Commonwealth power and the fiscal stimulus

Pape v Federal Commissioner of Taxation (2009) 257 ALR 1, 83 ALJR 765

In February of this year, the Australian Government announced that some 8.7 million 'working Australians' would receive a one-off 'tax bonus' of up to $900 as part of the government's efforts to combat a 'severe global recession'. The government no doubt hoped that each recipient would accept the 'tax bonus' gratefully and head for the closest flat-screen television retailer. Alas, one recipient – Mr Bryan Pape, an academic at the University of New England and part-time barrister – took a different approach. He commenced proceedings in the High Court alleging that the legislation providing for the 'tax bonus' was unconstitutional. While a majority of the High Court rejected his contentions, the four judgments handed down contain important analyses of the so-called appropriations power in s 81 and the executive power in s 61 of the Constitution.

Section 81 of the Constitution permits the appropriation of money from the Consolidated Revenue Fund 'for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.' Section 83 requires any such appropriation to be 'made by law'.

The primary submission made by the Commonwealth in support of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('Bonus Act') was that s 81, when coupled with the incidental power in s 51(xxxix), empowered parliament to authorise the expenditure of money for any purpose and without any relevant limitation. The submission echoed remarks by Sir Robert Garran to the 1929 Royal Commission on the Constitution to the effect that he was unable to divine any 'constitutional or other reason' for limiting the power of the Commonwealth Government to spend money raised by it.

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As Heydon J recognised, this was 'a wide submission' that had the potential not only to 'outflank' but 'destroy' the legislative restrictions on the power of the Commonwealth found in ss 51 and 52. The submission was rejected by each member of the court. In the principal majority judgment, Gummow, Crennan and Bell JJ carried out a comprehensive analysis of parliamentary practice with respect to appropriations in the United Kingdom and colonial Australia prior to 1901. According to their Honours, s 81 did not contain a 'power to spend' but simply a 'power to appropriate'. The exercise of the latter power precedes the former and involves the legal segregation of money from the general

mass of the Consolidated Revenue Fund so that it may ultimately be expended by the Executive if otherwise authorised to do so. It followed, according to their Honours, that the expressions 'for the purposes of the Commonwealth' in s 81 and 'by law' in s 83 were not limitations by reference to which any exercise of the power in s 81 was relevantly to be assessed. The power of the Executive to spend money, once appropriated under ss 81 and 83, was to be found elsewhere in the Constitution. To the extent that previous decisions of the court had assumed the contrary, they were in error: see, e.g. *Pharmaceutical Benefits Case* (1945) 71 CLR 237; *AAP Case* (1975) 134 CLR 338.

Having concluded unanimously that neither s 81 nor s 83 of the Constitution supported the Bonus Act, it was necessary to identify another source of power. For French CJ, Gummow, Crennan and Bell JJ, that source was the executive power in s 61, read with s 51(xxxix). According to their Honours, an Act will be valid where it concerns matters incidental to the carrying out by the Executive of 'enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation' (adopting the formulation of Mason J in the *AAP Case* (1975) 134 CLR 338 at 397). Having regard to the material before the court, their Honours held that this test was satisfied. The 'current financial and economic crisis' concerned Australia 'as a nation'. Determining that there was a need for an immediate fiscal stimulus was 'somewhat analogous' to declaring a state of emergency in response to a natural disaster. It was the Commonwealth Executive that was 'capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here' and only the Commonwealth had the resources to meet the present crisis on the scale provided for in the Bonus Act. It was not to the point to 'regret the aggregation of fiscal power in the hands of the Commonwealth over the last century'. French CJ reached a materially identical conclusion but emphasised that '[t]o say that the executive power extends to the short-term fiscal

measures in question in this case does not equate it to a general power to manage the national economy'. In light of the availability of s 61 (read with s 51(xxxix), it was unnecessary for the majority to consider whether the Bonus Act could also be supported by reference to a 'nationhood' power to be implied from s 61 and the Constitution as a whole.

... the clear divergence in approach between a majority prepared to accept, largely at face value, the submissions of the Commonwealth as to its unique role and financial standing in response to what it considered to be a global economic emergency, and a minority willing to assert the authority of the court and doubt both the accuracy and relevance of the Commonwealth's submissions on a number of levels.

In two judgments, the remaining three members of the court disagreed with the majority's reasoning on the availability of s 61. According to Hayne and Kiefel JJ, words like 'crisis' and 'emergency' 'do not readily yield criteria of constitutional validity'. The mere fact that only the Commonwealth had the administrative and financial resources to provide a 'tax bonus' in response to such a crisis or emergency did not mean that s 61 applied. Otherwise, 'the extensive litigation about the ambit of the defence power during World War II was beside the point'. At the core of their Honours' reasoning on this question was the distinction between end and means. Even assuming that only the Australian Government could achieve its stated aim of ameliorating the effects of a global financial crisis, the lawfulness of the means chosen by government to achieve that aim was a matter for the court. Their Honours noted that numerous different approaches to the provision of fiscal stimulus were available and that many of those approaches 'would find ready support' in heads of power dealing with taxation (s 51(ii)), social security benefits (s 51(xxiiiA)) and pensions (s 51(xxii)). Section 61 could not be relied upon merely because the provision of a 'tax bonus' was viewed by the Executive as more convenient.

Heydon J similarly noted that 'a speedy stimulus equal in size to the tax bonuses could have been effectuated for the benefit of the nation in some other way'. In order to enliven s 61, it was necessary (but not sufficient) for the Commonwealth relevantly to demonstrate that the application of powers other than s 61 could not have been applied to reach the same outcome. This it did not do. More fundamentally, it would be wrong, in construing the scope of s 61, to ascribe to the Executive all powers which might be thought to be inherent in the idea of 'national government'. To do so would be antithetical to the federal structure adopted in the Constitution. Section 61 was not to be read as conferring upon the Executive any powers not otherwise within the spheres of responsibility for which the Parliament of Australia had legislative competence. Once it was concluded that the creation of a right to receive, and duty to pay, the tax bonuses was a 'matter falling outside the legislative competence or spheres of responsibility of the Commonwealth, it falls outside s 61 also.'

Having determined that the Bonus Act was valid by reference to s 61, it was strictly unnecessary for the majority justices to consider whether the Act also fell within the taxation power in s 51(ii). However, Gummow, Crennan and Bell JJ nevertheless held that the Bonus Act was not a law with respect to taxation. While the 'tax bonuses' provided by the Act were limited to persons who had an adjusted tax liability greater than nil in the 2007–2008 income year, the bonus did not operate as a refund or rebate of tax. So much was demonstrated by the fact that the Bonus Act permitted a person to receive a 'tax bonus' greater than their adjusted tax liability. The present case could therefore be distinguished from *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155. Heydon J reached a similar conclusion. French CJ did not decide the issue. Hayne and Kiefel JJ found that the Bonus Act was valid under s 51(ii) but only to the extent it authorised the payment of a tax bonus equal to the lesser of the recipient's adjusted tax liability and the amount of bonus otherwise fixed in accordance with the Act.

In conclusion, perhaps the most notable aspect of the decision in *Pape* is the clear divergence in approach between a majority (French CJ, Gummow, Crennan and Bell JJ) prepared to accept, largely at face value, the submissions of the Commonwealth as to its unique role and financial standing in response to what it considered to be a global economic emergency and a minority (Hayne, Heydon and Kiefel JJ) willing to assert the authority of the court and doubt both the accuracy and relevance of the Commonwealth's submissions on a number of levels.

By David Thomas