Chapter Four

The *Tax Bonus Case*[1]

Bryan Pape

> *"The High Court is the only guarantee that the Constitution could not be arbitrarily flouted by any government, however popular. … It is to prevent the evasion of the Constitution".* (Sir John Downer)[2]

> *"(T)he respective positions of the Commonwealth and the States should be defined legally rather than politically. The Constitution did not set up a system of co-operative federalism or organic federalism".* (Sir Daryl Dawson)[3]

> *"As the process of modernization proceeds, revenue collection becomes centralized into the higher level of government".* (Popitz's Law)[4]

> *"In Australia nothing useful will be tried out so long as the Commonwealth continues to sit like a cuckoo in the nest claiming an excessive proportion of the whole national income".* (Colin Clark)[5]

After reviewing the implications of the High Court's reasons in the *Tax Bonus Case* (*TBC*)[6] with respect to the appropriation section and executive power, some observations are made on the next phase to rejuvenate the federal union. Much may still depend on questions of standing and the effectiveness of the Auditor-General. At the very least, the *Tax Bonus Case* has clarified the meaning of s. 81 of the Constitution. Three cheers for the High Court.

Synopsis

The *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) ("the Act") was assented to and commenced on 18 February, 2009. It provided for the payment of a lump sum of $900, $600 or $250 to persons who had taxable incomes ranging from up to $80,000, $80,001 to $90,000, and $90,001 to $100,000, respectively. They also needed to have had a tax liability of at least $1 for 2007-08. The total bonuses to be paid were estimated as $7.7 billion, out of an economic stimulus package of $12.2 billion.

I was supposedly entitled to $250. Having unsuccessfully fought against it being paid, it was later deposited into my bank account. A writ of summons and statement of claim was issued on 26 February, 2009 seeking a declaration that the Act was invalid. Next day it was served on the Commissioner of Taxation. On 13 March, Justice Gummow directed that the matter proceed by way of a special case, with the Commonwealth being joined as the second defendant. It was listed for hearing before the Full Court on Monday, 30 March at 2.15 pm. The Attorneys-General for NSW, WA and SA intervened. The remainder stayed in their stalls. Written submissions were filed by the parties and the interveners. To both a greater and lesser extent the interveners were allies of the plaintiff, although all supported the Commonwealth's reliance on the taxation power under s. 51(ii) and challenged in part his standing.

The Court acted on the plaintiff's submission that the case gave it an opportunity to "take out a clean sheet of paper" in considering the meaning of s. 81. Earlier judicial interpretations had erroneously focused on the minor premise, namely the meaning to be given to the words "for the purposes of the Commonwealth". Gummow, Crennan and Bell JJ held that the earlier interpretations were wrong in implicitly relying on the major premise, that s. 81 referred to spending. Once found, the troublesome minor premise of the meaning to be given to "the purposes of the Commonwealth" evaporated. The Garran view, which had prevailed for more than a century, was held to be wrong.

The impugned Act was upheld by a majority of 4:3, on the grounds that it was a valid law in reliance upon the executive power under s. 61 and the incidental power under s. 51 (xxxix). Future debate as to its width is likely to carry with it overtones of the Supreme Court of the United States striking down President Roosevelt's New Deal legislation in the 1930s. There the court was concerned with juxtaposition of two ideas; first, in 1934, in upholding a State Act dealing with a moratorium on mortgage loans, saying that "while emergency does not create power, emergency may furnish the occasion for the exercise of power".[7] Secondly, in the following year, in what is known as the *Sick Chicken Case*, it unanimously struck down federal legislation, holding that extraordinary conditions do not create or enlarge constitutional power.[8]

The use of the executive power to support legislation throws up for consideration in future cases the ambit of constitutional facts to establish what might answer the description of "emergency" situations. If the *TBC* had not proceeded by way of an agreed special case, and the constitutional facts about the global financial crisis (GFC) had been vigorously contested, the government's planned April payment of the tax bonus could have been thwarted. On one view, it is not a "global financial crisis" but a "government financial crisis" because of the projected shortfalls in taxation receipts.[9]

It might be that the *TBC* will be seen as an aberration, and confined to its peculiar uncontested facts as to the status of the emergency. If it later emerges that the so-called "financial emergency" was little more than a "storm in a teacup", similar protestations in future cases could be disregarded, like the shepherd boy who cried "wolf". (c.f. The Hon P J Keating, "the recession we had to have").

In upholding the validity of the impugned legislation by a majority of 4:3, the judgment relied on the executive power and the incidental power. It rejected the Commonwealth's primary submission, that the Act could be upheld through the use of the appropriation section, by 7:0.

Six Justices considered the use of the taxation power and all rejected it. Nevertheless, two would have upheld the validity of the Act if part of it had been severed. (That is to say, that the amount of the bonus was limited to the lesser of the 2007-08 tax liability and the amount of the bonus of $900, $600 or $250. In other words, if you were otherwise entitled to receive $900 and had a tax liability of $1 for 2007-08, all you would receive as a tax bonus would be $1. This would have affected about 11 per cent of taxpayers). The other four Justices rejected the application to sever the Act, which in essence was an application to enact a notional *Tax Bonus for Working Australians Act (No. 3)* 2009.

Three Justices considered the Commonwealth submissions seeking to uphold the validity of the Act by relying on the "trade and commerce power" under s. 51(i) and the "external affairs power" under s. 51 (xxix). All three rejected them.

So far as the issue of the plaintiff's standing was concerned, once the Court held that the plaintiff had a "matter", the issue of standing fell away. In short, it didn't arise: a 7:0 result in favour of the plaintiff against the two defendants and the three interveners on the question of standing.

The dissenting judgment of Heydon J "belled the cat" on the stance of the Commonwealth in the proceedings:

> "The preferred arguments of the defendants in these proceedings advanced wide constructions of s. 61 of the Constitution read with s. 51 (xxxix) and of s. 81 read with s. 51 (xxxix). These were arguments capable of producing very extreme results. If correct, they would cause the 'incidental' legislative power in s. 51 (xxxix) to be wider

> in its effects than any of the non-incidental legislative powers, and perhaps wider than all of them taken together. What s. 1 of the Constitution calls a 'Federal' Parliament would have a power to enact legislation of the kind usually associated with non-federal parliaments".[10]

Having broken up the party at No. 81 Constitution Avenue, will it now move down the avenue to No. 61? The "Delphic" expression of French C J might be tantamount to posting a "Beware" sign on the door of those who seek to enter No. 61:

> "The exigencies of 'national government' cannot be invoked to set aside the distribution of powers between the Commonwealth and the States and the three branches of government for which the Constitution provides, nor to abrogate constitutional provisions".[11]

Ramifications

Appropriations: Those who adhered to the views of Sir Robert Garran and Justice Murphy in the *Australian Assistance Plan Case (*the *AAP Case)*[12] (e.g., the 150 Members of the House of Representatives and the 76 Senators, which of course included the 42 members of the Federal Executive Council) might be a little disappointed by the result. It is worth recalling what Murphy J said in the *AAP Case*:

> "If the plaintiff's contentions were accepted, it would mean that the Parliament's use of its appropriation power has been unconstitutional since federation".[13]
>
> "From the material supplied to the Court and an examination of the Appropriation Acts, it appears that there were many current programmes [that is, in 1974-1975], some of which had been in operation for many years and which are not clearly referable to any head of legislative power in the Constitution other than s. 81.
>
> "These include substantial appropriations in the Departments of Education, Tourism and Recreation, Science, Health, Housing and Construction, Agriculture, Special Minister of State, Prime Minister, Media, Urban and Regional Development, Environment and Conservation, Labor and Immigration, and Social Security.
>
> "The appropriation for those purposes not within the scope of enumerated powers would, on the plaintiff's contention, be unconstitutional. Hundreds of items of appropriation since federation and many hundreds of millions of dollars would have been unlawfully appropriated and spent.
>
> "The chilling effect that such an interpretation would have on governmental and parliamentary initiatives is obvious. It is not a formula for operating a Constitution. *It is one for stultifying government*. If the surplus revenue issue is to be re-opened, the States would be encouraged to challenge items of appropriation in order to enhance the possibility of surplus revenue".[14] (Emphasis added).

What Justice Murphy said in the *AAP Case* about the stultification of government has now been consigned to the constitutional trash can. As French C J said:

> "Substantive power to spend the public moneys of the Commonwealth is not to be found in s. 81 or s. 83, but elsewhere in the Constitution or statutes made under it".[15]

Or as Heydon J said:

> "Section 81 does not create a 'legislative power' to confer on the Executive the power to spend what is appropriated".[16]

Executive Power: This issue, of the development of the jurisdiction of executive power, must be seen against the background of the present case, because it proceeded by way of a special case on agreed facts. Future challenges to the Commonwealth's use of the executive power and incidental power may not be so successfully resisted. "The question of the reviewability of factual assertions of the Executive grounding the exercise of its powers under s. 61 does not arise in this case, having regard to the accepted facts".[17]

Importantly, there is a difference in the views of the members of the Court on the interpretation to be given to the executive power under s. 61. The dissentients were more than concerned with the approach which the majority took:

> "The constitutional questions presented in this matter are deeper and more enduring than the particular and urgent circumstances that caused the enactment of the particular law. They raise issues that are fundamental to the constitutional structure of the nation, and transcend the immediate circumstances in which the questions were posed".[18]

> "The executive power of the Commonwealth is the executive power of a polity of limited powers".[19]

> "It is for the Court, not the political branches of government, to decide whether the means chosen to achieve particular political ends are constitutionally valid, and it is for the Court to identify the criteria that are to be applied to determine whether those particular means are constitutionally valid".[20]

Standing: Regrettably, my earlier lamentations on standing in 2005[21] continue. In the *Tax Bonus Case* it was unnecessary for the Court to decide these questions. In short, where federal jurisdiction is invoked and there is a "matter", questions of standing are subsumed within that issue.[22] Where the States turn a "blind eye" to the Commonwealth usurping their activities by the use of s. 96 tied grants, there is nothing the citizen can do. It is extremely doubtful that a State Attorney-General would consent to bring a relator action, as happened in the 1945 *Pharmaceutical Benefits Case.* Sir John Downer's observation that the High Court is the only guarantee that the Constitution would not be arbitrarily flouted was based on the implied premise that the States would actively institute proceedings in the Court to protect their interests. Experience has shown this premise to be false.

The decision of the High Court in declaring that it was beyond the constitutional competence of the Parliament to authorize it to give an advisory opinion on the validity of an Act of Parliament revealed a gap which has not been remedied. In *Re Judiciary Act* 1903-1920 & *Re Navigation Act of the Constitution* 1912-1920, the High Court held that there was "nothing in Chapter III [which deals with the Judicial power] to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[23] Regrettably, the rights of a citizen in a federal system have received little examination.[24] Professor Geoffrey Sawer noted that "the practice of advisory opinions has been of great public value in Canada and can be useful in any federation where the legal validity of important legislation is constantly open to doubt".[25]

It is both useful and timely to refer to s. 94 of the Constitution, which relevantly provides:

> "(T)he Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth".

In this context, "may" effectively means "must", because if the Commonwealth has no lawful authority to spend, now that s. 81 has been closed, how can it be a proper use of the s. 96 grants power[26] to tack or tie on conditions which, in substance, allow it to expand its powers not otherwise provided for in the Constitution? In this context it is important to note that nearly 90 per cent by value of the physical public assets are held by the States and Territories (see Annexure A): that is to say, the schools, hospitals, roads, railways, buses, trains, ports, power stations, gaols, etc. The Commonwealth's physical assets are mainly defence assets, e.g., warships, submarines, aircraft, tanks and artillery. Yet the Commonwealth raises about 82 cents in the dollar of all taxation levied. This is an extraordinary blight. If the Commonwealth were to be constrained in its power to tax, its capacity to engage in so-called nationhood activities would be correspondingly limited.

We have now progressed from the old use of the s. 96 grants power, being the Commonwealth's "card of entry" as Sir Robert Menzies called it, to a higher level of centralized Commonwealth control known as "executive federalism". I speak of the development of the National Partnership Agreements between the States and the Commonwealth. These numerous inter-governmental partnership agreements[27] are tantamount to a fusion of the States and Commonwealth into an unwarranted form of organic federalism.

Essentially the Commonwealth raises more revenue than it needs, which economists characterize as vertical fiscal imbalance (see Annexure B). To say that this has resulted in both a financial and accountability mess is not to overstate the situation. The Commonwealth must withdraw, and confine itself to the activities listed in the Constitution. It necessarily follows that the Commonwealth must reduce its level of income taxation to allow the States back into this field. Prime Minister Menzies "was in favour of a return of income tax to the States provided that the advantages of a single system of administration and assessment could be preserved".[28] Interestingly, it was South Australia in 1884 which introduced the first income tax in Australia. It also bears noting that the 1942 Uniform Tax Legislation was supposed to have ended on 30 June, 1947. The States must then be each responsible for fixing their respective rates of income tax. No objection ought be taken to the Commonwealth administering the collection of State income taxes.

Conclusion

From its silence, it seems that the Commonwealth has so far studiously ignored the reasons of the High Court in the *Tax Bonus Case* with respect to its unlawful use of s. 81. As Murphy J would put it, the Government has been *stultified*. When its primary submission to support the validity of the tax bonus legislation has been rejected by all seven Justices, it might reasonably be expected that a revised 2009-10 budget be submitted to the Parliament. If not, then the Auditor-General, on his own initiative, should report to the Parliament on those items of unlawful expenditure which in his opinion should be now cut from the 2009-10 budget.

Annexure A

Summary of Estimated Net Assets of the States and Territories
and the Commonwealth for the Year Ended 30 June 2010

	States & Territories $bn	Cth* $bn	Total $bn
Assets			
Financial	93	304	397
Non-financial	774	106	880
	867	410	1,277
Liabilities			
Superannuation	113	122	235
Other	243	319	562
	356	441	797
Net Assets / (Deficiency)	511	(31)	480

*Includes Reserve Bank of Australia

Source: Balance sheets prepared under Australian Accounting Standard 1049 for the Non-financial public sector plus the Reserve Bank of Australia as at 30/06/2008 as an estimate for 2009-10.

Comparison: BHP Billiton Group's net assets as at 30 June, 2009 were $ US41bn ($A 49bn).

Annexure B

Budgeted Commonwealth Revenue and Expenses
for the Year Ended 30 June 2010

Revenue				
Income tax			191	
Indirect taxes	- GST	44		
	- Other	30	74	
Miscellaneous taxes				3
			268	
Sundry revenue			23	291
Expenses				
General			338	
Less: Grants to States				
Current grants		74		
Capital transfers		18	92	246
Operating surplus before grants to States				**45**
Less: GST grants				44
Specific purpose grants			48	92
Operating deficit				**(47)**

Source: Statement 9: Budget Financial Statements, 2009-2010. *Budget Paper No. 1: Budget Strategy and Outlook, 2009-10*.

Endnotes:

1. Sub-titled "Or did the Commonwealth cry 'Wolf'?".

2. J C Bannon, *Supreme Federalist: The Political Life of Sir John Downer* (2009), at pp.188 -189.

3. Sir Daryl Dawson, *The Constitution – Major Overhaul or Simple Tune-up?* (1983) 14 Melbourne University Law Review 353 at p. 367.

4. Johannes Popitz, *"Der Finanzausgleich", Handbuch der Finanzwissenschaft,* vol. 2 (1927), Tubigen: JCB Mohr.

   [Johannes Popitz was born on 2 December 1884. After a career in the federal government, he became Minister of the Treasury in the state government of Prussia in 1933. As a conservative, he joined the political resistance group of CF Goerdeler, was condemned to death in 1944 and executed in Berlin on 2 February 1945. See, Charles B Blankart, *The process of government centralization: a constitutional view*, *Constitutional Political Economy* (Vol 11, 2000), 27-39 at n 2.]

5. Colin Clark, *Principles of Public Finance and Taxation*, Arthur Capper Moore Research Lecture, 26 June 1950, (1950, Federal Institute of Accountants), p.30.

6. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23.

7. *Home Building & Loan Assn v. Blaisdell*, 290 US 398 (1934), 426. "The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions*";* per Hughes CJ.

8. *ALA Schechter Poultry Corp et al v. United States*, 295 US 495 (1935) at 528.

9. *Updated Economic and Fiscal Outlook* (February 2009), at p.17. http://www.budget.gov.au/200809/content/uefo/download/Combined_UEF O.pdf.

10. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at para [397].

11. *Ibid.*, at para [127].

12. *Victoria v. Commonwealth & Anor* (1975) 134 CLR 338.

13. *Ibid.*, at p. 417.

14. *Ibid.*, at p. 418.

15. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at para [111].

16. *Ibid.*, at para [607].

17. *Ibid.*, at para [133].

18. *Ibid.*, at para [260].

19. *Ibid.*, at para [335].

20. *Ibid*., at para [350].

21. Bryan Pape, *The Use and Abuse of the Commonwealth Financial Power*, in *Upholding the Australian Constitution*, Proceedings of the Seventeenth Conference of The Samuel Griffith Society (2005), at pp. 270-274, 280.

22. *Pape v. Commissioner of Taxation and Anor* (2009) HCA 23 at paras [50] and [51].

23. (1921) 29 CLR 257 at p. 267.1.

24. See Peter H Schuck, *Citizenship in Federal Systems*, *The American Journal of Comparative Law*, (2000) Vol. 48(2), at pp. 195-226.

25. Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia,* (3rd ed., 1964), Case [57] and Notes at pp. 636-7.

26. "It was intended solely as an emergency measure to bail out a State in financial difficulties through no fault of its own"; per Kenneth Wiltshire, *Reforming Australian Governance: Old States, No States, or New States?*, in AJ Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2007), at p. 187.

27. Intergovernmental Agreement on Federal Financial Relations, http://www.coag.gov.au/intergov_agreements /federal_financial_relations/docs/IGA_federal_financial_relations.rtf.

28. Geoffrey Sawer, *The Commonwealth and the States*, Current Affairs Bulletin (1971) Vol 47 (4) at p. 55. See too Appendix A to *Resumption of Income Tax by the States* (report by Commonwealth and State Treasury Officers, January 19, 1953).