Pape v Commissioner of Taxation: Fresh Fields for Federalism?

PUBLIC LECTURE, QUT FACULTY OF LAW, 11 NOVEMBER 2009

DUNCAN KERR SC MP[1]

The litigation in *Pape v Commissioner of Taxation*[2] *(Pape)* challenged the appropriation and expenditure of funds the Commonwealth Parliament intended to grant to the government to fund a stimulus program to prevent Australia falling into recession during the global economic crisis that had emerged in late 2008. As one of a number of measures *The Tax Bonus for Working Australians Act (No 2) 2009 (Cth)* was enacted. The Act commenced on 18 February 2009 and provided for lump sum payments of minimum of $250 to be made to all persons with a tax liability of at least $1 in the then current tax year; expenditure the government argued was needed to create immediate increased demand in the economy. The plaintiff, a legal academic, issued a writ seeking a declaration that the tax bonus legislation was invalid. The case was given expedition. On 3 April 2009 the High Court by a majority of 4/3 delivered judgment in favour of the validity of the Act.

However it was not until 7 July 2009 that the Court's reasons for the decision were published. The reasons revealed that although the Court had narrowly decided in favour of the impugned payments the judges had unanimously rejected the Commonwealth's central arguments, viz:

- s 81 of the *Constitution* is a grant to the Parliament of the power to appropriate the consolidated revenue fund for any purpose (save one explicitly prohibited) it thinks fit;
- the Executive necessarily has power to expend any money lawfully appropriated; and
- the Parliament may enact a law requiring that payment, and regulating the conditions that are to be met before payment is made.[3]

---

1 Adjunct Professor of Law, QUT.
2 [2009] HCA 24.
3 Ibid see [287] (Hayne and Keifel JJ).

I 'STULTIFYING GOVERNMENT' OR BUSINESS AS USUAL?

Does the result in *Pape* mean that the Australian government now faces the grim prospect Murphy J warned of in the *AAP Case*[4] if the view, contrary to his own, which was reflected in the arguments put by the Commonwealth in *Pape*, were to prevail? His Honour noted that many areas of government expenditure are not clearly linked to any head of Commonwealth legislative power:

> From the material supplied to the Court and an examination of the Appropriation Acts, it appears that there were many current programs [*even in 1974-75*]…which are not clearly referable to any head of legislative power in the Constitution…
>
> 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.[5]

His Honour was concerned that denying the authority of the Commonwealth to fund such programs pursuant to s 81 of the *Constitution* would be a recipe for stultifying government. In a recent paper Mr Pape welcomed the prospect of the decision bearing his name having that effect:

> 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 2010 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 2010 budget.[6]

But that conclusion overlooks the fact that while the Commonwealth lost on its primary submissions it won 4/3 on its fallback **Executive + Incidental**[7] argument. That argument amounts to the proposition that the executive power conferred under s 61 of the *Constitution* coupled with the incidental legislative power conferred by s 51(xxxix) of the *Constitution* were sufficient to validly empower the Executive to access the funds so appropriated and to spend them for the purpose of responding to the financial crisis facing the nation.

But how wide is the power to spend conferred by the High Court under the **Executive + Incidental** power?

In an interesting first reaction to *Pape* Nick Seddon contends that 'the de jure position relating to appropriation and spending is no longer in accord with the de facto position and, further, there is little that can be done about this by way of constitutional

---

4 *Victoria v The Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338.

5 Ibid [418].

6 B Pape, 'The Tax Bonus Case or Did the Commonwealth Cry Wolf?' (Paper presented at The Samuel Griffith Society Twenty First Annual Conference, Adelaide, 29-30 August 2009) 11-12.

7 See the handout for a summary of the positions taken by the respective justices on the various constitutional arguments advanced by the Solicitor General for the Commonwealth in *Pape v Commissioner of Taxation* [2009] HCA 24.

challenge'.[8] I think he is correct in his estimation that the chance of successful challenge to an Appropriation Act is 'virtually nil'.[9] However my reasons are quite different. I agree with his conclusion only because of the minimal significance *Pape* now gives to an Appropriation Act.

Nick Seddon points to *Combet*[10] in order to demonstrate that the high level of generality used in Appropriation Acts makes it virtually impossible to challenge any particular expenditure. That misses the true significance of *Pape.*

Pape views an Appropriation Act exclusively as a constitutionally required procedural rule designed to ensure compliance with an underlying principle of responsible government - that the Executive must have the approval of the Parliament before it can access *any* funds: thus an Appropriation Act removes the otherwise prohibition on the Executive drawing money from the consolidated revenue fund.[11]

Contrary to previous constitutional understanding of the kind assumed by Murphy J in the *AAP Case*, *Pape* makes it clear that an Appropriation Act confers no substantive power to *spend* the money so made available.[12] As Heydon J very neatly puts the point, 'whether the executive has power to spend the money will depend on there being either a conferral of that power on it by legislation or some power within s 61 of the Constitution'.[13]

The 7/0 holding that all Commonwealth spending requires statutory or constitutional authority separate and distinct from the right to draw the money from the consolidated revenue fund means that, after *Pape,* save for the purposes of accountability to the Parliament, including the rule that money paid out of consolidated revenue without the authority of an Appropriation Act can be recovered by the Commonwealth,[14] the existence or otherwise of an Appropriation Act is no longer a matter of any consequence.

The Executive can no longer justify its power to make impugned expenditure by pointing to its having been authorised to do so by an Appropriation Act.

Pape means that an Appropriation Act can neither authorise, nor can it require, the Executive to expend any appropriated sums. Any constitutional challenge relying on the *Pape* decision would therefore need to directly attack the absence of authority for specific spending—actual or proposed. Is that possible? In my opinion it is. A proceeding could be commenced in the original jurisdiction of the High Court seeking a declaration that particular Commonwealth expenditure or proposed expenditure was not within power and/or an injunction to restrain it. The pleadings would need to identify

---

8 N Seddon, 'Appropriation and Spending—Does the Commonwealth have Carte Blanche' (Materials from the Speakers, Australian Association of Constitutional Law NSW Chapter; Forum on the *Pape* case, court 18D, Federal Court, Queens Square, Sydney,22 September 2009).

9 Ibid.

10 *Combet v Commonwealth* [2005] HCA 61.

11 *Pape v Commissioner of Taxation* [2009] HCA 24, [111] (French CJ); [178] (Gummow, Crennan and Bell JJ).

12 Ibid, [111] (French CJ); [178],[197],[202],[209]-[10] (Gummow, Crennan and Bell JJ); [296] (Hayne and Kiefel JJ); [602] (Heydon J).

13 Ibid [601]. Although in the minority in this regard his Honour's views appear to encapsulate a view common to the whole of the Court.

14 Ibid [59] (French CJ).

the challenged expenditure and assert that there was neither (a) legislation validly enacted pursuant to any head of Commonwealth legislative power nor (a) power within s 61 of the *Constitution* coupled with an appropriation under the incidental power authorising it. The High Court would have original jurisdiction under both s 75 (i) and s 75 (v) of the *Constitution* to hear such a challenge and, if persuaded, grant relief—subject only to potential threshold objections on grounds of absence of standing or justiciability.

Given the centrality even the majority gave to the right to litigate as a means of to vindicate the rule of law there seems no doubt that the issue is justiciable:[15] but what of standing.

In *Pape* standing was conceded – but that was an (understandably rare) instance of a beneficiary receiving an unsought grant seeking to impugn its validity and an (equally rare) instance of the Commonwealth not contesting his entitlement to do so. Would Mr Pape's standing been conceded had he been *in*eligible to receive a payment? And what if he had had to make an application to receive the benefit? If a plaintiff sought to challenge a Commonwealth programme such as the housing insulation scheme would he/she need to apply and be accepted or refused in order to gain individual standing to sue? As Nick Seddon points out there are a large number of Commonwealth programs, involving many billions of dollars, which are carried out without legislation apart from the Appropriation Acts.

The core question which is likely to be material to future litigation is this: is the fact that the plaintiff is an aggrieved taxpayer sufficient? Here the law does not seem to have been much clarified since the careful analysis given to the question by Gibbs CJ in *Davis v Commonwealth*:[16]

> 11. The final ground on which the plaintiffs base their standing to sue is that they are taxpayers. *In Attorney-General (Vict.); Ex rel. Black v. The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559, at pp 588-590 I left open the question whether the fact that the plaintiffs in that case were taxpayers, and in some instances parents of children at government schools, gave them a special interest to challenge a law under which financial aid was given to the educational activities of church schools. Murphy J., on the other hand, at p.634, expressed the wide view that "Any one of the people of the Commonwealth has the standing to proceed in the courts to secure the observance of constitutional guarantees". As Mr Colquhoun-Kerr pointed out in his helpful address on behalf of the plaintiffs, there has in recent years been a marked relaxation of the rules regarding standing in both England and Canada. In *Reg. v. H.M. Treasury, Ex parte Smedley* (1985) QB 657 it seems to have been accepted that an interest as a taxpayer and an elector is enough to give standing to challenge delegated legislation under which public moneys would be disbursed. That case, and *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd*., turned on the meaning of the words "sufficient interest" in O.53 r.3 of the *Rules of the Supreme Court* (U.K.), although that does not mean that they are of no assistance in deciding the present question. In Canada the majority of the Supreme Court has taken the view that a person who is not directly affected by legislation may nevertheless have standing to challenge it if he has a genuine interest as a citizen in its validity and if there is no other reasonable and effective manner in which the issue may be brought before the

[15] Ibid [152] – [8].
[16] (1986) 61 ALJR 32.

> court: *Minister of Justice of Canada v. Borowski* (1981) 130 DLR (3d) 588. On the other hand, the tendency in the United States seems to be towards restricting rather than relaxing rules as to standing: see *Valley Forge College v. Americans United* [1982] USSC 16; (1982) 454 US 464 (70 L Ed 2d 700). It would not be right for me on this application to decide whether the fact that the plaintiffs are taxpayers gives them standing to challenge the validity of the Act under which public moneys have been and will be disbursed. The question is arguable and that is enough. I shall not strike out pars.5 and 29 which are material to this question.

In *Pape* Gummow, Crennan and Bell JJ,[17] and French CJ,[18] held that issues of standing in constitutional litigation are subsumed within the notion of a 'matter'. Indeed they appear to regard the resolution of such 'matters' as having a 'permanent, larger and general dimension' with the parties and the court each playing their role in vindicating the rule of law under the Constitution.[19]

So it would seem that standing is not likely to be a deal breaker. The justices favouring the widest power to spend appear equally strongly committed to permitting a plaintiff to argue an instance going beyond power.

Their Honours explicitly affirmed that a question presented in a particular controversy as to the existence of power provided by s 61 of the *Constitution* can be determined under ch III with appropriately framed declaratory and other relief.[20]

Because in *Pape* the issue was resolved through a concession,[21] so it must be speculative, it seems reasonable to assume that Hayne and Kiefel JJ, who stated that the questions involved were fundamental to the constitutional structure of the nation and transcended the immediate circumstances in which they were posed,[22] would be no less likely than Gummow, Crennan and Bell JJ to reject challenges to standing and justiciablity. Heydon J's comments suggest he too would appear well disposed not to take any overly technical objections to standing or justiciability.[23]

In the result there is every reason to believe that threshold objections will not prevent future challenges to Commonwealth spending.[24]

II A HYPOTHETICAL CHALLENGE—COMMONWEALTH PROGRAMS FOR HOUSING

There are myriads of ways in which the Australian government currently spends money in areas beyond that incidental to express Commonwealth legislative heads of power. It

---

17 *Pape v Commissioner of Taxation* [2009] HCA 24, [152].
18 Ibid [50] – [1].
19 Ibid [152] – [8].
20 Ibid [234] – [5].
21 Ibid. In the final result French CJ and Heydon J focus on the concessions made by the Commonwealth. Hayne and Keifel JJ endorse the approach of Gummow, Crennan and Bell JJ although it not absolutely clear whether their statement at [272] was intended to adopt all, or only part, of their Honours reasons on standing.
22 Ibid [260].
23 Ibid [596].
24 However, the Chief Justice's reference to the long history of judicial caution in relation to the standing of individuals to challenge taxing legislation or expenditure, ibid [48]-[9] is a reminder against taking too confident a view.

can set up organisations such as the Bicentennial Authority or the Australian Commonwealth Scientific and Research Organization (CSIRO) and fund them; it can contract with the private sector to undertake functions it wants performed as it does with the providers of services for employment seekers, or it can operate through direct grant programs.

But for the sake of creating the context for discussion I propose looking briefly at how *Pape* might apply one hypothetical instance by examining its potential impact should a challenge be made to Commonwealth spending on housing—but without suggesting it is in any way unique: similar examples of expanded Commonwealth spending in areas that were once almost exclusively the preserve of the States can easily be found—the education revolution and the mooted possibility of a Commonwealth takeover of public hospitals being but two.

The Commonwealth has gradually increased its direct involvement in the provision of housing and housing assistance. It now provides substantial direct assistance to low income tenants in private rental accommodation—known as rent assistance. It also provides funds to community housing associations to build maintain and rent out accommodation. The most recent Commonwealth initiative in this area is the Housing Affordability Fund—a $512 m initiative aimed at assisting low and moderate income earners enter the housing market by reducing planning and infrastructure costs of building new housing developments. These direct funded programs whose total cost runs into the billions have largely replaced the Commonwealth assistance to the States to enable them to operate their own State housing schemes.

Assuming that no other head of power authorises such programs and expenditure[25] where might we expect the cleavage in the High Court to be.

The Court, if it conformed to its reasons in *Pape*, might be expected to have a minimum of three votes for invalidity—and no certain vote for the contrary, leaving the outcome far from clear.

Heydon J could be expected to hold such expenditure ultra vires—as extending beyond the contours of Commonwealth legislative power which executive power must generally follow.[26]

Hayne and Kiefel JJ also could be expected to cast a negative vote. Their Honours' reasoning in *Pape* would permit the Executive to spend on a wider range of activities than would Hayne J—but only for purposes 'peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation'.[27] Even the best advocate would be hard pressed to argue that expenditure on housing met

---

25 An assumption that would be tested if such litigation got past the threshold. Heydon J gave many examples of expenditure previously thought to be authorised under s 81 of the *Constitution* capable of being supported under various placita in s 51 of the *Constitution*. See *Pape v Commissioner of Taxation* [2009] HCA 24 fn 573, fn 693. Some expenditure on housing, particularly rental subsidies, might be argued to be included within the powers to make laws with respect to s 51(xxiiiA) of the *Constitution*, 'family allowances'.

26 Ibid [520].

27 Ibid [343], [329].

that criterion—given that the States have historically carried the main burden of the provision of public housing.

Their Honours held that s 61 of the *Constitution* cannot be permitted to effect a radical transformation in the constitutional structure of the nation,[28] and that spending without regard to the broad delineation of the division of legislative powers between the Commonwealth and the States infringes the *Melbourne Corporation* principle.[29] Given that that large but non-recurring cash grants to individuals offended that principle in *Pape* it is difficult to discern a basis in their Honour's reasoning to sustain an argument that recurrent Commonwealth expenditure in the billions of dollars over the forward estimates for housing programs would not also offend.

That is three votes for invalidity. What of the judgments that upheld the validity of the tax bonus payments.

There is enough in the reasoning of Gummow, Crennan and Bell JJ to give hope to those on either side of the argument.

The starting point for their Honours in *Pape* was that, except for constraints sourced in larger constitutional principles, the power conferred on the national government by s 61 of the *Constitution* to raise and spend public money, is at large.[30]

However it is important not to overlook their Honours' reservation that any action taken under s 61 of the *Constitution* must respect the *Melbourne Corporation* principle.[31]

Their Honours differed from the minority joint judgment in outcome rather than in principle on this point. There are two possible explanations of that difference.

The first possible explanation is that, but for their acceptance of the proposition that the global economic crisis created an emergency that only the Commonwealth could meet, their Honours would have found for the plaintiff. That would be consistent with their Honour's apparent support for dicta in *Davis*[32] that the existence of Commonwealth power is clearest where its exercise involves no real competition with State competence—which, given the historic involvement of the States in the funding of public housing, would be a hard proposition to establish.

The rival explanation would be that the *Melbourne Corporation* principle, properly understood, means that only measures which prevent the States from effectively governing will offend the doctrine.[33] That would be consistent with the previously orthodox view that growth in Commonwealth financial powers and the Commonwealth's extension into new areas but leaving the State's executive competence in place, albeit diminished in practical significance, are neither undesirable

---

28 Ibid [357].
29 Ibid [335], [357].
30 Ibid [220].
31 Ibid [240].
32 *Davis v Commonwealth* 166 CLR 79, 93-4 (Mason CJ, Deane and Gaudron JJ).
33 Perhaps allowing a distinction between funding which complements but does not entirely squeeze out State involvement (as to date in the area of housing discussed) and a funding proposal designed to replace State involvement—such as the mooted takeover of public hospitals.

nor prohibited. If this narrower view of the *Melbourne Corporation* principle is taken the significantly increased comparative capacity of the Commonwealth compared to the States to fund housing programs might even be thought to favour validity.[34]

However, given that their Honours held that *Pape* could be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation,[35] it may well be illusory to view the joint majority judgment as cementing any view on these matters, even as between their Honours.

It is equally difficult to predict how French CJ might decide such a hypothetical matter. His Honour referred with apparent approval to the dicta in *Davis* discussed above in the context of the joint majority decision,[36] and left open the same questions. The proposition that his Honour would find in favour of validity might be thought to derive support from his Honour's obiter remarks that s 61 of the *Constitution* 'arguably' permits expenditure on 'a range of subject matters reflecting the established practice of the national government over many years previously thought to have been supported by s 81.'[37] However, French CJ was also clear that there are no settled criteria and a case by case approach must be taken.[38]

If one is seeking a ratio it may be limited to his Honour's statement that the power conferred by s 61 of the *Constitution* extends to authorising short term fiscal measures to meet adverse economic conditions affecting the nation as a whole where such measures are on their face peculiarly within the capacity and resources of the Commonwealth government.[39]

In short there is enough we do not know the answers to in the *Pape* decision to keep us all interested – but none the wiser. A future challenge to a disputed field of Commonwealth expenditure (in an area not sanctioned by the Commonwealth's long previous use and where the States have capacity were the Commonwealth to vacate the ground) could well have some prospect of success. Assuming a case was brought before the High Court as presently constituted such a challenge would probably start with three of the plurality required – and at least some realistic chance of soliciting one, two, three or four of the other votes – the obtaining of any one of which would constitute a majority.

On the other hand it is premature yet to conclude that *Pape* will force the Commonwealth to revert to funding through the States and a return to genuine cooperative federalism.

Why is that so?

---

34 *Pape v Commissioner of Taxation* [2009] HCA 24, [239], drawing on the obiter of Brennan J in *Davis v Commonwealth* 166 CLR 79, 111.

35 *Pape v Commissioner of Taxation* [2009] HCA 24, [242].

36 Ibid [131] – [2].

37 Ibid [9]. His Honour's remarks were in marked contrast to the strong statements by Heydon J at [598] that 'practice must conform to the Constitution, not the Constitution to practice'.

38 Ibid [131].

39 Ibid [133].

Let's go back to Nick Seddon's contention that 'the de jure position relating to appropriation and spending is not in accord with the de facto position and, further, there is little that can be done about this by way of constitutional challenge'.[40]

His first contention that the de jure position is not in accord with the de facto position is almost certainly correct. It depends on the assumption that at least one of the four justices who found in favour of the Commonwealth in *Pape* would prohibit[41] large recurrent Commonwealth expenditure for programs like housing or health or education in areas of historic State interest if they could not be supported in association with a legislative head of power and were not a response to a financial crisis. On balance that is probably a reasonable assumption.

However his second contention, that there is little that can be done by way of constitutional challenge in my opinion, is probably incorrect.[42]

Yet, Nick Seddon and I may find ourselves arguing over a distinction without a difference. The Commonwealth is unlikely to radically revise the financial mechanisms it has evolved to extend its policy agenda into areas beyond its legislative competence unless faced with the necessity of doing so. *Pape* does not supply that necessity.

There is a brain teasing speculation which asks, if a tree falls in a forest and no one is around to hear it, does it make a sound?

Pape may be the tree falling in a forest where no one is around. Publishing their reasons long after the announcement of the High Court's decision upholding the validity of the tax bonus legislation meant that there was almost no public discussion of their potentially wider significance. No State has grasped, or looks remotely likely to want to grasp, the potential *Pape* offers them to recontest the spending ground earlier claimed by the Commonwealth. The States appear to have reached such a low point in morale and political legitimacy that they no longer have the desire or will to assert primacy either for revenue collection or expenditure for even what used to be their core areas of responsibility. No major political party (or even a minor one) seems interested in advancing an agenda based on strengthening the position of the States around the notions of cooperative federalism.

That leaves the possibility that other public spirited plaintiffs like Mr Pape might come forward to build on what he achieved. But will they? Who, when, over what issue? Doing what Mr Pape did was an extraordinary thing to do as an individual – and that someone will be keen to repeat the effort, particularly when there is little agitation for or much life left in the federal agenda which once dominated discussion of Commonwealth/State relations, cannot be assumed. It would be a less than popular stand to challenge Commonwealth 'motherhood' spending on housing, health or education. It would be certain to be strongly resisted.

The High Court may have unlocked a door that no-one is interested in pushing on – yet if the push comes, a decision to roll back Commonwealth authority cannot be ruled out.

---

40 Seddon, above n 8.

41 Other than by the grant of financial assistance to the States on condition as expressly authorised by s 96 of the *Constitution*.

42 For the reasons I have given with respect to standing and justiciability earlier.

Of course this discussion assumes that the justices of the High Court would adhere to the analyses they propounded in *Pape* were there to be a future challenge of the kind hypothesised.

But *Pape* may not be reliable in pointing the way forward.

The insistence of the joint majority judgment that *Pape* could be resolved without going beyond the notion of national emergency and the Chief Justice's observation that his conclusions left in place questions about the scope of executive power that cannot be answered in the compass of any single case,[43] leave doubts as to how wedded to their extensive dicta their Honours may be in the future.

There also remain fundamental questions about the limits of s 61 of the *Constitution* that the High Court has yet to settle.

Those fundamental questions spring from the High Court's shift from notions of Imperial law as the foundation of Australia's constitutional legitimacy to notions of original adoption and subsequent maintenance of its provisions by the people. But that is another subject – which requires attention in its own right.[44]

III APPENDIX

A *Table Showing Decisions*:[45]

Issue	**French CJ**	**Gummow, Crennan & Bell JJ**	**Hayne & Kiefel JJ**	**Heydon J**
Appropriations	No	No	No	No
Executive + incidental	Ok	Ok	No	No
Taxation	Unnecessary to decide	No (because no reading down)	Ok to read down	No
External Affairs	Unnecessary	Unnecessary	No	No
Trade & Commerce	Unnecessary	Unnecessary	No	No
Implied Nationhood	Unnecessary	Unnecessary	No	No
Locus Standi	OK	OK	OK	Ok

43 *Pape v Commissioner of Taxation* [2009] HCA 24, [113].

44 D Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law' (2009) *Publication forthcoming*.

45 Table sourced from D Bennett, '*Pape* case—Mud map' (Materials from the Speakers, Australian Association of Constitutional Law NSW Chapter; Forum on the *Pape* case, court 18D, Federal Court, Queens Square, Sydney, 22 September 2009).

B *Executive + Incidental: Summary of Judicial Views*

1 *French CJ*

Section 61 is not limited to statutory powers and the prerogative. However, the exigencies of government cannot be invoked to set aside the distribution of powers between the Commonwealth and the States.[46]

With seeming approval s 61 of the *Constitution* confers those executive powers appropriate to the central government of a federation where there is a distribution of legislative powers between the constituent elements.[47] The existence of Commonwealth executive power is clearest where its exercise involves no real competition with State competence[48] and, if contested, it invites consideration of the comparative capacity of the States and the Commonwealth to engage in the activity.[49]

The executive power does not extend to a general power to manage the national economy.[50] However, arguably it extends to 'a range of subject matters reflecting the established practice of the national government over many years' previously thought to have been supported by s 81 of the *Constitution*.[51]

There are no settled criteria and a case by case approach is needed. [52].

The power conferred by s 61 of the *Constitution* extends to authorising short term fiscal measures to meet adverse economic conditions affecting the nation as a whole where such measures are on their face peculiarly within the capacity and resources of the Commonwealth government.[53]

Questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws are likely to be answered conservatively.[54]

2 *Gummow, Crennan and Bell JJ*

Save in respect of constraints sourced in the constitutional position of the Executive governments of the States, the power conferred on the national government by s 61 of the *Constitution*, to raise and spend public money, is plenary.[55]

The Commonwealth Executive has power to engage in enterprises and activities peculiarly adapted to the government of a nation which cannot otherwise be carried on

---

46 *Pape v Commissioner of Taxation* [2009] HCA 24, [127].
47 *R v Duncan: Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, [insert pinpoint reference] (Mason J); ibid [132].
48 *Davis v Commonwealth* 166 CLR 79, 93-4 (Mason CJ, Deane and Gaudron JJ).
49 Ibid 111 (Brennan J); *Pape v Commissioner of Taxation* [2009] HCA 24, [131].
50 *Pape v Commissioner of Taxation* [2009] HCA 24, [133].
51 Ibid [9].
52 *Davis v Commonwealth* 166 CLR 79, 111 (Brennan J); ibid [131].
53 *Pape v Commissioner of Taxation* [2009] HCA 24, [133].
54 Ibid [10].
55 Ibid [220].

for the benefit of the nation-but that does not authorise incidental legislation in aid of any subject which the Executive *regards* as of national interest and concern.[56]

Constitutional prohibitions relating to revenue may limit the power to raise and spend money, for example, if it involves a payment that discriminates, gives preference or lacks uniformity of application.[57]

Any action taken under s 61 of the *Constitution* must respect the principles of *Melbourne Corporation v Commonwealth.*[58]

With seeming approval; the existence of Commonwealth executive power is clearest where there is no competition with the States and, where contested, it invites consideration of the comparative capacity of the States and the Commonwealth to engage in the activity.[59]

Pape can be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.[60]

With seeming approval: Does not extend to laws that create new offences or create rights or impose duties.[61]

3 *Hayne and Kiefel JJ*

Section 61 does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution—the limits of which are ascertainable from the distribution of legislative powers and the character and status of the Commonwealth as a national government.[62]

The Executive is not confined to limiting its expenditure to that made in accordance with a law under an enumerated head of power.[63] If the Executive has power to spend the incidental power also extends to legislation which facilitates and controls its expenditure and its application.[64]

With seeming approval s 61 of the *Constitution* allows the Executive to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation—for example CSIRO.[65]

With seeming approval the power to spend is wider than the Executive's power to undertake such activities itself.[66] However spending without regard to the broad

---

56 Ibid [228].
57 Ibid [238].
58 (1947) 74 CLR 31; ibid [240].
59 *Pape v Commissioner of Taxation* [2009] HCA 24, [239]; [287]; [418].
60 Ibid [242].
61 *Davis v Commonwealth* 166 CLR 79, 112 (Brennan J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237; 256, 260 (Latham CJ); ibid [244].
62 *Pape v Commissioner of Taxation* [2009] HCA 24, [327].
63 Ibid [343].
64 Ibid [342].
65 *AAP Case* (1975) 134 CLR 338, 397 (Mason J); ibid [329].

delineation of the division of legislative powers between the Commonwealth and the States infringes the *Melbourne Corporation* principle.[67]

The High Court must avoid conflating means and ends.[68]

Expressions such as 'crisis' and 'emergency' do not yield criteria of constitutional validity.[69]

Section 61 cannot be permitted to effect a radical transformation in the constitutional structure of the nation.[70]

4 *Heydon J*

Section 61 is not a broad grant of power;[71] the contours of executive power conferred generally follow those of legislative power.[72]

The power is limited by the legislative competence of the Commonwealth.[73]

The 'nationhood power' is of a very restricted character.[74]

A precondition, before s 61 of the *Constitution* can be drawn on beyond those normal limits to respond to a national crisis or emergency (assuming it can be) is establishing *as a fact* that the emergency can *only* be met promptly and appropriately by Commonwealth action.[75] But proof of the existence or otherwise of such an emergency is as ill suited for judicial adjudication as to suggest the asserted power may not exist at all.[76]

---

66 *AAP Case* (1975) 134 CLR 338, 396-8 (Mason J); *Pape v Commissioner of Taxation* [2009] HCA 24, [330].
67 *Pape v Commissioner of Taxation* [2009] HCA 24, [335]; [357].
68 Ibid [349].
69 Ibid [347]; [352] – [3].
70 Ibid [357].
71 Ibid [564].
72 Ibid [520].
73 Ibid [567].
74 Ibid [521].
75 Ibid [550].
76 Ibid [551].