



## **Express law** *fast track information for clients*

14 July 2009

### **High Court reasons for the Pape decision on the Tax Bonus Act**

In [\*Pape v Commissioner of Taxation and The Commonwealth of Australia \[2009\] HCA 23\*](#) (*Pape*) the High Court, in a 4:3 decision, upheld the validity of the *Tax Bonus for Working Australians Act (No. 2) 2009* (the Tax Bonus Act). Two of the judges in the minority would have partially upheld the validity of the Tax Bonus Act.

Reasons for these orders were delivered on Tuesday 7 July 2009.

While the majority of the Court upheld the validity of the Tax Bonus Act, in doing so it raised a range of issues, in particular in relation to s 81 of the Constitution, which provides for appropriations for the purposes of the Commonwealth, and s 61, which provides for the executive power of the Commonwealth.

This note provides a brief summary of the major issues discussed in the case.

The Attorney-General's Department is coordinating the analysis of existing Commonwealth programs in light of the Court's decision, and has asked that, where possible, departments and agencies await the outcomes of that analysis before independently seeking advice on any particular programs or varying a 'business as usual' approach in relation to existing programs.

### ***History of the proceedings***

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On 26 February 2009, Bryan Reginald Pape, a person apparently entitled to receive \$250 under the Tax Bonus Act, issued a writ against the Commissioner of Taxation, claiming declarations that the Tax Bonus Act is invalid and that the tax bonus payable to him is 'unlawful and void'.

He also sought an injunction restraining the making of the payment to him. A special case was prepared, stating four questions for the consideration of the Court. The Attorneys-General of New South Wales, South Australia and Western Australia intervened.

### ***Orders made on 3 April 2009***

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**Question 1: Does the plaintiff have standing to seek the relief claimed in his writ of summons and statement of claim?**

*Answer:* Yes.

**Question 2: Is the *Tax Bonus for Working Australians Act (No.2) 2009 (Cth)* valid because it is supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?**

*Answer:* The *Tax Bonus for Working Australians Act (No 2) 2009* is a valid law of the Commonwealth.

**Question 3: Is payment of the tax bonus to which the plaintiff is entitled under the *Tax Bonus for Working Australians Act (No 2) 2009* supported by a valid appropriation under ss 81 and 83 of the Constitution?**

*Answer:* There is an appropriation of the Consolidated Revenue Fund within the meaning of the Constitution in respect of payments by the Commissioner required by s 7 of the *Tax Bonus for Working Australians Act (No 2) 2009*.

**Question 4: Who should pay the costs of the special case?**

*Answer:* In accordance with the agreement of the parties announced on the second day of the hearing of the special case, there is no order for costs.

### ***Reasons***

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French CJ, together with a plurality judgment of Gummow, Crennan and Bell JJ, supported the making of the orders in the form proposed.

Hayne and Kiefel JJ would have decided that the Tax Bonus Act was a valid law of the Commonwealth when read down so that it provided for a payment to a person of the tax bonus or a person's adjusted tax liability, whichever is less. That way the Act would operate to repay some or all of (but not more than) the amount the taxpayer was liable to pay for income tax. On this reading down, it would be supported by the taxation power (s 51(ii)).

Heydon J would have answered 'No' to the second question and would not have needed to answer the third question. He agreed with the answers ordered to the first and fourth questions.

### ***Section 81 does not confer a 'spending power'***

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The most important issues canvassed in the case involve the operation of s 81 of the Constitution, and the extent and operation of the executive power of the Commonwealth conferred by s 61.

Section 81 of the Constitution provides:

All revenues 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.

In *Pape*, all members of the Court rejected the proposition that s 81 confers a 'spending power' on the Commonwealth. Instead, substantive power to spend Commonwealth money will need to be found elsewhere, either in legislation enacted by the Parliament (under a Commonwealth head of legislative power) or in the Constitution itself. In this latter respect, the power to spend may arise from the executive power of the Commonwealth derived from s 61 of the Constitution.

## ***Power to spend may arise from the executive power***

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French CJ, together with Gummow, Crennan and Bell JJ, found that, although the power to spend money for the purposes of the Tax Bonus Act did not arise from s 81, the power to spend can be found in the executive power, conferred on the Commonwealth by s 61 of the Constitution. They found that, in the particular circumstances in which the Tax Bonus Act was enacted (being circumstances of global financial and economic crisis), the executive power supported the expenditure provided for in the Act, to provide an immediate fiscal stimulus to the national economy. The incidental power in s 51(xxxix) of the Constitution then supported the provisions of the Tax Bonus Act which created rights to receive and a duty to pay the tax bonus, as incidental to that exercise of executive power.

Hayne and Kiefel JJ agreed that the executive power can support the expenditure of money by the Commonwealth. However, they concluded that the executive power to spend would not support the expenditure in this case.

## ***Scope of the executive power***

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Section 61 confers executive power on the Commonwealth. The scope of the executive power includes powers conferred on the Executive by statutes and the prerogatives of the Crown.

However, the judges in the majority make clear that the executive power of the Commonwealth is not limited to these elements.

Gummow, Crennan and Bell JJ, together with French CJ, agreed that the executive power extends at least to support executive action appropriate to the position of the Commonwealth as a national government. They all accepted that s 61 confers on the Executive the power to engage in activities that are peculiarly adapted to the government of a nation, which cannot otherwise be carried on for the benefit of the nation. This clearly includes making payments to provide immediate fiscal stimulus in a situation of economic crisis, such as that confronted when the Tax Bonus Act was enacted.

It appears to be left open, however, that the executive power to spend might extend well beyond this formulation, and might extend to any expenditure of money for public purposes unless this would impermissibly affect the position of the Executive Governments of the States.

As noted, the Attorney-General's Department, with the Australian Government Solicitor, are considering the issues raised by the case.

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