra* 239 (‘If that Act did nothing more it might be referable to the power to appropriate, which is a legislative power of the Commonwealth.’). This seems to qualify the views of Gummow, Crennan and Bell JJ, who traced ‘the difficulty with some of the reasoning in the earlier cases’ to ‘the form of argument presented by the Commonwealth in the *Pharmaceutical Benefits Case*, to which the judgments responded and which they rejected’: *Pape* (2009) 238 CLR 1, [180]–[181].

⁴¹ *Pape* (2009) 238 CLR 1, [188] (Gummow, Crennan and Bell JJ), [298] (Hayne and Kiefel JJ). Note, however, that cursory references were made in the *AAP Case* to historical considerations: (1975) 134 CLR 338, 354–5 (Barwick CJ), 385–6 (Stephen J).

⁴² *Pape* (2009) 238 CLR 1, [8] (French CJ), [178] (Gummow, Crennan and Bell JJ), [317] (Hayne and Kiefel JJ).

⁴³ There is, however, some suggestion that the satisfaction of ss 53 and 56 presents a non-justiciable question: *Pape* (2009) 238 CLR 1, [165]–[166] (Gummow, Crennan and Bell JJ).

⁴⁴ *Pape* (2009) 238 CLR 1, [176] (Gummow, Crennan and Bell JJ).

⁴⁵ *Pape* (2009) 238 CLR 1, [195] (Gummow, Crennan and Bell JJ), [295] (Hayne and Kiefel JJ). By virtue of s 97, s 51(xxxvi) would also authorise such legislation, as Gummow, Crennan and Bell JJ concluded: at [195].

critical limitation, if any existed, on the Commonwealth's power to spend.⁴⁶ At least two interpretations emerged, neither of which commanded the support of a majority: (i) the proviso imposes no limitation on the purposes for which Parliament may choose to appropriate public funds;⁴⁷ and (ii) an appropriation will be valid if the purpose to which it is directed may be the subject of a valid law, based either on the express heads of power in ss 51 and 52 or on inherent powers arising from the fact of nationhood.⁴⁸ The principal question, to which both of these interpretations are addressed, is whether 'for the purposes of the Commonwealth' is wider than, narrower than or coterminous with the legislative power of the Commonwealth. Pape submitted that the second interpretation should be preferred and that the Act was invalid for lack of a valid purpose.

The narrow reading of s 81 adopted by the court in *Pape* and discussed above seems to render consideration of the purposive proviso otiose. Were such consideration required, it would collapse the bipartite inquiry that the decision lays down for ascertaining the validity of an appropriation and its expenditure. Unless the first interpretation of 'purposes of the Commonwealth' is accepted (in which case those words serve no real function), consideration of whether an appropriation satisfies the purposive proviso will involve an examination of Commonwealth legislative power. That examination would be identical to the exercise to be undertaken in the second step of the court's approach to questions of appropriation and expenditure. This view, however, was taken only by Hayne and Kiefel JJ, who found it unnecessary to express a final opinion on Pape's submission.⁴⁹ The remainder of the court proceeded on the basis that the meaning of the purposive proviso held some relevance, though they were divided on the correct interpretation.⁵⁰

Gummow, Crennan and Bell JJ preferred a very broad view of the proviso. This conclusion followed from the drafting history of s 81, which, according to their Honours, indicated that 'purposes of the Commonwealth' was the federal equivalent to 'the public service' in the United Kingdom,⁵¹ a phrase that encompassed 'any service of the Crown

⁴⁶ See, eg, *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 240–1 (during argument), 252–4 (Latham CJ), 265–6 (Starke J), 274–5 (McTiernan); *contra* 271 (Dixon J); *AAP Case* (1975) 134 CLR 338, 392 (Mason J), 411 (Jacobs J).

⁴⁷ See, eg, *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254, 256 (Latham CJ), 273–4 (McTiernan J); *AAP Case* (1975) 134 CLR 338, 396 (Mason J).

⁴⁸ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 375 (Gibbs J). The comments cited here included references to purposes of both executive and judicial ilk. Such purposes could form the basis of valid legislation on the basis of s 51(xxxix). Hayne and Kiefel JJ (at [297]) differentiate between the interpretation adopted by Barwick CJ and Gibbs J in the *AAP Case* and that preferred by Dixon J in the *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 269. Their Honours label the former a polar extreme and the latter an intermediate position. With great respect, the distinction is illusory, a conclusion that is borne out by the fact that both Barwick CJ (at 363) and Gibbs J (at 375) express concurrence with Dixon J's opinion. See also *Pape* (2009) 238 CLR 1, [608] (Heydon J) (adopting Dixon J's opinion).

⁴⁹ *Pape* (2009) 238 CLR 1, [290] (Hayne and Kiefel JJ).

⁵⁰ Heydon J did so only to determine the validity of the Act were s 81 to confer a substantive power to spend money appropriated: *Pape* (2009) 238 CLR 1, [608].

⁵¹ *Pape* (2009) 238 CLR 1, [203]–[205] (Gummow, Crennan and Bell JJ).

anywhere'.⁵² This position seems equivalent to the first interpretation described above, namely that the proviso imposes no limitations on the purposes for which Parliament may choose to appropriate funds. French CJ disagreed and held that the proviso was not 'simply another way of saying "public service"'.⁵³ He concluded that '[t]he "purposes of the Commonwealth" are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*'.⁵⁴ This seems to equate the purposive proviso in s 81 with the requirement in s 83 that an appropriation be 'by law'. But there are inherent uncertainties in French CJ's approach to this issue. He separated the validity of the appropriation of money (authorised by s 81) from that of its expenditure and yet concluded that the proviso limited the 'power to *expend* public moneys' to expenditure for the purposes of the Commonwealth.⁵⁵ Of course, this may simply reflect the fact that any limit on the purposes for which moneys can be appropriated is also a limit on the purposes for which they can be expended. Slightly more difficult to reconcile, however, is French CJ's reason for rejecting the view that the purposive proviso was equivalent to 'the public service': that to do so would fail to give the words their 'full amplitude'.⁵⁶ It is ambiguous whether this is merely recognition of the fact that 'the public service' may not encompass grants under s 96 to the States or something more significant.

Heydon J also eschewed a broad interpretation of s 81 and construed the purposive proviso by reference to s 83. Thus, the power of appropriation, according to his Honour, is limited to the purposes that may be achieved by valid enactments pursuant to the Commonwealth's legislative powers.⁵⁷ The slight divergence in expression from French CJ's pronouncement holds little significance. It results from the fact that French CJ left open the possibility that some provisions of the *Constitution* may, by their own force, appropriate funds;⁵⁸ it is implicit in Heydon J's reasoning that he would have held that such appropriations require an enactment pursuant to one of the placita in s 51.⁵⁹ In contrast, Gummow, Crennan and Bell JJ were of the opinion that such appropriations are made by force of the *Constitution* itself.⁶⁰ It remains unclear which position Hayne and Kiefel JJ would have adopted on the purposive proviso. Their only comment that provides any hint of their view is that 'there is evident force in the view that ["purposes of the Commonwealth"]

⁵² *Re Samuel* [1913] AC 514, 526 (Viscount Haldane) quoted in *Pape* (2009) 238 CLR 1, [200] (Gummow, Crennan and Bell JJ).

⁵³ *Pape* (2009) 238 CLR 1, [75].

⁵⁴ *Pape* (2009) 238 CLR 1, [113].

⁵⁵ *Pape* (2009) 238 CLR 1, [8] (emphasis added).

⁵⁶ *Pape* (2009) 238 CLR 1, [75].

⁵⁷ *Pape* (2009) 238 CLR 1, [608] (Heydon J) approving the *Pharmaceutical Benefits Case* (1947) 71 CLR 237, 271–2 (Dixon J). Note that Gummow, Crennan and Bell JJ disapproved this: at [211].

⁵⁸ *Pape* (2009) 238 CLR 1, [75]. His Honour had in mind ss 3, 48, 66, 72(iii), 83, 84, 85(iii) and (iv), 87, 89, 93, 94, 105, 105A. For further consideration of this point, see *Pharmaceutical Benefits Case* (1947) 71 CLR 237, 251 (Latham CJ); *AAP Case* (1975) 134 CLR 338, 353 (Barwick CJ).

⁵⁹ See *Pape* (2009) 238 CLR 1, [606].

⁶⁰ *Pape* (2009) 238 CLR 1, [209].

is not limited to purposes in respect of which the Parliament has express power to make laws'.⁶¹

It is difficult to see how this discussion can be anything more than academic. Most, if not all, constitutional litigation that calls for consideration of the appropriation provisions of the *Constitution* will be directed towards preventing expenditure of the moneys appropriated;⁶² based on the approach laid down in *Pape*, the threshold issue will be whether legislative or executive power exists to support the expenditure. Even if the only issue in such litigation were the constitutionality of an appropriation,⁶³ there would be significant hurdles to overcome in the form of standing and justiciability.⁶⁴ In the unlikely event that all of those issues are surmountable, it remains hard to view s 81 as the great limiter. Though there are some that disagree,⁶⁵ such a contention lacks cogency given the *Constitution's* text and history. If anything, the stipulation in s 83 for an appropriation to be 'by law' is a more likely candidate to restrain Commonwealth appropriation.

The Connection between Taxing and Spending

More than other members of the court,⁶⁶ Gummow, Crennan and Bell JJ emphasised the historical connection between the capacities to tax and to spend, and its manifestation in the *Constitution*.⁶⁷ After noting the express limitations on the Commonwealth's taxation and revenue powers,⁶⁸ their Honours stated:

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*. ... 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).⁶⁹

This statement is unremarkable in all respects except one. Their Honours seem to suggest that the prohibition in s 51(ii) against discrimination between States or parts of States with respect to taxation may hold significance for the Commonwealth's capacity to spend appropriated funds where that capacity is sourced in the executive power and given effect by a law enacted pursuant to s 51(xxxix). If that is what their Honours intended, it is a

⁶¹ *Pape* (2009) 238 CLR 1, [290].

⁶² *Pape* (2009) 238 CLR 1, [316]–[317] (Hayne and Kiefel JJ).

⁶³ This improbable scenario would require there to be no utility in restraining the expenditure of the appropriated moneys.

⁶⁴ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 248, 255–6 (Latham CJ), 272–3 (Dixon J), 276 (McTiernan), 277–9 (Williams J); *AAP Case* (1975) 134 CLR 338, 364–6 (Barwick CJ), 370 (McTiernan J), 379–83 (Gibbs J), 387–91 (Stephen J), 393, 401–2 (Mason J), 410 (Jacobs J), 424–5 (Murphy J).

⁶⁵ Gabrielle Appleby, 'There Must be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93.

⁶⁶ *Pape* (2009) 238 CLR 1, [294], [338] (Hayne and Kiefel JJ), [595] (Heydon J).

⁶⁷ *Pape* (2009) 238 CLR 1, [164], [181], [182], [191], [192], [199], [238], [240].

⁶⁸ *Pape* (2009) 238 CLR 1, [237] referring to ss 51(ii)–(iii), 99, 117 of the *Constitution*.

⁶⁹ *Pape* (2009) 238 CLR 1, [238].

contention that may have weighty implications for schemes that provide payments to some States in order to compensate for taxation measures in the future and thus could flag the development of a significant precedent.

Executive Power

Of all the powers that the *Constitution* vests, the executive power is the most difficult to construe. Unlike the legislative power, the executive power is not divided into enumerated placita that conveniently describe persons, things or subjects that may form the basis of the exercise of the power. The interpretation of s 61 is rendered difficult by its sparse language and indeterminate terms. It provides that:

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.

There are three aspects of this provision that are of significance in tracing the submissions made by the Commonwealth and the reasons of the court. The executive power encompasses (i) the power to execute and maintain legislation made under the *Constitution*; (ii) the execution of the *Constitution*; and (iii) the maintenance of the *Constitution*. Though the Commonwealth was often not clear as to which of these three aspects its arguments were pegged, it seems fairly plain that the principles recognised by the majority of the court related to the third aspect of s 61, the maintenance of the *Constitution*.⁷⁰ Two issues thus arise in analysing the implications of *Pape's* ratio decidendi.

The first concerns the relationship between the scope of Commonwealth legislative power and the scope of Commonwealth executive power. At least until the *AAP Case*, it was relatively well established that 'the contours of executive power generally follow those of legislative power'.⁷¹ Thus, the subject-matters on which the executive power can operate were thought to be limited to those within Commonwealth legislative competence. That principle was apparently confirmed by the court in the *AAP Case*.⁷² It is, however, extremely ambiguous precisely what conception of the executive power emerges from that case. Barwick CJ and Gibbs J were clear that the scope of Commonwealth legislative power delimits executive power.⁷³ Mason J opined that the distribution of legislative powers was only one consideration in demarcating the content of executive power; the other was 'the

⁷⁰ *Pape* (2009) 238 CLR 1, [124], [127] (French CJ), [215] (Gummow, Crennan and Bell JJ). This is not explicit in French CJ's judgment, but the passages quoted at [124] and [125] and his reference to a speech given by Professor Sawyer (at [128]; see Winterton, above n 5, 32, 229) strongly support the contention.

⁷¹ Winterton, above n 5, 30 and cases cited at n 28.

⁷² *Ibid* 30–1, citing the *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 379 (Gibbs J), 396 (Mason J), 405–6 (Jacobs J).

⁷³ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ) ('With exceptions that are not relevant to this matter and which need not be stated, the [E]xecutive may only do that which has been or could be the subject of valid legislation.'). 379 (Gibbs J) (the words of s 61 'make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth').

character and status of the Commonwealth as a national government'.⁷⁴ Gibbs J would have given the Commonwealth legislative power over such a subject;⁷⁵ Barwick CJ was equivocal.⁷⁶ Jacobs J held that s 61 was not 'strictly limited' to the express grants in ss 51 and 52, but extended to 'all matters which are the concern of Australia as a nation'.⁷⁷ The confusion was perpetuated in *Davis v Commonwealth*.⁷⁸ It seems, but is by no means clear, that the positions taken in this debate are determined by the answers given to two questions: (i) does the fact of nationhood hold some consequence for Commonwealth power? (ii) if so, is the consequence to increase the scope of Commonwealth executive power alone or that of legislative power as well? *Pape* was consequently a suitable opportunity to consider and resolve the ambiguities thriving in this area of the court's jurisprudence.

The second issue relates to the relevance of the prerogative in interpreting s 61. The powers and capacities of the Executive uncontroversially include those conferred by valid Acts, those that are possessed by persons other than the Crown, and those that at common law belong uniquely to the Crown and derive from the Queen (the prerogative).⁷⁹ Uncertainty has surrounded the question whether the activities authorised by the executive power are limited to those three sources.⁸⁰ The significance of the question lies in the implications it holds for how a particular act may be shown to fall within the executive power. If executive power is indeed so limited, determining the validity of executive action would involve construing the relevant Act or looking to the common law to establish the existence of the particular power or capacity claimed. Were a fourth source of powers and capacities to be elucidated, a methodology for considering future cases would also need to be shaped.

In the face of strong dissents, a majority of the court (French CJ, Gummow, Crennan and Bell JJ) held that s 61 authorised the expenditure of funds appropriated by s 3 of the Act. The remainder of the Act was held to be incidental to that exercise of the executive

⁷⁴ *AAP Case* (1975) 134 CLR 338, 396.

⁷⁵ *AAP Case* (1975) 134 CLR 338, 375.

⁷⁶ *AAP Case* (1975) 134 CLR 338, 364.

⁷⁷ *AAP Case* (1975) 134 CLR 338, 405.

⁷⁸ (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ):

'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 ... [T]he 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';

(1988) 166 CLR 79, 103 (Wilson and Dawson JJ):

'the character and status of the Commonwealth as a national government is an element to be considered in the construction of s 61 of the *Constitution*';

(1988) 166 CLR 79, 110 (Brennan J) ('There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power.'). 119 (Toohey J, who adopted the views of Wilson and Dawson JJ).

⁷⁹ See *Pape* (2009) 238 CLR 1, [126] (French CJ); Winterton, above n 5, 111. Some definitions of the prerogative (the most prominent being that propounded by Professor Dicey: AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 425) collapse the distinction between the last two categories.

⁸⁰ Winterton, above n 5, 34.

power and thus supported by s 51(xxxix). The reasoning of French CJ, however, diverged significantly from that of Gummow, Crennan and Bell JJ.

Gummow, Crennan and Bell JJ

The reasoning of Gummow, Crennan and Bell JJ involved the acceptance of three propositions. First, the executive power to maintain the *Constitution* is not limited to action authorised by the prerogative;⁸¹ that limb confers power to protect the Australian body politic.⁸² Second, the executive power of the Commonwealth to expend funds appropriated by Parliament is limited only by the sphere in which State executive power may be exercised.⁸³ Third, that limitation is given effect by the adoption of the following test for the validity of executive action: is the impugned action an enterprise or activity that is peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation?⁸⁴

In applying these principles to the facts, their Honours identified the impugned executive action as ‘determining that there is the need for an immediate fiscal stimulus to the national economy’.⁸⁵ It was of crucial significance that the determination was taken in ‘novel’ and ‘unusual’ circumstances that were so serious and on such a scale as to amount to a ‘global financial and economic crisis’.⁸⁶ For on the basis of these facts, undisputed by the parties,⁸⁷ Gummow, Crennan and Bell JJ were able to conclude that the crisis concerned Australia as a nation; that ascertaining the appropriate response to the crisis was ‘somewhat analogous to determining a state of emergency in circumstances of a natural disaster’;⁸⁸ and that, given the first proposition stated above, the executive power was engaged.⁸⁹ The means of responding to the crisis satisfied the test contained in the third proposition because the States on their own would not be able to raise the funds necessary to make the payments.⁹⁰

Their Honours’ judgment provides several significant insights into their opinions as to the correct approach for construing s 61. First, no consideration was given to whether a legislative power existed to make laws with respect to national emergencies. Such

⁸¹ *Pape* (2009) 238 CLR 1, [214]–[215].

⁸² *Pape* (2009) 238 CLR 1, [215]. In this respect, note the concerns expressed by Professor Winterton about this manner of interpreting the maintenance limb, which in his opinion is erroneous: Winterton, above n 5, 32–3.

⁸³ *Pape* (2009) 238 CLR 1, [220]. This may be an elliptical reference to the distinction between capacities and their exercise: see below n 121.

⁸⁴ *Pape* (2009) 238 CLR 1, [228] approving the formulation in *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J) of the principle stated in the *AAP Case* (1975) 134 CLR 338, 397 (Mason J).

⁸⁵ *Pape* (2009) 238 CLR 1, [232].

⁸⁶ *Pape* (2009) 238 CLR 1, [229], [233]; see also [143] (‘crisis in economic affairs’), [230] (‘unusual nature of the current economic times’, ‘the most severe deterioration in the global economy since the Great Depression and the most significant economic crisis since the Second World War’), [231] (‘the global conditions were extraordinary’).

⁸⁷ But not necessarily by the States: as interveners, they were not able to lead any evidence: Transcript of Proceedings, *Pape v Commissioner of Taxation* (High Court of Australia, Mark Leeming SC, 1 April 2009) 133.

⁸⁸ *Pape* (2009) 238 CLR 1, [233].

⁸⁹ *Pape* (2009) 238 CLR 1, [233].

⁹⁰ *Pape* (2009) 238 CLR 1, [241], [242]; Transcript of Proceedings, *Pape v Commissioner of Taxation* (High Court of Australia, Mark Leeming SC, 1 April 2009) 132.

consideration would have indicated that their Honours were deriving executive power from the legislative power of the Commonwealth. Its absence indicates that the coextensive nature of the legislative and executive powers of the Commonwealth is no more, if such a thing ever existed. Second, the position of the Executive in the United Kingdom was influential in the reasoning. Their Honours made several references to the relevance of the wide scope of appropriation for ‘the public service’ in the United Kingdom to the construction of s 61.⁹¹ This led to the remarkable suggestion that the ‘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’ may be applicable to the scope of s 61.⁹² There are strong indications that, at least for Gummow, Crennan and Bell JJ, future questions relating to the scope of the executive power will be answered on the basis that if the Executive in the United Kingdom can do it and the position of the States does not prevent it, the Commonwealth Executive may act likewise.⁹³ Finally, the prerogative appears now to hold much less relevance in the construction of s 61.⁹⁴ Indeed, their Honours’ national emergency principle could quite easily have been reasoned based on the prerogative.⁹⁵ These observations are perhaps unsurprising, given some of Gummow J’s previously expressed opinions on the construction of s 61.⁹⁶

French CJ

French CJ reached the same ultimate conclusion as Gummow, Crennan and Bell JJ but his reasons are not susceptible to founding a broader principle. It seems likely that this was precisely his intention.⁹⁷ Indeed, he expressly withheld his support for the proposition that s 61 confers power on the Executive to respond to national emergencies.⁹⁸ The highest that the principle emanating from French CJ’s judgment may be put is as follows:⁹⁹

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.

⁹¹ *Pape* (2009) 238 CLR 1, [188], [198].

⁹² *Pape* (2009) 238 CLR 1, [226].

⁹³ *Pape* (2009) 238 CLR 1, [220]. Compare *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J) (‘The executive power of the Commonwealth at the date of the *Constitution* presumably included such of the then existing prerogative powers of the King in England as were *applicable to a body politic with limited powers.*’ (emphasis added)).

⁹⁴ *Pape* (2009) 238 CLR 1, [223]. The perspicacious reader will notice that Gummow, Crennan and Bell JJ were the only members of the court who felt the need to enclose the term in inverted commas: *Pape* (2009) 238 CLR 1, [199], [214], [215]. There is a temptation here to attribute some interpretational significance to judicial punctuation preferences. That temptation should be resisted, if only because inverted commas now appear in connection with terms such as ‘unjust enrichment’ and ‘cause of action’: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, [6], [92].

⁹⁵ See HE Renfree, *The Executive Power of the Commonwealth of Australia* (1984) 466–9.

⁹⁶ *Re Ditfort*; *Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369; *Re Residential Tenancies Tribunal of NSW v Henderson*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464.

⁹⁷ *Pape* (2009) 238 CLR 1, [9] (‘The implications of these propositions for the scope of the executive power are generally limited.’), [10], [133].

⁹⁸ *Pape* (2009) 238 CLR 1, [10].

⁹⁹ *Pape* (2009) 238 CLR 1, [133]; see also [8].

What is more significant, however, is that French CJ joined with Gummow, Crennan and Bell JJ on the methodological issues. It is a necessary corollary of his conclusion that the case did not depend on the implication of a legislative ‘nationhood’ power that the executive power need not follow the contours of legislative competence.¹⁰⁰ Like Gummow, Crennan and Bell JJ, French CJ recognised a new source of executive power separate from ‘[t]he collection of statutory and prerogative powers and non-prerogative capacities’.¹⁰¹ His views on the relationship between the prerogative and s 61, first expounded before his elevation to the court,¹⁰² now command a majority of the High Court.¹⁰³

While history and the common law inform its content, [s 61] 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.

The area not defined by the prerogative is, in French CJ’s opinion, to be derived from ‘the necessities of a modern national government’.¹⁰⁴ That criterion appears to have been partly based on the judgment of Dixon J in the *Pharmaceutical Benefits Case*.¹⁰⁵ Unlike Gummow, Crennan and Bell JJ, French CJ did not expressly approve Mason J’s test from the *AAP Case*.¹⁰⁶ However, he took it as established authority¹⁰⁷ that the test to determine whether a matter fell within this portion of the executive power was whether it was peculiarly within the capacity and resources of the Commonwealth and affected the nation as a whole.

Critique

Underlying any discussion of Commonwealth executive power are two issues: the relevance of English constitutional theory and the care to be taken in transplanting such notions into a federal system governed by a written constitution. *Pape* is no exception. The views adopted by the majority expose some significant concerns for the development of principle in this area.

First, the basis for the test first stated by Mason J in the *AAP Case* and now adopted by the court is unclear and vague.¹⁰⁸ What is ‘peculiarly adapted’ to a national government is a politically-charged criterion. In addition, whether a measure could otherwise be carried

¹⁰⁰ *Pape* (2009) 238 CLR 1, [133].

¹⁰¹ *Pape* (2009) 238 CLR 1, [127].

¹⁰² *Ruddock v Vadarlis* (2001) 110 FCR 491, [183] (French J) cited with approval in *Pape* (2009) 238 CLR 1, [214] (Gummow, Crennan and Bell JJ).

¹⁰³ *Pape* (2009) 238 CLR 1, [127].

¹⁰⁴ *Pape* (2009) 238 CLR 1, [128] quoting Geoffrey Sawer, ‘The Executive Power of the Commonwealth and the Whitlam Government’ (Lecture delivered at the Octagon Lecture Theatre, University of Western Australia, Perth, 4 June 1976) 10.

¹⁰⁵ (1945) 71 CLR 237, 269:

‘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 ... should be interpreted widely and applied according to no narrow conception of the functions of central government of a country in the world of to-day.’

¹⁰⁶ (1975) 134 CLR 338, 397.

¹⁰⁷ *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J); *R v Hughes* (2000) 202 CLR 535, [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁰⁸ *Pape* (2009) 238 CLR 1, [508] (Heydon J).

out appears to afford a significant degree of deference to the Executive in choosing the means of policy implementation. As Heydon J pointed out,¹⁰⁹ other means existed by which a stimulus could have been delivered to the economy, some of which would have involved the States. The adoption of this threshold also presents some practical difficulties. If, as in *Pape*, the States intervene in, rather than instigate, a constitutional challenge, their inability to lead evidence and put the Commonwealth to proof on this issue will result in an effectively unchallenged expansion of Commonwealth power. Given the emphasis placed on the unusually uncontentious nature of the factual assertions in *Pape*,¹¹⁰ the court may well already be alive to this concern.

Second, reliance on a principle of national emergency, or on the bland assertion that short-term fiscal measures are, in the circumstances, within the executive power, appears to come perilously close to stating conclusions without disclosing the underlying reasoning.¹¹¹ Gummow, Crennan and Bell JJ stated that the power they recognised originated in the United Kingdom, but without any support of authority.¹¹² Further, the proposition that the phrase ‘maintenance of this *Constitution*’ in s 61 ‘conveys the idea of the protection of the body politic’¹¹³ is proffered with little accompanying discussion of how that phrase has previously been construed.¹¹⁴ Hayne and Kiefel JJ criticised both majority judgments for conflating ends and means and relying on notions that were ‘protean and imprecise’.¹¹⁵ Such criticism has much force.

The most significant criticisms of the majority’s approach relate to the connection between legislative and executive power and the role of the prerogative within the latter.¹¹⁶ French CJ, Gummow, Crennan and Bell JJ have recognised a fourth category of executive power. What impelled such recognition is not apparent. The majority provided little by way of rebuttal to the well-known arguments in favour of employing the prerogative to measure the ambit of executive power, viz, that it provides a substantial body of principles offering certainty of both content and its ascertainment.¹¹⁷ Nevertheless, it is tolerably clear that their Honours envisage limits to this aspect of s 61, which seem, at the very least, to include subjecting the power to legislative control.¹¹⁸ It is also evident that they are aware of the potential for untrammelled expansion of Commonwealth power at the expense of the

¹⁰⁹ *Pape* (2009) 238 CLR 1, [550].

¹¹⁰ *Pape* (2009) 238 CLR 1, [11], [14] (French CJ), [229] (Gummow, Crennan and Bell JJ).

¹¹¹ Winterton, above n 6, 427.

¹¹² *Pape* (2009) 238 CLR 1, [233].

¹¹³ *Pape* (2009) 238 CLR 1, [215] (Gummow, Crennan and Bell JJ).

¹¹⁴ See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J) (‘The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorised by the Constitution without the intervention of [f]ederal legislation.’); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 441 (Isaacs J). See also Winterton, above n 5, 28, 32.

¹¹⁵ *Pape* (2009) 238 CLR 1, [349], [352]; see also [552] (Heydon J).

¹¹⁶ Of the minority, only Heydon J adverted to this methodological issue, though Hayne and Kiefel JJ were aware of the significance of the majority’s approach: *Pape* (2009) 238 CLR 1, [260] (Hayne and Kiefel JJ), [567] (Heydon J).

¹¹⁷ Winterton, above n 5, 33; Winterton, above n 6, 432–3.

¹¹⁸ *Pape* (2009) 238 CLR 1, [10] (French CJ), [227], [244] (Gummow, Crennan and Bell JJ).

States.¹¹⁹ Future decisions will no doubt resolve the opaqueness that presently engulfs these questions.¹²⁰ But if true regard is to be had to the distribution of powers between the Commonwealth and the States, the most reliable and secure guide for construing s 61 is the legislative competence of the Commonwealth. That States do not have the power to affect the capacities of the Commonwealth Executive is not to the point.¹²¹

More concerning than these issues of methodology is the conception of the federal Executive revealed in the reasons of Gummow, Crennan and Bell JJ. With great respect, their Honours pay too little regard to the fact that the Commonwealth is a polity of limited powers in drawing strong analogies between executive practice in the United Kingdom and the Commonwealth's executive powers.¹²² At present, this appears to be a minority position, for the other members of the court seem to envisage a Commonwealth Executive more in keeping with a federal system.¹²³

Taxation

The Commonwealth initially sought to support the entire Act as a law with respect to taxation authorised by s 51(ii), but later conceded that to fall within that placitum, the Act would have to be read down in accordance with the *Acts Interpretation Act 1901* (Cth).¹²⁴ Despite this concession, New South Wales submitted that the Act in its entirety fell within s 51 (ii). As a result, six justices considered the issue both with and without the benefit of the concession. Gummow, Heydon, Crennan and Bell JJ concluded that the Act was outside the scope of the taxation power and could not be read down; Hayne and Kiefel JJ also held that the Act was invalid but were able to read it down so as to come within power. French CJ felt it unnecessary to consider the issue.¹²⁵

¹¹⁹ *Pape* (2009) 238 CLR 1, [127] (French CJ), [228] (Gummow, Crennan and Bell JJ).

¹²⁰ See *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

¹²¹ See *Pape* (2009) 238 CLR 1, [223]. In this context, 'capacities' mean the Crown's rights, powers, privileges and immunities: *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 438–9 (Dawson, Toohey and Gaudron JJ). State legislation cannot modify the nature of Commonwealth executive power (that is, its capacities) though it may regulate the activities that, in the exercise of those capacities, can be undertaken: at 439 (Dawson, Toohey and Gaudron); but see at 454–5 (McHugh J), 473 (Gummow J).

¹²² *Pape* (2009) 238 CLR 1, [335] (Hayne and Kiefel JJ).

¹²³ *Pape* (2009) 238 CLR 1, [127] (French CJ) ('the exigencies of "national government" cannot be invoked to set aside the distribution of powers between Commonwealth and States'), [335] (Hayne and Kiefel JJ) ('The executive power of the Commonwealth is the executive power of a polity of limited powers.'). [519] ('it is inherent in the idea of a federation that the central government has less power than the central government of a non-federation'). For a more detailed discussion of this issue, see Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 261–2.

¹²⁴ *Acts Interpretation Act 1901* (Cth) s 15A.

¹²⁵ *Pape* (2009) 238 CLR 1, [8].

Prior to *Pape*, the court had only once considered whether an enactment that provided for payments to taxpayers was a law with respect to taxation.¹²⁶ In *Mutual Pools*, the court upheld an enactment¹²⁷ that rendered the Commonwealth conditionally liable to repay a sales tax, the collection of which was unconstitutional.¹²⁸ The amount to be repaid was equal to the amount of tax collected. The recipients of the payments were those from whom the tax had been collected or, if they had passed the tax on to their customers, the taxpayers' customers, (that is, third parties). New South Wales sought to draw an analogy between this statute and the Act and to characterise the Act as a rebate or refund of tax. This was despite some significant differences: the amount payable was determined by recipients' taxable incomes not their income tax liabilities;¹²⁹ and recipients were defined by several criteria, only one of which was that they had paid income tax.¹³⁰

A majority of the court appeared to take a narrow view of what payments will be authorised by the taxation power. That the Act used a limited class of taxpayers for a particular income year 'as the criterion of its operation' was insufficient to bring it within power.¹³¹ Gummow, Crennan and Bell JJ held that the Act was not a rebate nor a refund because the amount recipients received was not related to the tax they had paid in the relevant income year.¹³² Hayne and Kiefel JJ reached a similar conclusion, holding that there needed to be a 'direct connection ... between the amount of the bonus and the amount that has been paid in tax'.¹³³ Heydon J's views were to similar effect.¹³⁴

Conclusion

Without controversy, *Pape* may be interpreted as standing for the following propositions:

- (i) Neither ss 81 nor 83 confers a substantive spending power.
- (ii) The authority to spend public funds appropriated in accordance with ss 81 and 83 must be found elsewhere in the *Constitution* or in laws made under it.
- (iii) The subject-matters on which the executive power of the Commonwealth may operate are not limited to those within the legislative power of the Commonwealth.

¹²⁶ *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 ('*Mutual Pools*'). The only other case of some relevance is *Werrin v Commonwealth* (1938) 59 CLR 150, which upheld a provision that, in limited circumstances, barred recovery of payments erroneously collected as sales tax.

¹²⁷ *Swimming Pools Tax Refund Act 1992* (Cth).

¹²⁸ *Mutual Pools* (1994) 179 CLR 155, 167 (Mason CJ), 175 (Brennan J), 182–3 (Deane and Gaudron JJ), 204 (Dawson and Toohey JJ), 209, 217–8 (McHugh J). It is possible that this did not form part of the ratio decidendi of the case 'as the argument in this court ultimately proceeded upon the basis that the [*Swimming Pools Tax Refund Act 1992* (Cth)] was within a head of power conferred by the *Constitution*': at 166 (Mason CJ).

¹²⁹ The Act s 6.

¹³⁰ The Act s 5(1)(c).

¹³¹ *Pape* (2009) 238 CLR 1, [255]; see also [386] (Hayne and Kiefel JJ); [453] (Heydon J).

¹³² *Pape* (2009) 238 CLR 1, [254]–[255].

¹³³ *Pape* (2009) 238 CLR 1, [387].

¹³⁴ *Pape* (2009) 238 CLR 1, [453], [454], [456].

- (iv) The executive power to maintain the *Constitution* includes, but is not limited to, matters that fall within the prerogative.
- (v) Whether a matter falls within that part of executive power not derived from the prerogative will depend on whether it is peculiarly adapted to the government of the nation and cannot otherwise be carried out for the public benefit,¹³⁵ or whether it is peculiarly within the capacity and resources of the Commonwealth.¹³⁶

It may also be authority for the proposition that, where an enactment provides for payment by the Commonwealth to taxpayers, there must exist a direct relationship between the amount to be paid out and the amount of tax paid by those taxpayers for the enactment to be a law with respect to taxation pursuant to s 51(ii).

As a result of *Pape*, future constitutional litigation concerning Commonwealth expenditure is unlikely to address s 81. In that respect, the decision appears to settle the uncertainty associated with the holdings in the *Pharmaceutical Benefits Case* and the *AAP Case*. The controversy thus clarified has in fact existed since the Convention Debates; the court's resolution of it is consistent with the text of the *Constitution* and British and Australian constitutional practice. It is now clear that ss 81 and 83 hold a constraining role. There is a wider issue here as well. There are strong indications that the court, as it is presently constituted, will be reluctant to hold that provisions outside Part V of Chapter I confer legislative power unless the intention of such a conferral is express;¹³⁷ a connection to one of the provisions within that part will be necessary.

Unlike the appropriation question, the majority's basis for upholding the Act presents a vast array of questions and much scope for debate as to the proper approach to construing s 61. As a result of its exceptional facts and the lack of a clear majority in reasoning on s 61, it is unlikely to provide the basis for a large expansion in executive power; it is, as French CJ emphasised repeatedly, a decision of limited consequence in that regard.¹³⁸ The case's importance lies in its implicit rejection of the prerogative as *the* restraint on the activities in which the Executive may engage and its discarding of the Commonwealth's legislative competence as the measure of subject-matters on which executive power may operate. While the ramifications of this approach may or may not be far-reaching, they will certainly be long-lasting.

¹³⁵ *Pape* (2009) 238 CLR 1, [242] (Gummow, Crennan and Bell JJ).

¹³⁶ *Pape* (2009) 238 CLR 1, [133] (French CJ).

¹³⁷ For example, 'the Parliament *may make laws*' (emphasis added); see *Constitution* ss 120, 122.

¹³⁸ *Pape* (2009) 238 CLR 1, [9].