

OBITUARY

Bryan Pape and his Legacy to the Law

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University of New England academic and barrister Bryan Pape achieved remarkable success in shaping the direction of Australian constitutional law. He did so single-handedly, both by deciding to challenge the Rudd Government's stimulus payments in the High Court and then, as a litigant in person, by convincing every judge on the Court in Pape v Commissioner of Taxation that limits applied to the capacity of the Commonwealth to spend taxpayers' money. This article explores Pape's impact upon this area of the law by drawing out the personal and legal interconnections. The article is a study of what is an unusual, perhaps unique, example of the influence wrought by one person upon the interpretation of the Australian Constitution.

Introduction

Australia has had many notable scholars in the field of constitutional law, but few have had anything like the impact achieved by University of New England academic and barrister Bryan Pape. Despite a number of significant presentations and publications,¹ his greatest success lay outside academia. It came as a result of his appearance, as a litigant in person,² in the High Court matter that bears his name, *Pape v Commissioner of Taxation*.³

That decision is one of the most important handed down by the High Court in the field of constitutional law. It sparked a fundamental reassessment of two of the most significant, and thereto largely unexplored, aspects of the *Australian Constitution*, the scope of the Commonwealth's power to spend money and the federal executive power. *Pape v Commissioner of Taxation* was especially important in regard to the first of these, while subsequent decisions have built upon its findings in regard to the latter. Not surprisingly, these decisions have provoked a flurry of scholarship from Pape's former academic colleagues.⁴

This article explores the impact that Pape has had upon this area of the law, doing so by drawing out the personal and legal interconnections. Public law scholarship tends to focus only on the more formal aspects of the law, whereas this article seeks to explain how personal factors played a significant role in legal development. It begins with a biographical sketch of Pape's professional life, before exploring his views on federalism, his advocacy in the High Court in *Pape v Commissioner of Taxation* and the subsequent impact of that case. In doing so, the article provides a study of what is an unusual, perhaps unique, example of the influence wrought by one person upon the interpretation of the *Australian Constitution*.

Bryan Pape

Pape was born at Castlemaine in the goldfields region of Victoria on 17 January 1945, and died aged 69 on 27 April 2014. He lived a life full of professional achievement. After completing a Bachelor of Commerce in Accounting at the University of New South Wales in 1969, he worked as an accountant and then joined the New South Wales bar in 1977. Like some other notable

members of the legal profession, including former High Court Justice Michael McHugh⁵ and current Justice Susan Kiefel, Pape never completed a law degree. Instead, he came to practice after being awarded a Diploma of Law via the program run by what is now called the NSW Legal Profession Admission Board. His work at the bar across the years focused upon taxation law, international commercial arbitration and mediation, commercial law and constitutional law.⁶ His professional standing was reflected in the fact that he was appointed in 1981 at age 36 as a member of the Taxation Board of Review, a body whose functions have now been subsumed by the Administrative Appeals Tribunal. Later in his career, in 1992, he was appointed to the Australian Accounting Standards Board.

Pape was not one to bow easily to authority. Indeed, he was a fearless, independent thinker with a well-known tendency to be a troublemaker. One of his colleagues from the bar, Peter Graham, QC, said that Pape “relished the chance to rock the boat”.⁷ This was evident, for example, in how he sought change to the bar rules to permit barristers to be briefed directly by professional clients, such as accountants. Pape played a leading role in this debate, and in 1991 was even threatened with disciplinary action by NSW Bar Association President, Barry O’Keefe.⁸ Nonetheless, in 1992, under different leadership, the Association appointed him to a committee charged with investigating direct access to barristers. After what has been described as a “tortured path . . . littered with drama and betrayal,” Pape and the other supporters of change won out, and direct professional access was adopted.⁹

Pape left the bar in 2000 to become a legal academic in the School of Law at the University of New England in Armidale, NSW. As a senior lecturer for more than a decade, he taught a broad range of subjects, including taxation law, corporations law, evidence and proof, civil procedure and contracts. He played a significant role in setting up the Australian Centre for Agriculture and Law at the University, which seeks to “provide innovative scholarship on laws and institutions affecting rural communities” and “to develop policies and strategies to improve rural sustainability and social justice,”¹⁰ and in 2004 was its acting director. He also helped to establish a moot court at the Law School, and as a teacher is remembered for staging mock trials and insisting on high academic standards.¹¹ He was also instrumental in the introduction of a new compulsory course for undergraduate students entitled Advanced Research, Writing and Advocacy.¹²

Pape is fondly remembered at the University, but perhaps not quite so well by its administrators, as he “was a constant thorn in the side of vice-chancellors, deans, and senior management when they visited the School of Law. He was fiercely loyal to the School of Law. He would ask difficult and probing questions of these visitors”.¹³ His questions often related to the University’s finances, where he put his accountancy background to good effect in challenging administrators on why the Law School was not receiving a larger share of University income. Pape remained at the University of New England until early 2011, at which time he returned to the bar.

In addition to a busy professional life, Pape was active politically for around 30 years. He was a member of the State Council of the NSW Division of the Liberal Party for 12 years, and twice President of its City of Sydney Special Branch. For 10 years, he was also a member of the NSW National Party, Chairman of its New England Federal Electorate Council for six years and its State Treasurer for two years.¹⁴ In these roles, he again demonstrated a preparedness to argue

for contentious, even unpopular, positions, including removing sitting members in favour of younger talent,¹⁵ and merging the Liberal and National Parties in NSW.¹⁶

Pape eventually gave up these political connections to the coalition parties to stand as an independent for the Senate in 2010. He stood “on a platform of sticking up for federalism,”¹⁷ and promised to conduct a “constitutional audit” of all government legislation to ensure compliance with the decision in *Pape v Commissioner of Taxation*.¹⁸ He secured just 0.01 per cent of the vote.¹⁹ Pape’s shifting political allegiances suggested a level of restlessness, and indeed he once explained his politics in this way: “Like Deakin I am an advocate of a policy in search of a party rather than a member of a party in search of a policy.”²⁰

Pape on the Federation

Pape had firm views on how Australia should be governed. He was a staunch defender of the notion that Australia is best served by having a federal system in which the states are able to compete with each other while operating with autonomy within their spheres of interest. His view was that “decision making should be made at the lowest possible level, so that those most affected by the decision are responsible for its financing and administration”.²¹ He saw this as encouraging “self-reliance which makes for a healthy country” and that it would “improve society through innovation”.²² To facilitate this, he argued that Australia should be divided into a larger number of States, perhaps as many as 20.²³

Given his accounting background, it is not surprising that Pape had a particular interest in the taxation and other financial aspects of the Federation. In particular, he believed that the States should have the capacity to raise the money they required to fund their activities, without having to rely upon Commonwealth grants, especially tied grants. For example, the States, and not the Commonwealth, should set the level of income tax, even if this tax was collected on behalf of the States by the federal tier.²⁴ This, he argued, would promote competition between the states, such as in regard to their relative levels of taxation. In this and almost every other respect, Pape’s vision of the ideal form of the Australian Federation was far removed from how the system had actually come to work.

The *Australian Constitution* was drafted at two Conventions held in the 1890s. The key issues included questions of finance and trade, and how best to weigh the interests of the small States against those of the more populous States in the new national Parliament. Many of the framers were also concerned to maintain the rights of the colonies when they became States in the new Australian nation. As politicians from the colonies, they did not want to see the encroachment of the new central government into State areas of control.

To achieve this, when Australia became a nation on 1 January 1901 it also became a Federation. As stated in the opening preamble to the *Constitution*, the people of the colonies agreed to “unite in one indissoluble Federal Commonwealth”.²⁵ This system of federalism created by the *Constitution* involves two tiers of government in which power is divided between the Commonwealth and the States. Although the framers of the *Constitution* recognised the possibility of conflict and overlap, the system was based on the idea that the federal and state governments would be able to operate independently and that power and authority would be divided between them. This was achieved with a view to leaving the greater body of power with

the States. Indeed, a consistent theme in the convention debates is a concern held by many of the framers that the new constitution would ensure that the States would be the dominant tier.

This is reflected in how the framers decided that the *Constitution* would divide legislative power. The *Constitution* grants the Commonwealth legislative power over 40 specific areas (including a further power over social services that was added by referendum in 1946). These areas are listed in section 51 of the *Constitution*, with a few additional matters set out in section 52. The areas of federal legislative responsibility include matters such as taxation, defence, quarantine and marriage, while no mention is made of general areas of State interest such as education and health. These listed areas of responsibility describe the full extent of the legislative power of the Commonwealth Parliament. What is significant is that the States are left with everything else. The framers thought that, by restricting the Commonwealth to specific areas and leaving the residue to the States, the latter would have the greater responsibilities.

For the first two decades of the new nation, the High Court interpreted the *Constitution* in a way that maintained the position of the States and limited the growth of Commonwealth power. The Court did this through a restrictive interpretation of the listed Commonwealth powers and by the use of a doctrine of “reserved State powers”.²⁶ This doctrine meant that Commonwealth grants of power were to be interpreted so as to ensure that they did not encroach too far on the “residual” powers of the States. Another important early doctrine was that of the “implied immunity of instrumentalities”.²⁷ If federalism meant that each level of government is sovereign, then it was thought that it must follow that no government at either level could be told by any other government what it might or might not do. Hence, far from being bound, this doctrine meant that both the States and the Commonwealth were normally immune from each other’s laws. This reasoning was used to protect the States and their “instrumentalities” or agencies from Commonwealth interference.

The High Court as first appointed in October 1903 consisted of only three judges, Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O’Connor. In formulating these doctrines they saw themselves as developing a model of balanced federalism protective of the interests and position of the States. However, from 1906 onwards, when Justices Isaac Isaacs and Henry Higgins joined the Court, the early doctrines began to be eroded. In 1920, after a series of retirements and new appointments to the Court, the doctrines of “implied immunity of instrumentalities” and “reserved State powers” were swept away by the landmark decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers* case).²⁸

That decision not only rejected these doctrines, it also established a new approach to constitutional interpretation that continues to direct the work of the High Court to the present day. This approach, based upon the idea of literalism, or reading the words of the *Constitution* in their ordinary sense, is inconsistent with the use of overarching notions such as the “federal balance”. According to the Court, the *Constitution* must not be interpreted using “a vague, individual conception of the spirit of the compact”.²⁹ Instead, “the one clear line of judicial inquiry as to the meaning of the *Constitution* must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it”.³⁰

This approach has proven to be generally permissive of a broad interpretation of the listed areas of federal power. This has been aided by the repeated invocation by the High Court of the

idea that “where the question is whether the *Constitution* has used an expression in the wider or in the narrower sense, the Court should . . . always lean to the broader interpretation”.³¹ In addition, it is also often been stated that heads of federal power should be “with all the generality which the words used admit”.³² Dicta such as this have facilitated the steady encroachment of the federal sphere into State interests, or, as Pape put it, Australia has a federal system in which “the Commonwealth has usurped many of the functions of State governments”.³³

The expansion of federal legislative powers has been matched by a rise in the fiscal dominance of the Commonwealth. The *Constitution* was meant to secure the States’ financial position and independence. Indeed, at Federation in 1901, it was the States and not the Commonwealth that levied income tax. However, the demands of two world wars and the emergence of a truly national economy, as well as the ruthless exercise of its powers by the Commonwealth, have left the States with no revenue from income taxation.

The High Court decisions in the *Uniform Tax Cases* of 1942 and 1957 upheld a Commonwealth takeover of the income tax system.³⁴ The financial problems of the States were compounded by the more recent decision of the High Court in *Ngo Ngo Ha v New South Wales*.³⁵ In that case the High Court struck down excise duties levied by the States over alcohol and tobacco, thereby stripping them of around \$5 billion in annual revenue. Taken together, these cases deprive the States of access to the most important streams of taxation revenue in Australia.

The High Court has also given a wide interpretation to the ability of the Commonwealth to attach conditions to money granted to the States.³⁶ Section 96 of the *Constitution* allows the Commonwealth to make grants on “such terms and conditions” as it thinks fit. By attaching such conditions, the Commonwealth is able to direct in very specific terms how the State is to spend such money, and even how it is to regulate the area in which the money is to be spent. A State is free to refuse such money and the attached conditions, but in practice the States are rarely able to do so given their dependency on Commonwealth grants.

Over time, these decisions have dramatically altered the relative financial power of the Commonwealth and the States. In 1901-1902, 41 per cent of revenue was collected by the Commonwealth. Today, the Commonwealth collects 84 per cent of tax revenue, despite being responsible for only 58 per cent of total government spending. By contrast, the States collect only 16 per cent of taxation revenue while being responsible for 42 per cent of outlays.³⁷ The result is the problem of vertical fiscal imbalance, in which there is a mismatch between the amounts of taxation revenue each tier of government generates, and how much each needs to spend.

In order to deal with this imbalance, the States have turned to new sources of taxation, such as on gambling, and have become heavily dependent on Commonwealth grants. For example, over 2014-2015 the Commonwealth will provide the States with payments totalling \$101.1 billion, comprising general revenue assistance of \$54.9 billion and payments for specific purposes of \$46.3 billion.³⁸ This unhealthy dependency fulfils the prediction of Alfred Deakin, Australia’s second Prime Minister, who said soon after Federation that the States would find themselves “legally free, but financially bound to the chariot wheels of the Central Government”.³⁹

Pape railed against how legislative and financial power had come to be centralised in Australia. He sought a return to the original vision for the *Australian Constitution* in which the States could operate with autonomy and possess the financial resources needed to fulfil their functions. In

holding these views, Pape differed from many of his colleagues at the bar and in academia who supported, or simply accepted as a constitutional reality, the steady growth of Commonwealth power at the expense of the States.

Pape stood out as an unreconstructed supporter of States' rights. He often found voice for this through his participation in the annual conferences of the Samuel Griffith Society, an organisation that lists its aims as including "To defend the Australian *Constitution* against all who would attempt to undermine it" and "To oppose the further centralisation of power in Canberra".⁴⁰ At its events, Pape displayed a particular concern with how the Commonwealth had come to exert financial dominance within the Federation, such as through the Commonwealth directing the States in their affairs via tied grants under section 96 or spending money directly on matters thought to fall within State control.

In a 2005 paper entitled "The Use and Abuse of the Commonwealth Finance Power", delivered at the Samuel Griffith Society Annual Conference, Pape said:

If the use of s 96 by the Commonwealth and its tame acceptance by the States brought about a constitutional revolution, (without any formal amendment of the *Constitution*), then the abuse of the appropriation power to bypass the States has effectively destroyed the federal union . . .

Unwittingly, the drafters of the *Constitution* do not seem to have provided against the States and the Commonwealth acting in a way which has brought about change from a federal union to a de facto unitary system.⁴¹

Pape was not simply content to question the status quo, and in this paper also questioned whether some federal payments might actually be invalid under the *Constitution*. In a section entitled "Enactments beyond power?", he raised the possibility that a broad range of federal payments, such as to local government under the roads to recovery program or for participation in sport, might be unconstitutional.⁴²

In these and his other writings, Pape demonstrated not only his knowledge of constitutional law, but also that he was driven to advocate for a return to past practices. For him, this was a point of high principle. Indeed, he saw his role as a scholar as being to argue for what he saw as the ideal conception of the Australian Federation. It was not enough to simply understand how things worked; being an academic meant fighting for what he believed in. This was a recurrent theme in his scholarship. For example, he displayed this when he was given the honour of delivering the Third Sir Harry Gibbs Memorial Oration at the Samuel Griffith Society in 2010. His address began with the following quote from United States President Dwight Eisenhower: "Those who would stay free must stand eternal watch against the excessive concentration of power in government."⁴³ He concluded on the same theme by stating:

When Sir Harry Gibbs hung his heraldic banner as a Knight Grand Cross of the Order of St Michael and St George in St Paul's Cathedral in London, his motto of *Tenan Propositi* was unfurled for all to see: 'Hold to your principles'. His life was spent in doing so. We, too, must live up to his example.⁴⁴

Pape v Commissioner of Taxation

The *Constitution* is cryptic in setting out the extent of federal power to spend taxpayers' money. At best, section 81 of the *Constitution* states:

All revenue or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*.

This is complemented by the requirement in section 83 that no money may be drawn from the Treasury of the Commonwealth except by way of appropriation "made by law" (that is, under a valid law passed by the federal Parliament), while section 61 sets out the ambit of the Commonwealth's executive power in broad terms by stating that it is "vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth".

What is not made clear by these sections is the purposes for which the federal Parliament may appropriate money under section 81, and the subjects upon which the Commonwealth can expend such money. A key question has been whether the federal Parliament may appropriate and spend money for any purpose that it wishes, or whether it may do so only for a limited set of purposes that correspond to its powers as elsewhere set out in the *Constitution*.

Despite its fundamental importance, this question had come squarely before the High Court on only three occasions since federation in 1901. The Court failed to resolve the issue on either of the first two occasions. Its initial attempt was in *Attorney-General (Vic); Ex rel Dale v Commonwealth (First Pharmaceutical Benefits Case)*⁴⁵. The *Pharmaceutical Benefits Act 1944* (Cth) had established a scheme of free medicine, obtainable from approved chemists upon prescription by a doctor using a federal form. The Medical Society of Victoria sought a declaration that the Act was invalid, and an injunction against any expenditure under its provisions.

The High Court upheld the challenge, holding that the Act was not authorised by the power of appropriation in section 81 of the *Constitution*. On the meaning of "the purposes of the Commonwealth" in section 81, the *First Pharmaceutical Benefits Case* yielded no clear view. Latham CJ and McTiernan J took a broad view that there is no limit to the power, and as a result that the Commonwealth may fund whatever it wants. They found, in the words of McTiernan J, that "[t]he purposes of the Commonwealth are, I think, such purposes as the Parliament determines".⁴⁶ Dixon J, with whom Rich J agreed, did not reach any conclusion on what "the purposes of the Commonwealth" might mean. Starke and Williams JJ held that the Act was invalid by construing "purposes" narrowly and thus that the Commonwealth can only fund matters that fall within its other powers in the *Constitution*, most notably those areas listed in section 51 of the *Constitution* such as defence and taxation. As Williams J put it: "These purposes must all be found within the four corners of the *Constitution*".⁴⁷

The scope of section 81 next came before the High Court in *Victoria v Commonwealth and Hayden (AAP Case)*.⁴⁸ The High Court had before it a two-line item and schedule in the *Appropriation Act (No 1) 1974* (Cth) that authorised expenditure of \$5,970,000 for the Whitlam Government's Australian Assistance Plan. The Plan envisaged the establishment of Regional Councils for Social Development throughout Australia that would spend this money on welfare

activities such as family day care programs, counselling services for families and Community Health and Welfare Centres.

By 4:3, the High Court rejected the challenge. McTiernan, Mason and Murphy JJ affirmed a broad view of Commonwealth “purposes”. Barwick CJ and Gibbs J took a narrow view, while Jacobs J assumed for purposes of argument that such a view was correct. The final judge, Stephen J, expressed no opinion. He held that the plaintiffs’ challenge failed because they lacked the legal right to raise the issue.

A decade later in *Davis v Commonwealth*,⁴⁹ Mason CJ, Deane and Gaudron JJ noted the “long-standing controversy about the meaning of ‘purposes of the Commonwealth’ in s 81”. They concluded that the *AAP Case* could best be summarised “as an authority for the proposition that the validity of an appropriation act is not ordinarily susceptible to effective legal challenge”.⁵⁰

Based upon these decisions, the Commonwealth applied the view that the *Constitution* granted it an unlimited capacity to spend taxpayers’ money, or at the least that such payments could not be effectively challenged in the High Court. This meant that the Commonwealth approach such matters on the basis that, if it wished to spend money on a subject, it had the constitutional authority to do so, irrespective of whether that subject corresponded to one of its heads of legislative power or otherwise related to an area of State responsibility.

The Rudd Government followed this line of reasoning in its response to the global financial crisis that intensified in 2008. Its response was to spend large sums of taxpayers’ money on building and other projects by way of providing a stimulus to the economy. One key component was the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). It provided a “fiscal stimulus package” in the form of one-off bonus payments worth \$7.7 billion to 8.7 million taxpayers whose taxable income in 2007-2008 was less than \$100,000. For incomes under \$80,000 the amount payable was \$900; for incomes between \$80,000 and \$90,000 it was \$600; for incomes between \$90,000 and \$100,000 it was \$250.

No one seriously contested in Parliament or elsewhere that the Commonwealth had the ability to enact this law and so to expend taxpayers’ money in this way. That is, until Pape came along. Despite being a potential recipient of a \$250 payment, he challenged the validity of the legislation. Many people have wondered why Pape took the extraordinary step of initiating a High Court challenge to the Government’s decision to grant him this one-off payment. Examined in light of his background and beliefs, his decision was not surprising, even if it reflected significant personal and professional courage. It takes a brave person to stand between the Commonwealth and an offer of cash to nearly 9 million taxpayers, let alone in the midst of a global economic recession. No doubt his decision to act was fortified by his long professional experience at the bar, and his predilection to challenge those in authority.

A number of other factors also led Pape to initiate the challenge. These included his view that restricting the areas in which the Commonwealth could spend money might help to facilitate a more balanced Federation in which the States could exercise greater authority and autonomy. He also believed that he and others ought to publicly assert such principles, and that the High Court, and the media attention it would attract, was an appropriate way of doing this. At an intellectual level, he also saw the case as an opportunity to test the arguments he had made in his 2005 paper to the Samuel Griffith Society on “The Use and Abuse of the Commonwealth

Finance Power”.⁵¹ Most fundamentally, Pape saw the case as raising questions about the rule of law: “It comes back to a basic rule-of-law argument, either we are going to be governed by laws or we’re not. And the fundamental law in this country happens to be the Constitution. You can only spend money on what you have been authorised to spend it on.”⁵²

These convictions though were not enough. This is because Pape was of the view that, whatever the legal merits of the Commonwealth’s financial position, and in particular the scope of its appropriations and spending powers, the combined effect of the *AAP Case* and *Davis v Commonwealth* was that such payments were not open to legal challenge. Hence, in his 2005 paper to the Samuel Griffith Society, he said: “What is alarming, is that the citizen is denied access to the High Court to challenge appropriations which are beyond power. In short, the High Court needs to be afforded the opportunity of reconsidering the issues of standing and justiciability.”⁵³

Pape told me later that the catalyst for him bringing the challenge was a conversation we had had about how the barriers to challenging Commonwealth expenditure may not be insurmountable. Pape was a regular attendee of the annual constitutional law conferences hosted by the Gilbert + Tobin Centre of Public Law at the University of New South Wales. We often discussed constitutional matters, including Australia’s federal system, and in 2008 talk turned to the weight that should be given to the dicta in *Davis v Commonwealth*. We discussed how it must be open to reconsideration given that the dicta was merely obiter, and even then was arguably not a fair reading of the result in the *AAP Case*. It was certainly a point of view that was open to question, and in any event none of the judges who had expressed the view remained on the High Court. We also agreed that a person in receipt of a Commonwealth payment would be able to mount a good case for standing in respect of challenging the validity of that payment. However, the discussion ended on the note that surely no person would be likely to challenge their own receipt of federal money.

I thought no more of this conversation until Pape made news headlines around Australia in March 2009 for launching a one-man attack on the Rudd Government’s stimulus payments. He explained in the media that “his challenge was not aimed at the idea of an economic stimulus, but at upholding the Constitution”.⁵⁴ As he later made clear to the High Court, he was bringing this case simply because it provided a convenient opportunity, or “suitable vehicle,” to test the ambit of federal power to spend taxpayers’ money.⁵⁵ Certainly, no self-interest was involved. Pape not only stood to lose his \$250 bonus payment, but faced the prospect, in the event of a loss, of paying tens of thousands of dollars in costs to the Commonwealth (which the Commonwealth indicated in its submissions to the High Court that it would seek from Pape in the event of him losing the case). His decision was a rare example of a High Court case not being fought for financial or political advantage or over a person’s liberty, but to vindicate a point of principle.

With the stimulus payments about to be distributed, the High Court brought the matter on for an expedited hearing. After a directions hearing on 13 March, the matter was set down before the full court of the High Court just over two weeks later on 30 March. The case then proceeded over three days until 1 April 2009. It was a David and Goliath battle. On the one hand was Pape, representing himself and instructed by the Sydney commercial law firm Toomey Pegg, and on the other, the might of the Commonwealth, led by the Solicitor-General and future High Court Justice, Stephen Gageler, SC.

The high stakes involved in the case attracted intense media interest and a packed High Court gallery. The possible financial consequences of the case also led to threats to Pape and the High Court. Pape was the subject of vicious personal attacks, including on social media platforms such as Facebook, from people concerned that they might not receive their government stimulus payment. One social media page entitled “We hate Brian [sic] Pape!!!” invited people to join in order to show their “vehement disdain for this lawyer wanting his 15 minutes of fame. Brian [sic] Pape is UnAustralian”.⁵⁶ On the second day of the hearing, a disgruntled Canberran concerned that they might not receive their \$900 stimulus payment called the High Court to make a bomb threat.

In opening his argument, Pape emphasised that his case had nothing to do with the merits or demerits of the stimulus payment. For him, the case was “essentially fundamentally about one issue and that is the overreach of Commonwealth power”.⁵⁷ He argued for a narrow construction to the Commonwealth’s spending power. On the second day of the hearing, no doubt to the great relief of Pape, the Solicitor-General announced to the Court that agreement had been reached between the parties as to costs, and that the Commonwealth would support an order from the Court that “each party should bear its own costs”.⁵⁸

Two days after the hearing concluded, the High Court reconvened on 3 April to announce the result. It appeared to be a devastating loss for Pape. While the Court held, contrary to the suggestion in *Davis v Commonwealth*, that Pape had standing to bring the case, it answered the case before it by stating: “The Tax Bonus for Working Australians Act (No 2) 2009 is a valid law of the Commonwealth.”⁵⁹ In accordance with the agreement reached between the parties, the Court made no order as to costs against Pape.⁶⁰

The public reaction was that Pape had achieved nothing by his challenge, and, indeed, some even argued that his actions could prove counter-productive. Chris Merritt, writing in *The Australian*, wrote:

Bryan Pape should not expect any herograms from federalism’s few remaining true believers. From a federalist perspective, this man’s joust with the Commonwealth appears to have been entirely counter-productive. Instead of defending states’ rights, Pape’s case may well have enabled the High Court to remove doubts about the scope of federal power . . . Pape’s challenge should never have been filed.⁶¹

Such conclusions were, however, premature. The Court had announced its orders on 3 April, but not its reasons, leaving these for a later date. These were ultimately released some months later on 7 July 2009. They showed that the Commonwealth had won the case, but that it was a Pyrrhic victory. The stimulus payment had been upheld, but grave doubt had been cast on a broad range of other federal payments.

The seven judges of the High Court produced four judgments running to 217 pages. The Court unanimously adopted Pape’s view that the Commonwealth power of expenditure was not unbounded, but strictly limited. In doing so, it resolved the legal uncertainty arising from the *First Pharmaceutical Benefits Case* and the *AAP Case*.

The analysis, adopted by all of the judgments, was that although an appropriation under section 81 is a necessary precondition for expenditure, neither expenditure nor activities will be

valid unless supported by some other source of power. French CJ summed up the Court's conclusions by saying:

The provisions of ss 81 and 83 do not confer a substantive 'spending power' upon the Commonwealth Parliament. They provide for parliamentary control of public moneys and their expenditure. The relevant power to expend public moneys, being limited by s 81 to expenditure for 'the purposes of the Commonwealth', must be found elsewhere in the *Constitution* or statutes made under it.⁶²

In reaching this conclusion, the Court rejected the Commonwealth's broad view of its power.

Applying this finding to the *Tax Bonus for Working Australians Act*, the Court by a 4:3 margin (French CJ, Gummow, Crennan and Bell JJ, with Hayne, Heydon and Kiefel JJ dissenting), held that the additional source of the power necessary to uphold the bonus payments could be found in the Commonwealth's executive power in section 61 of the *Constitution*. It was recognised that this power includes the responsibilities arising, as Mason J had put it in the *AAP Case*, "from the existence and character of the Commonwealth as a national government".⁶³ The making of payments to taxpayers as part of a "fiscal stimulus package," in an effort to minimise the effects in Australia of the global financial crisis, was held to fall within this aspect of the power.

The enactment of legislation to identify the recipients and amounts of the payments was further held by the majority to be incidental to the exercise of executive power, and thus valid under the express incidental power in section 51(xxxix) of the *Constitution*. Although the administration of the Tax Bonus Act was vested in the Commissioner of Taxation, thus bringing it within the definition of a "taxation law", the whole Court held that the Act could not be supported in its full operation as a law with respect to taxation under section 51(ii) of the *Constitution*. However, Hayne and Kiefel JJ (in dissent) held that its operation could be read down so that a significant proportion of the intended payments could be supported by section 51(ii). This could be achieved by treating the "bonus payments" as offsets against tax liability. In the case of taxpayers entitled to the payment of \$900, for instance, those who had already paid tax of less than \$900 would be entitled only to a refund of the total tax they had paid (and not to the remainder of the \$900), while those who had paid tax of more than \$900 would be entitled to the whole \$900 by way of a partial tax refund. This, however, was a minority view, rejected by Gummow, Crennan and Bell JJ, and by Heydon J.

The reasoning in the case in restricting the Commonwealth's power to spend money was a major blow to the Federal Government. Indeed it is arguably the most significant defeat on a point of legal principle ever suffered by the Commonwealth at the hands of the High Court. On this point at least, the decision of the Court amounted to a strong affirmation of Pape's own view that the *Constitution* establishes a Federation in which federal power, including its power to spend money, is necessarily limited.

Perhaps shocked by the result, and hopeful that it might be overturned, the Commonwealth was slow to respond. Indeed, it gave no discernible response whatsoever, leaving numerous payments to continue even though they lacked any visible constitutional support. This was to the great annoyance of Pape, who later said that the election promises of both major parties in the federal poll of the following year showed that:

They are treating the Constitution as though it is a cobweb and they can brush it away . . . The problem with the executive power is it [currently] stops when the government says it stops. That is no way to run a country. In the political playpen, if you throw out the rule of law, it is government by expediency.⁶⁴

Pape was ready to point out that the decision had large implications for other areas of federal expenditure. He queried the validity of billions of dollars of federal payments to local government for regional and local community infrastructure and to universities for research funding, saying:

If the Commonwealth has relied on what it misconceived as a spending power under section 81 of the *Constitution* then these payments would be unlawful . . . the Commonwealth and the universities have continued to disregard the unanimous reasoning of the High Court in quashing the improper use of the appropriation section.⁶⁵

Concerns over federal funding for local government played a role in almost producing a referendum to change the *Constitution*. The likely invalidity of programs such as the roads to recovery program provided impetus to the long-standing push by local government to gain recognition in the *Constitution*.⁶⁶ Its proposal emerged as a change to the *Constitution* that would enable grants to be made directly to local government, in addition to the States, via section 96 of the *Constitution*. Despite agreement being reached between the major parties that the proposal would be put to the Australian people at the 2013 federal election, and the bill for the referendum having been passed by both Houses of Parliament,⁶⁷ the referendum was withdrawn at the 11th hour due to Kevin Rudd deposing Julia Gillard as Prime Minister. Pape himself was opposed to the change to the *Constitution*, which he saw as exacerbating the current problems with the Federation by expanding the scope for the Commonwealth to use s 96. He described the proposal as a wasteful exercise that would permit the Commonwealth to “pork-barrel” marginal seats via payments to local government.⁶⁸

The Successor Cases

It did not take long for others to realise that the High Court’s decision in *Pape v Commissioner of Taxation* opened the way to challenge other examples of expenditure. The next High Court challenge involved an equally determined litigant, again pursuing a point of principle, who sought to have the High Court strike down the National School Chaplaincy Program on the basis that it breached the separation of church and state.

The National School Chaplaincy Program was created by the Commonwealth to provide financial support for chaplaincy services in schools. Ronald Williams from Toowoomba in Queensland was the father of four children enrolled at the Darling Heights State School. In 2007, the school’s principal sought funds under the program to extend the number of days that their chaplain was available to students. Under the Darling Heights Funding Agreement, the Commonwealth undertook to fund the provision of chaplaincy services at the school by Scripture Union Queensland.

Desiring a secular education for his children, and opposed to the federal government funding religious positions in state schools,⁶⁹ Williams challenged the validity of the National School Chaplaincy Program in the High Court. One basis of the challenge was that the scheme conflicted with the guarantee in section 116 of the *Constitution* that “no religious test shall be required as a qualification for any office or public trust under the Commonwealth”. This argument was rejected by the Court on the basis that the chaplains engaged by Scripture Union Queensland did not hold an office under the Commonwealth. Williams also argued that the funding provided by the Commonwealth for the scheme was invalid because it was not supported by any source of power in the *Australian Constitution*. This argument relied upon the reasoning in *Pape v Commissioner of Taxation*.

A majority of the High Court in *Williams v Commonwealth (Williams (No 1))*⁷⁰ accepted this argument, holding that the funding agreement between the Commonwealth and Scripture Union Queensland, and payments made by the Commonwealth under that Agreement, were invalid. In reaching this conclusion, the Court unanimously used as a starting point the holding in *Pape v Commissioner of Taxation* that every expenditure by the Commonwealth must be supported by a specific source of federal constitutional power.

In the absence of legislation supporting the program, the question was whether this authority could be supplied by the Commonwealth’s executive power in section 61 of the *Constitution*. By majority, the High Court held that, in the absence of supporting legislation, section 61 did not empower the Commonwealth to enter into the funding agreement or to make payments under it. It was held that federal executive power does not automatically include the capacity to enter into agreements or to provide funding with respect to matters that could have been provided for by legislation. Federal executive power may only extend to such matters where they are in fact supported by legislation.

In reaching this conclusion, the High Court emphasised that the ambit of the Commonwealth spending and executive powers must be read in the context of the systems of federalism and responsible government created by the *Constitution*. The federal dimension of the decision was made more explicit than had been the case in *Pape v Commissioner of Taxation*. Indeed, in a passage that would have delighted Pape, French CJ began his judgment by referring to Andrew Inglis Clark’s observation that an essential and distinctive feature of a “truly federal government” is the “preservation of the separate existence and corporate life of each of the component States of the Commonwealth”.⁷¹

Pape was quick to recognise the significance of *Williams (No 1)*. It not only reinforced the principles identified in *Pape v Commissioner of Taxation*, it broadened the range of federal payments that could potentially be struck down for unconstitutionality. Hence, he told the media soon after the decision that “future spending on many regional programs, such as direct funding for surf clubs, local council housing schemes and health spending, such as money given directly to certain hospitals, could also all be in doubt”.⁷²

The Commonwealth responded swiftly to *Williams (No 1)* by enacting the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). It inserted a new section 32B into the *Financial Management and Accountability Act 1997* (Cth) so as to overcome the Court’s judgment by providing parliamentary authorisation for existing and future federal expenditure programs.

Specifically, the section authorises funding for programs specified in the regulations for which the Commonwealth otherwise does not have power to make, vary or administer.

The *Financial Framework Legislation Amendment Act (No 3)* also inserted a new Part 5AA and Schedule 1AA into the *Financial Management and Accountability Regulations 1997* (Cth). These authorised (via s 32B) direct federal funding for 427 grants and programs, including, at item 407.013, the National School Chaplaincy and Student Welfare Program. Collectively, these grants and programs amount to many billions of dollars, and as much as 10 per cent of all Commonwealth expenditure.

Undeterred, Williams brought a second High Court challenge to the federal funding of chaplaincy services. The High Court began in *Williams v Commonwealth (Williams (No 2))*⁷³ by affirming the principles laid down in *Pape v Commissioner of Taxation* and *Williams (No 1)*. French CJ, Hayne, Kiefel, Bell and Keane JJ, with Crennan J concurring, stated:

In *Pape*, all members of the Court concluded that ss 81 and 83 of the *Constitution* do not confer a substantive spending power. All members of the Court agreed that the power to spend appropriated moneys must be found elsewhere in the *Constitution* or in statutes made under it

. . . It is those conclusions which underpinned the decision in *Williams (No 1)*.

The Commonwealth had sought leave to reopen the decision in *Williams (No 1)*, that is, to argue that it was wrongly decided. The High Court refused this application and instead reaffirmed the correctness of the decision.

Proceeding on this basis, the Court turned to whether the provision of chaplaincy services could be supported by federal power, and so authorised via section 32B. It rejected the contention that federal executive power might support such payments, and in addition found that such payments could not be supported by the federal power to provide “benefits to students” in section 51(xxiiiA) of the *Constitution*. This was because providing a school with the services of a chaplain or welfare worker –

. . . does not provide material aid to provide for the human wants of students. It does not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student. There is no payment of money by the Commonwealth for or on behalf of any identified or identifiable student. And the service which is provided is *not* directed to the consequences of being a student.⁷⁴

In addition, such payments could not be supported by federal power to pass laws for “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth” in section 51(xx) of the *Constitution*, even if it were assumed that the recipient of such funding was in every case such a corporation. This was because the law was only for the provision of funding and as such . . . is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.⁷⁵

Without a source of power within the *Constitution*, the inevitable consequence was that the Commonwealth's remedial legislation was not valid insofar as it sought to authorise expenditure on the National School Chaplaincy and Student Welfare Program. This result followed inexorably from the High Court's prior decisions in *Pape v Commissioner of Taxation* and *Williams (No 1)*.

Conclusion

Pape achieved remarkable success in shaping the direction of Australian constitutional law. He did so single-handedly, both by deciding in the first place to challenge the Rudd Government's stimulus payments in the High Court and then, as a litigant in person, by convincing every judge on that Court that, contrary to what was thought to be the position, strict limits applied to the capacity of the Commonwealth to spend taxpayers' money. Pape may have lost his challenge to those payments, but in doing so he *demolished the long held assumption that the Commonwealth can spend money in whatever area it wishes. Instead, the High Court held that the Commonwealth can spend money only in areas in which it has legislative or executive power.*

A large number of federal programs have clearly rested on shaky ground since the decision of the High Court in *Pape v Commissioner of Taxation*.⁷⁶ The Commonwealth had undoubtedly been hoping that this uncertainty would be resolved in future cases, but instead the High Court built on the foundation in *Pape v Commissioner of Taxation* to impose further significant limits upon federal spending in its subsequent decisions in *Williams (No 1)* and *Williams (No 2)*.

Legal development in this area over the space of just a few years is remarkable. What had seemed an unassailable Commonwealth position has now been exposed as contrary to the *Australian Constitution*. The limits imposed in this respect reflect Pape's view of how the Australian Federation should operate.

Pape himself took enormous pleasure in the approach adopted by the High Court in his and subsequent cases. There was a glint in his eye when he discussed these matters, which demonstrated the great pride he took in his achievement. To do otherwise would have been false modesty. Not only had he achieved what is perhaps the most significant victory in the history of the High Court by a litigant in person, but he had done so, at significant personal risk, in a way that vindicated what he saw as fundamental principles.

What would have been especially pleasing to him was not only the restrictions imposed upon the federal spending power, but the recognition in *Williams (No 1)* of the importance of federalism, and the role of the States in particular, in determining how the *Constitution* should be interpreted. This approach and the language used by members of the Court marked a significant break from past practice, raising questions as to whether further developments might be in store. For example, does *Pape v Commissioner of Taxation* and its successor cases establish a recognition of federal concepts that might be used to develop other areas of Australian constitutional doctrine,⁷⁷ such as in regard to the capacity of the Commonwealth to enter into intergovernmental agreements?⁷⁸ All this suggests that Pape left a major legacy to the law, but that the significance of this will no doubt take many more years to unravel.

Endnotes

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24. Bryan Pape, "Competitive Federalism" (2013) 4 *Dialogue* 17, 20.
25. *Commonwealth of Australia Constitution Act 1900* (Imp), preamble.
26. See, for example, *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ, Barton and O'Connor JJ).
27. See, for example, *D'Emden v Pedder* (1904) 1 CLR 91, 109-110 (Griffith CJ).
28. (1920) 28 CLR 129.
29. Ibid 145 (Knox CJ, Isaacs, Rich and Starke JJ).
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31. *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 368 (O'Connor J).
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49. (1988) 166 CLR 79, 95.
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