The 2009 D. H. Drummond Memorial Address
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The Rule of Law and the Global Financial Crisis

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Yesterday was the 77th anniversary of the Governor of New South Wales, Sir Philip Game's dismissal of the Lang Government. It was a turbulent clash between the rule of law and Premier Jack Lang's handling of the then Global Financial Crisis (GFC-1, otherwise known as the "Great Depression"- 'NSW was on the verge of bankruptcy and ruin'[1]. The budget for the 1932 financial year had not been passed. It was reported 'that government cheques were ricocheting like a hail of rubber bullets'[2]). David Drummond was a Minister in the new Government commissioned on 16 May and after the result of a general election re-commissioned on 18 June 1932 as Minister for Education. Before Lang was sacked Drummond made a speech on the Supply Bill in which he foresaw this event.

> *If the Premier of New South Wales takes any and every step to break the law if it does not suit him to adhere to it, he is accepting a responsibility the consequences of which may be far- reaching.*[3]

After 30 years as a Member of the NSW Legislative Assembly (including 12 years as Minister for Education) David Drummond, then 59, took his seat in as the Member for New England in the House of Representatives in 1949. Drummond found himself ten years on in 1959 as member of a *Joint Committee on Constitutional Review*[4]. You will not be surprised to learn that the power of the Commonwealth to spend and manage the national economy were issues which this committee deliberated upon. It doubted that the Commonwealth had the power to spend money on research and the CSIRO in particular and recommended that the Constitution be altered to authorize such activities.

These are matters to which I will later turn.

When there is no judge, there is no law. The ability to turn to the court is the cornerstone of the rule of law [5] . So said Aharon Barak a former President of the Supreme Court of

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[1] B Foott, *Dismissal of a Premier –The Philip Game Papers*, (1968) 1

[2] Bede Nairn, *Jack Lang* (1995), 260, n 17.

[3] NSW Parliamentary Debates – Legislative Assembly, 25 Feb 1932 at p.7894

[4] Neil O'Sullivan et al, Joint Committee on Constitutional Review, Second Report, *Parliamentary Papers, 23rd. Parliament – First Session, Vol. III* ,(25 Nov., 1959)

[5] Aharon Barak, *The Judge in a Democracy*, (2006), 194

Israel. He was echoing Lord Diplock who had earlier said that *it would be grave gap in our system of public law if even a single public-spirited taxpayer was prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped* [6].

The issue of the 'right to be heard' or standing arose in the Tax Bonus case. On 3 April the High Court by a majority upheld the validity of the *Tax Bonus for Working Australians Act (No2) 2009.* Some of you may have even received a $900 windfall from the Canberra money tree orchard. The defendants, the Commissioner of Taxation and the Commonwealth of Australia together with the intervening States' Attorneys'-General opposed the plaintiff's contention that he was entitled to seek an order that the Act was invalid. The Court rejected the Defendants' and Interveners' submissions and held that the plaintiff had standing for all purposes. The reasons when given should make fascinating reading. Particularly if the Court follows what Murphy J said in the DOGS case.

> *A citizens' right to invoke the judicial power to vindicate constitutional guarantees should not, and in my opinion, does not depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has standing in the courts to secure the observance of constitutional guarantees.* [7]

I hasten to say that contrary to the view of Murphy J, there are no constitutional guarantees as such. At best there is a legitimate expectation that the three organs of Government, the executive, legislature and the judiciary will work to uphold the constitution.

If the Court adopts the views of Barak, Diplock and Murphy this will overturn the way it has previously approached the question of standing. For example Gibbs J had remarked that "*it is somewhat visionary to suppose that the citizens of the State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible"*[8]. The same position applies to the citizen in seeking to get the *fiat* of Attorney-General of a State to bring a so called relator action[9]. Unless citizens could show how the challenged legislation peculiarly affected them in some way different from other citizens they had no standing to seek relief. They needed to get the Attorney-General to institute proceedings.

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[6] *R v Inland Revenue Commissioner, ex parte National Federation of Self Employed and Small Business Limited*, [1982] A.C. 617, 644

[7] *Attorney- General (Vic); Ex Rel Black v. Commonwealth*, (the Defence of Government Schools – the DOGS Case) (1981) 146 CLR 559 634.

[8] *Victoria v. Commonwealth* (1975) 134 CLR 338, 383 (the Australian Assistance Plan case). Approved in *Bateman's Bay Local Aboriginal Land Council v. Aboriginal Community Benefit Fund Pty Ltd*. (1998) 194 CLR 247, 263.

[9] *Attorney-General (Vict):Ex rel Dale v Commonwealth* (1945) 71 CLR 237 (the Pharmaceutical Benefits case).

The *Tax Bonus case* picked up on what I said four year ago to the Samuel Griffith Society, in a paper entitled, '*The Use and Abuse of the Commonwealth Finance Power'*. There I lamented that someone needed go to the High Court and follow the example of a Mr Thorson QC in seeking redress of the unlawful expenditure of public money. In that case the Supreme Court of Canada had given Mr Thorson standing to challenge the validity and appropriation of money to implement the *Official Languages Act (1968-69) (Can) C.54.* Laskin J (later to become CJ) observed:

> *The substantive issue raised by the plaintiff's action is a justiciable one; and prima facie, it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication* [10].

As you can probably guess *Thorson's case* was the harbinger for the recent challenge to the Tax Bonus Act.

From an academic perspective the Tax Bonus case was legal research in action. The 1991 Nobel Laureate in Economic Science, Ronald H. Coase, when asked, what interested him, he replied: - *"You don't find out anything unless you are looking for it"; "Look around and find a problem and then try to tackle it"* [11]. The tax bonus legislation was a suitable vehicle to test whether the Commonwealth Parliament had overreached its power. The policy merits or demerits of the legislation were irrelevant. By bringing the case, the Commonwealth was forced to defend its reliance on some controversial sections of the Constitution. The method was not to write a paper and seek to have it peer reviewed and published in a learned journal, but to get the High Court to decide the issue. In short to follow the Coase approach and to get the problem solved.

This approach is analogous to the advances in surgical techniques developed from the treatment of battlefield casualties. There was no time for the army surgeon to write a leisurely paper to explore the issues. The aim was to save lives through risk taking, ingenuity and improvisation. For example the vascular surgery techniques used to salvage limbs (89% out of 130 cases saved) carried out by the Mobile Army Surgical Hospital units in Korea, otherwise known as MASH – (not be confused with Hawkeye played by Alan Alda in the MASH television series) ,and later in Vietnam. Hippocrates once said *"He who wishes to be a surgeon should go to war."* [12] Similarly in constitutional litigation where fighting the case requires dealing convincingly and quickly with the issues as they arise. For example a submission by the Commonwealth that where the Tax Bonus Act violated the constitution, it was severable. Something akin to amputating a limb infected with gangrene to save the body.

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[10] *Thorson v. Attorney-General of Canada* [1975] 1 SCR 138, 145; (1974) 43 DLR (3d) 1, 6-7

[11] Richard Epstein, *"A Conversation with Ronald H Coase"*- DVD (2002)

[12] Lt.Col B..A. Price, 'The Influence of Military Surgeons in the Development of Vascular Surgery', *J.R. Army Med Corps* (1999) 145 : 148-152. I am indebted to Prof Randall Albury for drawing this paper to my attention.

Former Chief Justice of the High Court, the Hon Murray Gleeson in his Boyer Lectures noted that *the role of the High Court is closely bound up with the nature of federalism.* What is federalism?

> *Its essence is an agreed division of powers and authority between the political entities which make up the federation: in Australia, the Commonwealth and the States. Inevitably disputes will arise from time to time, either between governments, or between citizens and governments, (sic the tax bonus case is such an example), over the limits of powers defined by the Constitution. Resolving such disagreements is ultimately, the task of the High Court* [13] .

One of the architects of the Constitution, Sir John Downer saw *the High Court as the only guarantee that the constitution could not be arbitrarily flouted by any government, however popular.*[14] As we have seen unless the citizen has standing, that guarantee is illusory. This is particularly so if the States 'turn a blind eye' or acquiesce to the invasion by the Commonwealth into activities which are the responsibility of the States.

The prime reason for the payment of the tax bonus of $900 ($7.7 bn) was to stimulate the economy and to mitigate the effect of the Global Financial Crisis (GFC - 2). Its asserted purpose was to stimulate by encouraging spending. Thereby increasing the level of demand and jobs. *Whether the legislation is wise or unwise as a matter of policy is a question with which the Court is not concerned.*[15]

Much economic information and data referred to in the special case (objected to as irrelevant) was relied upon by the Commonwealth to illustrate the need for the tax bonus legislation amongst other economic stimulatory measures .For example the shortfall in taxation revenue, the projected budget deficits, accumulating by 2012 at $118 billion [16], and the need to borrow an extra $125 billion to peak at $200 billion of Commonwealth Inscribed Stock[17]. The projected budget deficits for the 4 years to 2013 are $187.4 bn. The updated debt projection as at 30 June 2013 now stands at $300.8[18] billion as announced by the Treasurer on Tuesday night. The interest bill is $7.6 bn for 2010 to nearly doubling at $13.9 bn for 2013. The cure may be worse than the illness.

> *The overwhelming majority of the increase in net debt is due to the collapse in tax receipts resulting from the deteriorating global economic outlook and the unwinding of the commodities boom. A secondary impact is the increase in payments typically associated with a slowing economy. A third component is*

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[13] The Hon A. M. Gleeson, *The Rule of Law and the Constitution*, (2000), 83.
[14] J. C. Bannon, *Supreme Federalist, The Political Life of Sir John Downer*, (2009), 188
[15] *Home Building & Loan Assn v Blaisdell,* 290 U.S. 398 (1934), 448.
[16] The Hon Wayne Swan MP and the Hon Lindsay Tanner MP, *Updated Economic and Fiscal Outlook,* Feb 2009
[17] S. 4 *Commonwealth Inscribed Stock Act 2009* (Cth)
[18] Table 2, Australian Government General Sector Balance Sheet –Statement 9 of Budget Paper No 1 2009-2010, http://www.budget.gov.au/2009-10/content/bp1/html/index.htm >

> *the Government's **temporary** stimulus measures put in place to support growth and jobs* [19].

The Commonwealth relied upon the concerns expressed by member counties of the G-20, particularly the communiqués issues from their well publicized meetings. An officious bystander may well have remarked that the primary purpose of these meetings was to do *no business.* It was no more than a pretence that by meeting something was being done. This observation is not new. It was made by J. K Galbraith in his celebrated book *The Great Crash 1929.*

> *In recent times the no-business meeting at the White House – attended by governors, industrialists, representatives of business, labour and agriculture- has become an established institution of government. Some device for stimulating action, when action is impossible, is indispensable in a sound and functioning democracy. Mr Hoover in 1929 was a pioneer in this field of public administration* [20].

If the "G20 meeting in London" is substituted for the words "White House", then something akin to the current political and economic atmosphere is created.

So we come to the crux of the Tax Bonus case. On 3 April the High Court upheld by a majority the validity of the Tax Bonus Act. The reasons for its decision await publication.

The matter came before a full bench of the High Court, of seven Justices, by way of a special case which had been referred by Gummow J. This was the first occasion on which this court had sat. Those sitting were Chief Justice French and Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell. Constituted by four men and three women.

Essentially the Commonwealth's case was that the Tax Bonus Act was a valid law because:

- It involved the appropriation of moneys from the Consolidated Revenue Fund for the purposes of the Commonwealth
- It was incidental to the execution of the Executive power of the Commonwealth, the so called *nationhood power*
- It was a law with respect to external affairs
- It was a law with respect to overseas and interstate trade
- It was a law with respect to taxation.

A cursory glance of the Act shows that there is nothing in it which mentions the first four topics. It is silent on the appropriation of money although we are told in the explanatory memorandum that for 2009 $7.7 billion is to be spent as bonuses. The specific

[19] The Hon Wayne Swan MP and the Hon Lindsay Tanner MP, *Updated Economic and Fiscal Outlook,* Feb 2009 at p.45.
[20] J. K. Galbraith, *The Great Crash 1929*, (1955), 160.

appropriation provision sought to be relied upon was the provision dealing with the refund of taxes in s 16 of the *Taxation Administration Act 1953* (Cth). The Commissioner of Taxation has the general administration of the Act. And the taxable income for 2008 serves as the basis for fixing the quantum to be paid, $900, $600 or $250.

One could be pardoned for thinking that the appropriation ground, not to mention the others, would have come as a surprise to the Commissioner of Taxation. Relevantly s 81 of the Constitution provides 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……*

The Commonwealth contended that 'for the purposes of the Commonwealth' means whatever the Commonwealth says it means; the so called 'broad view'. This view was espoused by Latham C J, and McTiernan J in the 1945 *Pharmaceutical Benefits case* and by Mason and Murphy JJ in the 1975 *Australian Assistance Plan case.* On the other hand the so called narrow view, which I submit is the better one, contends that 'for the purposes of the Commonwealth' can only be found in the 39 paragraphs of s 51 and in other specific powers in the Constitution such as Judicial power, the Executive power or in the Territories power (s 122) or the power to make grants to the States under s 96. This view was held by Dixon, Starke and Williams JJ in the *Pharmaceutical Benefits case* and by Barwick C J and Gibbs J in the *AAP case*

For some years the Commonwealth has bypassed the States by using s 81 to appropriate moneys directly to local councils, E.g. Roads to Recovery, AusLink, Computers in Schools and last November's announcement of $300 million to be paid directly to 565 Local Councils under the Regional and Local Government Community Restructure Program to build and refurbish community infrastructure such as swimming pools, sports grounds, community centres, libraries and walkways.

The thrust of the Commonwealth's submission was that the spending power of the Commonwealth should be expanded. In short, raising money by coercive taxes and spending were no more than two sides of the same coin. The Solicitor-General for the Commonwealth submitted that the provisions of Section 8(1) Article I of the United States Constitution should be reflected in the approach to be followed in interpreting the meaning of the words 'for the purposes of the Commonwealth' in s 81. The Commonwealth wanted to effectively amend the Constitution by substituting s 8 (1) of the US Constitution for s 81. Alteration must follow the s128 route.

> *The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;……*

This is not a novel proposition. The then Commonwealth's Solicitor-General, Sir Robert Garran, who was intimately concerned with the framing of the Constitution, gave evidence to the 1927-1929 Royal Commission on the Constitution to the effect that *in practice the Commonwealth Parliament has, always acted on the assumption that section 81 gives it an absolute power for general purposes* [21].

The controversy as to the meaning of s 81 was fuelled by the evidence of Owen Dixon KC presented to the Commissioners on 13 December 1927 on behalf of a committee of the Victorian Bar Association. They opined that *the function of appropriating money seems to be treated as an exercise of the power of law making, and not as a separate power* and concluded that the *Federal Parliament has upon a number of occasions and over a long period of time exceeded its powers in the expenditure of money.*

Eighty years on it might be hoped that the High Court in delivering its reasons in the Tax Bonus case will quell the controversy as to the meaning of *for the purposes of the Commonwealth* in s 81.

Next the Commonwealth relied upon the "incidental power" to be found in paragraph (xxxix) of s 51 of the Constitution and its relationship with the Executive power under s 61. Under the Constitution, the executive power is vested in the Federal Executive Council. This body comprises the Governor-General and 42 [22] executive councillors who are required to sit in Parliament in accordance with s 64 and in adherence with the convention of responsible government. The 42 members of the executive are known as the Inner Ministry, (the Cabinet – the Prime Minister and 20 other Cabinet Ministers) and the Outer Ministry, 9 Ministers and 12 Parliamentary Secretaries). This is the Commonwealth Government.

> *Relevantly s 51 (xxxix) provides:-*
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> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-*
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> *Matters incidental to the execution of any power vested by this Constitution…. <u>in the Government of the Commonwealth</u>, …….*
>
> *S 61 provides :-*
>
> *The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*

[21] J.B. Peden et al, *Report of the Royal Commission on the Constitution,* (1929), 140.
[22] S. 4 of the *Ministers of State Act 1952* (Cth)

All of this begs the question of what is meant by the executive power of the Commonwealth. Mason J in the *AAP case* illustrated the nationhood power by suggesting that the CSIRO was authorized by relying on the incidental power in s 51(xxxix) and the executive power under s 61. There Mason J said

> *But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 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*[23] .

Likewise the Commonwealth contends the Tax Bonus Act was incidental to the executive in managing the national economy in response to the global economic crisis. Of course the contrary view is that there are already sufficient powers available to the Government to manage the economy through for example the taxation power and the banking power. *Extraordinary conditions do not create or enlarge constitutional power.*[24] The plaintiff's contention as to the defendants' material in the Special Case dealing with the global financial crisis and its projected economic impact in Australia was that it was irrelevant. Of course the contrary submission can be conveniently put as *while emergency does not create power, emergency may furnish the occasion for the exercise of power.*[25]

Interestingly both of statements came from US cases which challenged President Roosevelts New Deal legislation. Strikingly the tax bonus case had overtones of the contest between President Roosevelt and the US Supreme Court.

In short the tax bonus case has provided an opportunity for the High Court to explore the width of the executive power. It was considered by Brennan J in *Davis v Commonwealth* [26] (the Bicentennial Authority case)

> *This Court has not settled the questions and whether and to what extent it is within the executive power of the Commonwealth for the Executive Government of the Commonwealth to exercise its prerogative powers or to engage in lawful activities or enterprises calculated to advance the national interest*[27] .

The concept of national interest means different things to different people. Simply because an activity might be within the national interest does not mean that it attracts

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[23] *Victoria v. Commonwealth* (1975) 134 CLR 338, 397

[24] *A.L.A. Schechter Poultry Corp et al v United States* 295 U.S. 495 (1935) at 528;

[25] *Home Building & Loan Assn v Blaisdell*, 290 U.S. 398 (1934), 426. *The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions;* per Hughes C.J.

[26] (1988) 166 CLR 79

[27] Ibid, 110

Commonwealth power. Such a proposition is tantamount to heresy in some quarters, particularly members of the Federal Parliament irrespective of political allegiance. If something is in the national interest and the State and Commonwealth Parliament agree then there are ways for the activity to be regulated. They can pass uniform legislation or the States can avail themselves of s 51(xxxvii) and refer the relevant power to the Commonwealth. There is also no reason why the Commonwealth cannot abdicate passing laws in a particular field and simply rely on the respective States to deal with it. If the Commonwealth has withdrawn from the field there is no work for s 109 to do. It is a useful reminder that *the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution* [28].

The scope of the executive power according to Mason J allowed *the Government to engage in enterprises and activities peculiarly adapted to the government of the nation and* ***which cannot be otherwise carried on for the benefit of the nation.*** [29] [emphasis added]. The Government's declared aim of increasing the level of aggregate demand could have been simply and lawfully, achieved by the granting of a tax rebate for the current year of income and reducing the rate of PAYG deductions from salaries and wages. This is precisely what the Menzies Government did to stimulate the economy after the 1961 credit squeeze. From March 1962 until June 1964, taxpayers were entitled to a 5 % tax rebate. A *par excellence* illustration of managing an economic crisis through the use of the taxation power under s.51 (ii).

The present scheme is to give an arbitrarily fixed amount of $900, $600, or $250 to residents who had a taxable income of up to $100,000 for 2008 and had a tax liability of a least $1. It was claimed by the Commonwealth that the tax bonus payments to be effective must be given as a lump sum. The Court was invited to deduce that this would produce a "big bang" increase in consumer spending and that it can only be delivered by the executive.

I won't further weary you by canvassing the arguments based on the trade and commerce power under s 51(i), the external affairs power und s 51(xxix) and the taxation power under s 51 (ii), being characterized as a gift or bounty. I have wearied you enough.

What is known is that the Global Financial Crisis attracted the occasion for the valid use of at least one head of power. What is unknown are the reasons for this decision. The Chinese word for crisis is formed by two characters. One represents danger and the other represents opportunity. If the High Court decides that 'for the purposes of the Commonwealth' in the appropriation section should be given a broad interpretation as against a narrow one then the concentration of power in the Commonwealth Parliament and Executive will be complete. This is the ***danger***.

[28] *Victoria v Commonwealth* (1975) 134 CLR 338, 378
[29] Ibid

On the other hand if the Court closes down the "appropriation avenue" and compels the Commonwealth to retreat and confine its activities those enumerated in the Constitution this will provide an ***opportunity*** for the rejuvenation of the Federation. It might trigger the correction of vertical fiscal imbalance. That is not some disease of the ear, but a fiscal sickness described by some as *Canberraitis.* [82 cents of every dollar of taxation in Australia is now levied by the Commonwealth]. Its symptoms were diagnosed by Professor Geoffrey Sawer *as those who tax don't have to justify the spending and those who spend don't have to justify the taxing.*

The prescription for its cure rests with the High Court. If not then it might be helpful after 46 years to *finally take heed of Drummond's 1963 prophesying farewell speech to the Parliament that the constitutional reform for our own preservation and future development will make the reforms which the 1959 Constitutional Review recommended pale into insignificance.*

14 May 2009.

[3976 words]