His Honour dealt also with the submission that the reasons given for exercising a statutory discretion might be extraneous to any objects the legislature had in mind, by saying that:

> the point at which the argument breaks down is when it asserts that the environmental aspects of mining operations proposed to be carried on for the extraction of ore for the concentrates intended to be exported are extraneous to the scope and purpose of the *Customs Act* and the *Customs (Prohibited Exports) Regulations*[16]

Generally the unanimity of the Justices and the brevity of the judgments seem to entrench the principles under review in no uncertain fashion.

A postscript to this case is that following the plaintiffs' declining to participate in the inquiry held pursuant to the Act (and concluded before the hearing of the case) and as a result of the findings of the inquiry, permission to export the minerals was refused by the Minister as from 1 January 1977.

S. B. AUSTIN*

STATE OF VICTORIA v. THE COMMONWEALTH OF AUSTRALIA[1]

Constitutional law — Appropriations power — Constitution ss. 51, 52, 61, 81, 83, 94, 96 — Expenditure pursuant to an appropriation Act — Executive power — National implied power — Standing — Justiciability — Appropriation Act (No. 1) 1974 — 1975 s. 3, sched. 2, div. 530, item 4.

Since the *Uniform Tax Cases*[2] the Commonwealth's pre-eminence in financial matters has never been questioned. The power of the purse has given to the Commonwealth control in many areas of governmental activity over which it has no direct constitutional power. This has been achieved largely through the medium of section 96 grants, though it has not been solely limited to such means. The general appropriations power of section 81 has also been relied on to fund Commonwealth involvement in a wide range of activities. Despite the importance of this method of funding the extent and scope of section 81

[16] *Id.* 579.

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[1] (1975) 50 A.L.J.R. 157; (1975) 7 A.L.R. 277. High Court of Australia; Barwick C.J., McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

[2] *First Uniform Tax Case* (1942) 65 C.L.R. 373, *Second Uniform Tax Case* (1957) 99 C.L.R. 575.

has never been finally settled.[3] Thus when section 81 became directly in issue in *Victoria* v. *The Commonwealth*, the High Court had a fine opportunity to clarify the position. Unfortunately, far from clarifying the position, the High Court has managed to further muddy the already murky waters of the appropriations power.

The case itself concerned a challenge by the State of Victoria and the Attorney-General for that State to an appropriation of some $5,970,000 to the Australian Assistance Plan. The appropriation of this sum was contained in the Appropriation Act (No. 1) 1974-1975 (Cth). By section 3 of the Act it was provided that "The Treasurer may issue out of Consolidated Revenue Fund and apply for the services specified in Schedule 2 in respect of the year ending in 30 June 1975, the sum of $2,863,510,000". The particular appropriation impugned in Schedule 2 fell within the appropriations for the Department of Social Security contained in Division 530. Item 4 of that division read as follows:

4. Australian Assistance Plan	
01. Grants for Regional Councils for Social Development	$5,620,000
02. Development and evaluation expenses	350,000
Total	$5,970,000

The Australian Assistance Plan itself was not a creature of separate legislation, but existed as an administrative scheme within the Department of Social Security. The features of the scheme were contained in two discussion papers and a document entitled "Australian Assistance Plan—Guidelines for a Pilot Programme". Basically, the Australian Assistance Plan provided for the establishment and financing of Regional Councils for Social Development "to assist in the development, within a nationally co-ordinated framework, of integrated patterns of welfare services".[4] The Australian Assistance Plan had both a planning and operative function. Not only did it endeavour to plan and co-ordinate existing welfare services, but also it funded new services, such as family day care programs and youth clubs. Several of these Regional Councils existed in Victoria.

The two plaintiffs claimed that the above provision of the Appropriation Act was not for "the purposes of the Commonwealth" within section 81 of the Constitution and was thus invalid. In consequence of this they sought an injunction restraining the defendants (the Commonwealth and the Minister of Social Security) from spending the money that the Act had purported to appropriate. The defendants

[3] The scope of s. 81 had never been directly in point. *In Attorney-General for Victoria* v. *The Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 C.L.R. 237, s. 81 came to be considered as a means of upholding the validity of the Act setting up a pharmaceutical benefits scheme. Although the claim was rejected the scope of s. 81 did fall for discussion.

[4] (1975) 50 A.L.J.R. 157, 159 *per* Barwick C.J. quoting from *Australian Assistance Plan, Discussion Paper No. 1* (1973) 3.

asserted the validity of the appropriation and the plan. The plaintiffs demurred to the defence. In argument on the demurrer, the defendants were permitted to argue that the plaintiffs did not have standing and that the issues raised in the case were not justiciable.

By the barest of majorities[5] the claim of the plaintiffs was dismissed. The majority reasoning, however, was far from uniform, and in like manner also was the minority. The complexity of the decision stems from their Honours' different understanding of the nature and effect of an appropriation Act. To Barwick C.J., Gibbs, McTiernan and Murphy JJ. the Appropriation Act was analysed as an ordinary Act of Parliament, within the context of the appropriations power. As a result, to these justices the main focus of their decision was upon the power given in the Constitution to legislate for appropriations. For their Honours the question was the extent to which section 81 empowered Commonwealth appropriations. Although the remaining justices were not unmindful of this issue, they preferred to base their decision more upon the nature and effect on an appropriation Act itself. Thus to Mason, Stephen and Jacobs JJ. an appropriation Act was different from other Acts. What was important in their minds was not to what purpose the money was appropriated, but rather, how the money, in fact appropriated, would be spent. To this end, an analysis of the executive power (section 61) was required to see whether such money was actually spent in a manner within the executive power of the Commonwealth. To add further difficulty, there was entwined among these two orientations, questions of standing and justiciability.

Scope of Section 81

A majority of the justices came to their decision on the basis of the scope of the Commonwealth's power to make appropriations. By section 81 of the Constitution it is provided that "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth". To these justices the issue raised was whether the impugned legislation, namely, a provision of the Appropriation Act, was "for the purposes of the Commonwealth". In answer to this question two divergent views were proffered. On the one hand there was the wide view of the power by the majority justices, McTiernan and Murphy JJ. and also, on this issue, Mason J.; while on the other hand the Chief Justice and Gibbs J. took a restricted view.

McTiernan J. relied extensively (almost exclusively) upon the dicta of Latham C.J. in *Attorney-General for Victoria* v. *The Commonwealth*.[6] His Honour agreed with Latham C.J. when he said:

> the Commonwealth Parliament has a general, and not a limited, power of appropriation of public moneys. It is general in the sense

[5] The majority were McTiernan, Stephen, Jacobs and Murphy JJ., the minority consisted of Barwick C.J., Gibbs and Mason JJ.

[6] (1945) 71 C.L.R. 237.

> that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth.[7]

Latham C.J. had then continued with examples of such appropriations in the fields of exploration and scientific research. To Latham C.J. the "Commonwealth" to which the "purposes of the Commonwealth" referred should not be construed as a "political organ" or a "geographical area", but rather it "refers to the people who, by covering clause 3 of the Constitution, are 'united in a Federal Commonwealth under the name of the Commonwealth of Australia' ".[8] Given this broad approach to section 81, McTiernan J. had no trouble in upholding the appropriation in question.

Murphy J. reached a similar conclusion, though posited reasons of his own in addition to reliance upon previous authority.[9] He approached the interpretation of section 81 on basically a *reductio ad absurdum* argument. If section 81 did have limitations such as the plaintiffs proposed, namely, that the "purposes of the Commonwealth" are restricted to those purposes for which the Commonwealth is empowered to make laws under other sections of the Constitution, for example sections 51, 52, and 122, then the financial framework of the Commonwealth would be untenable. In His Honours words "it would be quite impossible to conduct the finances of the country if the appropriation power was so limited".[10] In support of this view he relied upon the opinion of a former Solicitor-General, Sir Robert Garran, in his submission on this question to the Royal Commission on the Constitution in 1929. There the Solicitor-General pointed out that numerous Acts and appropriations would be invalid if the wide interpretation was not taken. Apart from such reasoning, Murphy J. also relied upon two analytical points with respect to section 81, firstly, the Constitution itself had no express limitation upon section 81, and secondly, the different wording in section 51(xxxi), "for any purpose in respect of which the Parliament has power to make laws", indicated to Murphy J. that in section 81 no limitation was intended.

Mason J., although overall upholding the claim of the plaintiffs, on this question agreed with the opinion of McTiernan and Murphy JJ. He analysed the proposition that the section has an interpretation limited merely to those matters in respect of which the Commonwealth has power to make laws. He acknowledged that there may be analytical reasons for such a limited view, such as the surplus revenue provision of section 94; however such reasons were outweighed by the practical

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[7] *Id.* 253, referred to by McTiernan J. in *Victoria* v. *Commonwealth* (1975) 50 A.L.J.R. 157, 167.

[8] *Id.* 256 McTiernan J.'s adoption of Latham C.J.'s viewpoint should be contrasted with Gibbs J.'s opinion that the "Commonwealth" was the body politic and not "the people forming a particular community", (1975) 50 A.L.J.R. 157, 169.

[9] Murphy J. also agreed with the views of Latham C.J. in the *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237, 254-256, see *Victoria* v. *The Commonwealth* (1975) 50 A.L.J.R. 157, 185.

[10] *Victoria* v. *The Commonwealth* (1975) 50 A.L.J.R. 157, 185.

consequences of such an interpretation. For example, with a limited view of section 81, each appropriation item would be subject to judicial scrutiny. This, apart from being prejudicial to the processes of Parliament, would require all appropriations to be specifically outlined, thus producing an unworkable appropriation Act. Also the narrow view of section 81 "would deprive the Commonwealth of the power to make grants for purposes thought to be deserving of financial support by government . . . and not involving any exercise of the Commonwealth's executive power".[11] Thus for His Honour "the purposes of the Commonwealth" were "such purposes as Parliament may determine".[12]

In contrast to this broad approach, Barwick C.J. and Gibbs J. adopted the narrower view proposed by the plaintiffs. Gibbs J. reached this conclusion for two reasons. Firstly, there was the weight of previous authority. In particular, with the majority in the *Pharmaceutical Benefits* case[13] that section 81 contained an effective limitation on the purpose for which an appropriation may be made. As to the extent of that limitation His Honour took the view:

> that "purposes of the Commonwealth" are purposes for which the Commonwealth has power to make laws—purposes which however are not limited to those mentioned in sections 51 and 52 but which, as was pointed out by Starke J. (at p. 266) and Dixon J. (at p. 269) in the *Pharmaceutical Benefits Case*, may include matters incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government.[14]

Secondly, to Gibbs J. there were analytical reasons within the Constitution which demanded that the "purposes of the Commonwealth" be restricted. His Honour reasoned that to give section 81 no restriction whatever would be to deprive the words "for the purposes of the Commonwealth" of all meaning. For example, the specific expenditure provisions, such as section 51(iii) (bounties) and section 96 (State grants), would have no meaning with such a broad interpretation of section 81. Also His Honour placed some reliance upon the surplus revenue provision of section 94. That provision presupposed that there might be surplus revenue and so the States had an interest in how the revenue of the Commonwealth was disposed because they could have rights to any of the undisposed revenue.

Barwick C.J. reached the same conclusion by a similar course. However, in so doing the Chief Justice placed greater emphasis upon section 94 and its place in Australian federalism. The only cases in which the Commonwealth could appropriate monies for purposes other than those contained in the specified and enumerated powers in respect of which it could make laws were under section 96 and for purposes

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[11] *Id.* 177.

[12] *Ibid.*

[13] (1945) 71 C.L.R. 237 *per* Dixon, Rich, Starke and Williams JJ.

[14] *Victoria* v. *The Commonwealth* (1975) 50 A.L.J.R. 157, 169. Gibbs J. only considered the extent of the national implied power to the point where the welfare scheme under consideration would not be within such a power.

"inherent in the fact of nationhood and of international personality".[15] Even in those cases there are restrictions. Firstly, with respect to section 96 grants, a State cannot be forced to accept a grant with attached conditions. Secondly, with respect to the national implied power, merely because a thing is of national interest, for example the economy, that does not automatically bring it within the scope of the Commonwealth's appropriations power; but items which do come within the power include such matters as exploration, research and the creation and maintenance of departments of state.[16]

From this examination of the scope of the appropriation power, the different perspective of the other justices should now be considered. In this regard, the judgment of Mason J. provides an excellent link. His Honour recognised that although what had been challenged was an individual item in the Appropriation Act, and thus the scope of the appropriation power fell to be considered, what in effect was being objected to was the expenditure by the executive of moneys which had been appropriated to a particular administrative scheme. In fact His Honour ultimately based his decision upon that ground.

Expenditure by the Executive of Appropriated Money

Three of their Honours drew a distinction between the appropriation of money by Parliament and the actual expenditure of such money. In the words of Mason J.:

> An appropriation, as I have explained, has a limited effect. It may provide the necessary parliamentary sanction for the withdrawal of money from Consolidated Revenue and the payment or subscription of money to a particular recipient or for a particular purpose but it does not supply legal authority for the Commonwealth's engagement in the activities in connection with which the moneys are to be spent.[17]

This dictinction becomes crucial in the opinion of Stephen, Mason and Jacobs JJ.: for Stephen J. on the ground of standing to challenge an appropriation Act, and for Mason and Jacobs JJ. with respect to the scope of the executive power to spend duly appropriated money.

Both Mason and Jacobs JJ. held that any administrative scheme carried out must be within the executive power of the Commonwealth (section 61). The scope of executive power was ascertainable from the distribution of legislative powers and the character and status of the Commonwealth as a national government. However, their Honours differed on the application of this principle to the facts. Mason J. was unable to uphold the scheme under any head of power, (including section 51(xxxix) or under the national implied power). The scheme was more than a mere trial programme. It actually was being run and operated as a new social welfare initiative. Mason J. succinctly stated his position when he said:

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[15] *Victoria* v. *The Commonwealth* (1975) 50 A.L.J.R. 157, 164-165.
[16] *Ibid.*
[17] *Id.* 177.

> the *Appropriation Act*, in so far as it relates to item 530.4, the item in question, is a valid exercise of that power conferred by s. 81. However, in my view the activities which call for the expenditure of this money, the elements which comprise the scheme known as the Australian Assistance Plan, stand largely, if not wholly, outside the boundaries of the executive power of the Commonwealth.[18]

In contrast, Jacobs J. found the expenditure upon the Australian Assistance Plan to be within power. His Honour reached this conclusion for two reasons. Firstly, the scheme was within the national power of the Commonwealth. It was a means of co-ordinating existing schemes. Secondly, "in so far as the proposed expenditure does not fall directly within a specific power of the Commonwealth it is an expenditure of money which is incidental to the execution by the Commonwealth of its wide powers respecting social welfare".[19] To reach that conclusion His Honour ascribed to section 51(xxxix) a wide area of power. In addition to this reason, Jacobs J. would have dismissed the plaintiff's action on the basis that the statement of claim revealed no fact upon which they were entitled to relief. In particular, His Honour disputed the plaintiff's contention that "an appropriation is bad unless the purposes thereof flow from and are governed by legislation of the Commonwealth independent of and separate from the actual appropriation of moneys".[20] This claim was refuted by His Honour after examining the scope of the prerogative in relation to expenditure. He concluded that "The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself".[21] As in the present case the statement of claim alleged only the want of supporting legislation, then His Honour felt that the action should be dismissed.

Standing

Stephen J. also drew a distinction between the mere appropriation of moneys and the expenditure of such moneys. As His Honour saw the plaintiffs' attack being only upon a provision in the Appropriation Act, he dismissed their claim because they lacked standing. His Honour was able to do this because he saw the Appropriation Act as different from an ordinary Act of the Commonwealth Parliament. He put the difference in this way:

> It is, then, with this special type of Act of Parliament that the present proceedings are concerned. It is an Act which, while a necessary pre-condition to lawful disbursement of money by the Treasury, is not in any way directed to the citizens of the Commonwealth; it does not speak in the language of regulation, it

[18] *Id.* 179.
[19] *Id.* 184.
[20] *Id.* 180.
[21] *Id.* 181. The plaintiffs' contention that the description of the particular item of appropriation was not sufficiently specific, was similarly dismissed by Jacobs J.

> neither confers rights or privileges nor imposes duties or obligations. It only permits of moneys held in the Treasury being paid out, upon the Governor-General's warrant, to Departments of the Government. Its importance is essentially confined to the polity in question, here the Federal polity; the control which (*sic*), by its means, is exercised by the legislature over proposed government expenditure is of significance within the framework of that polity, but has no direct effect upon the powers or interests of the component parts of the federation, the States.[22]

Accordingly, due to the special nature of an appropriation Act, a State and the Attorney-General of a State had no standing to mount an action against the provision of such an Act.

Of the other majority justices, only Murphy J. touched upon the question of standing. He acknowledged the force of Stephen J.'s argument with respect to appropriation Acts, but he did not have to decide the question. His Honour declared himself in favour of liberalising the requirements of standing in favour of individuals and regarded "the tendency to exaggerate the standing of an Attorney-General" to have been to the detriment of private litigants.[23]

All the minority justices, because of their holding, that the challenged appropriation was invalid, were required to consider the issue of standing. All these justices found that the plaintiffs (but in the judgment of Barwick C.J., only one of the plaintiffs) had sufficient standing. Central to the consideration of Barwick C.J. and Gibbs J. was the view that there would be harm done to the States if an invalid appropriation was allowed to stand because the States would thus be deprived of the possibility of claiming surplus revenue under section 94. As the State had standing because of its interest in the existence of surplus revenue, Barwick C.J. said he did not need to decide the standing of the Attorney-General, but regarded him as an unnecessary party.[24] In addition, both Mason and Gibbs JJ. recognised that the States had an interest in maintaining the Constitution. In the words of Mason J.:

> The real interest of the States, so it seems to me, is that they are constituent elements in the Federation and that the Federation is one in which there is a division of powers and a consequential allocation of responsibilities between the Commonwealth and the States. As such they have an interest in the observance of the Constitution and in ensuring that the Commonwealth keeps within the bounds assigned to it by the Constitution.[25]

Justiciability

The issue of justiciability of the claim was not a major part of their Honours' reasoning in the case, though some judges did pass comment upon it. McTiernan J., in line with his broad conception of section 81,

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[22] *Id.* 174.
[23] *Id.* 188.
[24] *Id.* 166.
[25] *Id.* 179.

placed the dispute within the field of politics and not law. In contrast the minority justices made it clear that the determination of the limits of the Constitution was clearly justiciable, though Mason J. did recognise the peculiar nature of the Act challenged and limited his comments to the question of expenditure. The remaining judges did not consider the issue.

Conclusion

Although there were several separate strands of reasoning involved in the present decision, the case does provide a useful discussion upon matters which are rarely subject to litigation and yet which are vital for the smooth functioning of the Commonwealth's financial affairs. It is clear now that in future considerations of the appropriation power more weight will have to be given to the peculiar nature of the appropriation Act itself. This at least must be the import of Stephen, Mason, and Jacobs JJ.'s decisions.

There is still no definitive answer to the question whether section 81 authorises Parliament to determine the purposes of an appropriation. Three justices answered "yes", two answered "no", one did not have to consider the question and one assumed for the sake of argument but did not decide that the answer was "no". With changes in the composition of the Bench, there will no doubt be further attempts to challenge appropriations in the future. The same applies to the question of administrative schemes associated with expenditure. Finally, although the justices were generally agreed that the Commonwealth had an inherent power associated with its status as a national government, the extent of that power still awaits further explanation.

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