STRUCTURAL PROBLEMS FOR A GUARANTEED MINIMUM INCOME AND A JOB GUARANTEE SCHEME

BY CHRISTOPHER ARUP*

Economic and technological developments suggest that the Commonwealth will again be pressed to consider the enactment of a scheme to guarantee universally either a minimum income or a job opportunity. In this article, Mr Arup examines the debate over the efficacy of the two guarantees, concentrating upon their structural problems and operational difficulties as these result from doubts about constitutional power. He concludes that support for either guarantee lies in a combination of heads of constitutional power.

This article examines the sources of constitutional power for a major extension of federal social security and employment opportunity schemes. In doing so, the article examines the social policy of the extensions to the extent of identifying structural and operational problems that stem from doubts about constitutional power. If such schemes are to be proposed, designed and implemented, then the constitutional authority to do so and the consequent structural complications are critical considerations.

The article is thus an excursion into the realms of preventative law: anticipating the constitutional problems that should be avoided when the laws embodying the schemes are written. The writer anticipates that major alterations to our welfare schemes will be made and that, in particular, some form of guaranteed minimum income scheme (referred to as the "GMI") will be implemented. The GMI has received endorsement[1] in principle and calls for its implementation are currently being renewed. Furthermore, there is increasing interest in job guarantee

* B.A. (Melb.), LL.M. (Monash); Lecturer in Legal Studies, La Trobe University.

[1] A summary of major proposals overseas to 1974 is contained in the Commonwealth of Australia, Treasury Taxation Paper No. 8 *Negative Income Tax and Tax Credit Systems* (1974). In Australia, a GMI has been recommended by, *inter alia*, the Commission of Inquiry into Poverty and the Priorities Review Staff: Commonwealth of Australia, Commission of Inquiry into Poverty, *First Main Report* (1975) and Commonwealth of Australia, Priorities Review Staff, *Possibilities for Social Welfare in Australia* (1975), respectively. However, more recently, relevant government inquiries have chosen not to recommend for or against a GMI. See Commonwealth of Australia, Taxation Review Committee, *Full Report* (1975); Commonwealth of Australia, The National Superannuation Committee of Inquiry, *Final Report—A National Superannuation Scheme for Australia Part One* (1976) 19; Commonwealth of Australia, Inquiry into Unemployment Benefit Policy and Administration, *Report* (1977) 10. Leading private social welfare organisations have recommended the introduction of a GMI; in particular, see Australian Council of Social Service, Task Group on Guaranteed Minimum

schemes in comparable countries, particularly in the United States.[2] Considerable research and consideration of the viability of the GMI[3] and other schemes have been completed and the schemes would now benefit from experimental implementation. In any case, worthwhile discussion does not depend upon the likelihood of a major alteration like the GMI. Discussion of the relevant heads of power and the leading High Court cases provides insight into the scope for all kinds of milder government developments in social welfare and economic opportunity schemes.

The most comprehensive need-related monetary scheme is the GMI. The GMI has found favour in one or other of its subtly varied forms with both conservatives and social democrats. Briefly, such a scheme is aimed to ensure every income unit of society a minimum income to the extent of making a payment to a unit from government funds if the unit does not earn that minimum from other sources. This it would do either by paying amounts to units according to a tapering means test or, more popularly, by taxing each unit's income in such a way as to credit it with an income or tax allowance to ensure that its income after tax is at least the minimum income and, if the income falls below that level, to make a transfer payment to that unit. In Australia, the Commission of Inquiry into Poverty recommended a tax-linked guarantee in 1975.[4] The Inquiry's recommendation was that income tax should be assessed by crediting every income unit with a minimum income and then taxing all other income at a constant proportional rate. If the income from other sources was such that the tax on it was less than the minimum income, then the unit was to receive a net cash payment from the government; if the income was such that the tax on it was more than the minimum income, then the unit was merely to receive a deduction from tax liability up to that minimum amount.

Why then has interest in a GMI firmed in recent years? The following arguments have been made in favour of a GMI: that lack of income is the main characteristic of need; that the needy are allowed more choice

---

Income, *Guaranteed Minimum Income: Towards the Development of a Policy* (1975).

[2] 55 Congressional Digest 167 (June-July 1976) for a summary of the (Humphrey-Hawkins) Full Employment and Balanced Growth Bill. Further, refer Gartner *et al.* (eds), *A Full Employment Program for the 1970s* (1976); Bullock (ed.), *A Full Employment Policy for America* (1973); Griffiths, "The Right to Work and Full Employment" (1979) 1 Social Alternatives 69; Griffiths, *Unemployment: Muddled or Managed* (1978) ch. 12.

[3] The proposal is not new: *e.g.* Russell, *Roads to Freedom* (1918). For critical discussion of the GMI: Tobin *et al.*, "Is a Negative Income Tax Practical?" (1967) 77 Yale Law Journal 1; Prest, "The Negative Income Tax: Concepts and Problems" (1970) British Tax Review 352; Henderson, "The Relief of Poverty: Negative Income Taxes and Other Measures" (1971) 47 Economic Record 106; Saunders, "A Guaranteed Minimum Income Scheme for Australia? Some Problems" (1976) 11 Australian Journal of Social Issues 174.

[4] Commonwealth of Australia, Commission of Inquiry into Poverty, *First Main Report* (1975).

in their consumption through the provision of money rather than services; that a GMI ensures that those most in need receive the limited government funds available for social assistance; that the plethora of special categories and selective criteria of eligibility for assistance no longer bear close relation to the state of those in need; that the economy cannot provide employment for all those who seek it; that a GMI is a device for the equitable redistribution of the narrowly concentrated benefits of a capital-intensive, technologically advanced industrial economy; that recipients benefit from the security of a clear income right; that recipients enjoy an economic base from which to engage in voluntary, useful, constructive activity; that income security independent of employment leads to the redesign of lowly paid, dirty and fluctuating jobs; that recipients are free to develop alternatives to the urban, industrial, high-consumption lifestyle; that a GMI allows for part-time work without a 100% clawback of earnings; that the provision of welfare is merged with the assessment of a tax in a system to which all citizens must submit; that there is a highly developed tax apparatus in existence to operate such a scheme; that the administrative costs of delivering social welfare are reduced through rationalisation; that the stigma, indignity and dependency engendered by submission to welfare departments and agencies are eliminated; that the rate of take-up of assistance by those in need is increased.

On the other hand, closer scrutiny has led to the identification of various operational difficulties. Some such difficulties are not peculiar to a GMI; others depend upon what also goes or remains of the present tax and welfare systems. The criticisms are as follows: that a GMI is difficult to operate; that an adequate concept of "income" to take account of a unit's total economic resources, such as rent-free housing, is hard to form; that the identification and assessment of the needs of units which vary in size and composition cause complications; that accounting for such non-income resources as wealth and capital gains is hard to integrate into the same scheme; that there are obstacles to attuning the accounting periods for the correct and timely assessment of units with fluctuating incomes or unpredictable needs; that some needs must still be ministered to by the provision of specialised services; that claimants are allowed greater opportunity to mis-state their condition; that a GMI is too generous in its allowances to those above the poverty line; that the proportional tax rate is too hard on the middle-income earners; that a GMI provides a disincentive for the needy to accept lowly paid, dirty and fluctuating jobs; that the substitution of a GMI displaces persons employed in administration and the ministering services; that a GMI is insufficiently flexible to be used as an instrument of social policy, say to dampen down demand; that a GMI involves too radical a change in the concept of welfare; that entrenched interests and the public are likely to resist the introduction of a GMI.

More recently, strong arguments have been made for the channelling of resources, not into further schemes of financial support, but into comprehensive programmes to fund employment on public and private projects of a socially useful nature. In Australia, job opportunity schemes have in the past been marginal, stop-gap and discretionary.[5] They have taken the form of unemployment relief works and subsidies to start sectional groups such as youth in the workforce. In contrast, a full-scale job guarantee proposal has been embodied in the Humphrey-Hawkins Full Employment and Balanced Growth Bill, which was introduced into the United States Congress in 1976.[6] Briefly, the proposal would oblige the United States Government to gear its economic policies and instruments, such as its monetary and fiscal policies, to the achievement of the goal of full employment. To the extent that general, conventional economic management failed to bring about full employment, the Government would be obliged to implement supplementary programmes specifically to reduce cyclical, structural and youth unemployment. Moreover, to the extent that the supplementary programmes failed to achieve the goal, then the Government would be obliged by the legislation to provide a job opportunity for anyone who needed one, either on a private or a public project. Thus, the Federal Government would become the "employer of last resort".

The following arguments have been made here and in the United States in favour of the scheme: that the unemployed want work; that the work provides necessary training and experience; that a job means standing, definition and dignity in our society; that the unemployed are co-opted into the main stream of society; that the extension of employment leads to a reduction in crime, disaffection and the like; that the market does not otherwise provide the additional jobs needed; that the unskilled, the young and other distinct groups are bearing more than their fair share of the burden of structural changes and recession; that a job opportunity scheme is a means of redistributing the narrowly concentrated gains from structural changes, such as automation and energy scarcity; that a government scheme ensures that resources are allocated to employment with a future in line with necessary structural change; that job guarantees encourage the redesign of lowly paid, dirty and fluctuating work; that job guarantees allow workers to be more independent and rational in their job choice and reduce feather-bedding, the stretching out of work; that resources are allocated to socially useful projects such as conservation and care; that funding is only

[5] Current employment related schemes are briefly summarised in Commonwealth of Australia, Department of Industry and Commerce, *Handbook of Services and Assistance to Industries Provided by Commonwealth and State Governments and Agencies* (1979). Earlier schemes are reviewed in Commonwealth of Australia, Priorities Review Staff, *Assistance for Structural Adjustment, Income Maintenance, Etc.* (1975).

[6] 94th Congress, 2d Session, H.R. 50, S. 50. The text of the Bill is to be found in Bullock (ed.), *A Full Employment Policy for America* (1973) Appendix V.

needed to pay the initial costs of such projects and the projects become self-sufficient; that the programme is necessary to utilise the idle productive capacity of the economy; that extra wage-earners lead to an increase in consumption and in industrial activity; that the government receives at least half its outlay back in additional tax revenue, savings on welfare payments and the like; that unemployment does not curb inflation; that there are other ways of beating inflation than by restricting government spending, depressing demand and maintaining unemployment; that unemployment is a worse social problem than inflation.

Predictably, the idea of a job guarantee has encountered fierce opposition. The following criticisms are levelled at it on policy grounds: that, as unemployment is largely frictional a job guarantee is not needed; that the scheme locks the unemployed into a sector of lowly paid, meaningless, relief jobs; that the unemployed do not have the skills required for useful work; that a job guarantee gives employers an opportunity to put off workers in good existing jobs; that employers use the scheme's funds for workers they can pay for themselves; that a job guarantee creates impractical expectations among married women, the elderly, and others withdrawn from the workforce; that a job guarantee erodes the pool of workers needed for the lowly paid, dirty and fluctuating jobs; that a job guarantee reduces the supply of labour for conventional work and bids up wages; that the increase in government and consumer spending resulting from the scheme inflates demand; that the projects are non-productive and divert resources away from the efficient private sector where real recovery lies; that there are better means such as tax cuts to stimulate growth and influence its direction; that the scheme requires further government interference in the economy and reliance on the government for a livelihood; that entrenched interests and the tax-payers are likely to resist such a large-scale redirection of resources.

In addition to its economic and social aspects, the structure of a full employment programme is a novel concept in the conduct of government in Australia. The United States proposal calls for the setting of goals and the imposing of obligations in statutory terms on the executive in its formulation and execution of general and specific economic policy. It is problematic that genuine adherence to the objective of full employment can be ensured by the inclusion in a statute of such devices as the precise elaboration of goals and procedures, requirements that Ministers develop policies and report to Parliament and the public, the establishment of a parliamentary review committee, the creation of an independent advisory authority, requirements that Ministers be advised by the authority, deadlines for the attainment of the programme, standing for the unemployed to apply for *mandamus* and the like.[7] These political

[7] Professor Daintith discusses the problems in the English context, in "The Functions of Law in the Field of Short-term Economic Policy" (1976) 92 L.Q.R. 62.

considerations are also set out for the record. As the full employment scheme is included here for the purpose of comparison with the guarantee of a minimum income to each unit, the article selects the element of the ultimate job guarantee to each member of the workforce for treatment.

Method

Before the constitutional examination begins, it should be clear that the main subject for assessment is a fully-fledged legislative scheme. It is considered more useful to consider a scheme which sets out in statute rather than the occasional administrative decree of practice, its objects, mechanics and supervision as well as its funding and expenditure. Hence, the subject is not a scheme of the status, say, of the recent Australian Assistance Plan[8] (referred to as the AAP) but a statutory scheme with its sources of funding, criteria of eligibility and procedures for review elaborated.

Examination of the constitutionalities of the scheme will proceed by individual head of power, seeking authorisation by each head in turn for the GMI and a job guarantee and at the same time remarking on the support detected for lesser developments in assistance. It will emerge that a combination of powers is required to found the GMI securely. However, no doctrinal bar is placed upon a cumulative or overlapping support so long as the reference to any one power is not endangered by mixing its subject-matter with the subject-matter of other powers so as to cause problems of characterisation. Clearly, a law may be a law with respect to two or more constitutional subjects at the same time, and the legislation is not required to nominate any one of the powers as its particular support.[9] Furthermore, if the law may be characterised in substance as a law with respect to two subjects, only one of which is a constitutional subject, then the law will probably still be constitutional.[10] Finally, a law will be valid if one part is referable to one head of power and other parts to other heads of power.

The constitutionality of the schemes will also be examined in relation to their two essential facets: source and form of funding, and form and recipient of assistance.

Sections 51(xxiii) and (xxiiiA)[11]

1. *GMI*

(a) *Form and recipient of assistance*

The source of much of the insight into the social welfare powers

[8] Commonwealth of Australia, Social Welfare Commission, *Report on the Australian Assistance Plan* (1976).

[9] *E.g. Federal Council of the British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201, 243 *per* Latham C.J.

[10] *E.g. Murphyores Incorporated Pty Ltd* v. *The Commonwealth* (1976) 136 C.L.R. 1, 22. *Cf. R.* v. *Barger* (1908) 6 C.L.R. 41.

[11] For general discussion of the scope of these powers, Phillips, "Federalism and

remains the cases of *Federal Council of the British Medical Association* v. *The Commonwealth* (referred to as the *B.M.A.* case)[12] and *Attorney-General for Victoria (ex relator Dale)* v. *The Commonwealth* (referred to as *Dale's* case),[13] but the case of *State of Victoria* v. *The Commonwealth* (referred to as the *AAP* case)[14] had added more recent comment to the store of authority.

Without doubt, the various types of assistance enumerated in the two paragraphs may be provided at least by way of monetary payment. Whether any of the items of assistance may instead take the form of a service or a thing is not, however, settled. In the *B.M.A.* case, Dixon J. was of the opinion that the terms "allowances", "pensions" and "endowment" meant only monetary payment, while Webb J. thought that they encompassed also goods and services.[15] However, Latham C.J., McTiernan, Dixon and Williams JJ. all considered that "benefits" meant not only monetary payments but also payments in kind or in services.[16] It is arguable that the very choice of different words for assistance to varied groups implies that some were to be more limited in form than others; the dictionary definitions will support this. On the other hand, the choice of differing terms might signify no more than the fact that there were different conventional words for assistance to each group—in 1901 in the case of section 51(xxiii) and in 1945 in the case of section 51(xxiiiA). Furthermore, even if some of the assistance is limited to monetary payments, the provision of certain things or services, as for example counselling on family budgeting or legal representation against creditors, would be reasonably incidental to the provision of monetary payments to those in need.[17]

The GMI is clearly a scheme of monetary payments and encounters no obstacles in the above respect. Interestingly, the AAP, where it assisted the classes enumerated in section 51(xxiii) and (xxiiiA) at all, commonly did so indirectly by funding professionals and volunteers to provide services such as consumer advice or social support to members of the classes in the particular region; in this way the class received service rather than a monetary payment. None of the judges in the *AAP* case to consider section 51(xxiii) and (xxiiiA) took objection to this form of provision.[18]

---

the Provision of Social Services" in Hancock (ed.), *The National Income and Social Welfare* (1965); Sackville, "The Constitutional Framework of Social Welfare" (1973) 5 F.L. Rev. 248; Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers" in Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 37-45.

[12] (1949) 79 C.L.R. 201.
[13] (1945) 71 C.L.R. 237.
[14] (1975) 134 C.L.R. 338.
[15] (1949) 79 C.L.R. 201, 259 *per* Dixon J., 292 *per* Webb J.
[16] *Id.* 245 *per* Latham C.J., 282 *per* McTiernan J., 260 *per* Dixon J., 286-287 *per* Williams J.
[17] *Id.* 246 *per* Latham C.J.
[18] (1975) 134 C.L.R. 338.

Whether or not assistance can take the form of services or things as well as payments, each form of assistance must be related, if not directed, to the classes of person or conditions specified in the two paragraphs. The breadth of constitutional assistance depends first on the scope of these classes and then on the directness of the forms of assistance.

The present unemployment benefit will serve as a good example. Clearly a monetary payment to those completely without work, the totally unemployed, is supported. The problems arise on a departure from the usual conception of the unemployed. For instance, one can question the validity of a coverage of those only partially unemployed or those merely suspended from employment: are those involuntarily working part-time, or working short-time, unemployed? Narrow technical tests such as whether the claimant has a contract of employment are perhaps not appropriate. As an amendment to the Constitution, section 51(xxiiiA) was intended to be remedial: an interpretation of it should be liberal and popular. The issue is indeed relevant to the GMI as one of its objectives is to reach the working poor, those only intermittently earning an income and incurring difficulty obtaining the present benefit because of the waiting periods and strict means tests.[19] The GMI would mean payments to some of these people, as it would to the so-called "unemployables", not because they satisfied a work test but because they were in financial need. The underlying question is whether a benefit can still be referable to unemployment if it does not require, as the GMI would not require, a test that the claimant was seeking work and could not obtain it. The short answer is that the word "unemployment" simply means to be without work, whatever the reason.[20]

At the same time, the benefit must relate not too remotely to this condition or state of unemployment. The scheme would not be referable just because it provided a benefit on some other basis to a person such as a student who also happens to be unemployed. This suggests that the scheme must ascertain that the claimant is in fact unemployed; the benefit must operate on the fact of the unemployment. While the benefit may not have to be designed to alleviate or remedy the state of unemployment, it would have to turn on some aspect of being unemployed. Thus, expenses paid for travelling to find work would be within power but not an allowance for a trip to Bali.

The need to relate a payment clearly to one particular condition may result from the simple fact that the relevant paragraphs choose expressly to enumerate various classes and thereby to limit recipients. There follows a requirement that a payment to one class be distinguishable from payments to other classes by seizing upon the difference in reasons why each class is in need—such as unemployment, incapacity

[19] Social Services Act 1947 (Cth), ss. 119(1), 114(1) and 120(d).
[20] *The Oxford English Dictionary* (1970) Vol. 11, U-174.

for work or the obligation to care for another. Not all those classes imaginably in need are enumerated. This line of reasoning is shaky, however, because the enumerated classes cannot help but overlap—a student, for example, is unemployed and, arguably, he could not obtain a job if he was free to do so—and as a result there can be no requirement that a payment turn only upon criteria peculiar to one class. Instead, a payment might properly relate to more than one class if it turns upon a characteristic which is common and critical to each. Unsurprisingly, the lack of opportunity to earn, or, more broadly, financial need, is the characteristic common and critical to the classes.

Whatever the strength of the foregoing argument, there is an expansive single class within section 51(xxiiiA) in the "family". The GMI identifies recipients according to units that can be treated at least in theory as pooling their income. The most common proposal chooses the nuclear family as the primary unit, varying the tax or income credit according to the number of dependants within that unit. The inclusion of family allowances in section 51(xxiiiA) will support this. But not every unit in need can be so reached; "singles", even couples without children, may not be families. However, dictionary definitions of family include not only a set of parents and children or relations but also include a household. In line with this, the alternative unit for the operation of the GMI is the residential or household group—if this wider view were taken of the family then singles, couples without children, groups of the same sex, will be covered. Incidentally, in dealing with units greater than one person, the GMI fails to resolve any problems of distribution within a family that occur between husband and wife and parents and children.

If it is constitutional for the GMI to operate upon a common characteristic or denominator of various classes itemised in the Constitution, then its scope may be augmented by adding in the other classes in section 51(xxiii) and (xxiiiA), in particular the invalid, the sick, the elderly, children, and students. With less assurance, the so-called "people powers" elsewhere in section 51 could be included where they are subject matter powers rather than purpose powers, that is, where they refer to a class of persons rather than to a limited purpose in relation to that class. In this way, sections 51(xxvii), 51(xxvi), and 122 add support. Again in respect of each of these powers, there will be limits on the definitions of the class and on the indirectness of the valid connection of the benefit with that class. Grey areas emerge—for how long is a new Australian an immigrant; is a payment to a unit in which only one parent was born overseas a payment in respect of immigration?

Despite the apparent breadth of the classes itemised, the classes may not cover all those in need that the GMI is to reach. The GMI scheme might therefore have to distinguish those within the classes in need from those outside also in need. And even if the classes itemised include within them all those in financial need, it may not be sufficient to say that a

scheme is reaching those classes simply by providing benefits to people in need. While that part in each class reached will have the common characteristic of need (and it does not matter that only a part of each class is reached), the coverage is in a sense fortuitous. If, on either of these two grounds, a scheme would need to distinguish beneficiaries according to class then its efficiency and economy as well as its scope would be seriously affected.

A need to discriminate would be avoided if the view were adopted that the classes included in the various constitutional heads and in particular in section 51(xxiiiA) cover almost all those in need and that it is incidental to the execution of the powers to provide the covered classes with payments through a single scheme, to provide others with payments in fortuitous or subordinate conjunction. This view is an extension of the view taken by Jacobs J. of the AAP in the *AAP* case.[21] Although it was probably unnecessary to do so, Jacobs J. relied more on section 51(xxxix) than the implied incidental power within each express power. He took the view that it was reasonably incidental to the exercise of the powers to spend on matters within sections 51 and 61 (found in those sections and in section 81) to spend on other matters conjunctively. A similar argument could be made in support of the GMI. On balance, however, the argument extends the incidental powers too far. While it was undoubtedly convenient to use the same AAP apparatus to provide assistance to covered classes and to other classes, it was not really necessary for, or even conducive to, the success of the provision to the covered classes that provision be made for others. In regard to the GMI, the very fact that the covered classes are now reached by selective benefits, without the need for a less discriminating scheme, suggests the same. The provisions to others would exceed rather than expand the main power.[22] Accordingly, to Barwick C.J., Gibbs and Mason JJ. in the *AAP* case, the fact that a broader range of classes than those included in section 51 could be funded through the Plan characterised the Plan as a general social welfare scheme which was beyond the competence of the Commonwealth even though some of the services would reach classes specified in section 51.[23] Therefore, it remains unlikely that the High Court would take the more generous overview of the GMI.

(b) *Funding*

The nature of the funding of a GMI may also affect its validity. Present social security benefits are funded from moneys brought into Consolidated Revenue from income and other taxes such as company

[21] (1975) 134 C.L.R. 338, 414-415.

[22] Discussed in Lane, *Commentaries on the Australian Constitution* (1972) 239-241.

[23] (1975) 134 C.L.R. 338, 362-364 *per* Barwick C.J., 377-379 *per* Gibbs J., 400-401 *per* Mason J.

taxes. Social security allocations are a significant part of the yearly appropriations for the Federal Budget and while income tax collected is now sufficient to cover social security payments, present financial arrangements do not attempt to confine the social security vote to an appropriation from funds made up of income tax revenue alone. Furthermore, if the projections of the automation of work prove correct, there will in the future be fewer wage-earners to contribute income taxes to Consolidated Revenue and it is unlikely that the drop in numbers will be entirely compensated for in higher rates of income tax. The government will look further beyond income from employment to other groups for tax revenue; already there are suggestions for resources, wealth, capital gains and consumption taxes. If the GMI is to be paid for, at least in part, by taxes other than income tax, it becomes harder to integrate the raising of its funds, and the making of its payments, into the one scheme. At the same time, the observation is made that if the GMI is to reach those truly in need, account must be taken of the non-income assets and wealth of the claimants. The introduction into the equation of the other economic strengths of the claimants would provide its own administrative difficulties but it could reduce the importance of the issue of drawing the limits to the concept of "income" that the present scheme of taxation highlights. Nevertheless, it is likely that some of the units contributing revenue to the scheme will not, definitionally, be eligible for its payments. Rather than elaborate on the administrative and political difficulties this creates, let me indicate the potential constitutional doubts concerning section 51(xxiiiA).

According to the *B.M.A.* case, section 51(xxiiiA) empowers the making of laws for the provision by the Commonwealth of assistance and not the making of laws in regard to assistance as such. Therefore, for example, the Commonwealth cannot enact a law that prohibits any person from providing assistance to a group unless the prohibition is reasonably necessary to the execution of the power to provide assistance itself. Equally so, the Commonwealth cannot require anyone else to provide assistance.[24] So for instance the Commonwealth cannot require employers to pay their employees retrenchment payments or income maintenance while they are out of work. At the same time, according to Dixon J. in the *B.M.A.* case, the Commonwealth can provide its assistance, most significantly, by means of a contributory scheme.[25] To reconcile this remark of Dixon J. with the other observations in the *B.M.A.* case, one must conclude that the Commonwealth can only require those within the class of potential recipients to make contributions.

If this is the correct view—that contributions from any other unit than the potential beneficiaries cannot be required through section

[24] (1949) 79 C.L.R. 201, 242-243 *per* Latham C.J., 260 *per* Dixon J., 279 *per* McTiernan J., 292 *per* Webb J.

[25] *Id.* 261.

51(xxiiiA)—then the source of the revenue for the GMI will have to be distinguished from other government revenue or its funding supported by another head of power. While section 51(xxiii) and the "people powers" do not involve this limitation, section 51(xxiiiA) includes most of the likely classes. While many units of natural persons, at present higher income earners, could be required to contribute to the GMI a kind of insurance premium[26] on the basis that they one day might be in need, other units such as companies would never be eligible for a payment. If the contributors to the GMI are to extend beyond its potential beneficiaries then there must be other valid laws to tax these other units.

2. *Job Guarantee*

So far as any job guarantee programme requires that the Commonwealth provide financial assistance to employers for the creation and maintenance of jobs, the guarantee may be referable to section 51(xxiii) as the provision of unemployment benefits. Again, however, there must come a point at which a provision brings about a benefit to an itemised class so indirectly that the provision is too remote. But is the provision of a benefit by the Commonwealth through an agency or third person, public or private, necessarily too remote? In the *B.M.A.* case, in the context of a scheme to pay for the supply of free medicines through chemists, Dixon J. also remarked that the Commonwealth may provide a benefit through a separate body "set up for that purpose".[27] It is submitted that the condition "set up for the purpose" is not required so long as the separate body is acting as a channel for funds from the Commonwealth. After all, child endowment was paid to the parent of the child and no administrative effort was made to ensure that the money was spent on the child directly. Unless the endowment was instead an endowment upon the parent for giving birth to the child, the

[26] This also raises the question of the relevance of section 51(xiv) of the Constitution, the insurance power, to federal social security schemes. The scope of the insurance power is not treated here because fundamental doubts about its relevance to a scheme of social or public insurance exist. In particular doubt lies as to whether the Commonwealth could, through this power, compel persons to insure themselves or others, in the light of the comments of Fullagar J. in *Insurance Commissioner* v. *Associated Dominions Assurance Society Pty Ltd* (1953) 89 C.L.R. 78, 87. Further see Cantor, "National Insurance in its Constitutional Aspects" (1928) 2 A.L.J. 219. More critically, doubt must lie as to whether a comprehensive social insurance scheme really is "insurance" at all, especially if (a) contributors and contribution levels do not correspond to payees and payment levels and (b) the event "insured" against is more of a certainty than a risk or contingency. See *e.g. Australian Steamships Ltd* v. *Malcolm* (1914) 19 C.L.R. 298; *Hospital Provident Fund Pty Ltd* v. *The State of Victoria* (1952-1953) 87 C.L.R. 1 and further Kennan, "The Possible Constitutional Powers of the Commonwealth as to National Health Insurance" (1975) 49 A.L.J. 261. The question was again raised by the National Superannuation Committee of Inquiry, *op. cit.* 38-39.

[27] (1949) 79 C.L.R. 201, 261; see also 246 *per* Latham C.J.

endowment was the provision of assistance for the child through another. It is difficult to imagine how else it could have been done.

In a similar vein, the provision of a job guarantee can take the form of a subsidy to an employer, say as a certain proportion of wages, for each worker he employs. Doubts arise when the provision takes the form rather of a lump sum grant or a loan to the employer that is not tied to the number of employees or the wages bill. Again, as in the case of the GMI, there will be heads of power other than section 51(xxiiiA) that support less particular financial assistance to industry but, equally again, these heads will not cover all industries in which there is unemployment. So, returning to the provision of an unemployment benefit, when does the connection of the benefit to the unemployment become too remote? By way of analogy, is expenditure on a campaign to discourage smoking the provision of a sickness benefit? Arguably, a grant or a loan to an employer to help him stay in business, and thus to continue to employ workers, preventing their unemployment, would not be too remote. But the connection of a grant or loan to search for new materials or markets would be too speculative.

Furthermore, job maintenance rather than job creation raises the objection that the assistance is to be employed, not to the unemployed. It is likely, however, that this would be treated as a very technical objection. Provided there were economic studies and administrative tests to assess periodically whether such workers would have been unemployed in part or whole if their employer had not received the subsidy, the provision would still be related to unemployment. A similar issue arose in the 1930s when the State governments were providing subsidies to private employers as part of an unemployment relief scheme; the courts held that the subsidies were within the scope of the State legislation as a provision of unemployment relief.[28]

Section 51(ii)

1. *GMI*

(a) *Form and recipient of assistance*

Section 51(ii) is probably the most obvious head of power for support of the GMI because all the variations proposed would be administered through the federal income tax assessment system. This scheme is well-established and comprehensive. It operates essentially upon the fact of earning income; it avoids in this way the selectivity and partiality of the social security scheme. Proponents of GMI argue that its administration through the income tax system will save money and avoid the stigma of a welfare scheme. This is not to say that the integration of GMI within the income tax system will not raise new

[28] See *e.g. O'Neill* v. *City of Williamstown* [1932] V.L.R. 412; *Metropolitan Water, Sewerage and Drainage Board* v. *MacPherson* [1933] A.R. (N.S.W.) 64.

problems for the new tax system,[29] and some of these fresh problems are constitutional.

The fundamental doubt whether the GMI will be supported by a power to legislate with respect to taxation is not created by the laws that will require payment of taxes to the government or that will grant income allowances or tax credits—such laws are part of the present valid system. Rather, the doubt rests with the law authorising net cash payments out to those units which are assessed to be in need of extra income to bring them up to the GMI.[30] Treated in isolation would such a provision be a law with respect to taxation? Or together with the other provisions, would such a law form part of a legislative scheme with respect to taxation?

Fundamentally, the answer depends on what taxation means. In a different context from a welfare scheme, taxation has been defined by the High Court as a compulsory levy by a public authority for public purposes.[31] For the GMI, the initial problem rests with the requirement of a levy. In his work *Legislative, Executive and Judicial Powers in Australia*, Wynes characterises the requirement as an exaction.[32] To elaborate on this requirement, it seems that no money has actually to change hands from the taxpayer to the government: the transaction may take place on paper. Nonetheless, there must be a real obligation (at some stage) for the taxpayer to make a payment to the government.

The GMI is without objection so far as it requires each unit of income to pay tax at a proportional rate, say 40%. Within this requirement each unit could validly be attributed a certain income allowance or tax credit equivalent to the GMI. For many, the tax they actually owed would merely be reduced or at the most cancelled out this way. To this extent, there would be little change because the present system takes account of the taxpayer's circumstances and capacity to pay by provision of allowances, deductions and rebates for family responsibility and certain running expenses and by an exemption from any tax for income below a certain level.[33] Notwithstanding, the net gain transfer payment to the needy is a new element. Treated in isolation, it does not satisfy the definition of taxation. It cannot truly be considered a rebate, an exemption or a credit—it clearly goes further than that.

The objection to the transfer payments might be overcome if payments did not have to be characterised in isolation. The payment would be within power if the view were taken that they were subsumed within an overall system which is essentially taxation. The character of the system of which such payments form an inseparable part would "infect" the payments. Or in reference to the incidental powers, such payments

---

[29] Commonwealth of Australia, Treasury Taxation Paper No. 8 *op. cit.* 8-15.
[30] "Current Topics" (1974) 48 A.L.J. 511 and 560.
[31] *Parton* v. *Milk Board (Vic.)* (1949) 80 C.L.R. 229, 259 *per* Dixon J.
[32] (4th ed. 1970) 169.
[33] Income Tax Assessment Act 1936 (Cth), ss. 51, 81 AA-82 K.

would be viewed as reasonably incidental and subsidiary to the other features of the overall system.

Along these lines, the payments could be characterised as one aspect of a process whereby all units are assessed for income tax and most units make a net payment to the government. Predominantly, the process is concerned with extracting money from taxpayers. However, if the process must be divided up and each aspect considered separately, then the payment out to certain units is still just the outcome of a process of taxing each of those units. The system still imposes upon each of those units a general and contingent obligation to pay tax, and a duty to compile returns each period and so on. Sometimes during an ongoing process, the assessment results in a payment out. Within the present system, units receive refunds when they do not earn at the level anticipated so that the rate of tax assessed in advance to fix provisional or PAYE deductions turns out to be too high. Certain units are permitted to bring into account losses made in an earlier period (when no tax is paid) to reduce their taxable income and hence their tax in subsequent periods.[34] In this way, a broader view is taken of the taxation process than that view which turns on the outcome of any one assessment.

Taking the long term view of the unit's participation in the system, a payment out may be justifiable if the unit had paid tax at some time. But how recently, or how often should the unit have paid tax, for the connection with the payment out to be made? A possible way of avoiding the remoteness is to require the unit to make a token payment every now and again; the payment would have to be token because if the unit is truly in need it cannot afford to wait for a refund. The payment could be extracted at the commencement of a period or through the PAYE process.

The idea of a provisional payment to be refunded and possibly supplemented at the end of a period of assessment would create a difficulty for those who earn some income but still require a major supplement through GMI. Those in serious need cannot wait for money, they require immediate assistance, rather than refunds and retrospective credits and payments; assessments that are adjusted at the end of a period because of an interruption or drop in earnings are untimely. It is true that after the experience of one period, many units' total income can be predicted with some degree of assurance and PAYE deductions for the next period adjusted accordingly. But this would not completely protect units from the effects of uncharacteristic or total interruptions in earnings where they were not able to save any money. In these cases the PAYE system must at least be capable of responding during the period to refund money or make payments.

The device of a formal or token payment would not work for those who earn no income at all from which tax could be provisionally

[34] *Id.* ss. 80, 149-158 AC.

withdrawn. For these units, a payment in a past period would have to provide the necessary connection. To make them instead pay at the start of a period a provisional tax would only create further hardship.

So the question is whether remoteness may be overcome by the requirement of a token payment or the lodging of a return or by some payment in the past. Pursuing this inquiry, we can say that while the law must concern itself with taxation, it is of no concern that the motive behind the imposition of taxation, or the consequence of its imposition, is to effect a different purpose which the Commonwealth has no power to effect, such as the implementation of a comprehensive social security scheme.[35] The enquiry is directed instead to the true nature and character of the law, to its substantial operation; does it create rights and obligations with respect to taxation?[36] This means, however, that it is the substance of the law and not its stated intent or the formalities, that determines its characterisation. On this basis, if each unit is to be treated separately, then the requirement of a token payment or the compiling of a return will not suffice; while obligations are imposed in respect of the assessment of taxation, the substantial or true operation of the law is to create the right to a transfer payment from the government to the subject rather than the other way around.

Therefore, the payments out may only be referable if all units can be treated together within the one system that predominantly imposes obligations to pay money to the government. A further constitutional requirement makes more difficult the merging of payments in, credits and the payments out into the one indistinguishable, unseverable law. Section 55 of the Constitution requires that any law imposing taxation should have no other function. In keeping, separate statutes are presently made for the imposition and for the assessment of taxation. While Howard suggests that this separation is over-cautious,[37] it does make it easier to isolate the various aspects of the system.

(b) *Funding*

It should be amply clear now that section 51(ii) supports laws that require units to pay tax to the Commonwealth. Within this power, a special or sectional levy to raise revenue is permissible. From 1945 to 1950 for instance, the Commonwealth imposed a separate levy on incomes to serve as a social services contribution. The contributions were assessed and collected through the income tax scheme and paid into Consolidated Revenue. An amount equivalent to the sum of the social services contributions payable to the Commonwealth and pay-roll tax collections was appropriated each year from Consolidated Revenue and paid into the National Welfare Fund, a trust account which had been first established in 1943 with grants from the Consolidated Revenue

[35] *Fairfax* v. *Federal Commissioner of Taxation* (1965) 114 C.L.R .1.
[36] *Id.* 7 and 13 *per* Kitto J., 19 *per* Windeyer J.
[37] Howard, *Australian Federal Constitutional Law* (1968) 324 .

Fund. It was envisaged that if need be, the National Welfare Fund would be supplemented with revenue from income tax collections and, after 1950 when the separate social services levy was dropped, this was done.[38] In this way, it can be seen that tax revenue for social security benefits need not come from the ultimate recipients. At the same time, it is suggested that the levy must be made payable to the government itself and not direct to the ultimate beneficiaries and, probably, first into Consolidated Revenue rather than straight into a special fund created for the beneficiaries. This procedure is necessary because a tax is defined as a payment to a public authority for a public purpose.[39] It is further necessary if the expenditure of the funds is to be considered the result of a valid appropriation by the Parliament.[40]

These requirements present no major obstacle to the GMI even if it is to be funded from other taxes in addition to income taxes. However, the extra steps in the procedure, from the imposition and collection of the different taxes to the expenditures, may serve further to isolate the payments to the needy.

Summing up: a generous and broad view of a tax system incorporating a GMI would permit the taxation power to support transfer payments to the needy, but a more technical and particular characterisation will require reference of the payments out back to the social welfare powers or some other power.

2. *Job Guarantee*

It follows from what has been said that the taxation power can support levies to fund employment opportunities provided those levies are paid first into the government's coffers. The power would therefore not support a requirement that employers establish their own fund to create extra jobs in their industry. It also follows from what has been said about it, that the taxation power cannot support the actual provision to the unemployed of a job. Even if it were legitimate to do so, the provision of a job could not be conceptually subsumed within the levy scheme and in isolation the provision is clearly not "taxation". We have already concluded that it will not always constitute the provision of unemployment benefit.[41]

Section 81

If the taxation power will support the raising of the funds for the GMI, then section 81 may provide greater support for the expenditure than the social welfare powers. Occasional interpretations of the appropriations power have provided hope for those who seek to expand

---

[38] Kewley, *Social Security in Australia 1900-1972* (2nd ed. 1973) ch. 12.

[39] *The Vacuum Oil Co. Pty Ltd* v. *The State of Queensland* (1934) 51 C.L.R. 108, 142 *per* McTiernan J.; *R.* v. *Barger* (1908) 6 C.L.R. 41, 82 *per* Isaacs J.

[40] Campbell, "Parliamentary Appropriations" (1971) 4 Adelaide Law Review 145; Sawer, *Federation Under Strain* (1977) 87.

[41] *Supra* pp. 30-31.

Commonwealth activity in welfare.[42] One clear judicial view gives support to expenditure of this nature. On this view, section 81 empowers Parliament to authorise withdrawal and expenditure of moneys for any purpose Parliament thinks fit—authority for this view is to be found in the judgments of two of the six judges in *Dale's* case[43] and two of the six judges in the *AAP* case,[44] with McTiernan J. one of the two in each case.

Even in the unlikely event that this straightforward and wide view of Commonwealth power were to achieve a majority on the High Court at the appropriate time, there would remain a fundamental constraint upon the capacity of the Commonwealth to exercise the appropriations power for the purpose of general social welfare. While, like the taxation power, the appropriations power may be validly exercised with an ulterior motive, any legislation made under it must remain a law with respect to appropriation. The critical point for a law on expenditure is the extent to which it may go beyond the authorisation of the withdrawal and disbursement of funds, the earmarking of the sum and the purpose, before the law is no longer a mere appropriation law and must be referable to other heads of constitutional power.

According to Professor Campbell,[45] "[i]f an appropriation Act does not create legal duties, neither does it confer any power to take measures to accomplish the purposes for which money has been voted other than the expenditure of public funds". Accordingly, an appropriation Act does not create of itself any obligation on the government to make payment to a person for whom the money is ultimately intended; the Act could not create a right to the GMI for the needy or a job guarantee for the unemployed. At the same time, the incidental powers, both within section 81 itself and section 51(xxxix), increase the scope of an appropriation law. Thus, according to McTiernan J. in *Dale's* case, the law could prescribe the purpose of the expenditure, provide for the administration of the payments, and include safeguards against the misuse of the funds.[46]

The appropriations power does not authorise the Commonwealth, however, to engage directly in the areas and activities for which the money is intended. Indeed, for Rich, Starke, Dixon and Williams JJ. in *Dale's* case,[47] the Commonwealth could not withdraw moneys unless it were for an otherwise constitutional purpose, in other words, for those

---

[42] Evans, "Constitutional Issues" (of the challenge to the A.L.A.O.) (1975) 1 Legal Service Bulletin 166. See further Saunders, "The Development of the Commonwealth Spending Power" (1978) 11 Melbourne University Law Review 369.

[43] (1945) 71 C.L.R. 237, 256 *per* Latham C.J., 273 *per* McTiernan J.

[44] (1975) 134 C.L.R. 338, 367 *per* McTiernan J., 421 *per* Murphy J.

[45] Campbell, *op. cit.* 161-162.

[46] (1945) 71 C.L.R. 237, 275; also 256-257 *per* Latham C.J. *Cf. AAP* case (1975) 134 C.L.R. 338, 369-370 *per* McTiernan J., 424 *per* Murphy J., 396 *per* Mason J.

[47] (1945) 71 C.L.R. 237, 266 *per* Starke J., 269 *per* Dixon J., 282 *per* Williams J., (Rich J. agreeing).

purposes derived from the Commonwealth's legislative, executive and judicial powers and functions and from its existence as a state and its status as a national government. This view was adopted by Barwick C.J. and Gibbs and Jacobs JJ. in the *AAP* case[48] albeit with differing views on the breadth of these various constitutional purposes. For Mason J., the other judge to express a view on the matter in the *AAP* case, while the Parliament could withdraw money for any purpose it determined, whether the purpose was included elsewhere in the Constitution or not, any spending of the money on the AAP drew it into the actual carrying out of activities, which in the case of the AAP were not sustained by other heads of power.[49] Appropriation does not extend to the use of the money withdrawn and earmarked.

Arguably, the GMI requires activity which goes beyond the mere withdrawal and earmarking—even beyond the disbursement—of funds. The course of the *AAP* case[50] obscured this essential consideration for social welfare schemes. As the various guidelines and procedures for the administrator of the expenditure on the Plan were expressed in administrative decree as merely provisional or experimental, the Commonwealth made reference to its executive and "inherent status" power to add support to the appropriation. Several judges recognised that the Commonwealth had such powers to carry out research into an area of its own choosing, to formulate policy and the like.[51] Similarly, it has been suggested[52] that such powers, including the Crown prerogative powers, support payment of emergency relief on an ad hoc basis to various classes. While it was assumed rather than stated in the *AAP* case that research did not have to be in areas that were within those matters upon which the Commonwealth may subsequently legislate, it would seem that executive functions go beyond the mere support of legislation.[53] If there were any doubt, one could say that the Commonwealth may investigate almost any area if it were contemplating funding the States through section 96 in that area or otherwise co-operating with them in that area.

Nonetheless, the full-scale, statutory, provision of a GMI would not be supportable through the executive and "inherent status" powers. Even more clearly than in the case of the AAP, the GMI could not be characterised merely as an experimental or emergency measure. The only sustainable connection with these powers would be based on

---

[48] (1975) 134 C.L.R. 338, 361-364 *per* Barwick C.J., 371-379 *per* Gibbs J., 412-413 *per* Jacobs J.

[49] *Id.* 396 *per* Mason J.

[50] (1975) 134 C.L.R. 338.

[51] Although the AAP went beyond this: *id.* 397-398 *per* Mason J., 412-413 *per* Jacobs J.

[52] Gerard, "A Reply to the AAP Case" (1977) 2 University of New South Wales Law Journal 105, 110.

[53] Richardson, "The Executive Power of the Commonwealth" in Zines (ed.) *Commentaries on the Australian Constitution* (1977).

an argument that the GMI was required to prevent civil disorder and a breakdown of the state threatened by the disaffected poor. While the prevention of rebellion is a recognised interpretation of the function of social welfare,[54] clear evidence of danger would be required before the Court would make the connection.

At the same time, a pilot for the GMI would be appropriate to identify and eliminate operational difficulties and to assuage public doubts prior to any nation-wide introduction. The implementation of the GMI in Northern America has taken this course. If the pilot may be seen as research or fact-finding, reference might be made to the executive powers provided, of course, that the requirements for the exercise of these powers, in particular who may properly make executive rules and how they may be made, are observed.[55] Again, these requirements (and their observance) were not investigated in the *AAP* case because the plaintiff had chosen to challenge only the Appropriation Act itself.

Public Service Powers

If the GMI is considered just a scheme for the spending of money, then section 81 may provide some support. Section 81 cannot provide support for the provision of a job guarantee, however. Rather, the job guarantee may be supported by the public employment powers. These powers are to be found in sections 52 and 67 of the Constitution, and in every other power that supports the direct undertakings of the Commonwealth and implies incidentally that persons may be employed to carry out these activities.

Is there any limitation implied in these powers to employ? Arguably, persons may only be employed to carry out the Commonwealth's legitimate governmental functions—as the wording of sections 52 and 67 would indicate for example—and not be employed just for the sake of employment. But there is no judicial opinion to be found on this point and the level of employment has not surprisingly been a political and economic rather than a judicial matter. The numbers required to perform legitimate governmental functions at any one time is a matter of opinion: the courts are likely to decline to review the choice of numbers provided of course that the government has actually assigned each of those employed to a function within its constitutional brief.

Conclusion

As a result of the absence of a general welfare power, a rather elaborate but tentative matching of existing powers to the components of the proposals is required. Much of the chance of a comprehensive guarantee surviving a constitutional challenge in the High Court might

[54] Piven and Cloward, *Regulating the Poor: The Functions of Public Welfare* (1971).

[55] Gurry, "The Implementation of Policy Through Executive Action" (1977) 11 Melbourne University Law Review 189.

therefore depend upon the mood of the time, the make-up of the Court, and the resulting view of the need for such a federal scheme. The chances are not improved now that Jacobs and McTiernan JJ. are no longer on the bench. Nevertheless, the writer is prepared to suggest that a GMI scheme would be supported, in its funding by the taxation power, and in its payments by a broad view of the classes and the means of provision to them encompassed by section 51(xxiii) and 51(xxiiiA). A full employment scheme so far as it was to guarantee a job to each individual unemployed would be supported, in its funding by the taxation power, and in its provision by that part of section 51(xxiiiA) empowering the provision of the unemployment benefit and by the powers of the Commonwealth to assist industries and to employ persons to perform its many functions. The alternatives—constitutional amendment, reference by the States of powers to the Commonwealth, and provision through the States by tied grants—do not seem practicable.