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Commonwealth Financial Powers – Taxation, Direct spending and Grants – Scope and Limitations

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Abstract

The traditional approach to the topic of fiscal federalism is generally to highlight the limited capacity of State governments to independently raise sufficient revenue to acquit their extensive responsibilities in major service areas including health, education and transport. This is then contrasted with the financial strength of the Commonwealth which it employs to effect policy domination over the hapless States, who, driven by penury, accept offers of ‘financial assistance’ on such terms and conditions as the Commonwealth thinks fit. The effects of this have, as many have illustrated at length, been harmful to accountability and responsible government on one hand and the vitality of the federal division of power on the other.

However, in just the last three years, there have been two important developments in fiscal federalism that present the opportunity for a reappraisal of this all too familiar landscape. The two developments are, of course, the 2009 decision of the High Court in *Pape v Federal Commissioner of Taxation* and the 2008 Intergovernmental Agreement on Federal Financial Relations. This paper considers both to offer a contemporary assessment of the state of Australian federalism and intergovernmental relations.

Commonwealth Financial Powers – Taxation, Direct spending and Grants – Scope and Limitations

Andrew Lynch^{*}

My brief is to examine the state of fiscal federalism in Australia today. The traditional approach to this topic is generally to highlight the limited capacity of State governments to independently raise sufficient revenue to acquit their extensive responsibilities in major service areas including health, education and transport. This is then contrasted with the financial strength of the Commonwealth which it employs to effect policy domination over the hapless States, who, driven by penury, accept offers of 'financial assistance' on such terms and conditions as the Commonwealth thinks fit. In short, the Australian federal system has long possessed one of the more pronounced cases of 'vertical fiscal imbalance' – a mismatch between revenue collection and expenditure responsibilities across the tiers of government. The effects of this have, as many have illustrated at length, been harmful to accountability and responsible government on one hand and the vitality of the federal division of power on the other.

However, in just the last three years, there have been two important developments in fiscal federalism that present the opportunity for a reappraisal of this all too familiar landscape. To be sure, the fundamental elements as crudely outlined have not altered. Australia's vertical fiscal imbalance has not magically righted itself and indeed shows no sign of doing so. But there is much to be said for thinking about the

^{*} Director, Gilbert + Tobin Centre of Public Law and Associate Professor, Faculty of Law, UNSW. This paper was presented at the Constitutional Centre of Western Australia, *Power & Politics: New Dimensions of Federalism In Australia*, 2-3 July 2011. I gratefully acknowledge the research assistance of Jackie Hartley in preparation of this paper.

overall picture in new, and I will argue, fairly positive, ways. The two developments are, of course, the 2009 decision of the High Court in *Pape v Federal Commissioner of Taxation*¹ (which I shall refer to as the *Tax Bonus Case* since I want to discuss additional commentary by Mr Pape without causing unnecessary confusion) and the 2008 Intergovernmental Agreement on Federal Financial Relations.

As we shall see, it is entirely possible for different people to have distinctly different reactions to both the High Court decision and the IGA. While I am certainly of the view that there are elements of both of which one has good reason to be wary, let me say at the outset that I think they must be approached with a frank appreciation of the unhealthy state of fiscal federalism beforehand. Rather than repeat the familiar tropes with which I just began about the extent and effects of financial imbalance between the Commonwealth and States, I would simply point to the decision in the dying days of the Howard government to acquire responsibility for, and so 'save', the Mersey Valley Hospital in Tasmania under the rubric of so-called 'aspirational nationalism'. The Coalition's loss of the 2007 election meant that this seemingly unpredictable and alarmingly anti-federalist ethos was not afforded an opportunity to flourish. While the *Tax Bonus* decision and the 2008 IGA cannot perhaps ensure that 'aspirational nationalism' or something like it ever takes root, they together represent a clear reorienting away from that possibility. I should think that gladdens even the most strident critics of either.

I will address the topics of spending and grants chiefly through discussion of these recent developments, rather than give what would be, to this audience I am

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¹ (2009) 238 CLR 1.

confident, a largely unnecessary chronological history. Inevitably though, the past frames the present but I shall try to draw on it only as necessary. With that in mind, let us turn firstly to Commonwealth spending.

The Commonwealth's Spending Power after the *Tax Bonus Case*

The *Tax Bonus Case* concerned a challenge by Bryan Pape to the *Tax Bonus for Working Australians Act (No 2) 2009 (Cth)*. The Act provided that the Taxation Commissioner was required to issue 'tax bonus' payments of one of three fixed amounts to all Australian residents with a taxable income of or under \$100,000 and an adjusted tax liability of more than nil in the 2007-08 income year. The purpose of these payments was to 'provide immediate economic stimulus' so as to guard against the effects of the 'Global Financial Crisis'. Section 3 of the Act enabled the bonuses to be drawn against a standing appropriation from Consolidated Revenue.

The *Tax Bonus Case* undoubtedly throws up several major questions, some of them fairly worrying, but it does at least manage to conclusively answer one that had hitherto eluded clear determination by the Court. The notion that s 81 of the Commonwealth Constitution provided a source of power for the federal executive to spend money it appropriated from Consolidated Revenue attracted a fair level of implicit support in the *Pharmaceutical Benefits Case* of 1945 and the *AAP case* thirty years later, despite division as to whether this power was at large or was limited by the qualification that an appropriation be "for the purposes of the Commonwealth".

The meaning of that phrase takes on far less significance in light of the unanimous view of the Court in the *Tax Bonus Case* that neither s 81 nor the further requirement

in s 83 that no money shall be drawn from the Treasury “except under appropriation made by law” confers a substantive power upon the Commonwealth to enact legislation authorising the expenditure of money so appropriated.² As the Chief Justice said, the provisions in question:

‘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.’³

With the Commonwealth’s expenditure merely ‘conditioned’, rather than authorised, by the requirement for an appropriation of money by statute under ss 81 and 83, the critical question becomes that of finding substantive power ‘elsewhere in the Constitution’⁴ to support the spending in question. The legislative powers of the Commonwealth in ss 51 and 52 of the Constitution provide an obvious source and the Commonwealth did also seek to sustain the Act using the powers to make laws with respect to taxation, trade and commerce and external affairs. However, the majority judges were relieved of the need to discuss these possible sources of support by their accepting that the stimulus spending was a valid exercise of the executive power in s 61 of the Constitution, with the law enacted in exercise of the incidental power in s 51(xxxix). It was on the scope of the executive power that consensus amongst the Court came to an end resulting in a 4:3 split.

In ruling the payment of the tax bonuses within the executive power, the Chief Justice and, in a joint judgment, Gummow, Crennan and Bell JJ, articulated a view of

² See (2009) 238 CLR 1, 103 (Hayne and Kiefel JJ); further Andrew McLeod, ‘Case Note: The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*’ (2010) 32 *Sydney Law Review* 123, 129-31.

³ (2009) 238 CLR 1, 36.

⁴ (2009) 238 CLR 1, 55 (French CJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 (French CJ, Gummow and Crennan JJ).

executive power in s 61 that was something more than the combination of statutory and prerogative powers and non-prerogative capacities. Those things 'form part of, but do not complete, the executive power'.⁵ Echoing his opinion in *Ruddock v Vadarlis (the Tampa Case)*, French CJ insisted that additionally the executive power had to confer such necessary power as 'to be capable of serving the proper purposes of a national government'.⁶

Although other sources were referenced, the kernel of this idea of 'nationhood' as an additional source of executive power lies in the words of Mason J in the *AAP case* recognising for the Commonwealth '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'.⁷ That statement received a general endorsement across the Court in the *Tax Bonus Case*, albeit with Heydon J reserving judgment on its correctness. But, as Anne Twomey has argued in her fairly devastating critique, the 'nationhood' dimension of executive power as expressed by Mason J suffers from a troubled lineage despite its purported derivation from the implied legislative power raised by Dixon J in the *Communist Party Case*.⁸ Additionally, she blames 'increasingly loose dicta on the subject', especially in the Bicentennial case of *Davis v Commonwealth*, as extending the implication and sidelining the caveat applied by Mason J to his original exposition, that

'it would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers

⁵ (2009) 238 CLR 1, 60.

⁶ Ibid. Gummow, Crennan and Bell JJ, directly citing the CJ's *Tampa* reasons, expressed the view that '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', which they certainly saw as including 'the protection of the body politic or nation of Australia': 83.

⁷ *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338, 397.

⁸ Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 332-34.

to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution'.⁹

In rejecting the stimulus spending as a valid exercise of executive power, the dissenting opinions in the *Tax Bonus Case* forcefully invoked these words.¹⁰

The importance attributed to the federal structure by the two majority judgments was, however, more telling. As several commentators have pointed out, the joint judgment of Gummow, Crennan and Bell JJ was notably less concerned about setting boundaries on the potential scope of the executive power of the Commonwealth than that of the Chief Justice. Perhaps the most surprising feature of the former was the broad analogising of the power contained in s 61, so far as the raising and expenditure of public moneys, with that of 'the executive in the United Kingdom at the time of the inauguration of the Commonwealth'.¹¹ Their Honours found that a feature of the latter which had been carried over to the federal polity in Australia today was the capability to 'respond to a crisis be it war, natural disaster or a financial crisis on the scale here'.¹² There was no real attempt made to justify this claim of similarity between such challenges, yet it is far from clear that they each give rise to a corresponding requirement for action which, on Mason J's formulation, is 'peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'. While the minority judges disputed that this was satisfied,¹³ the joint judgment merely asserted that the 'point is that only the

⁹ *AAP Case* (1975) 134 CLR 338, 398.

¹⁰ (2009) 238 CLR 1, 124 (Hayne and Kiefel JJ); 181 (Heydon J).

¹¹ (2009) 238 CLR 1, 85 (Gummow, Crennan and Bell JJ).

¹² (2009) 238 CLR 1, 89 (Gummow, Crennan and Bell JJ).

¹³ (2009) 238 CLR 1, 123 (Hayne and Kiefel JJ); 178-79 (Heydon J).

Commonwealth has the resources to meet the emergency which is presented to it as a nation state'.¹⁴

Although he provided the crucial fourth vote to uphold the Act, French CJ was far more circumspect on the underlying principles in play and his reasons have been widely identified as pivotal to an appreciation of the case. His Honour would not go any further than to say that the executive power 'extends to the short term fiscal measures in question' while insisting this did not amount to a 'general power to manage the national economy'.¹⁵ Furthermore, and in contrast to the joint judgment, the Chief Justice was hesitant about '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'.¹⁶ In a further distinction, he showed no interest in equating the power in s 61 with that of the UK government, nor did he echo the suggestions in the joint judgment that the spending capacity took its measure from the breadth of the power to tax.¹⁷

Having repeated Mason J's qualification to his remarks in the *AAP Case*, the Chief Justice was express that the significance of the federal distribution of powers, as well as the separation of powers across the national government, could not be displaced by an invocation of the exigencies of 'national government'.¹⁸ The limiting effect of these constitutional principles was to be determined on a case by case basis.

¹⁴ (2009) 238 CLR 1, 91 (Gummow, Crennan and Bell JJ).

¹⁵ (2009) 238 CLR 1, 63.

¹⁶ (2009) 238 CLR 1, 24.

¹⁷ (2009) 238 CLR 1, 89-90 (Gummow, Crennan and Bell JJ).

¹⁸ (2009) 238 CLR 1, 60.

Despite the uncertainty that might be thought to attend Commonwealth spending programs as a result of all this, the Chief Justice offered the following assurance:

‘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.’¹⁹

This statement is, of course, the obvious departure point for trying to assess the significance of the *Tax Bonus Case* two years on. In late 2009, Duncan Kerr worked through a hypothetical challenge to Commonwealth spending on housing, an example of expenditure without an obvious connection to legislative or executive power he said was anything but unique.²⁰ He leaned towards such a challenge enjoying a reasonable prospect of success given the clearly stated limitations favoured by the dissenting judges in the *Tax Bonus Case* and the difficulty of predicting how any of the majority judges might decide. Cheryl Saunders has remarked on the very deliberate steps the CJ took to limit the utility of his opinion in this regard – we might go so far as to say it is ‘future-proofed’, but as Kerr pointed out, beyond the setting of a ‘national emergency’, ascertaining the likely views of the authors of the joint judgment, especially as between each other, is just as difficult.

It is for this reason that I think, without at all disputing that the case is pregnant with quite challenging possibilities regarding the legitimate scope of executive power per se, its consequences for fiscal federalism is not as dramatic as might have first appeared. Speaking to the Sir Samuel Griffiths Society in 2010, Bryan Pape said that ‘the High Court has given the executive a magic genie, but no criteria as to how it is

¹⁹ (2009) 238 CLR 1, 24.

²⁰ Duncan Kerr, ‘*Pape v Commissioner of Taxation*: Fresh Fields for Federalism?’ (2009) 9(2) QUT Law and Justice Journal 311, 315-18.

to be used, let alone stopped'.²¹ While in one sense that is a fair assessment, this new genie clearly labours under restrictions that the one previously thought to lurk in the lamp of s 81 did not.

The sparse and inconclusive judicial consideration of s 81 prior to the *Tax Bonus Case* had only fuelled the Commonwealth's assumption of an essentially unlimited spending power, despite the enigmatic presence of those words 'for the purposes of the Commonwealth' in the section. Uncertain as we are about the scope of the power in s 61 after 2009,²² no member of the Court in the *Tax Bonus Case* suggested that it was, so far as it supports Commonwealth spending, as unbounded as some earlier judges had found s 81 to be. While the joint majority judgment easily went the furthest in suggesting a broad spending capacity, even those judges expressly confined their reasons as not 'going beyond the notions of national emergency'.²³ As worryingly 'protean and imprecise' as that concept is,²⁴ it nevertheless suggests some kind of boundary – one which offers little resistance, it might be thought, to challenges to spending such as Kerr's hypothetical and also Mr Pape's more recent *bête noire*, the Commonwealth funding of local councils to construct bicycle pathways. In any case, it is wisest to understand the import of the *Tax Bonus Case* through a combination of the more confined reasoning of the Chief Justice and that of the dissenting opinions.

²¹ Bryan Pape, 'Stopping Stimulus Spending, or is the Sorcerer's Apprentice Controlling the Executive', *Third Sir Harry Gibbs Memorial Oration*, 6.

²² Contrast the views of Twomey, above n 8, 341-42 with the more limited assessment of McLeod, above n 2, 140.

²³ (2009) 238 CLR 1, 91 (Gummow, Crennan and Bell JJ).

²⁴ (2009) 238 CLR 1,122 (Hayne and Kiefel JJ).

This suggests that the case offers more of a question mark than a green light in terms of Commonwealth spending. But what use is a question mark? My colleagues Nicola McGarrity and George Williams have seized upon the precarious legitimacy of Commonwealth grants to local councils resulting from the decision as strengthening the case for the looming constitutional referendum on local government to address funding.²⁵ That certainly has implications for Australia's divided system of government, but ones presently best left merely as noted.

More directly on point, the use made by Guy and Hocking of the question mark provided by the *Tax Bonus Case* was to append it to the notion of a 'revival of co-operative federalism'.²⁶ They said:

...the case highlights a resurgence in cooperative federalism since what it means, in effect, is that the Commonwealth will be unable to use the executive and spending powers to unilaterally intervene in the dominant realm of the states to implement (for example) social welfare programmes or economic policies initiatives that cannot be directly linked to a constitutional head of power.²⁷

They went so far as to conclude that this 'will no doubt facilitate a revival of the political primacy of the states in the federal constitutional balance of power'.²⁸

Kerr, by contrast, warns that such predictions are 'premature'. With the knowing voice of government experience, he says:

The Commonwealth is unlikely to radically revise the financial mechanisms it has evolved to extend its policy agenda into areas beyond its legislative competence unless faced with the necessity of doing so. [The *Tax Bonus Case*] does not supply that necessity.²⁹

²⁵ Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164, 185-86.

²⁶ Scott Guy and Barbara Ann Hocking, 'Federalism and Tax Bonuses: Reflection in the Australian Context' (2010) 39 *Common Law World Review* 379, 408

²⁷ *Ibid* 410.

²⁸ *Ibid* 411.

²⁹ Kerr, above n 20, 319.

Quite apart from the ambiguity provided by the judicial reasons given in the case not compelling a Commonwealth withdrawal, Kerr highlights the lack of any enthusiasm on behalf of the States to reclaim areas that have come under federal control through spending by the Commonwealth.³⁰ He also points to a lack of political party interest in recalibrating the constitutional position of the States on the back of the High Court's decision.³¹

While I think this is a shrewd assessment of the significance of the *Tax Bonus Case* so far as the Commonwealth reaction goes, I do not share in Kerr's portrayal of the States nor party politics as so completely disengaged from the concept of co-operative federalism. The 2008 IGA to which I want to now turn is proof of this. Instead, I would argue that the lack of any attempt to capitalise on the signals sent by the Court in the *Tax Bonus Case* owes less to any debased 'morale and political legitimacy' on behalf of the States, and much more to an appreciation that they might actually be better off securing their role in the federal system through intergovernmental agreement rather than aspiring to reverse the tide of successive constitutional defeats on money matters since the *Federal Roads Case* of 1926.³²

To that end, in usefully suggesting to the Commonwealth that its fiscal powers are not at large, perhaps the greatest importance of the *Tax Bonus Case* is simply in underscoring the mutual gains to be made through intergovernmental co-operation.

Grants through the prism of the 2008 IGA

30

Ibid.

31

Ibid.

32

Victoria v Commonwealth (1926) 38 CLR 399.

The 2008 IGA effected a dramatic rationalisation of the use by the Commonwealth of specific purpose payments (or SPPs) to the States and directed the power to make conditional grants of financial assistance under s 96 of the Constitution in accordance with the objectives found within just six National Agreements made by the national and State governments. In essence 90 plus SPPs were replaced by block funding in the areas covered by each Agreement - education, skills, healthcare, disability, affordable housing and Indigenous reform. Arguably even more significant than the reduction of SPPs was the move away from stipulating inputs required of States to focus on their achievement of outcomes. How the States spend their funding under each Agreement to this end is far more in their own hands than was the case under the SPP system. This shift has greatly augmented the role of the COAG Reform Council, charged with assessing the performance of the States in meeting targets and as against each other. While there are issues that might rightly concern us about these new arrangements, it should be noted at the outset that they basically amount to the realisation of proposals for which various experts and the States themselves had been agitating for some time.³³ They are unquestionably an improvement on the immoderate and haphazard use of tied grants by the Commonwealth from the Whitlam through to the Howard eras.³⁴

But while the design of the 2008 IGA provided the means to capitalise on the distinctly federal benefits of diversity, innovation and competition, this is a fairly

³³ Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth-State Funding – Final Report* (2002) 3; ALP Advisory Group on Federal-State Reform (Michael Keating et al), *A Framework to Guide the Future Development of Specific Purpose Payments (SPPs)*, 31 July 2007; Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31 UNSWLJ 509, 527; Scott Bennett and Richard Webb, *Specific purpose payments and the Australian federal system*, Parliamentary Library Research Paper, No 17, 14 January 2008, 17-18.

³⁴ Geoff Anderson and Andrew Parkin, 'Federalism: a fork in the road?' in Chris Aulich and Mark Evans (eds), *The Rudd Government: Australian Commonwealth Administration 2007-2010*, (2010) 99.

fragile state of affairs. The basic workability of the scheme's dependence on performance indicators and benchmarking data, as well as clarity over objectives, roles and responsibilities were all the subject of a Heads of Treasuries review that reported to COAG in February. While those sorts of 'teething' issues were probably to be expected, the IGA remains subject to more fundamental pressures. Not the least of these is a reversion to Commonwealth control of inputs borne either of impatience with getting results under the new system, the desire to deliver on election promises or simply habit. The gains made in rationalisation of SPPs have been steadily undone by the proliferation of National Partnership Payments designed to fund specific projects and also reward States in the attainment of reform in nationally-significant areas.³⁵ The similarity between the old SPPs and the NPPs is hardly surprising – they rely on the same generous constitutional authority provided to the Commonwealth in s 96 to make grants on such terms and conditions as it sees fit.

The power in section 96, in combination with that of the Commonwealth to tax, was memorably described by Zines as 'the power to destroy'.³⁶ But, while the great financial dominance of the Commonwealth has been assisted by judicial decisions regarding these respective powers, such an outcome was, as Deakin recognised, inevitable from the outset and has been driven chiefly by 'political and economic forces'.³⁷ No alternative interpretation of either ss 51(ii) or 96 would have succeeded in thwarting this result.

³⁵ Geoff Anderson, 'Whither the Federation? Federalism under Rudd' (2010) 5(1) *Public Policy* 1, 13; Anne Twomey, 'The Future of Australian Federalism – Following the Money' (2009) 24(2) *Australasian Parliamentary Review* 11, 20-21.

³⁶ Leslie Zines, *The High Court and the Constitution* (5th ed: 2008) 483.

³⁷ *Ibid* 487.

This is not to say that Australia's very high degree of vertical fiscal imbalance is itself inevitable and a problem for which there is no remedy. But, like its cause, the solution is clearly political not legal. Essentially, it requires the Commonwealth to 'make room' for States to raise revenue independently. The failure to do so ensured that the States did not avail themselves of the Fraser government's reopening the door for them to a tax on income in the late 1970s,³⁸ and in the early 1990s signs that Prime Minister Hawke might agree to a recalibration of fiscal federalism so as to address VFI were a not insignificant factor in his vulnerability to a successful challenge for the leadership by Paul Keating.³⁹

Given this history, it is difficult to foresee how reform of vertical fiscal imbalance might occur. In not addressing either VFI, or for that matter, horizontal fiscal equalisation, the 2008 IGA has been accused of being 'predicated on the assumption that the federal financial system is structurally sound'.⁴⁰ That probably is exactly how the Commonwealth does see the lie of the land. The recently announced review into the means of distributing GST to the States shows that, at least in the unusual times of a minority government, the Commonwealth is willing to entertain a rejigging of how revenue is apportioned across the federation, but it seems safe to say that it continues to be highly satisfied with the size of its tax base relative to the States.

³⁸ Cheryl Saunders, 'The Uniform Tax Cases' in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (2003) 62, 77.

³⁹ Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998) 40-42.

⁴⁰ Gareth Griffith, *Managerial Federalism – COAG and the States* (NSW Parliamentary Library Research Service, Briefing Paper No 10/09), 29.

In light of the persistence of these underlying fiscal settings, the IGA has been criticised as little more than a further instance of the Commonwealth's continuing usurpation of the functions of State governments through exercise of its entrenched financial dominance.⁴¹ Bryan Pape has complained that 'co-operative federalism has given way to collaborative federalism and now to executive federalism'.⁴² The tension between these degrees of intergovernmental engagement was well recognised by Martin Painter in his important research into Australian federalism over the 1990s. Undeniably, the growth of COAG over the last two decades has further concentrated the dominance of executive government and poses distinct challenges for parliamentary oversight.⁴³ This demands continued attention and possibly even deeper structural reform.

But Pape's lament is more specific than this. He focuses particularly on the use of a standing appropriation from Consolidated Revenue to the COAG Reform Fund from which the Commonwealth executive may determine to make grants of financial assistance to the States and Territories on the terms and conditions set out in written agreements between them.⁴⁴ The use of a standing appropriation is not itself, as the *Tax Bonus Case* demonstrates, problematic. Pape objects that, through the elaborate statutory mechanism in respect of the IGA, the Executive is effectively left to determine the terms and conditions upon which grants of financial assistance are

⁴¹ Anne Twomey, 'Commonwealth Coercion and Co-operation' in *Upholding the Australian Constitution Volume Twenty* (The Samuel Griffith Society, Sydney, 2008) 64, 71-72; Cliff Walsh, 'Fixing Fiscal Federalism' in Robert Carling (ed), *Where To for Australian Federalism?* (Centre for Independent Studies, St Leonards, 2008) 43, 51.

⁴² Pape, above n 21, 14.

⁴³ Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31(2) *University of New South Wales Law Journal* 493; Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is it Time to Formalise COAG's place in the Australian Federation?' (2011) 39 *Federal Law Review* 103.

⁴⁴ Pape, above n 21, 9-10. The relevant legislative provision is *COAG Reform Fund Act 2008* (Cth), s 7(2).

made to the States, despite s 96 vesting this control in the hands of the legislature.⁴⁵ So much may be accepted. Pape's further arguments in this vein seek to restrict the capacity of the Commonwealth to even make intergovernmental agreements, and also to appropriate funds under s 81 for payments to the States and Territories in accordance with those agreements, beyond the areas of its legislative capacity. But if the terms and conditions that may potentially be attached to a grant under s 96 are, subject to specific limitations derived from the constitutional prohibitions on the Commonwealth's legislative capacity such as ss 51(xxxi) and 116,⁴⁶ generally at large then it seems difficult to argue that these cannot be the subject of mutually agreed understandings between the respective governments through what effectively amounts to a parliamentary delegation to the Commonwealth executive. Pape's concern over executive empowerment in this regard is appreciable but it is hard to doubt the constitutionality of these arrangements is secure. I would further submit that I find no great attraction in the alternative, so far as the conduct of federal relations is concerned. Even if the involvement of the Commonwealth in many of these areas was to cease, it seems fair to assume it would not relinquish its commanding financial position. State action in important areas would, we might presume be both underfunded and unco-ordinated.

Ultimately, I would submit that the IGA on Federal Financial Relations is to be assessed not against an idealised system of co-ordinate federalism, of the kind we have not seen since before the First World War, but instead against an appreciation of just how bankrupt the federal system might conceivably be given certain features

⁴⁵ Ibid, 14-15.

⁴⁶ See respectively *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 (French CJ, Gummow and Crennan JJ); and *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 593 (Gibbs J); 657 (Wilson J).

that we probably have to accept as immutable. The scope of the Commonwealth's powers to tax and grant money to the States are obviously foremost in this regard, but their significance is underpinned by further elements, such as the High Court validation of Commonwealth retention of surplus revenue as early as 1908.⁴⁷ Consequently, the Commonwealth's coercive capacity is a spectre that inevitably hangs over intergovernmental relations in our federal system.

Despite these elements, we remain a very long way from the bleak picture that Latham CJ in the *First Uniform Tax Case* painted for the States as a vision of their future the Court would be powerless to prevent. As his Honour recognised, the operation of financial powers upon the state of the federation was a matter for the 'political arena', not the Courts.⁴⁸ That being so, and notwithstanding the need to closely monitor its operation and specific concerns as to its fragility, I share Anderson and Parkin's assessment of the 2008 IGA as a 'genuine pro-federalist innovation'.⁴⁹

Does the Federal Financial Relations IGA do enough to rehabilitate the Federation? Almost certainly not. But does it offer more in this respect than we might have expected from the Commonwealth given the constitutional status quo? Almost certainly, it does.

⁴⁷ *NSW v Commonwealth* (1908) 7 CLR 179.

⁴⁸ (1942) 65 CLR 373, 429.

⁴⁹ Anderson and Parkin, above n 34.