The confusion arising from the contradictory judgments in the First Pharmaceutical Benefits Case (1945) 71 CLR 237 and the AAP Case (1975) 134 CLR 338 was dramatically resolved in Pape v Commissioner of Taxation [2009] HCA 23. Although the seven judges produced three different views of the appropriate result in that case, they unanimously held that an appropriation made under s 81 is not itself sufficient to confer validity on the proposed expenditure. Instead, the expenditure must be justified by some other grant of power found in the text of the Constitution.

The case arose from the response of the Rudd Labor government to the global financial crisis that emerged in 2008. The Tax Bonus for Working Australians Act (No 2) 2009 (Cth) provided for a “fiscal stimulus package” in the form of a one-off bonus payment to 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. Mr Bryan Pape, a Senior Lecturer in Law at the University of New England and potential recipient of a $250 payment, challenged the validity of the legislation.

The Tax Bonus Act did not itself contain an appropriation clause. However, s 16 of the Taxation Administration Act 1953 (Cth) makes a standing appropriation to cover any amount which the Commissioner of Taxation “is required or permitted to pay … by or under a taxation law”. The term “taxation law” is defined by s 995-1(1) of the Income Tax Assessment Act 1997 (Cth) as “an Act of which the Commissioner has the general administration”; and the Tax Bonus Act was brought within this definition by s 3, which vested “the general administration of this Act” in the Commissioner. All members of the Court except Heydon J held that this device was sufficient to provide the necessary appropriation to cover the bonus payments. Heydon J assumed that this was correct, but added that in view of his other conclusions “[613] this question does not arise”.

However, this conclusion did not mean that the legislation was valid. The whole Court held that (as French CJ put it) the requirement for parliamentary appropriation “[80] is a necessary condition which takes its place with other conditions and limitations … upon the executive power to spend” but is not “itself a substantive source of power to expend public money”. Accordingly, the “substantive source of power” must be found elsewhere.

By 4:3 (French CJ, Gummow, Crennan and Bell JJ, with Hayne, Heydon and Kiefel JJ dissenting), it was held that the source of the power to make the bonus payments could be found in s 61 of the Constitution – on the ground that the executive power of the Commonwealth includes the responsibilities arising, as Mason J had put it in the AAP Case, “[397] from the existence and character of the Commonwealth as a national government”. 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. On that basis, the enactment of legislation to identify the recipients and amounts of the payments was held by the majority to be within the express incidental power (s 51(xxxxix)), as incidental to the exercise of executive power under s 61. As to these issues see Chapter 12, §2(b).

Although the administration of the 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 s 51(ii). However, Hayne and Kiefel JJ held that its operation could be read down so that a significant proportion of the intended payments could be supported by s 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 a 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 (at 246-255) by Gummow, Crennan and Bell J, and also (at 456-457) by Heydon J. As to these issues see Chapter 23, §1.

It was also argued that the Act could be supported by reference to the trade and commerce power (s 51(i)) and the external affairs power (s 51(xxxix)). French CJ, Gummow, Crennan and
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Bell JJ had no need to consider these arguments; but Hayne, Heydon and Kiefel JJ rejected them. As to these issues see respectively Chapter 16, §6 and Chapter 19, §§3(b) and 4(c).

Finally, quite apart from the argument that a parliamentary appropriation under s 81 was itself a sufficient basis for expenditure, the Commonwealth had sought to use s 81 in two more subtle ways. One involved a combination of s 81 and s 61. Since the ordinary function of the executive is to “execute” laws made by the Parliament, it was said that a legislative appropriation is sufficient to enliven an exercise of the executive power: once the legislature makes an appropriation, the executive can “execute” it! The other argument involved a combination of s 81 and s 51(xxxxix): once money has been appropriated to a particular purpose, it was said that legislation simply specifying how the money should be applied to that purpose was incidental to the appropriation. Here too French CJ, Gummow, Crennan and Bell JJ had no need to consider these arguments, while Hayne, Heydon and Kiefel JJ rejected them.

In retrospect, the decisive passages in the AAP Case were those that emphasised the limited effect of a parliamentary appropriation: its characterisation by Mason J as “[393] a rara avis in the world of statutes”, by Jacobs J as “[411] no more than an earmarking of the money”, and by Stephen J as a ’[386] special type of Act of Parliament’, providing no more than “a necessary precondition to lawful disbursement of money by the Treasury”. In addition, French CJ now drew attention to the further comment by Stephen J that the appropriation was “[390] not truly an instance of law making but rather an example of the exercise of fiscal control over the executive by the legislature”. According to French CJ in Pape, this comment “[94] was consistent with the view, albeit he did not articulate it, that s 81 was not a source of substantive legislative power”.

By contrast, the crucial error which the AAP Case perpetuated was spelled out in the assertion by Barwick CJ that the Act “[365] both authorizes the expenditure of part of the Consolidated Revenue Fund and, to enable that expenditure, appropriates so much of the Fund as is necessary to do so. It cannot be said that the Act does nothing, merely earmarking part of the Consolidated Revenue Fund which remains as it was before appropriation. The real operation of the Act is to provide an authority for expenditure”. Even the reasoning of Mason J was not entirely free from this error: in a crucial passage he insisted that the parliamentary appropriation does “[396] provide the necessary parliamentary sanction for the withdrawal of money from Consolidated Revenue”, and for “the payment or subscription of money to a particular recipient or for a particular purpose”, but does not “supply legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent” – since engagement “in any specific activities depends upon the extent of the Commonwealth's legislative, executive and judicial powers”. The contrast here between the expenditure of money (which is authorised by an appropriation) and the “activities” which provide the context and purpose of the expenditure, is at best misleading. The correct analysis, as now adopted by all of the judgments in Pape, is that although the appropriation is a necessary precondition for the expenditure, neither expenditure nor activities will be valid unless supported by some other source of power.

It appears to be still acceptable (or at least convenient) to assume that when s 81 requires the Parliament to appropriate money before it can be expended, it thereby impliedly invests the Parliament with the power to do so. Thus Gummow, Crennan and Bell JJ spoke of “[187] the power of appropriation conferred by the Constitution”, and of “[195] matters incidental to the power of appropriation vested in the Parliament”. However, the idea that this “appropriation power” is also a “spending power” was finally exploded. Gummow, Crennan and Bell JJ traced that idea to the arguments of counsel for the Commonwealth in the First Pharmaceutical Benefits Case, and especially to that of EG Coppel KC, who spoke of “[245] the power to spend under s 81”, which he read as embodying the United States doctrine that it is “implicit in the very nature of government that the Federal Government has capacity to spend for purposes as large as the purposes for which it is empowered to raise money”. That is, the power to pay money out is a necessary corollary or parallel to the power of getting it in; and the Australian provision for “appropriation” of money paid into consolidated revenue was sufficient to incorporate that parallel.
In rejecting this conception the judgments in *Pape* relied heavily on historical materials illustrating the crucial role of appropriations in the British constitutional tradition as a way of ensuring legislative control of government spending, and also on pointers to the intended meaning of s 81 drawn from the Convention Debates of the 1890s. They also relied on earlier High Court dicta. In *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179, Griffith CJ had said: “[190] ‘The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements.’ In the same case, Isaacs J had said: “[200] ‘Appropriation of money to a Commonwealth purpose’ means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out” (emphasis added). As Gummow, Crennan and Bell JJ pointed out (at 176), the italicised words imply that the purpose has already been determined by legislation other than the appropriation itself. Again, in *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, Isaacs and Rich JJ had said that: “[222] The object of supply and appropriation is simply to furnish the Crown with authority and opportunity to obtain the money it desires for the government of the country”. They described the purpose of an appropriation as “[224] financial, not regulative” – making no substantive contribution to “transactions in which the Executive engages within its constitutional domain”, except that “[225] the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction.” More recently, in *Northern Suburbs General Cemetery Reserve Trust* (1993) 176 CLR 555, McHugh J had said: “[601] Neither s 81 nor s 83 of the Constitution gives any express power to appropriate money for Commonwealth purposes. However, the power to appropriate is a necessary incident of the power to make laws with respect to a subject matter and is implied by the grant of that power.” In short, alongside the understanding of the appropriation power as implicitly a “spending power”, there had always been an accumulation of judicial utterances acknowledging its more limited role.

French CJ summed up the Court’s conclusions by saying: “[8] 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.” These conclusions mean that it is also no longer important to determine the precise scope of the phrase “the purposes of the Commonwealth” – since even if the broadest view of those purposes be taken, it does not follow that expenditure for those purposes will be valid. The point was made clearly by Hayne and Kiefel JJ – who did not agree that the bonus payments could be upheld as an exercise of executive power under s 61, but did agree that the power to spend must be found in s 61 and not in s 81.

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**Hayne and Kiefel JJ:** [290] Although it is convenient to begin … by considering s 81 and what is meant in that section by “for the purposes of the Commonwealth”, it will ultimately be unnecessary to attempt some definitive exposition of the meaning of this phrase beyond saying that there is evident force in the view that it is not limited to purposes in respect of which the Parliament has express power to make laws. Not least is that so when it is recognised that there may be an appropriation for a valid exercise of the executive power of the Commonwealth and that, at least to the extent of matters going to the very survival of the polity and a class of matters like national symbols and celebrations, the executive power of the Commonwealth is not bounded by the express grants of legislative power. But it is neither necessary nor possible to attempt to chart the boundaries of the area encompassed by the phrase “for the purposes of the Commonwealth” when
it is used in s 81. And in particular, it is not necessary to decide whether the phrase encompasses any purpose determined by the Parliament to be a purpose of the Commonwealth.

Nevertheless, the phrase “purposes of the Commonwealth” still attracted contradictory dicta. On the one hand, French CJ held that the words should be understood as “[81] words of constraint”. He found that precisely because ss 81 and 83 “[53] are better seen as parliamentary controls of the exercise of executive power to expend public moneys than as a substantive source of such power”, it follows “that the ‘purposes of the Commonwealth’, for which appropriation may be authorised, are to be found in the provisions of the Constitution and statutes made under it which, subject to appropriation, confer substantive power to expend public moneys”. On the other hand, he also held that “[75] the words ‘purposes of the Commonwealth’ must be given their full amplitude and not read down on the assumption that they are simply another way of saying ‘public service’.” Again, while Gummow, Crennan and Bell JJ insisted that s 81 “[184] does not support the validity of the Bonus Act”, they also held that “[185] [t]here is no support in the text or structure of the Constitution for … treating the phrase in s 81 ‘for the purposes of the Commonwealth’ as containing words of limitation of legislative power”. By contrast Heydon J, while insisting that ss 81 and 83 “[606] do not create a grant of legislative power to authorise expenditure”, held also that, if that view were wrong, it would be necessary to read the words “purposes of the Commonwealth” narrowly, since a wider meaning, “[608] taken with the executive power to spend … [and with] a power to legislate under s 51(xxxix) as an incident to it, [would] make the Commonwealth a government of general and unlimited legislative powers”.

The phrase “for the purposes of the Commonwealth” had been introduced into s 81 at the 1898 Convention. An earlier draft had used the phrase “for the Public Service of the Commonwealth”, in accordance with what was “[302] then current British parliamentary practice”. The change invited speculation on whether “purposes of the Commonwealth” covered an area wider, or narrower, or the same as, “Public Service”. Consistent with the approach of the Court as a whole, they reasoned that the meaning of “for the purposes of the Commonwealth” need not be determined.

Hayne and Kiefel JJ: [313] There is no doubt that in British parliamentary practice the “public service” encompassed a wide variety of purposes. But the breadth and diversity of purposes for which money might be appropriated under British parliamentary practice is consistent with the absence of any relevant limitation of the subjects to which the executive power in Britain could apply the revenues of the state … The breadth of the powers of the Crown in Britain provides no assistance in deciding whether, in the federal form of government for which the Constitution provides, the Executive Government of the central polity has some lesser power.

[314] Similarly, the debate about whether “the Commonwealth” when used in the phrase “for the purposes of the Commonwealth” refers to the polity created upon Federation or refers to the nation organised in accordance with the Constitution is a debate which, however it is resolved, sheds little light upon the questions that must be decided in the present matter. It sheds little light on those issues because the debate about the meaning of “the Commonwealth” when used in s 81 masks a more fundamental question.

[315] That more fundamental question is whether “for the purposes of the Commonwealth” … provides some limitation upon executive power in relation to spending that is not derived by reference to other provisions of the Constitution, notably s 61. That question is not resolved by choosing between reading “the Commonwealth” in s 81 as referring to the polity or the nation.

[316] It is readily accepted that “for the purposes of the Commonwealth” does not yield a criterion easily applied as a measure of constitutional validity of an appropriation. When it is recognised that parliamentary appropriation is a necessary but not sufficient step for the spending of money by the Executive it may be thought to follow that a more precise and concrete issue would be presented by considering whether particular expenditure for identified purposes was a valid exercise of the executive power of the Commonwealth or was authorised by a valid law of the Parliament. Even in such a case, however, determining whether the purpose being pursued is within the phrase “the purposes of the Commonwealth” would not be easy.
In *Victoria v Commonwealth and Hayden* ("the AAP Case") [ (1975) 134 CLR 338 at 370], McTiernan J concluded that the question of what is a purpose of the Commonwealth was "non-justiciable". In *Attorney-General (Vic) v Commonwealth* ("the Pharmaceutical Benefits Case") [(1945) 71 CLR 237 at 256], Latham CJ described the question as a "political matter". It is not necessary to adopt either of those paths of reasoning to conclude that asking whether a particular appropriation can be described as being for a purpose of the Commonwealth will seldom if ever yield an answer determinative of constitutional litigation in this Court. There are at least two reasons why that is so. First, the generality with which appropriations are ordinarily expressed will not readily permit examination of whether the purposes thus identified are purposes of the Commonwealth. Secondly, if there is a plaintiff (other than a State Attorney-General) who has standing to challenge a particular expenditure, the question at issue will be about a particular application of money to a particular purpose. That is an inquiry that will turn upon the ambit of the power (legislative or executive) that is said to be engaged if the expenditure is made.

All this being so, the question at issue in the present matter is not to be understood as depending upon first resolving the meaning or application of the expression "for the purposes of the Commonwealth" … Rather, validity of the Impugned Act depends upon other considerations.
Although it is common (and sometimes convenient) to speak of the “nationhood power” as if it were an implied grant of legislative power, the fourth edition of this book sought to make it clear that, insofar as it is proper to speak of a “nationhood power” at all, it needs to be kept firmly in mind that what is referred to is an aspect of executive power – that is, of “the executive power of the Commonwealth” as vested by s 61. No power to legislate on matters relating to Australia’s “nationhood” could arise except through the operation of s 51(xxxix) of the Constitution, as incidental to activities undertaken by the executive government that are, as Mason J put it in the AAP Case (1975) 134 CLR 338, “[397] peculiarly adapted to the government of a nation”.

The same point was made emphatically by all of the High Court judgments in Pape v Commissioner of Taxation [2009] HCA 23. At issue in that case were the “bonus payments” made in 2009 to most taxpayers, amounting in most cases to a one-off payment of $900, as part of a “fiscal stimulus package” undertaken by the Rudd government in response to the global financial crisis that emerged during 2008. The criteria for the payments were spelled out in the Tax Bonus for Working Australians Act (No 2) 2009 (Cth). The principal issue was whether such a “stimulus package”, designed to minimise the effects of a global financial crisis on the Australian economy, could be justified as an exercise of executive power by reference to the considerations referred to by Mason J in the AAP Case. On that issue the High Court divided 4:3. French CJ, Gummow, Crennan and Bell JJ, held that the “stimulus package” was valid as an exercise of executive power, and accordingly that the legislative enactment of criteria for the payments was valid under s 51(xxxix). In dissent on this issue, Hayne and Kiefel JJ were prepared to concede, and Heydon J to assume, that the Commonwealth executive power extends to a broad concern with “national” issues, but denied that this could be used as a rationale for the “stimulus package”. However, only Heydon J held that the payments were wholly invalid. Hayne and Kiefel JJ held that, to the extent that all or part of the payments could be redefined as a refund of assessed tax liabilities, the legislation could be upheld as a law with respect to “taxation” under s 51(ii) (see Chapter 23, §1).

Despite the consensus on the idea that the executive power includes a legitimate concern with “nationhood” issues, all seven judges also acknowledged (and French CJ joined Hayne, Heydon and Kiefel JJ in insisting) that this aspect of the power must be limited by considerations of federalism. Moreover, all seven judges rejected the idea that s 81 of the Constitution could give rise to a general “appropriation power”, itself capable of supporting the validity of national expenditures (see Chapter 24, §1). However, some of the considerations formerly debated in relation to the scope of s 81 now became applicable in relation to the scope of executive activities under s 61. For example, in Attorney-General (Vic); Ex rel Dale v Commonwealth (First Pharmaceutical Benefits Case) (1945) 71 CLR 237, Dixon J had said: “[271] In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and … to take no narrow view, but the basal consideration would be found in the distribution of powers and [272] functions between the Commonwealth and the States”. Both French CJ (at 88) and Heydon J (at 608) quoted that passage, though French CJ (at 88, 108) also quoted the description of it by the Constitutional Commission, in Volume 2 of its Final Report (AGPS, 1988), as a “[832] Delphic counsel”. That description, itself rather Delphic, was explained by Heydon J as conveying an imputation that what Dixon J said was “[608] unclear” – a criticism which in Heydon J’s view made insufficient allowance “for the inherent difficulty of the subject matter” and for Dixon J’s “compressed manner of expression”.

One result of Pape is that many expenditures traditionally regarded as justified by the “appropriation” or “nationhood” powers may now be thrown into doubt, or at least left in search of a new rationale. (For example, Hayne and Kiefel JJ suggested that the establishment of the Commonwealth Scientific and Industrial Research Organisation might now be “[329] supported as an exercise of the patents power” in s 51(xviii).”) The extent to which such questions were left unanswered was emphasised by French CJ, who began his judgment by outlining his conclusions, but added an important caveat.
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French CJ: [9] The implications of these propositions for the scope of the executive power generally are limited. The aspect of the power engaged in this case involves the expenditure of money to support a short-term national fiscal stimulus strategy calculated to offset the adverse effects of a global financial crisis on the national economy. The legislative measures defining the criteria of that expenditure and matters incidental to it were authorised by s 51(xxxix) … The constitutional support for expenditure for national purposes, by reference to the executive power, may arguably extend to a range of subject areas reflecting the established practice of the national government over many years, which may well have relied upon ss 81 and 83 of the Constitution as a source of substantive spending power. It is not necessary for present purposes to define the extent to which such expenditure, previously thought to have been supported by s 81, lies within the executive power.

[10] Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws, absent authority supplied by a statute made under some head of power other than s 51(xxxix) alone, are likely to be answered conservatively. They are likely to be answered bearing in mind the cautionary words of Dixon J in the Communist Party Case [(1951) 83 CLR 1 at 187]:

“History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected” …

[T]he identification of a class of events or circumstances which might, under some general rubric such as “national concern” or “national emergency”, enliven the executive power does not arise for consideration here.

French CJ located his analysis of the “nationhood” issue in a wider overview of executive power.

French CJ: [126] It is not necessary for present purposes to consider the full extent of the powers and capacities of the Executive Government of the Commonwealth. Such powers as may be conferred upon the Executive by statutes made under the Constitution are plainly included. So too are those powers which are called the prerogatives of the Crown, for example the power to enter into treaties and to declare war. In addition, whatever the source, the Executive possesses what have been described as the “capacities” which may be possessed by persons other than the Crown.

[127] The collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power. They lie within the scope of s 61, which is informed by history and the common law relevant to the relationship between the Crown and the Parliament. That history and common law emerged from what might be called an organic evolution. Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of “national government” cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions. This important qualification may conjure the “Delphic” spirit of Dixon J in the Pharmaceutical Benefits Case. But to say that is to say no more than that there are broadly defined limits to the power which must be respected and applied case by case. As for this case, it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional distribution of powers.

[128] In this connection, Professor Geoffrey Sawer in 1976, referring to the judgment of Mason J in the AAP Case, suggested that s 61 includes “an area of inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of a modern national government”. There has been substantial support in this Court for that proposition.
By way of example French CJ quoted from Dixon and Starke JJ in the First Pharmaceutical Benefits Case, and from Barwick CJ and Mason J in the AAP Case (see Chapter 24, §1). He also quoted from Davis v Commonwealth (1988) 166 CLR 79, along with the assertion by Mason J in Barton v Commonwealth (1974) 131 CLR 477 that s 61 “[498] enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth”, and the reference by Jacobs J in that case to “[505] “the executive power of the Australian Government as the government of a sovereign state”. Further, he noted the approval in R v Hughes (2000) 202 CLR 535 at 554-5 of observations by Mason J in R v Duncan; Ex parte Australian Iron & Steel Ltd (1983) 158 CLR 535, treating the executive power as derived in part from “[560] the character and status of the Commonwealth as a national government”, and as “appropriate to … a central executive government in a federation in which there is a distribution of legislative powers between … the constituent elements in the federation”. On that basis French CJ concluded:

**French CJ: [132]** Elucidation of the content of the executive power in s 61 and the incidental power conferred by s 51(xxxix) is a process to be distinguished from the discovery by implication of a “nationhood” power as an implied head of legislative competence. This is not a case which depends for its resolution upon the existence of any such implied power. The executive power extends, in my opinion, to 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. This is consistent with the executive power as broadly explained by Mason CJ, Brennan, Deane and Gaudron JJ in Davis, and by Mason J in the passage from Duncan quoted in Hughes. To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. In this case the Commonwealth had the resources and the capacity to implement within a short time-frame measures which, on the undisputed facts, were rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries.

Gummow, Crennan and Bell JJ began their consideration of this aspect of the case by asserting:

**Gummow, Crennan and Bell JJ: [214]** The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with “the prerogative”; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it.

With that understanding, the phrase “maintenance of this Constitution” in s 61 imports more than a species of what is identified as “the prerogative” in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.

They also implied (though without elaboration) that the scope of s 61 might be amplified by the references to it in ss 67, 70 81, 84 and 86 of the Constitution, each of which “[214] assumes the existence and conduct of activities of government” – and perhaps also by the observations of Isaacs J in Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (Wool Tops Case) (1922) 31 CLR 421 at 439-40, apparently implying that s 61 had extended Commonwealth executive power beyond the territorial limits that were then supposed to confine the scope of State executive power. Additionally, they noted that the Australia Act 1986 (Cth) had left “[217] no doubt that the polity which the Constitution established and maintains is an independent nation state with a federal system of government”. They added, however:

**Gummow, Crennan and Bell JJ: [218]** But it is as well to recall that references to “nationhood” and the like in the decisions of this Court may be traced to its earliest years. In Commissioners of Taxation (NSW) v Baxter ([1907] 4 CLR 1087 at 1108) Griffith CJ, Barton and O’Connor J said:

“The object of the advocates of Australian federation, then, was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian...
Commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British Crown.”

[219] It has also long been recognised that in ascertaining the boundaries of the authority of the Executive Government of the Commonwealth in any given situation there will be a need to deal, as Isaacs J put it, with “new positions which the Nation in its progress from time to time assumes” [Wooll Tops Case, 31 CLR at 438] …

[220] [I]t is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament. Otherwise there appears no good reason to treat the executive power recognised in s 61 of the Constitution as being, in matters of the raising and expenditure of public moneys, any less than that of the executive in the United Kingdom at the time of the inauguration of the Commonwealth.

[221] New South Wales submitted that the Constitution split the executive and legislative power of the respective bodies politic in a particular way so as to effect an accommodation between them. The executive power, whether of the Commonwealth or the States, it was said, “continues to be subservient to legislative power irrespective of whether the source of the legislative power is State or Commonwealth”.

[222] There are difficulties with that submission and, like the submission itself, these are fundamental in nature. First, the submission gives insufficient acknowledgement to the comparative superiority of the position of the Commonwealth in the federal structure. That superiority informs the doctrine associated with the judgment of Dixon CJ in Commonwealth v Cigamatic Pty Ltd (In liq) [(1962) 108 CLR 372] … Secondly, the submission of New South Wales, in speaking in terms of continuation, gives insufficient weight to the creation by the Constitution of a new body politic which enjoyed capacities superior to that of a mere aggregation of the federating colonies.

They amplified the reference to Cigamatic (see Chapter 25, §3) by referring to Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410, which held that the States have no specific legislative powers that might allow them “[440] to restrict or modify the executive capacities of the Commonwealth”, since “the character of the Commonwealth as a body politic, armed with executive capacities by the Constitution, by its very nature places those capacities outside the legislative power of another body politic, namely a State”.

Accordingly, Gummow, Crennan and Bell JJ regarded it as an open question whether the executive power of the Commonwealth under s 61 might extend to the full scope of “[226] that very broad proposition concerning the extent of the common weal” which was embodied in the British notion of “the public service of the Crown” – a notion for which they were willing to find an Australian parallel in the notion of “public purposes” for which property may be acquired under s 51(30) (as broadly interpreted in cases like Worthing v Rowell and Musion Pty Ltd (1970) 123 CLR 89). They acknowledged that Commonwealth executive power must have some limits: for example, that extradition treaties (and, one might add, other treaties) cannot be acted upon in the absence of legislative implementation, so that extradition as an executive act needs legislative authority. They also cited A v Hayden (1984) 156 CLR 532 to illustrate “[227] the incapacity of the Executive Government to dispense with obedience to the law”. They concluded, however, that “it is unnecessary to attempt to determine the outer limits of the executive power”.

Instead, it was sufficient for present purposes to refer to the proposition enunciated by Mason J in the AAP Case that under s 61 the executive government has power “[397] 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”. Gummow, Crennan and Bell JJ accepted that formulation, as Brennan J had done in Davis v Commonwealth (at 111) – but with the qualification there added by Brennan J (and later repeated by the joint judgment in R v Hughes (2002) 202 CLR 535, at 555) that this does not mean that executive power “[111] extends to whatever … the Executive Government deems to be in the national interest”. Applying the formulation by Mason J to the agreed facts of Pape, Gummow, Crennan and Bell JJ said:
Gummow, Crennan and Bell JJ: [230] Collectively the facts emphasise the unusual nature of the current economic times being experienced globally and in the domestic national economy. Rapid changes in macroeconomic circumstances globally have caused the Commonwealth Department of the Treasury to revise economic forecasts downwards from those released in the 2008-2009 Budget on 13 May 2008. The Government has published a document entitled Updated Economic and Fiscal Outlook, in which it is stated that the world is experiencing a global recession triggered by a global financial and economic crisis which is the most severe deterioration in the global economy since the Great Depression and the most significant economic crisis since the Second World War. The revised forecasts mentioned foreshadow significantly weaker domestic growth and higher unemployment. Reports and statements provided by international bodies, the Group of Twenty and the International Monetary Fund, emphasise the global nature of the current financial and economic crisis … Such is the background and context in which the Commonwealth Government has announced three “fiscal stimulus packages” …

[231] The defendants contend that the purpose of the tax bonus is immediate fiscal stimulus to the economy to support economic growth and employment and to help reduce the impact of the global recession in Australia. They also contend that without a timely stimulus to the economy of this kind, Australia would face a more severe financial and economic slowdown than has been forecast. It was alleged that the global conditions were extraordinary and that that circumstance gives rise to the need for a fiscal stimulus to support economic growth and jobs. It was said that the fiscal stimulus was targeted towards low and middle income households, which are most likely to spend the additional income and are most vulnerable during the economic downturn …

[232] In determining whether the Bonus Act is supported by s 61 and s 51(39xix) of the Constitution, it is necessary to ask whether determining that there is the need for an immediate fiscal stimulus to the national economy, in the circumstances set out above, falls within executive power and then to ascertain whether s 51(39xix) of the Constitution supports the impugned legislation as a law which is incidental to that exercise of executive power …

[233] [T]hat there is a global financial and economic crisis is not contested … It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out above is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity.

[234] The content of the power provided by s 61 of the Constitution presents a question of interpretation of the Constitution. That power has at least the limitations discussed in these reasons, but it is unnecessary in the present case to attempt an exhaustive description.

Notice that, by contrast with the above analogy with declaring a state of emergency “[233] in circumstances of a natural disaster”, French CJ had expressly refrained from determining the relevance of “[10] some general rubric such as ‘national concern’ or ‘national emergency’.” Instead, he had emphasised the limitations derived from considerations of federalism. Gummow, Crennan and Bell JJ also acknowledged those limitations, but appeared to interpret them less restrictively than the rest of the Court. For purposes of the present case, they discarded no such constraints at all. No argument had been offered on the basis of any implied immunity of the States like that found in Melbourne Corporation v Commonwealth (1947) 74 CLR 31 (see Chapter 25, §2(a)); and any attempt to limit Commonwealth spending to expressly granted areas of legislative power would give “[240] insufficient weight to the significant place in s 51 of the power to make laws with respect to taxation”. It was unclear whether this last observation was a cryptic allusion to the old idea that the power to pay money out is coextensive with the power to get it in (see the supplement to Chapter 24, §1). At all events, they concluded:

Gummow, Crennan and Bell JJ: [241] The intervening States do not seriously dispute that only the Commonwealth has the resources available to respond promptly to the present financial crisis on the scale exemplified by the Bonus Act. The submissions of the interveners appear to have been
moved more by apprehension of a wide reading of the scope of s 61. But in considering what enterprises and activities are peculiarly adapted to the government of the country and which cannot otherwise be carried on for its benefit, this case may be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.

[242] It is not to the point to regret the aggregation of fiscal power in the hands of the Commonwealth over the last century. The point is that only the Commonwealth has the resources to meet the emergency which is presented to it as a nation state by responding on the scale of the Bonus Act. That Australia is a federal state does not produce the consequence that the policy determined upon by the Executive Government cannot be put into effect by measures such as the Bonus Act. The present is an example of the engagement by the Executive Government in activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit.

[243] To the extent that the implementation of this policy involves the creation by s 7 … of a right to receive the tax bonus and the imposition by s 8 of an obligation to restore overpayments, legislation is necessary and the authority to enact it is supplied by s 51(xxxix) of the Constitution.

Finally, these three judges noted that the legislation did not, like that in the First Pharmaceutical Benefits Case go beyond what was fairly “incidental” to an exercise of executive power by “[244] creating rights and imposing duties which were not incidental to the execution of another head of legislative power”. “[245] The entitlement to payment which is conferred by the Bonus Act is not … of such a character; it is incidental to the effectuation of the fiscal stimulus policy”.

Hayne and Kiefel JJ rejected these conclusions. They were willing to treat the bonus payments as partially valid by “reading them down” to amount to a form of tax refund, which could be upheld as incidental to taxation under s 51(ii) (see Chapter 23, §1). However, they did not agree that the making of the payments as part of a “fiscal stimulus package” could be justified as an exercise of Commonwealth executive power. They accepted that the executive power extends to those capacities explained in Davis v Commonwealth as arising “[93] from the character and status of the Commonwealth as a national polity”. They accepted the language of Dixon J in the First Pharmaceutical Benefits Case, explaining those capacities as including “[269] whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government”, and as needing to be “interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day”.

In particular, like the majority judges, they accepted the language of Mason J in the AAP Case, where he spoke of “[397] a capacity 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”. But they also picked up on his further insistence that to give this conception “[398] a wide operation effecting a radical transformation” in the scope of Commonwealth power “would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers”. They denied that this involved any return to notions of “federal balance” or “reserved State powers” (see Chapter 7); but unlike Gummow, Crennan and Bell JJ, they thought that assistance could be derived from the underlying principles of Melbourne Corporation v Commonwealth.

Hayne and Kiefel JJ: [335] The bound that is passed when the Commonwealth Executive seeks to spend money in the manner for which the Impugned Act provides is the boundary set by those structural considerations which informed and underpinned the decision in Melbourne Corporation. The executive power of the Commonwealth is the executive power of a polity of limited powers. The Engineers’ Case [(1920) 28 CLR 129] decided that the powers are not to be understood as confined by a priori assumptions. But no statement of this Court suggests that the executive power of the Commonwealth is unbounded.

[336] Why do structural considerations require the conclusion that the executive power of the Commonwealth in matters of spending is not unbounded? That question is best approached by examining the proposition that, in matters of raising and expenditure of public moneys, the
executive power recognised in s 61 is the same as the power of the Executive in the United Kingdom at the time of Federation. There are several reasons to reject that proposition.

[337] First, the ambit of the Commonwealth executive power is to be identified having regard to the whole of the constitutional structure, not only those provisions that deal directly with the subject of executive power. To do otherwise would not read s 61 in the context of the whole Constitution. In particular, identifying the scope of Commonwealth executive power in relation to raising and expenditure of public moneys requires consideration of more than the respective spheres of exercise of executive power by the Commonwealth and State governments. To confine attention to executive power is to ignore the intersection between executive and legislative power for which s 51(39) expressly provides. The Parliament’s legislative powers cannot be determined without regard to the engagement of s 51(39) with respect to matters incidental to the execution of powers vested by the Constitution in the Government of the Commonwealth. Conversely, the powers of the Commonwealth Executive must be determined bearing in mind that there is legislative power with respect to matters incidental to the execution of that executive power.

[338] Secondly, determination of the ambit of the Commonwealth Executive’s power in matters of raising and expending public moneys must not ignore the carefully delineated intersection between the respective roles of the Executive and the Parliament that not only lies at the centre of a proper understanding of the provisions of Pt V of Ch I and Ch IV of the Constitution but also informs the meaning that is to be given to s 61 in matters of executive power with respect to public moneys. The central elements of the delineation of the respective roles of the Executive and the Legislature … came directly from the United Kingdom practices of the late nineteenth century. But there was one fundamental alteration to those arrangements that was made by the Constitution and cannot be ignored. The Parliament which was to control both taxation and expenditure under the Australian Constitution was given only limited legislative powers. Yet when it is said that the position of the Commonwealth Executive in matters of expenditure is no different from that of the United Kingdom Executive at the time of Federation, it is asserted that the executive arm of government has unbounded powers.

[339] Of course it must be understood that, as Dixon J said in Melbourne Corporation:
“...the position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth” [74 CLR at 82-83].

But it is the very fact of the supremacy of the Commonwealth’s legislative power that directs attention to the consequences that follow for the continued existence of separate polities, separately organised, if the executive power of the Commonwealth in matters of expenditure is unbounded. If the executive power in this respect is unbounded, the legislative power of the Parliament in such matters, given by s 51(39), is limited only by the requirement that the legislation be with respect to a matter incidental to the execution of that power ...

[342] It would be wrong to read the incidental power as having some narrow or confined application in connection with the execution of powers vested by the Constitution in the Government of the Commonwealth. The matters incidental to the execution of the power of the Executive to withdraw from the Treasury (under an appropriation made by law) and spend the money so withdrawn are not limited to matters incidental to the withdrawal; they must include matters incidental to the execution of the power to spend what has been withdrawn. And if the Executive has power to spend money for a particular purpose, it is not to be supposed that the incidental power would not authorise the enactment of legislation facilitating and controlling that expenditure and its application. Legislation which facilitates and controls the expenditure and its application is not a narrow subject. It includes the specification (as in the Impugned Act) of conditions that must be met if the payment is to be made. But it extends to providing for terms and conditions regulating the manner and circumstances of application of the money provided. No distinction can then be drawn between cases where the money is to be spent directly by or on behalf of the Commonwealth.

The spending of money by giving it to a third party may be classed as “spending” and spending it directly by or on behalf of the Commonwealth might be classed as the Commonwealth “engaging in activities”. But even if such a classification could be made it supports no different engagement of the
incidental power. That is why attention must focus on the ambit of the executive power, not upon a supposed distinction between spending money and engaging in activities …

[343] The Executive’s power to spend money is not confined to expenditures made in accordance with a law made by the Parliament under an enumerated head of legislative power. But, for the reasons given earlier in connection with the executive power generally, the executive power to spend is not unlimited. Its limits are determined in the same manner as are the limits on the executive power generally …

[346] It is said that, because there is a national economic crisis or emergency to which a national response must be made, the executive power under s 61, to spend money that has been lawfully appropriated, extends to spending money to meet that crisis in whatever way the Executive chooses. And it is said that the Impugned Act is valid because the Parliament may make a law providing for the execution of the power of the Executive by requiring the Commissioner of Taxation to make the payments that the Impugned Act requires.

[347] Words like “crisis” or “emergency” do not readily yield criteria of constitutional validity. It may be accepted, for the purposes of argument, both that there is shown to be a national crisis to which a national response is required and that only the Commonwealth has the administrative and financial resources to respond. It does not follow, however, that the Commonwealth’s executive power to respond to such circumstances by spending money is a power that is unbounded. Were it so, the extensive litigation about the ambit of the defence power during World War II was beside the point …

[348] The argument by reference to national “crisis” or “emergency” can be summed up as being: “There is a crisis; if the Commonwealth cannot do this, who can?”

[349] What that and similar forms of rhetorical question obscure is a conflation of distinct questions about ends and means. The questions are conflated because the legislative power to enact the Impugned Act is treated as depending upon the execution of a power, said to be implicitly vested by the Constitution in the Executive, to meet a national crisis (in this case a financial or economic crisis). But if that is the end to which the exercise of power is to be directed, it by no means follows that any and every means of achieving that end must be within power. To argue from the existence of an emergency to either a general proposition that the Executive may respond to the crisis in any way it sees fit, or to some more limited proposition that the Executive has power to make this particular response, is circular.

[350] Describing the expenditure in issue in this matter as a “short term fiscal [measure] to meet adverse economic conditions affecting the nation as a whole” engages no constitutional criterion of a kind hitherto enunciated by this Court. It is a description that conflates the distinction between ends and means that this Court must maintain. It is for the political branches of government, not this Court, to fix upon the ends to be sought by legislative or executive action. It is for the Court to identify the criteria that are to be applied to determine whether those particular means are constitutionally valid.

[351] The question for decision is whether the response that has been made (by the enactment of the Impugned Act) is within power. That question is not answered by pointing out why the Impugned Act was enacted.

[352] Reference to notions as protean and imprecise as “crisis” and “emergency” (or “adverse effects of circumstances affecting the national economy”) to indicate the boundary of an aspect of executive power carries with it difficulties and dangers that raise fundamental questions about the relationship between the judicial and other branches of government …

[353] [N]o party or intervener disputed that there is a global financial crisis, or sought to suggest that Australia stands apart from the crisis or is immune from its effects. It was, therefore, not necessary in this case … to examine whether it is for this Court to decide what constitutes a “crisis” or an “emergency”; or whether it is sufficient that the Executive has concluded that circumstances warrant such a description. If it is for the Court to decide these matters, questions arise about what evidence the Court could act upon other than the opinions of the Executive, and how those opinions could be tested or supported. Yet, if it is to be for the Executive to decide whether there is some form of “national emergency” (subject only to some residual power in the
Court to decide that the Executive’s conclusion is irrational), then the Executive’s powers in such matters would be self-defining.

[354] The difficulties that are presented by such an understanding of executive power are real and radical. They are difficulties that have their immediate origins in two different sources. The first is the conflation of ends and means. The second is that reference is made to crisis or emergency to invoke (at least inferentially) that notion of which Dixon J wrote in *Australian Communist Party v The Commonwealth* [(1951) 83 CLR 1 at 187-8] when speaking of the source of the legislative power to put down subversive activities and endeavours as “the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities”. But as Dixon J went on to say [83 CLR at 188], “[t]he extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper”.

[355] The different ways in which a fiscal stimulus can be delivered were described in several documents which were produced by international organisations and upon which the Commonwealth relied as demonstrating both the existence of an international financial crisis and the degree of international agreement about how it should be met. Those documents show that a fiscal stimulus can be delivered in a number of different ways, including direct government investment as, for example, in capital works and provision of additional disposable income to some or all members of the community, by reduced taxation and taxation instalments, rebates in respect of taxation that has not yet been paid, refunds of taxation that has been paid, increased social security benefits or other direct payments to recipients.

[356] Legislative measures with respect to taxation and social security benefits would find ready support in s 51(ii), s 51(xxiii) and s 51(xxiii A). Legislation for some other forms of direct payments to recipients may likewise be supported by other heads of power within s 51. The question is whether a direct payment not otherwise supported by legislation made under an enumerated head of power may be made in exercise of the executive power of the Commonwealth.

Apart from this discussion of the *executive* power, Hayne and Kiefel JJ did accept that the Commonwealth’s status as a national government may give rise to an implied *legislative* power. They denied, however, that such a power could extend to a general “[358] legislative power with respect to the national economy”.

**Hayne and Kiefel JJ: [359]** The Commonwealth advanced the argument in two forms. First, it was submitted that a legislative power with respect to the “national economy” was created and sustained by s 92 of the Constitution together with the aggregation of specific heads of legislative power with respect to trade and commerce, taxation, bounties, borrowing, banking, currency, insurance, corporations and external affairs, and the exclusive power under s 90 to impose duties of customs and of excise. Secondly, the Commonwealth submitted that a legislative power with respect to the national economy is a necessary implication from the Commonwealth being the national government. Both submissions should be rejected.

[360] With respect to the first argument, it is enough to say that the aggregation of separate heads of power yields no greater power than the sum of the parts.

[356] With respect to the second of the arguments, it may readily be accepted that the Constitution recognises that there is a national economy. Where once there may have been six separate markets, one of the chief elements of the design of the Constitution (and in particular Ch IV concerning Finance and Trade) was to create and foster national markets. But the implication of legislative power with respect to a subject-matter described as the “national economy” by no means follows from the observation that there is a national economy.

[362] First …, despite the evident constitutional intention to create and foster national markets the Parliament was given no express head of power with respect to such a subject-matter.

[363] Secondly, the expression “national economy” is anything but certain. Its uncertainty is demonstrated by the fact that a central premise of the present litigation was that Australia’s economic wellbeing is not isolated from global economic influences. That may suggest that there is only limited utility in treating (or at least in continuing to treat) the Australian national economy as if it is a separate and distinct unit. It is not necessary, however, to examine that subject further.
More particularly it was not explained what areas the asserted power would cover beyond such subject-matters as now fall within s 51(i) ("trade and commerce with other countries, and among the States"), s 51(ii) ("taxation; but so as not to discriminate between States or parts of States") and s 51(xiii) ("banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money"). Rather, the power which it was said should be implied was treated as sufficiently described by its alleged connection with the fact of the existence of Australia as a nation. But that connection does not create or give content to such a power …

It may be accepted that there is some implied legislative power in the Parliament that follows from the existence of the national polity. That power extends to laws putting down subversive activities and endeavours. But that implied legislative power does not extend so far as to encompass the general subject of the “national economy”.

Not only is the content of such a power too uncertain to permit its implication, but, even if the power could be given sufficiently certain content, its implication is not necessary. As will later be shown, in all but a small part of its operation, the Impugned Act is a law with respect to taxation. There is no lack of power to provide for refunds of taxation paid by those who paid tax for the 2007-08 income year; no lack of power to provide for reduction in taxation instalments payable in respect of those who are “Pay as you go” taxpayers; no lack of power to provide for reduction in rates of direct or indirect taxation. And no other aspect of the three “fiscal stimulus packages” mentioned at the start of these reasons was said to be dependent upon the implication of the power now under consideration.

These considerations apart, the argument that power with respect to the national economy is a necessary implication from the constitutional text and structure amounted ultimately to no more than the proposition that the economic circumstances that now exist require national action. That provides no sufficient basis for the implication of the asserted power.

The Impugned Act is not supported by considerations stemming from the position of the Commonwealth as the central government of the nation.

Heydon J dissented outright. He denied that there was any relevant “nationhood power”, whether conceived of as a legislative or as an executive power. He treated the Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1 as a “[499] binding authority” to the contrary, since in that case Deane J had joined Gibbs CJ, Wilson and Dawson JJ in rejecting the idea that the “nationhood power” could be used to support s 6(2)(e) of the World Heritage Properties Conservation Act 1983 (Cth) (see Chapter 19, §4(b)). As to Burns v Ransley (1949) 79 CLR 101 and R v Sharkey (1949) 79 CLR 121, Heydon J said:

Heydon J: [498] The laws protecting the Commonwealth from subversion and sedition which were held valid in Burns v Ransley and R v Sharkey can be seen as an aspect of “the execution and maintenance of [the] Constitution” within the meaning of those words in s 61. Hence, although Dixon J saw this as having an artificial aspect, it is possible to support these cases as being within the executive power conferred by s 61, and s 51(xxxix) authorises the enactment of laws on that subject. Legislation dealing with sedition and subversion is also within the defence power in s 51(vi), for that is not limited to external threats against the Commonwealth and the States from foreign nation states. However, none of this supports the defendants’ argument in relation to legislation regulating the economy. As Wilson and Dawson JJ said in Davis v The Commonwealth [166 CLR at 102], “subversion, sedition and the like are matters of a very special kind, striking, as they do, at the very foundation of the Constitution”. They are far removed from the field in which the Tax Bonus Act operates …

A “nationhood power” of the width claimed by the defendants shares the vagueness of other constitutional “doctrines” which briefly flourished but were then rejected. One was the doctrine of the inalienable or essential functions of governments. Others were doctrines resting on implications of representative government and representative democracy beyond those implications to be drawn from the text of the Constitution. The vagueness of a “nationhood power” is demonstrated by the ease of a slide from asking whether activities are incidental to the existence of the Commonwealth, to asking whether they are geographically nationwide, to asking whether they
are activities which the central government has characterised as national, to asking whether they are activities which the central government has identified as being politic for it to engage in or regulate. In the course of this slide the central government is being permitted to characterise or define its way into legislative power of its own initiative …

[509] [I]t is not necessary to imply into the Constitution a term as broad as the defendants advocate. It is not necessary to do so in relation to sedition, by reason of s 51(vi) and s 61. And it is less necessary, and, if it matters, very much less desirable, to imply a “nationhood power” of the kind advocated by the defendants in order to deal with economic problems. There are extensive express powers to do this – for example, s 51(i), (ii), (iii), (iv), (ix), (xii), (xiii), (xiv), (xvi), (xvii), (xix)(xx), (xxvii), (xxix), (xxxi) and (xxxvii), s 90, s 96 and s 115. The very specificity of these provisions negates the defendants’ proposition that there is some wider power …

[510] In summary, the wide power on which the defendants rely cannot be treated as an independent legislative power to be implied into the Constitution.

Next, Heydon J turned to the contention that an executive “nationhood power” might be located “[511] within, or perhaps alongside, s 61”. For this purpose he, too, focused on “Mason J’s test” – that is, on the passage in the AAP Case asserting “[397] a capacity 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.” Although content to work with that test, Heydon J took care to stipulate that “[545] it is not necessary to consider” whether the test is valid, since in any event he concluded that it was not satisfied here. In quoting the test he did, however, observe: “[511] The concluding 13 words are particularly important”.

Heydon J: [512] The defendants relied on Mason J’s test – but for the concluding 13 words, “and which cannot otherwise be carried on for the benefit of the nation.” That was a significant act of jettison, but it was essential if the defendants’ argument was not to be wrecked …

[513] That is because a speedy stimulus equal in size to the tax bonuses could have been effectuated for the benefit of the nation in some other way. The Commonwealth acting alone could have given an equivalent stimulus in a different form under s 51(ii) (by granting tax rebates a little higher than the bonuses and paying them out in exactly the way the tax bonuses were paid out). The Commonwealth acting in cooperation with the States could have done it under s 96, by granting the money to the States on condition that the bonuses be paid pursuant to the formula which is set out in the Tax Bonus Act … [It is not correct to say] that the Commonwealth Government “is the only Government with the resources, both financial and administrative, to provide it” … [or to speak of] the need for national action in consequence of the insufficiency of the powers of the States to engage in the relevant enterprise. So framed, the question is one of insufficiency of powers. Legally, there is no bar to the States injecting monies equivalent to the total of the tax bonuses into the economy: their powers are “sufficient” to do this; they are not in the very constrained position that they are in, compared to the Commonwealth, in international affairs. Practically, it may be true that the States in the year 2009 would have difficulty in raising sufficient monies for the purposes of a large fiscal injection, at least without considerable disruption to the rest of their activities: but the Special Case did not aver or deny this. It was for the defendants to demonstrate, if it were integral to their argument, that the States lack practical power to raise the monies by persuading the Commonwealth to engage in an act of cooperative federalism and supply them through s 96, or that they would have refused to cooperate with a Commonwealth plan to employ s 96. This the defendants did not do …

[518] Hence the concluding 13 words of Mason J’s test are not satisfied. That is no doubt why the defendants chose to abandon them.

The reference by Mason J to activities “peculiarly adapted to the government of a nation” was also subjected to critical analysis.

Heydon J: [519] The question: “What enterprises and activities are peculiarly adapted to the government of a nation?” cannot be answered without inquiring: “Which type of nation? Which specific nation? What form of government?” The nation in question being Australia, it is necessary to bear in mind … that the Commonwealth Government, while in one sense a “national govern-
must be "\[398\] limited in scope", since it would be "inconsistent with the broad division of responsibilities" between Commonwealth and States to allow it "a wide operation effecting a radical transformation" in Commonwealth responsibilities. He insisted that what was recognised in *Davis v Commonwealth* was "\[521\] a power of a very limited character, relating to symbolic aspects of nationhood, like the regulation of flags, emblems, national days and celebrations", and thus "very remote from the extensive power, claimed by the defendants …, to provide a national response to problems of national interest and concern". He denied the relevance of what Deane J said in the *Tasmanian Dam Case* about "\[253\] the mere appropriation and payment of money to assist what are truly national endeavours" involving "no competition with State authority", since "\[522\] it is easy to imagine" cases in which “legislation regulating the payment of money” might give rise to inconsistency with State legislation under s 109 of the Constitution, and even more obvious that if the Commonwealth claimed a broad power to regulate the national economy, “State legislation regulating economic activity within a State would often be vulnerable under s 109”. He also emphatically rejected a suggestion that the Commonwealth’s “spheres of responsibility” – a phrase used by Mason J in *Barton v Commonwealth* (at 498) – could somehow be expanded by reference to the fiscal responsibilities created by the *Reserve Bank Act 1959* (Cth) and the *Charter of Budget Honesty Act 1998* (Cth).

**Heydon J:**[531] How could an Act enacted in 1959 and another Act enacted in 1998 cast light on s 61, which was approved in the Australian colonies in the 1890s and enacted at Westminster in 1900? The defendants submitted that this course was legitimated by what O’Connor J said in the *Jumbunna* case ([1908] 6 CLR 309 – that is, that "\[367\] we are interpreting a Constitution broad and \[368\] general in its terms, intended to apply to the varying conditions which the development of our community must involve"). They also submitted that the words of s 61 had to be read as “subject to the understanding that in 1900 [executive power] was an evolving concept and it continued to evolve through time ... because the Constitution was established for the government of the nation into the future, in good times and in bad.”

**[532]** There are several difficulties with the defendants’ submissions …

**[533]** First, the defendants’ submission that Mason J … meant to use the expression “spheres of responsibility” in a broad sense … must be rejected. As noted earlier, he made it plain in *Victoria v Commonwealth and Hayden* ([AAP Case] 134 CLR at 398) that the “broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers” caused the “executive power to engage in activities appropriate to a national government” not to have a “wide operation”, but to be “limited” …

**[534]** Secondly, it may be accepted that some find merit in “organic” or “living tree” or “living force” approaches to the Constitution, free from the “dead hands” of the framers, insulated from the cryogenic effects of their language, and emancipated from enslavement to their mental world. It may be assumed but not conceded that in particular instances those approaches, depending on what is meant by them, can have value. However, they do not work validly when applied to developments in governmental practices, whether “organic” or not, which led to legislation that was not within legislative power as originally understood. So to apply them would be to espouse a theory of continuous constitutional revolution, in which successive usurpations would be
constantly seeking to legitimise themselves by claiming de jure status from their de facto position. Some of the defendants' submissions suggested that it is appropriate to take into account the individual mental attitudes of the framers. That is not correct. But even if it were, there is little doubt that it would have come as a grave shock to O'Connor J ... to be told, if the Reserve Bank Act and the Charter of Budget Honesty Act had been enacted in 1903, that these statutes demonstrated the existence of a power in the Commonwealth Executive and the Commonwealth legislature to manage the economy fiscally, even though three years earlier no express language to that effect had been inserted in s 51 or in any other part of the Constitution. If, as the defendants suggested, O'Connor J’s principles could be used to that end, they would be profoundly damaging to the position of the States. For the wider the Commonwealth’s power to manage the economy by legislative means the less is the power of the States to enact valid legislation to control economic problems as they perceive them. That is inverting O’Connor J’s principles, not applying them ... [535] Thirdly, if it were perceived that the legislation actually enacted by the Commonwealth were capable of being used as a means of establishing what the executive (or the legislative) power of the Commonwealth is, there would soon be an increase of appetite which grows with what it feeds on. Satiation of that appetite, if it were ever possible to achieve it, would only come at a point when the distribution of power which the thinking of O’Connor J and Mason J was astute to preserve had been annihilated ... [536] Fourthly, the Charter of Budget Honesty Act can scarcely support a wide constitutional power in the Commonwealth Executive: it gives rise to no enforceable obligations (Sched 1, cl 3(2)). Nor does the Reserve Bank Act, for it did not cut down the power of the States to conduct their own fiscal policies, ie their expenditure policies ... [537] Finally, the defendants’ submission that in 1900 “executive power” was an “evolving concept” appeared to rest on a silent appeal to recent authorities. Those authorities recognise a principle of construction that applies where a constitutional expression relates to doctrines “still evolving in 1900” [200 CLR at 629] or “in a condition of continuing evolution” [187 CLR at 482] or “in a state of development” [204 CLR at 97] or subject to “cross-currents and uncertainties” [202 CLR at 501] or subject to “dynamism” [202 CLR at 496]. In these circumstances, where it is possible to establish the meaning which skilled lawyers and other informed observers of the federation period considered a constitutional expression bore, or would reasonably have considered that it might bear in future, it might be right to apply that meaning. In argument no detailed attempt was made to employ that approach here. Even if it had been applied ..., it would not have overcome the difficulty identified by Mason J – that expanded meanings of “executive power” to include a “nationhood power” cannot disturb “the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers” in the Constitution.

In the AAP Case, Jacobs J had treated the reference in s 61 to “the maintenance of this Constitution” as evoking “[406] the idea of Australia as a nation within itself and in its relationship with the external world”. In Davis v Commonwealth Brennan J had glossed that passage by saying that the Constitution “[110] did not create a mere aggregation of colonies”, but “summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite ‘in one indissoluble Federal Commonwealth’” – with the result that the executive power of the Commonwealth “extends to the advancement of the nation whereby its strength is fostered”. Heydon J articulated “[538] four difficulties” with this approach.

Heydon J: [539] First, in one sense there was an “Australian nation” well before 1901. It was not “summoned ... into existence” in 1901, any more than the Polish nation was summoned into existence in 1918. What happened in 1901 was that the political organisation of the people making up the existing nation was reorganised from six colonies to a single Commonwealth divided into six States, with governmental responsibilities being divided between those seven polities and any States or Territories created in future. Even if [as Brennan J had said] that reorganisation of itself involved “melding the history of the people”, or “embracing their cultures”, or “synthesizing their aspirations and their destinies”, which may be doubted, the melding, the embrace and the synthesis are not legally relevant to the present problem ...
Secondly, defining what “matters ... are the concern of Australia as a nation”, what is involved in “the idea of Australia as a nation” and what is meant by “the protection and advancement of the Australian nation” are impossibly difficult tasks. Defining what matters are of “national concern” is as difficult as defining what matters are of “international concern” in relation to s 51(xxxix), for the concept is equally nebulous ... 

Thirdly, even if Brennan J is correct in saying that the Constitution did more than redistribute the powers of the former colonies between the new States and the new Commonwealth, it did do at least that. That explicit distribution cannot be undermined by the more general possibilities to which Brennan J pointed ... 

Fourthly, Jacobs J’s reasoning invites uncontrollable aggrandisement on the part of the Commonwealth. It is a truism that Commonwealth legislation cannot “recite” itself into validity. Similarly, if matters of “national concern” are those about which the Commonwealth wishes to hold discussions with the States, to encourage the States to enact uniform legislation, to enact legislation complementary with State legislation, or to develop any other national approach of a non-legislative kind, like conducting inquiries and taking initiatives, the Commonwealth is, merely by developing those desires, giving itself a basis on which to engage in executive conduct. It is thus elevating its conduct into validity. This suggests that Jacobs J’s reasoning is wrong.

Heydon J also considered a separate argument that, independently of any concept of “nationalhood”, the Commonwealth’s power under s 61 includes a power to manage the national economy.

Heydon J: [547] The defendants pointed to the many express powers of the Commonwealth having a potential impact on the economy and the effect of ss 88, 90, 92 and 99 in creating a free trade area. It was submitted that “[w]hen all the powers of the Commonwealth are aggregated, the conclusion is irresistible that the Commonwealth has constitutional responsibility for management of the national economy.” It was not clear whether the argument went so far as to claim that the Commonwealth had a specific (although unexpressed) legislative power of this kind. It did seem to claim that the Commonwealth had an executive power to manage the national economy, and that legislation could be enacted under s 51(xxxix) incidentally to the execution of that power ...

[548] A narrow version of the defendants’ submission was that there is a power in the Executive to deal with a national fiscal emergency only capable of being promptly and appropriately met out of the resources of the Commonwealth, both financial and administrative ...

[549] It is sufficient to deal specifically here only with the narrow argument for a power to manage the economy in times of national fiscal emergency. It does not exist, and hence the wider power cannot exist either ...

[550] First, the alleged power to deal with a national fiscal emergency depends on satisfaction of a factual pre-condition. That pre-condition is that the emergency is only capable of being promptly and appropriately met by Commonwealth action. The pre-condition has not been satisfied. There were many ways in which the Commonwealth could have stimulated consumer spending by reducing taxation. While the defendants may be correct in saying that some of those methods could not have operated as quickly and effectively as a direct payment via the “tax bonuses”, the Commonwealth did have power to act by paying genuine tax rebates by way of direct payment and by employing s 96 as speedily as it paid the “tax bonuses” ...

[551] Second, there is no constitutional warrant for the supposed power to deal with a national fiscal emergency. There is no express warrant for it. The claim that it exists is entirely novel. Its existence is doubtful because of its potential for abuse. Let it be assumed that, whatever conclusions historians writing in the future may come to, the current economic crisis is as severe as the Special Case says. The truth is that the modern world is in part created by the way language is used. Modern linguistic usage suggests that the present age is one of “emergencies”, “crises”, “dangers” and “intense difficulties”, of “scourges” and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, “wars” must be waged, “campaigns” conducted, “strategies” devised and “battles” fought. Often these problems are said to arise suddenly and unexpectedly. Sections of the public constantly demand urgent action to meet particular problems. The public is continually told that it is facing “decisive” junctures, “crucial” turning points and “critical” decisions. Even if only a very narrow
power to deal with an emergency on the scale of the global financial crisis were recognised, it
would not take long before constitutional lawyers and politicians between them managed to
convert that power into something capable of almost daily use. The great maxim of governments
seeking to widen their constitutional powers would be: “Never allow a crisis to go to waste”…

[552] Thirdly, it is far from clear what, for constitutional purposes, the meanings of the words
“crises” and “emergencies” would be. It would be regrettable if the field were one in which the
courts deferred to, and declined to substitute their judgment for, the opinion of the Executive or the
legislature. That would be to give an “unexamimable” power to the Executive, and history has
shown, as Dixon J said, that it is often the Executive which engages in the unconstitutional
supersession of democratic institutions. On the other hand, if the courts do not defer to the
Executive or the legislature, it would be difficult for the courts to assess what is within and what is
beyond power. It is a difficulty which suggests that the power to deal with national fiscal
emergencies does not exist.

Finally, there was an argument that, independently of reference to “nationhood” or to “the
national economy”, the Commonwealth’s executive power included a general “spending power”,
to which the tax bonus legislation was “incidental” under s 51(xxxix). One version of this
argument was the idea that appropriation triggers spending: that once the legislature makes an
appropriation under s 81, the executive must be able to “execute” it under s 61. However the
argument was put, it involved an assumption “[553] that Parliament could appropriate for any
purpose whatever by an appropriation law”. The argument was therefore fallacious. According to
Heydon J: “[564] The fallacy lies in the excessive width it attributes to the executive power”.

Heydon J: [566] The defendants’ submission at its most extreme … was that s 51(xxxix)
authorises the Parliament to legislate in aid of any subject which it wished to. They submitted …
that Parliament could appropriate for any purpose whatever by an appropriation law, that it was
within the executive power of the Commonwealth to spend the appropriated funds for that purpose,
and that legislation could be enacted under s 51(xxxix) incidentally to that power …

[567] Gibbs J was, with respect, correct to say [134 CLR at 378-9]:

“According to s 61 of the Constitution, the executive power of the Commonwealth ‘extends
to the execution and maintenance of this Constitution, and of the laws of the
Commonwealth’. Those words limit the power of the Executive and, in my opinion, make it
clear that the Executive cannot act in respect of a matter which falls entirely outside the
legislative competence of the Commonwealth.”

Isaacs J was of a similar opinion [31 CLR at 441, 443], as was Barwick CJ [134 CLR at 362] …
Mason J, too, said that the executive power of the Commonwealth is a power which enables, and
does no more than enable, “the Crown to undertake all executive action which is appropriate to the
position of the Commonwealth under the Constitution and to the spheres of responsibility vested in
it by the Constitution” (emphasis added) [131 CLR at 498]. The Crown inherited the executive
power as exercisable in the United Kingdom and in the Australian colonies in 1900, but subject to a
qualification deriving from the federal nature of the constitutional compact. Since the creation of a
right to receive and a duty to pay tax bonuses is a matter falling outside the legislative competence
or spheres of responsibility of the Commonwealth, it falls outside s 61 also …

[570] Even assuming that Parliament could appropriate for any purpose whatever by an
appropriation law, including the purpose of paying tax bonuses, it was not within the power of the
Executive under s 61 to expend the appropriated funds to pay tax bonuses.
(c) **Supplement to Chapter 23, §1**

Whenever a compulsory exaction is held to be a “tax”, legislation imposing such an exaction will fall within the core of the power conferred by s 51(ii). However, it may sometimes happen that a law which does not impose such an exaction may nevertheless be valid as a law “with respect to” taxation. In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, the Commissioner of Taxation had agreed to refund certain taxes if (as proved to be the case) they were found to be invalid (see Chapter 27, §2(b)). The Commonwealth enacted legislation to vary that agreement so that only those companies that had actually borne the burden of the tax would receive the refund. The High Court held that the legislation was valid under s 51(ii) as a law with respect to taxation.

In *Pape v Commissioner of Taxation* [2009] HCA 23, the High Court considered the validity of legislation for one-off bonus payments to 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. The legislation was entitled the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth); the payment was described as a “tax bonus”; and by s 3 “the general administration of this Act” was vested in the Commissioner of Taxation, with the consequence that the legislation was brought within the definition of the term “taxation law” (as “an Act of which the Commissioner has the general administration”) in s 995-1(1) of the *Income Tax Assessment Act 1997* (Cth). Nevertheless, in argument before the High Court, the Commonwealth conceded that the Act could not be upheld in its entirety as a law with respect to taxation.

In the end that concession did not matter, since French CJ, Gummow, Crennan and Bell JJ were prepared to hold that the payments were valid as an exercise of Commonwealth executive power under s 61, with the consequence that the legislation was valid under s 51(xxxix) (see the supplement to Chapter 24, §1). However, Hayne and Kiefel JJ were unable to accept that analysis (see Chapter 12, §2(b)). Accordingly, it was necessary for those two judges to consider the arguments arising under s 51(ii).

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**Pape v Commissioner of Taxation**

[2009] HCA 23

**Hayne and Kiefel JJ:** [382] The Impugned Act raises no revenue. It requires the making of payments to persons who were liable to pay income tax for the immediately preceding financial year … [O]n the face of the Act, the amount to be paid is fixed by reference to the taxable income of that person in that financial year but is not fixed by reference to the amount of tax that was paid. Only those who have lodged their taxation return are eligible for the payment.

[383] The Court’s decisions about the ambit of the taxation power have focused, at least for the most part, upon whether a law requiring payment of a sum to government is a law with respect to taxation … [In *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1] KItto J expressed his often-quoted propositions about characterisation of a law in the context of deciding whether the statutory provisions then in question were to be supported as a law with respect to taxation … Subsequent decisions, including *Australian Tape Manufacturers Association Ltd v The Commonwealth* [(1993) 176 CLR 480], *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* [(1993) 176 CLR 555], *Airservices Australia v Canadian Airlines International Ltd* [(1999) 202 CLR 133] and *Luton v Lessels* [(2002) 210 CLR 333], have also focused upon whether particular forms of compulsory exaction are properly described as taxation. By contrast, the question in this case is whether a law which requires payment of money to those who have been taxpayers is a law with respect to taxation.

[384] In *Mutual Pools & Staff Pty Ltd v The Commonwealth* [(1994) 179 CLR 155], the Court held, subject to a qualification that is not now material, that a law regulating and defining rights of refund of amounts unnecessarily or mistakenly paid to the Commonwealth in discharge of asserted...
taxation liabilities was a law with respect to taxation. But that is not this case. If the Impugned Act operated according to its terms, there would be no necessary connection between the amount that was paid as tax and the amount to be paid as a tax bonus.

[385] Rather, the argument that the Impugned Act, in all its operations, is a law with respect to taxation may be understood as the reflex of the argument considered and rejected in *Fairfax*. In *Fairfax*, it was submitted that consideration of what “seems most likely to have been the main preoccupation of those who enacted” the law in question [114 CLR at 7] showed that the law was a law with respect to *that* subject-matter (promotion of investment in government securities) not a law with respect to taxation … But as Kitto J rightly pointed out in *Fairfax* [114 CLR at 10-11], an inquiry into the ultimate indirect consequences of the operation of a law can yield no conclusion except about the motives of the legislators. And those motives, even if they could safely be identified, are beside the point.

[386] Here, it is said that the Impugned Act, in all its operations, is a law with respect to taxation because it takes as the critical criterion for its operation the identification of a person as one who has paid tax for the most recently completed financial year. And because those, and only those, who have paid tax (and whose taxable income for that year did not exceed $100,000) are eligible for the payment, the law is said to be a law with respect to taxation. But as in *Fairfax*, that fact, standing alone, directs attention to why the legislators may have enacted the Impugned Act. While it may readily be accepted that the Impugned Act seeks to single out certain taxpayers for the benefit for which it provides, that does not make the Impugned Act a law with respect to taxation. Further, although the payment to be made under the Impugned Act is called a “tax bonus”, attribution of that name adds nothing to the debate about characterisation. [As Kitto J pointed out in *Fairfax*, 114 CLR at 7], “[t]he character of the Impugned Act depends upon “the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes”.

[387] The amount to be paid depends upon a person’s taxable income for 2007-08. On the face of the Impugned Act there is no direct connection, in all operations of the Act, between the amount of the bonus and the amount that has been paid in tax. As the Act is written, the amount that is paid under the Impugned Act may be more or it may be less than the amount of tax the person paid for that year. By the time payments must be made under the Impugned Act it will not be known whether a person to whom the payment is made will be liable to pay income tax for 2008-09.

[388] The Commonwealth was right to accept that the Impugned Act is not a law with respect to taxation in all its operations.

Accordingly, Hayne and Kiefel JJ turned to the question of whether the Act could be “read down” under s 15A of the *Acts Interpretation Act 1901* (Cth) to allow it to operate to the extent that it could validly do so. They accepted the enjoinder in *Pidoto v Victoria* (1943) 68 CLR 87 that such a “reading down” should not be attempted if the Court “[108] is of opinion that the law was intended to operate fully and completely according to its terms, or not at all”. However, they were disinclined to take the search for Parliament’s actual intention too literally.

**Hayne and Kiefel JJ: [389]** The metaphor of “intention” must not be permitted to mislead. It may greatly be doubted that legislation is ever passed with legislators intending less than full and complete operation of the statute according to its terms. And in the present matter it may be observed that an important motive for the Impugned Act being directed to taxpayers with low adjusted tax liabilities was the expectation that those taxpayers are more likely to spend the tax bonus than others. But if [the test is] … a comparison between the legal and practical operation of the Act according to its terms and its legal and practical operation as read down, the Impugned Act should be read down in the manner submitted by the Commonwealth. The operation of the Impugned Act as read down is not so different from its operation in accordance with its terms as to lead to the conclusion that it is not intended to operate in that restricted fashion. In particular, because the Impugned Act was evidently intended to provide an urgent stimulus to the economy by putting money in the hands of the intended recipients quickly, it is not to be assumed that the legislative “intention” was that there were to be no payments at all unless those who had paid the least amount of tax for the 2007-08 income year received the whole of the intended amount …
The valid operation of the Impugned Act depends upon reading down the class of those who are entitled to the payment. In particular, what is necessary is the reading down of one of the five cumulative requirements set out in s 5(1) as conditions to be satisfied for entitlement to a tax bonus: the requirement of par (c) that “the person’s adjusted tax liability for that income year is greater than nil”. The class of persons that s 5(1)(c) identified is larger than the legislative power with respect to taxation allows to the extent that it entitles a person to payment of a tax bonus that is greater than the amount of the person’s adjusted tax liability.

Read down in the manner indicated, the Impugned Act provides for payment to taxpayers whose taxable income for the income year 2007-08 did not exceed $100,000 (and who are not within one of the exceptions provided by s 5(2)) of the amount of that person’s adjusted tax liability for that income year or the amount of the tax bonus fixed under the Act, whichever is the less. Read with that operation, the Impugned Act provides for repayment to certain taxpayers of some or all of the amount the taxpayer was liable to pay for income tax for the last complete income year. With that operation the Impugned Act is a law with respect to taxation.

Gummow, Crennan and Bell JJ protested strongly that this solution was not acceptable.

Gummow, Crennan and Bell JJ: [248] The question is whether [the Act] was designed to operate fully and completely according to its terms or not at all. The plaintiff correctly submits that the lower income earners, whose position was of particular concern in the framing of this fiscal stimulus “package”, are the most prejudiced by the reading down proposed by the defendants. The reading down suggested by the Solicitor-General must yield to the contrary intention to most benefit those who have paid the least tax. Section 6 cannot be read down as proposed …

[251] The proposed reading down of s 6 of the Bonus Act does not limit the provision to one or more of various operations otherwise encompassed by any form of general words. Rather, it seeks to introduce a foreign integer, namely the adjusted tax liability of those persons who otherwise would have answered the criteria in one of pars (a), (b) and (c) of s 6. To treat s 15A of the Interpretation Act as authorising such a reading of s 6 would be to risk construing s 15A as impermissibly entrusting legislative power to Ch III courts.

[252] The result is that the plaintiff has the benefit of the concession by the defendants and the Bonus Act is not supported by s 51(ii) of the Constitution.

[253] New South Wales sought to gainsay that concession by arguing that it was unnecessary because the Bonus Act in its terms was supported by s 51(ii). That submission, made orally after the concession by the defendants, may have exceeded the proper role of an intervener, but no objection was taken to it.

[254] In any event, the Bonus Act could not be sustained on the basis suggested. This is that the statute is analogous to that considered in Mutual Pools & Staff Pty Ltd v The Commonwealth [(1994) 179 CLR 155]. That statute provided for the refund of payments of taxes paid pursuant to an invalid law. Here the Parliament has not acted to make any refund of tax lawfully exacted for the 2007-2008 income tax year.

[255] In Moore v The Commonwealth [(1951) 82 CLR 547 at 569], Dixon J said that the power conferred by s 51(ii) covers “what is incidental to the imposition and collection of taxation”. The Bonus Act takes as the criterion of its operation certain taxpayers for the 2007-2008 income year. But that does not render the Bonus Act a law with respect to the imposition and collection of taxation. In particular, given the formulation of s 6 as enacted, the Bonus Act cannot be said to be “in substance” a law conferring a rebate of tax on income brought to account for 2007-2008.

French CJ had no need to consider this issue, but Heydon J also rejected the appeal to s 51(ii). He held that it was fundamentally misconceived, in a way that no “reading down” could cure.

Heydon J: [449] There is no doubt that a law supported by s 51(ii) could have been employed to achieve the goals of the Tax Bonus Act. For example, a law could have made a retrospective downward adjustment of tax liability and provided for corresponding repayment of excess sums assessed. Nothing in the materials before the Court suggested that that technique would have been slower or less convenient or less effective than the technique embodied in the Tax Bonus Act. The
only question is whether the different technique actually employed by the Tax Bonus Act makes it a law with respect to taxation.

Relying on what Kitto J said in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 (namely, that the characterisation of an Act depends on “[7] the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes”), the plaintiff had submitted that the Act was not a law with respect to taxation because the tax bonus was merely a “gift”, to which the taxpayer had no legal right. Heydon J rejected that argument. He held, as other members of the Court had done, that the Act made entitlement to the bonus an enforceable legal right. With that exception, Heydon J generally accepted the plaintiff’s arguments.

**Heydon J:** [453] The other submissions of the plaintiff broadly to the following effect are correct. The right to recover the payments did not affect the legal rights and liabilities of recipients with respect to their *taxation* affairs. The tax liability of recipients as assessed under the *Income Tax Assessment Act* 1997 (Cth) remains unchanged; they are obliged to pay a sum corresponding to the tax assessed as payable in their notices of assessment, not that sum less the tax bonus. The Tax Bonus Act does not provide for the amendment of any assessment. It does not provide for a refund or repayment or rebate. The entitlement to a tax bonus cannot be set off by the Commissioner or the recipient against the recipient’s existing tax liability. The lack of correlation of the tax bonuses with tax liability is revealed by the fact that even if the recipient’s “adjusted tax liability” is less than the bonus – even if it is as little as $1 – it may still trigger a bonus of $900. The Tax Bonus Act has nothing to do with arriving at a figure which the recipient must pay by way of tax, or which the Commonwealth must pay in order to ensure that no more than the legally correct amount of tax was exacted. The tax bonuses were to come to recipients, in the ordinary course, by payment to the credit of a nominated financial institution account pursuant to s 7(2) of the Tax Bonus Act. The Tax Bonus Act injects $7 billion into the bank accounts of persons thought likely to spend what they receive. The Tax Bonus Act is thus a method of achieving fiscal goals. It is not a law about tax liabilities. It does not change, regulate or abolish any right, duty, power or privilege with respect to taxation. The Tax Bonus Act may produce for recipients an effect equivalent in money terms to an Act retrospectively reducing their tax liability and reimbursing any overpayment, but, even in substance, it is not equivalent in law. An Act of the latter kind would alter *taxation* liabilities; the Tax Bonus Act does not. The references to “adjusted tax liability” and “taxable income” serve as methods for identifying the class of recipients and the quantum of what they are to receive. These references to their tax position have nothing to do with the correctness of their tax liability. Their tax position is significant because of its utility as a guide to whether recipients are likely to spend rather than save the bonuses paid, and because of the Commissioner’s possession of readily available records enabling expeditious assessment of whether recipients meet the criteria for entitlement to the bonuses. It was not the bonus which adjusted any tax liability; rather, it was the “adjusted tax liability” which was a criterion for identifying which persons were eligible for the bonus.

[454] The defendants submitted that a law could relate to taxation even though it provided for a payment to achieve an object other than the correction of a taxation error. The present difficulty, however, is that the Tax Bonus Act, although devised to achieve an object other than the correction of a taxation error, has no other connection with rights and liabilities in relation to taxation …

[455] It was not an intended effect of the Tax Bonus Act to generate an incentive for taxpayers to file their tax returns [by 30 June 2009] … [The date was merely] a means of assisting ascertainment of which taxpayers would and which taxpayers would not be eligible for the tax bonus. Like other references to taxation integers, it helped mark out a class of persons to which the law would apply. But neither it nor the other markers gave the law the character of one relating to tax …

[456] Unlike the legislation upheld in *Mutual Pools & Staff Pty Ltd v Commonwealth*, the Tax Bonus Act did not regulate and define “rights of refund of amounts unnecessarily or mistakenly paid to the Commonwealth in discharge of asserted taxation liabilities” [179 CLR at 183] … It cannot be said that the Commonwealth was acknowledging that it had “mistakenly imposed” too much tax on the persons falling within s 5 of the Tax Bonus Act, and was saying “we want to hand it back.” The Commonwealth was not acknowledging any mistake. It had not made any mistake …
It did not want to “hand back” something mistakenly received. It wanted to hand over sufficient monies to stimulate the economy …

[457] The defendants made a concession that if the Tax Bonus Act could only be validated by recourse to s 51(ii), it could not be supported “to the extent that it would authorise payment to an individual of [a] tax bonus that is in excess of that individual’s adjusted tax liability.” However, they submitted that the Tax Bonus Act could be read down and remain valid so far as it was not in excess of power. But the submission only extended to a reading down of the Tax Bonus Act which would cure that relatively minor defect. The defendants did not submit that even if the much more radical defect discussed in the preceding paragraphs existed, the Tax Bonus Act was nonetheless capable of being validated by being read down. The decision to abstain from that submission was correct. The only reading down submission advanced by the defendants was structured so as to deal with the consequences of their concession – not the much more radical defect.
(d) Supplement to Chapter 16, §6

In *Pape v Commissioner of Taxation* [2009] HCA 23, legislation enacted as part of a “fiscal stimulus package” to minimise the effects on the Australian economy of the global financial crisis that emerged in 2008 was upheld in its entirety (by a 4:3 majority) on the basis that a national response to the crisis was a valid exercise of Commonwealth executive power, and the legislation was incidental to that exercise. In defending the validity of the legislation, the Commonwealth had also relied on various other heads of power. The four judges who accepted the argument relating to executive power (French CJ, Gummow, Crennan and Bell JJ) had no need to consider these other suggestions; but for Hayne, Heydon and Kiefel JJ it was necessary to do so. One argument was that the legislation was valid under s 51(i) because the maintenance of a vigorous national economy would be beneficial to interstate trade and commerce, and (perhaps especially) to Australia’s trade with other countries. Hayne, Heydon and Kiefel JJ all rejected that argument.

*Pape v Commissioner of Taxation*

[2009] HCA 23

**Heydon J:** [436] [The] power to make laws with respect to “trade and commerce with other countries, and among the States” … compels a distinction between trade and commerce with other countries, and among the States, on the one hand, and other forms of trade and commerce, on the other. It does not permit an argument that trade and commerce in Australia is one indivisible whole. Nor does it permit an argument that any legislation having an effect on trade and commerce in Australia must inevitably have an effect on trade and commerce with other countries, and among the States. While it may not be necessary to demonstrate that the Tax Bonus Act is exclusively related to trade and commerce with other countries, and among the States, it is necessary to show at least that it has some definable relationship with that class of trade and commerce …

[437] To establish this relationship, the defendants posed the key question as being: “does this law have a substantial economic effect on the flow of commercial transactions, goods, services, money, credit, among the States?” …

[438] The defendants’ argument was, in summary, that the intended practical operation of the Tax Bonus Act was to inject $7.7 billion into the Australian economy and give around 8.7 million recipients the means to participate directly in trade or commerce “thereby affecting both directly and indirectly trade and commerce among the States and with other countries.” The only controversial part of this proposition is what appears in quotation marks …

[440] The first of the defendants’ submissions appeared to rest, whether or not legitimately, on the intentions or purposes of those who introduced the legislation. The submission was that the Explanatory Memorandum to the Bill for the Tax Bonus Act explained it as part of a package to give effect to the government’s “Nation Building and Jobs Plan”, which was “introduced to assist the Australian people [to] deal with the most significant economic crisis since the Second World War and [to] provide immediate economic stimulus to boost demand and support jobs.” However, the Explanatory Memorandum does not establish the legislative purpose necessary to support the submission, namely a purpose that the trade and commerce in which recipients of the bonus will participate will be trade and commerce with other countries, and among the States …

[441] The same is true of other indications of legislative purpose. Thus the government’s “Updated Economic and Fiscal Outlook” (February 2009) contended that a purpose underlying the decision to provide for tax bonuses was, together with all the other elements in the “Nation Building and Jobs Plan”, to “support economic growth and jobs in Australia”, and … “deliver an immediate stimulus to the economy to support growth and jobs now”. These goals are neutral as between the impact on trade and commerce with other countries, and among the States, on the one hand, and other types of trade, on the other. It was not demonstrated to be the case that if there is a significant impact on the latter types of trade and commerce it will merely be a collateral and unintended result of endeavouring to provide the former type …

[442] Leaving aside s 15AB of the *Acts Interpretation Act* 1901 (Cth) and the capacity at common law to resort to other material giving contextual background, the only evidence of
statutory purpose is that to be found by construing the statute. The Tax Bonus Act does not reveal a purpose of having an impact on trade and commerce with other countries, and among the States, as distinct from other kinds of trade …

[443] The second submission … appeared to turn not on the purposes of those who promoted the legislation, but on its likely effects. The submission was that “[t]he Court of Cessation will have a material effect on the amount of” trade and commerce with other countries, and among the States …

[444] Nothing in the provisions of the Tax Bonus Act reflects any criterion ensuring that particular recipients are more likely to make expenditures, if they make expenditures at all, in trade and commerce with other countries, and among the States. The Act is structured so as to target a class – persons with taxable incomes between nil and $100,000, divided into three subclasses. The class as a whole is not inherently likely to favour trade and commerce with other countries, and among the States, as the object of their expenditures. The same is true of each subclass …

[446] [T]he Court of Cessation referred to the financial modelling underlying the “Nation Building and Jobs Plan”. But no financial modelling was cited to support the alleged reasonable anticipation that the expenditure of the bonus payments would have a material effect on the amount of trade and commerce with other countries, and among the States. Indeed the defendants specifically conceded that no financial modelling of that kind had been done. All they pointed to was modelling indicating an effect on gross domestic product of 0.5 percent by June 2009 and another 0.75 to 1 percent by June 2010 … [W]hile these figures measure an impact on trade and commerce, they do not measure any impact on trade and commerce with other countries, and among the States …

[447] The defendants accepted that the payments were “not focused on interstate trade and commerce”, but were focused on trade and commerce in general. However, they submitted that the desired effect on gross domestic product gave the payments a sufficient practical connection with trade and commerce with other countries, and among the States. That submission must be rejected. It ignores a necessary distinction. It fails to bridge a gap not otherwise bridged. It could not be correct unless s 51(i) were rewritten by leaving out the last seven words …

[448] The answer to the question posed by the defendants as the key one is “no”. But even if it is assumed that the spending of the bonus payments will have some eventual connection with trade and commerce with other countries, and among the States, it has not been demonstrated [to use the words of Dixon J in Melbourne Corporation v Commonwealth (1947) 74 CLR 31 at 79] that the connection is more than “insubstantial, tenuous or distant”. Hence “[the legislation] cannot be described as made with respect to” that kind of trade and commerce.

Hayne and Kiefel JJ: [375] It may be accepted that the Impugned Act was promoted and passed with the hope that many recipients would spend the sum paid. Those who do spend the money may spend it in a way that constitutes international or interstate trade and commerce. But neither the legal nor the practical effect of the Impugned Act is such as to make it a law with respect to either or both of international or interstate trade and commerce …

[376] The Commonwealth submitted that the question critical to the engagement of s 51(i) in this case was one about the practical effect of the Impugned Act. In particular, would the Impugned Act have “a substantial economic effect on the flow of commercial transactions, goods, services, money, credit, among the States?”

[377] It is not necessary to decide whether an affirmative answer to the question posed by the Commonwealth would suffice to show that the Impugned Act is a law supported by s 51(i). It was not submitted that the material in the Special Case directly answered the factual question posed by the Commonwealth. The material in the Special Case showed that the “$42 billion Nation Building and Jobs Plan” announced in February 2009 (of which the Impugned Act was one component) was designed to provide “a boost to the economy of around ½ per cent of [Gross Domestic Product] in 2008-09 and around ¾ to 1 per cent of GDP in 2009-10” … But the material in the Special Case shows no estimation of how the increase in Gross Domestic Product relates to trade and commerce with other countries, or among the States. As the Commonwealth acknowledged in argument, “nobody has modelled the precise effect on the flow of transactions among the States”.

[378] The Impugned Act is not a law with respect to trade and commerce with other countries, and among the States.
In *Pape v Commissioner of Taxation* [2009] HCA 23, the High Court considered a challenge to aspects of the “fiscal stimulus package” mounted by the Rudd government in response to the global financial crisis that emerged during 2008. The Commonwealth claimed that the package was valid under various heads of power, including the external affairs power. One basis for this claim was simply that the origins of the financial crisis were geographically external to Australia, and that the government was trying to defend the Australian economy against pressures arising from outside Australia. French CJ, Gummow, Crennan and Bell JJ did not consider this argument, since they held that the relevant legislation was valid on other grounds (see Chapter 12, §2(b)). However, those judges who did consider the “externality” argument gave it short shrift.

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**Hayne and Kiefel JJ:** [369] The causes of the financial difficulties which now confront Australia may be found in events occurring outside Australia. Those events and their consequences have affected many countries. The Impugned Act provides for payments to Australian taxpayers with a view to reducing the domestic consequences of those events. The Impugned Act is directed, and directed only, to providing a fiscal stimulus to the Australian economy. It is not a law with respect to any matter or thing external to Australia.

**Heydon J:** [465] There is authority, not challenged in this case, which holds that a place, person, matter or thing outside Australia is within the phrase “external affairs”. Hence, on that authority, a law relating to a place, a person, a matter or a thing outside Australia can be a valid law pursuant to s 51(xxxix) – for example, war crimes committed in Europe, or sexual crimes committed in Thailand. But it does not follow that a law regulating matters and things within Australia falls within the external affairs power simply because a cause of the perceived need to regulate those Australian matters and things arose outside Australia. That kind of law relates not to external affairs, but to domestic affairs. A law relating to a consequence is not necessarily a law relating to its cause …

[466] The Tax Bonus Act does not relate to the external causes of the present state of the Australian economy. The Explanatory Memorandum to the Bill for the Tax Bonus Act said that the tax bonuses were part of the Commonwealth’s plan:

“to assist the Australian people [to] deal with the most significant economic crisis since the Second World War and [to] provide immediate economic stimulus to boost demand and support jobs.”

Those are references to an Australian economic crisis, Australian demand and Australian jobs. The demand stimulated is demand within the Australian economy. The Tax Bonus Act is thus concerned with Australian matters and things …

[468] The rights and obligations which the Tax Bonus Act creates are not created by reference to matters and things lying outside Australia. They are created by reference to persons liable to pay Australian income tax for the period 2007-2008 who are Australian residents in that year …[The bonuses] were to be paid to the credit of a financial institution account nominated in the recipient’s income tax return for the 2007-2008 income year … [and] “maintained at a branch or office of the institution that is in Australia” pursuant to s 8AAZLH(2) of the *Taxation Administration Act 1953* (Cth) … The legislation is thus directed to internal Australian affairs, not external affairs …

[469] The defendants submitted that the Tax Bonus Act related to external affairs because the actions it mandated in Australia had effects on the global financial crisis outside Australia. However, while an improvement in the condition of Australian affairs might have beneficial effects overseas, the legislation is not specifically structured so as to achieve those effects …

[470] If the defendants’ submission were correct, it would rest upon so wide a construction of s 51(xxxix) as to make many of the platica in s 51 unnecessary. That is because a great many matters and things in Australia have been affected by external causes. Further, if the defendants’ submission were correct, it would have implications for the federal division of powers between the Commonwealth and the States.
The idea that s 51(xxix) might provide a foundation for legislation enacted in response to international recommendations was central to the Commonwealth’s attempt to rely on that head of power in Pape v Commissioner of Taxation [2009] HCA 23. However, those judges who considered the issue seemed either to require that, in order to constitute a basis for legislation, such recommendations must effectively amount to obligations, or, at least, that they must have the kind of precise and specific focus that has been required for treaty obligations before they can be implemented by legislation under s 51(xxix).

The legislation at issue in Pape (the Tax Bonus for Working Australians Act (No 2) 2009 (Cth)) was enacted as part of a “fiscal stimulus package” designed to minimise the effects of the global financial crisis that emerged during 2008. The argument was that the Group of Twenty (“the G-20”), the International Monetary Fund and the Organisation for Economic Co-operation and Development had all exhorted their member countries to introduce “fiscal stimulus packages” to help contain the damage to the national and global economy. As most fully analysed by Heydon J, that argument was interwoven with appeals to two other aspects of “external affairs”. One of them, that the global financial crisis was a matter of “international concern”, was rejected by Heydon J as having “[472] no merits” for the reasons given in XYZ v Commonwealth (2006) 227 CLR 532. The other was that international cooperation in response to the crisis was an aspect of international “comity”, and had the capacity to affect Australia’s relations with other countries.

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Heydon J: [461] The defendants submitted that a law seeking the pursuit and advancement of comity with foreign governments could be a law with respect to external affairs. They submitted that international economic agencies have called for all countries with advanced economies to pursue policies of fiscal stimulation. The Australian Government had answered the calls by agreeing to use fiscal measures to stimulate domestic demand rapidly in committing to the Declaration of the Summit on Financial Markets and the World Economy on 15 November 2008 (“the G-20 Declaration”). The Tax Bonus Act pursued international comity with foreign governments in dealing with the global financial crisis. And the defendants submitted that a failure by Australia to act had the capacity to affect its relations with other countries …

[462] [South Australia] contended that the Tax Bonus Act would be valid if it were a proportionate legislative response to an assumption by the Australian Government of “a precise and identifiable international obligation or international commitment” or to receipt by the Australian Government of “a specific and identifiable recommendation of a relevant international organisation”. South Australia did not rely on any recommendation. But it identified an “international commitment” in the following words in the G-20 Declaration, appearing under the heading “Actions Taken and to Be Taken”:

“Against this background of deteriorating economic conditions worldwide, we agreed that a broader policy response is needed, based on closer macroeconomic cooperation, to restore growth, avoid negative spillovers and support emerging market economies and developing countries. As immediate steps to achieve these objectives, as well as to address longer-term challenges, we will: …

• Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability.”

[463] The defendants joined South Australia in advancing this submission. They said that the G-20 Declaration was an agreement – not an agreement “made within any formal treaty structure” and not “an enforceable agreement”, but rather a “commitment to act in a particular way for international purposes.” But the defendants did not go so far as to submit that those G-20 countries which had not complied with the commitment were departing from any agreement. The defendants also submitted that s 51(xxix) extended to implementing recommendations of international bodies
that are not binding under international law. They relied on certain “recommendations” as steps carried out in the implementation of the G-20 Declaration …

[474] The word “comity” has several meanings … The intended meaning [here] appears to be the fostering of friendly relationships between the government of Australia and other governments. Yet many kinds of legislation may improve, or damage, the friendliness of relationships between the Australian Government and other governments. To adopt the suggested criterion would be to give s 51(xxix) a meaning far beyond anything yet recognised in the authorities …

[475] If legislation is to be validated by recourse to a treaty (or international commitment) that treaty or commitment must set out a regime defined with “sufficient specificity to direct the general course to be taken” by the relevant states [Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 at 486] … [It] need not have the precision necessary to establish a legally enforceable agreement at common law, but it must avoid excessive generality …

[476] [T]he passage quoted above from the G-20 Declaration … is no more than aspirational. It does not say which fiscal measures are to be used. What is stated leaves it very much open to individual governments to decide whether to use fiscal measures, and, if so, which ones. That is because of the words “as appropriate”. It is also because of the reference to “maintaining a policy framework conducive to fiscal sustainability”, which points against deficit spending. As New South Wales submitted, it is a qualified proposition on which governments can agree, but it “commits to nothing, because different views quite reasonably can be taken of what is sufficient to stimulate domestic demand to rapid effect as appropriate, and what is necessary to maintain fiscal sustainability.” It is what might be expected of an organisation like the G-20, which concentrates on discussion, dialogue and influence, and which has a diverse membership. It is highly improbable that in the ordinary course the deliberations of such a body would generate obligations in international law. In Victoria v The Commonwealth it was said that an “external affair” did not exist where all that was stated was a “broad objective with little precise content and permitting widely divergent policies by parties” [187 CLR at 486]. Yet that is all the G-20 Declaration does. The defendants submitted that it went further, because the “words of commitment” given by the G-20 nations had triggered “an overall sameness about the nature of the responses.” That was not demonstrated by the material the defendants referred to. In any event, the existence of parallel conduct does not necessarily demonstrate a commitment to pursue it …

[477] The defendants submitted that the requirement in Victoria v The Commonwealth that the treaty have sufficient specificity should be read in the light of the fact that Arts 4 and 5 of the World Heritage Convention were held to be sufficient in The Commonwealth v Tasmania [(Tasmanian Dam Case) (1983) 158 CLR 1]. If the language in one case is to be assessed in the light of the decision in another, the appropriate process in these proceedings seems to be the opposite of that argued by the defendants. That appropriate process would be to read what was said in The Commonwealth v Tasmania, a case in which the Court was sharply and closely divided on many questions, in the light of the detailed treatment of specificity by five Justices in the later decision of Victoria v The Commonwealth. In any event, the World Heritage Convention was a solemn treaty. It was made under the auspices of the General Conference of the United Nations Educational, Scientific and Cultural Organisation. It followed the usual course for treaties of going through lengthy processes of negotiation, adoption, ratification and eventually entry into force. In those respects it is in sharp contrast with the G-20 Declaration. The G-20 Declaration falls more into the genre of public relations than the genre of treaties …

[478] [T]he defendants also relied … on the whole of the section “Actions Taken and to Be Taken” from the G-20 Declaration. That contained an account of international economic problems and the actions already taken to deal with them. It also contained five bullet points reflecting agreements in addition to the one appearing as part of the passage quoted above. The only one containing an agreement arguably referable to the Tax Bonus Act is an agreement to “[c]onduct vigorous efforts and take whatever further actions are necessary to stabilize the financial system.” But an agreement that “further actions are necessary” is far too unspecific to give constitutional validity to a particular and highly specific action like enacting the Tax Bonus Act. As New South Wales correctly submitted, that “is a most unlikely, waffly or aspirational statement to engage Commonwealth legislative power” …
Recommendations by international agencies cannot support the validity of the Tax Bonus Act. Any support they can give to a law enacted in reliance on s 51(xxix) exists only where they are pronounced in order to give effect to the terms of a treaty to which they relate. The defendants relied on the following words of Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry* [(1936) 55 CLR 608 at 667]:

“[T]he Parliament *may* well be deemed competent to legislate for the carrying out of ‘recommendations’ ... resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.” (emphasis added)

The defendants said that that passage, which was quoted in *Victoria v Commonwealth* [187 CLR at 483], was actually applied in that case. That is not so. In that case the Court specifically declined to decide whether legislation enacted to carry out the recommendations of international agencies made otherwise than in order to give effect to the terms of a treaty to which they relate could be supported by s 51(xxix). The better view is that it cannot, because mere recommendations do not create international obligations. In any event, even if some recommendations could do so, the recommendations relied on in this case are too vague …

The defendants relied on two passages in a document dated 28 January 2009 issued by the International Monetary Fund and entitled “World Economic Outlook Update”. The first was:

“Monetary and fiscal policies need to become even more supportive of aggregate demand and sustain this stance over the foreseeable future, while developing strategies to ensure long-term fiscal sustainability.”

The other was:

“In current circumstances, the timely implementation of fiscal stimulus across a broad range of advanced and emerging economies must provide a key support to world growth. Given that the current projections are predicated on strong and coordinated policy actions, any delays will likely worsen growth prospects. Countries that have policy room should make a firm commitment to do more if the situation deteriorates further. Fiscal stimulus packages should rely primarily on temporary measures and be formulated within medium-term fiscal frameworks that ensure that the envisaged buildup in fiscal deficits can be reversed as economies recover and that fiscal sustainability can be attained in the face of demographic pressure. Countries that have more limited fiscal space should focus their efforts on supporting the financial sector and credit flows, while ensuring that budgets adjust to less favorable external conditions.” (footnote omitted)

These passages say nothing specific about tax bonuses, and they impose no obligation to grant them.

Further, the International Monetary Fund is established by the Articles of Agreement of the International Monetary Fund, a treaty to which Australia is a party. Article VIII (“General Obligations of Members”) does not create an obligation on any party to comply with a recommendation either of the International Monetary Fund itself or of its officials. Nor does any other Article …

The defendants also relied on various passages in a “Note by the Staff of the International Monetary Fund” on a meeting of G-20 deputies held in London on 31 January and 1 February 2009. Under the heading “Executive Summary” it was stated …:

“[W]ith constraints on the effectiveness of monetary policy, fiscal policy must play a central role in supporting demand, while remaining consistent with medium-term sustainability. A key feature of a fiscal stimulus program is that it should support demand for a prolonged period of time and be applied broadly across countries with policy space to minimize cross-border leakages.”

Later still, in a section headed “Fiscal Policy” …, the document stated that G-20 countries had adopted (or planned to adopt) fiscal stimulus measures amounting on average to 0.5 percent of GDP in 2008, 1.5 percent in 2009 and about 1.25 percent in 2010. It … reported that many countries had announced plans “to protect liquidity-constrained or vulnerable groups”. Examples of these plans were given, including Australian plans to support children and pensioners. The document then estimated that the fiscal stimulus plan would increase GDP growth by 0.5 to 1.25 percent. These passages do not envisage anything like the Tax Bonus Act and have no relevance to it. The Act does not “protect liquidity-constrained or vulnerable groups”. Instead it selects them as suitable recipients of the bonus because of the expectation that they will spend it quickly …
Supplement to Chapter 19, §4(c)

[483] The defendants relied next on a document issued by the Organisation for Economic Co-operation and Development. It was a “Statement on IMF-OECD-World Bank Seminar on the Response to the Crisis and Exit Strategies” … This [document] creates no specific obligation on any nation. Indeed, it recommends no specific action for Australia.

[484] The Organisation for Economic Co-operation and Development was created [in 1960] by the Convention on the Organisation for Economic Co-operation and Development, to which Australia is a party. Article 5 provides:

“In order to achieve its aims, the Organisation may:
(a) take decisions which, except as otherwise provided, shall be binding on all the Members;
(b) make recommendations to Members; and
(c) enter into agreements with Members, non-member States and international organisations.”

The document relied on by the defendants is neither a decision nor an agreement. It is at most a recommendation. Since it is a statement not of the Organisation for Economic Co-operation and Development alone, but of an “IMF-OECD-World Bank Seminar”, it is doubtful whether it is even an Organisation for Economic Co-operation and Development recommendation. The defendants contended that the recommendations were not made under Art 5. If the power to make them lies elsewhere, there is even greater difficulty in triggering s 51(xxix).

Hayne and Kiefel JJ: [370] It is not shown that Australia has undertaken any international obligation sufficient to found the Impugned Act in the external affairs power. It was submitted that there is an international agreement or understanding to make a co-ordinated international response to a global economic problem. The agreement or understanding was said to have two sources. First, reference was made to a Declaration of the Summit on Financial Markets and the World Economy made by the leaders of the Group of Twenty (“the G-20”) on 15 November 2008 in Washington DC. Australia is a member of the G-20. Secondly, reference was made to some recommendations of the IMF and the Organisation for Economic Co-operation and Development (“the OECD”). Australia is a member of each of those organisations.

[371] As was pointed out in Victoria v The Commonwealth (Industrial Relations Act Case) [(1996) 187 CLR 416 at 486-7], legislation may be supported under the external affairs power if the legislation gives effect to some international obligation. But as also pointed out in that case, what is said to be the legislative implementation of a treaty may present some further questions for consideration, including whether the treaty in question sufficiently identified the means chosen in legislation as one of the ways in which parties to the treaty are to pursue some commonly held aspiration expressed in the treaty. In the present case, however, it is not necessary to examine these questions. It is sufficient to observe that neither the Declaration by the leaders of the G-20, nor the recommendations of either the IMF or the OECD, imposed any obligation on Australia to take action of the kind now in question.

[372] The chief focus of the Declaration by the leaders of the G-20 was the articulation of some “common principles for reform of financial markets” and the statement of an “action plan to implement principles for reform”. Whether the statement of these principles, or the settling of an action plan, are to be understood as imposing obligations on participants need not be considered. What the Commonwealth submitted to be the relevant obligation was not contained in these parts of the Declaration. Rather, the relevant obligation was said to be contained in a part of the Declaration that described “Actions Taken and to Be Taken”. Under that heading, the Declaration recorded that the nations represented had taken certain actions and would take a number of steps to “restore growth, avoid negative spillovers and support emerging market economies and developing countries”. Six steps were set out. One of them was:

“Use fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability”.

Read in the context of the Declaration as a whole it is evident that none of the six steps described was intended to bind the nations whose leaders signed the Declaration to any particular course of action. Rather, the document as a whole made plain (by its use of expressions like “as appropriate”) that it was for each nation to chart its own course in responding to the circumstances that have arisen. The Impugned Act was not enacted in fulfilment of any obligation on Australia recorded in the Declaration of the leaders of the G-20.
The recommendations made by the IMF and the OECD are of a similarly advisory or hortatory character. In a *World Economic Outlook Update*, published in January 2009, the IMF said that “[m]onetary and fiscal policies need to become even more supportive of aggregate demand and sustain this stance over the foreseeable future, while developing strategies to ensure long-term fiscal sustainability” and further, that “the timely implementation of fiscal stimulus across a broad range of advanced and emerging economies must provide a key support to world growth”. But these and similar statements made by staff of the IMF in a paper presented to a meeting of the Deputies of the G-20 did no more than point to the perceived need for action to be taken by individual nations if there was to be a durable recovery in global economic activity. They imposed no obligation upon any nation.

The Impugned Act is not a law with respect to external affairs.
The close connection between the need for “standing” and the need to present a “matter”, emphasised in *Croome v Tasmania* (1997) 191 CLR 119, was emphasised again in *Pape v Commissioner of Taxation* [2009] HCA 23. The case involved a challenge to the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth), which provided for a one-off bonus payment to taxpayers whose taxable income in the previous year 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. The legislation was challenged by Mr Bryan Pape, a Senior Lecturer in Law at the University of New England. He claimed standing on the basis that he himself was putatively entitled under the legislation to a bonus of $250, and must therefore have standing to argue that that entitlement itself was invalid. The Commonwealth conceded that he had standing to challenge the validity of his own entitlement, but contended that, if he were successful, the result would be only to invalidate his own entitlement, leaving the general operation of the Act unimpaired. The High Court rejected this contention.

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**French CJ:** [45] The Commonwealth accepted that Mr Pape had a sufficient interest and therefore standing to seek a declaration that the tax bonus payable to him is unlawful and void. However, it maintained that he did not have standing to seek a declaration that the Tax Bonus Act is invalid. In particular, it was submitted, he could not argue that the Tax Bonus Act was invalid in its application to persons who would receive a tax bonus of a greater amount than the tax that they paid given that he himself will not be in that class of persons.

[46] The submission was an unattractive one. It assumed that if Mr Pape were to succeed in establishing that the payment to him was unauthorised because the Tax Bonus Act was beyond power, there would be no consequence beyond his entitlement. It is difficult to imagine how the Commonwealth, faced with a finding by this Court that the Tax Bonus Act is invalid, could confine the application of that finding to Mr Pape and disregard it in its application to the remainder of those purportedly entitled under the Act. A declaration of invalidity of the Act would reflect the resolution of a question forming part of the matter in respect of which Mr Pape has invoked this Court’s jurisdiction …

[47] There is a long history of judicial caution in relation to the standing of private individuals to challenge the validity of statutes absent some particular or special interest to be advanced by such challenge. The Supreme Court of the United States described the relation of taxpayer to federal government as “shared with millions of others” and “comparatively minute and indeterminable” [*Massachusetts v Mellon*, 262 US 447 at 487 (1923)] …

[49] Private challenges to spending arrangements have also encountered standing difficulties. In the *AAP Case* [(1975) 134 CLR 338 at 402], Mason J observed that the activity there under challenge created no cause of action in the individual citizen … Similarly, in *Attorney-General (Vict); Ex rel Black v Commonwealth* [(DOGS Case) (1981) 146 CLR 559 at 589], Gibbs J did not think that plaintiffs who were taxpayers and parents of children at government schools had a sufficiently “special interest in the subject matter” of an action to challenge the validity of grants made under s 96 for the purposes of funding church schools …

[50] The question of standing is not readily detached from that of jurisdiction where the jurisdiction is federal. In *Croome v Tasmania* [(1997) 191 CLR 119 at 132], Gaudron, McHugh and Gummow JJ pointed to the conceptual awkwardness, if not impossibility, of the attempted severance between questions going to the standing of the plaintiffs and those directed to the constitutional requirement that federal jurisdiction be exercised with respect to a “matter” …

[51] The interdependence of jurisdiction and standing was revisited in *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [(1998) 194 CLR 247 at 262]: “[I]n federal jurisdiction, questions of ‘standing’, when they arise, are subsumed within the constitutional requirement of a ‘matter’. This emphasises the general consideration that the
principles by which standing is assessed are concerned to ‘mark out the boundaries of judicial power’ whether in federal jurisdiction or otherwise.” (footnotes omitted)

[52] Mr Pape’s standing was conceded in relation to his challenge to the lawfulness of the payment to be made to him under the Tax Bonus Act. That concession concludes the question of his standing for the purpose of the relief he claimed. It was a necessary part of the disposition of the matter before the Court that it determine whether the Tax Bonus Act was valid. Declaratory relief which Mr Pape sought would reflect, were he to succeed, [the] findings made by the Court leading to the conclusion that he was not entitled to the tax bonus payment. He would be entitled to a declaration of invalidity in relation to the Act reflecting that conclusion.

Gummow, Crennan and Bell JJ: [152] It is now well established that in federal jurisdiction, questions of “standing” to seek equitable remedies such as those of declaration and injunction are subsumed within the constitutional requirement of a “matter”…

[153] The defendants submit that the plaintiff has standing to challenge the payment of the tax bonus to him but “does not have standing to challenge the validity of the payment of tax bonus to anyone else”. The defendants are supported in this submission by New South Wales, South Australia and Western Australia.

[154] It is accepted, for example, … that (i) the plaintiff has a right to payment by the Commissioner of the tax bonus pursuant to s 7 of the Bonus Act, and (ii) there thus is an immediate right and duty in the relationship between the plaintiff and the defendants which gives rise to a justiciable controversy. However, it is submitted that while the relief the plaintiff may obtain includes the injunction he seeks against the Commissioner, it cannot include a declaration against the Commissioner and the Commonwealth of invalidity of the Bonus Act. That outcome is said … to be dictated by the absence in the plaintiff of a “particular interest in that broader issue of validity”.

[155] This and other submissions to like effect should be rejected. They proceed from erroneous assumptions as to the nature and incidents in the present case of the adjudication of matters arising under the Constitution or involving its interpretation, and thus give insufficient weight to the place of the rule of law in the scheme of the Constitution.

[156] It may be accepted, to adapt the words of Starke J in The Real Estate Institute of NSW v Blair [(1946) 73 CLR 213 at 227], that the plaintiff cannot “roam at large” over the Bonus Act and that he should be restricted to a declaration of invalidity with respect to those provisions applying to him, so far as they are unauthorised by the Constitution.

[157] However, the Bonus Act is a statute of nine sections which together present what appears to be an inseverable whole. The plaintiff’s entitlement is in an amount of $250 (s 6(c)). Other persons qualify for $900 (s 6(a)), or $600 (s 6(b)). Assume that the plaintiff demonstrates the invalidity of so much of the statute as purports to confer his entitlement to the $250. A question of severance would then arise as to the operation of the statute with respect to the payments of $900 and $600. The plaintiff has the competence, as a step in the resolution of the controversy between him and the defendants, to embark upon that question as it may arise.

[158] The disposition of the controversy between the plaintiff and the Commissioner and the Commonwealth does not turn solely upon facts or circumstances unique to the plaintiff. If the plaintiff succeeds in establishing, as a necessary step in making out his case for relief, that the Bonus Act is invalid, then the reasoning of the Court upon the issue of invalidity would be of binding force in subsequent adjudications of other disputes.

Heydon J: [401] On the defendants’ approach, even if the Court held the Tax Bonus Act invalid in relation to the plaintiff, the Commonwealth could continue to treat it as valid in relation to all other persons to whom it applies, and make payments under it even though the duty to do so depended on a statute which had been enacted beyond power, unless each of those persons instituted proceedings similar to those instituted by the present plaintiff. The defendants contemplated that bizarre and unimaginable state of affairs with remarkable equanimity. In fact, it would not arise. The concession that the plaintiff has standing in relation to his own position entails the conclusion that he has standing for all purposes. The defendants’ submissions rest on the theory that the Tax Bonus Act could be void in relation to the plaintiff but not in relation to all other persons to whom it applies. That theory is wrong. If the Act is void in relation to the plaintiff, it must be void for all similarly placed persons upon whom an entitlement is conferred.