

# EXECUTIVE POWER IN AUSTRALIA – NURTURED AND BOUND IN ANXIETY

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*This paper reviews the place of executive power within the Commonwealth Constitution in light of historical and recent developments. It summarises, in particular, the scope of executive power and the extent to which it is informed and constrained by its federal constitutional setting. It also considers the role of the traditional prerogatives of the Crown in defining the content of executive power, and of non-statutory executive power generally, and executive power under the constitutions of the various States.*

Executive power in representative democracies is associated with two kinds of societal anxiety – anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive approaches to its content. The first kind arises out of perceived threats to the social order, the character of civil society and, *in extremis*, its existence. The second kind is concerned with the sufficiency of checks on abuses of executive power. Non-statutory executive power, sourced directly from the *Constitution*, engenders particular anxiety because it is not easy to attach to it justiciable constraints of the kind that can be derived from the text, subject matter and purpose of a statutory grant of power. Perhaps the most high profile anxiety-generating issue feeding into the exercise of executive power in Australia in recent times has been the entry of non-citizens into the country by sea with the assistance of people smugglers. In responding to what may broadly be called ‘border control issues’, both statutory and non-statutory executive powers have been invoked by the Commonwealth Government.

Anxious ambivalence about executive power was reflected in the approach of the drafters of the *United States Constitution* who were said to have ‘feared both executive power and executive weakness, regarding the former as the seed of tyranny and the latter as the wellspring of anarchy.’<sup>1</sup> The

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<sup>1</sup> Michael Nelson, ‘The Evolving Presidency’, Landmark Document 1787-2014.

drafters no doubt had in mind recent unhappy experiences with monarchical powers.

Dystopian visions of overblown executive power find frequent expressions in the popular culture of the United States and, given the porosity of our cultural boundaries, may trouble Australian perspectives from time to time. The graphic novel *Watchmen*, made into a film in 2009, imagined a history in which Richard Nixon won the Vietnam War with the help of a nuclear powered superhero and served at least five successive terms with an executive power virtually unchecked so that he could meet the threat of nuclear war with the Soviet Union. In one of a collection of essays published in 2010 linking popular culture to political possibilities, the authors said of *Watchmen*:

Neither Reagan nor Bush were so audacious but to the extent that *Watchmen* reflects real world growth of executive power, it raises the spectre of possibility.<sup>2</sup>

The distinctly B-grade film, *Judge Dredd*, is a fine depiction of muscular executive power operating at street level and subsuming judicial functions. Sylvester Stallone stars as a police officer in a future New York. He is armed with coercive investigative, adjudicatory and punitive powers. His class of officer has replaced an effete and ineffective judiciary. He expresses his constitutional position succinctly with the words ‘I am the law’, which he announces from the saddle of a levitating Harley-Davidson.

The executive power of the United States is vested, by § 1 of Art 2, in the President. Within three months of his inauguration in 2017, the newly elected President had signed 32 executive orders, actions and memoranda. They purported to suspend the country’s refugee program and to limit inbound travel from largely Muslim countries. They also included an order authorising the construction of a border wall between Mexico and the United States.<sup>3</sup> For those of an anxious disposition a dystopia, exceeding filmic imagination, had arrived and was living in the White House. Even some not so anxious about executive power were concerned. Professor John Yoo of the University of

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<sup>2</sup> Trevor Parry-Giles, Will P Howell and Devin Scott, ‘Reflection and Deflection: An Approach to Popular Culture and Politics’ in Andrew E Herrmann and Art Ferbig (eds), *Communication Perspectives in Popular Culture* (Lexington Books, 2010).

<sup>3</sup> ‘List of Trump’s Executive Orders’, *Fox News* (online), 28 April 2017 <<http://www.foxnews.com/politics/2017/04/28/list-trumps-executive-orders.html>>.

California at Berkley, author of Justice Department memoranda providing legal cover for enhanced interrogation techniques and a proponent of a robust approach to executive power in this age of terror, wrote in the *New York Times* on 6 February 2017:

Faced with President Trump's executive orders suspending immigration from several Muslim nations and ordering the building of a border wall, and his threats to terminate the North America Free Trade Agreement, even Alexander Hamilton, our nation's most ardent proponent of executive power, would be worried by now.<sup>4</sup>

For those who did not worry so much about such things, the executive power was being applied to give immediate and direct effect to promises on which the President was elected. Those who did worry seemed to have derived some comfort from the constraints imposed on the President by the legislative and judicial branches of the government of the United States. Writing in the October 2017 edition of the *Atlantic Magazine*, Professor Jack Goldsmith of Harvard Law School, a former Assistant Attorney-General in the Bush Administration, observed that:

Thus far, however, Trump has been almost entirely blocked from violating laws or the Constitution. The courts, the press, the bureaucracy, civil society, and even Congress have together robustly enforced the rule of law.<sup>5</sup>

Goldsmith qualified that observation in the concluding paragraph of that article by suggesting it relied upon two assumptions:

1. That President Trump's presidency would fail and that he would not be re-elected.
2. That the United States is fundamentally stable.

In the uncertainty about those assumptions lies a considerable anxiety about an expanding exercise of executive power fuelled by the anxieties of constituencies that may have led to that expansion.

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<sup>4</sup> John Yoo, 'Executive Power Run Amok', *The New York Times* (New York), 6 February 2017, A21.

<sup>5</sup> Jack Goldsmith, 'Will Donald Trump Destroy the Presidency?', *The Atlantic Magazine* (Washington DC), October 2017.

Societal anxieties favouring strong executive government have not been absent from the Australian scene. They may be seen in a variety of guises including statutory schemes providing for the control of criminal organisations, the prevention of terrorist activity and executive control over certain classes of criminal offender. To call them ‘anxieties’ is not to suggest that they are unfounded, although they may be exaggerated. Some of the schemes expanding statutory executive power, to which such anxieties have given rise, have affected freedom of association and communication, other aspects of personal liberty, and the privilege against self-incrimination. Their scope and their interactions with the judicial system have been the subject of litigation in the High Court. That litigation has been an important part of the story of statutory executive power in this country, which has been a major strand in the development of general administrative law. That development in relation to executive power has also had constitutional dimensions arising out of the separation of Commonwealth judicial powers under the *Constitution* and constraints on State and Commonwealth legislative power preventing direction of courts by the Executive and the conferral of executive powers on courts and judges which are incompatible with the judicial function.<sup>6</sup> An important constitutional dimension was reflected in the decision in *Kirk v Industrial Court (NSW)*<sup>7</sup> which effectively entrenched the supervisory powers of the Supreme Courts of the States in respect of the exercise of the executive power of the States.

Executive power not confined by clearly stated criteria for its existence and exercise, can be a source of anxiety based on the hard lessons of history. In *Australian Communist Party v Commonwealth*,<sup>8</sup> which concerned the validity of the *Communist Party Dissolution Act 1950* (Cth), Sir Owen Dixon was concerned with whether the executive power of the Commonwealth under s 61 could be linked with the incidental power under s 51(xxxix) of the *Constitution* to support the challenged legislation. He observed that textual combinations of that kind suffered from artificiality when used to produce a power to legislate with respect to designs to obstruct the course of government or to subvert the *Constitution*. He said in an oft quoted statement:

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<sup>6</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>7</sup> (2010) 239 CLR 531.

<sup>8</sup> (1951) 83 CLR 1.

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.<sup>9</sup>

Sir Owen Dixon's observation about the history of the misuse of executive power was accompanied by his acknowledgement that forms of government might need protection from dangers likely to arise from within the institution to be protected. However, he refused to imply a legislative power to grant to the Executive Government an unexaminable authority to apply a vague formula relating to prejudice to the maintenance and execution of the *Constitution* and the laws made under it. Nor would he imply an authority, by the application of such a formula, to impose the consequences which would ensue under the *Communist Party Dissolution Act*. He accepted that Parliament could legislate on a subject of legislative power and confer discretion on the Executive, the exercise of which could affect rights and liabilities within the subject of the power and could be made to depend on any event or matter a legislature chose including administrative opinion.

Two cases involving removal to other countries of non-citizens who arrived in Australia by boat without visas illustrates ways in which the legislative power can constrain or extend the scope of executive power. The first was the *Malaysian Declaration Case*.<sup>10</sup> The ministerial power under s 198A of the *Migration Act 1958* (Cth), as it stood in 2011, to declare another country a place to which 'offshore entry persons' could be removed was conditioned on ministerial findings that the country met certain criteria relevant to the protection of the human rights of the person removed. In substance, the High Court held the ministerial declaration in relation to Malaysia invalid on the basis that the Minister had not determined the existence of the criteria.

The Act was then amended so that a power to make a declaration, to similar effect, of another country as a 'regional processing country', was conditioned only upon the Minister considering the declaration to be in the national interest. In so doing, the Minister was to have regard to assurances that the declared country would protect persons removed to it and provide for an assessment of whether they were refugees, but such assurances were not

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<sup>9</sup> Ibid 187.

<sup>10</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

required to be legally binding. A challenge to a declaration of Papua New Guinea as ‘a regional processing country’ failed in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.<sup>11</sup>

Those two cases, as well as many of the migration cases which have reached the High Court have concerned the scope and limits of executive powers conferred by statute. Perhaps the most dramatic example of the invocation of non-statutory executive power in the context of border protection arose in 2001 in the decision of the Full Court of the Federal Court in the Tampa Case: *Ruddock v Vadarlis*,<sup>12</sup> to which further reference will be made later. However, the most recent and perhaps most significant decisions on the scope and limits of non-statutory Commonwealth executive power have concerned the expenditure of public monies.<sup>13</sup> Notwithstanding their subject matter, rather less politically fraught than border protection, what was said in them about the extent of and constraints upon non-statutory executive power in the area of public expenditure, would seem to have implications for the extent of, and constraints upon, non-statutory executive power in other areas. Before referring to those cases it is desirable to look briefly at the origins of the executive power of the Commonwealth.

There was little evidence of deep constitutional angst on the part of the drafters of the Australian Constitution when it came to their consideration of the executive power. They were not revolutionaries. They were constructing what was to be initially a self-governing colony constituted by an Act of the British Parliament. The principal provision of the *Constitution* relevant to the executive power is s 61, which provides that:

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.

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<sup>11</sup> (2014) 254 CLR 28.

<sup>12</sup> (2001) 110 FCR 491.

<sup>13</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

Its drafting history says something, but not a lot, about its scope and content.<sup>14</sup> A Constitutional Committee was established by the National Australasian Convention in 1891 to prepare a draft Bill for a new constitution. Its members included Samuel Griffith, Edmund Barton, Alfred Deakin and Andrew Inglis Clark. One of the issues for consideration set out in a memorandum prepared by Griffith was an executive 'with powers correlative to those of legislature'. A framework document was produced by the committee. It proposed an executive government but did not advert to its power.<sup>15</sup>

Inglis Clark had himself prepared a draft Constitution Bill which was effectively the working document of the Constitutional Committee of the Convention. It was derived from the *Constitution of the United States* to the extent that it allocated specified legislative powers to the Federal Parliament and provided for a separation of federal judicial power from that of the legislature and the executive. However, in relation to the 'location, nature and exercise of the executive power' cl 5 of his draft substantially followed the wording of s 9 of the *British North America Act 1867*. Clause 5 provided:

The executive power and authority of and in the Federal Dominion of Australasia is hereby declared to continue and be vested, subject to the provisions of this Act, in the Queen.<sup>16</sup>

The draft of the *Constitution* which emerged from the Constitutional Committee of the 1891 Convention contained two clauses which, read together, were the precursors of s 61. Clause 1 of the proposed Chapter II entitled 'The Executive Government' provided:

The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative.<sup>17</sup>

Clause 8 of the same chapter provided:

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<sup>14</sup> The drafting history is set out in more detail in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 194–206 [40]–[61].

<sup>15</sup> 'Memorandum of Decisions of Constitutional Committee, Printed from Day to Day' (Document 4) in Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891, reprinted 1973).

<sup>16</sup> John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 80.

<sup>17</sup> *Ibid* 329.

The Executive power and authority of the Commonwealth shall extend to all matters with respect to which the Legislative powers of the Parliament may be exercised, excepting only matters, being within the Legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers.<sup>18</sup>

In the event cl 8 was amended on Samuel Griffith's motion to read:

The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth.<sup>19</sup>

Griffith said it did not alter the intention of cl 8 but added:

As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be.<sup>20</sup>

He said, of his amendment, which forms part of the text of s 61 as it presently stands, that it 'covers all that is meant by the clause, and is quite free from ambiguity.'<sup>21</sup> The reader of that remark might reflect that the history of the interpretation of legal texts, the *Constitution*, statutes and private transactional documents suggests that complete freedom from ambiguity, while it may be a happy event, is generally speaking not the norm.

When the draft Constitution was further considered at the 1897 Australasian Federal Convention in Adelaide, Edmund Barton characterised the executive power of the Crown as 'primarily divided into two classes: those exercised by the prerogative ... and those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council.' The second class he characterised as 'the offsprings of Statutes'.<sup>22</sup> His observations were summarised by Quick and Garran in their *Annotated Constitution of the*

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid 425.

<sup>20</sup> *Official Record of the Debates of the National Australasian Convention*, Adelaide, 6 April 1891, 777 (Sir Samuel Griffith).

<sup>21</sup> Ibid 778.

<sup>22</sup> *Official Report of the Australasian Federal Convention Debates*, Adelaide, 19 April 1897, (Barton) 910.

*Commonwealth* published in 1901, in the proposition that ‘executive acts were either (1) exercised by prerogative, or (2) statutory’.<sup>23</sup>

There were no substantial changes to the provisions of Chapter II dealing with the location and nature of executive power as proposed in the draft Constitution which was recommended to the 1897 Convention. Neither Griffith, who by then was Chief Justice of Queensland, nor Inglis Clark who had been appointed to the Supreme Court of Tasmania, were in attendance at the 1897 and 1898 Convention sessions. They offered written observations on the 1897 draft but did not suggest any alterations relating to the location and scope of the executive power.<sup>24</sup> The Colonial Office suggested a change, which was accepted at the Sydney Session of the Convention in 1897.<sup>25</sup> The change was that the declaratory words ‘is exercisable’ be substituted for the words ‘shall be exercised’, presumably so that the provision would not have the form of a command directed to the Queen as the repository of the power.<sup>26</sup>

When the revised draft Constitution was presented to the Melbourne Convention in 1898 the provisions which were to become s 61 were found in two clauses, 60 and 67 in Chapter II, following the text of clauses 1 and 8 of the original Chapter II with the amendment to cl 8 made by Griffith and the Colonial Office amendment. The two clauses were condensed by the drafting committee at the 1898 Convention into one clause which became s 61.<sup>27</sup>

Some early and tantalisingly brief observations about the content of the executive power in s 61 can be found in various sources. Robert Garran in his book *The Coming Commonwealth* published in 1897, foreshadowed the character of what he called the ‘federal executive power’ as nominally vested in the Queen but for the most part exercised by the Queen’s Australian advisers. He wrote:

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<sup>23</sup> John Quick and Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney Legal Books, 1976) 701.

<sup>24</sup> Samuel Griffith, ‘Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897’ June 1897 reproduced in Queensland, Journals of the Legislative Council, vol 47, Pt 1: Inglis Clark, ‘Proposed Amendment to the Draft of a Bill to Constitute the Commonwealth of Australia’ reproduced in Williams, above n 16, 707.

<sup>25</sup> Inglis Clark, ‘Proposed Amendment to the Draft of a Bill to Constitute the Commonwealth of Australia’ reproduced in Williams, above n 16, 781.

<sup>26</sup> *Ibid* 715, 719.

<sup>27</sup> *Ibid* 1035–6, 1091, 1131.

On almost all matters of merely Australian administration the *real* executive power will belong to a Federal Executive Council of some kind.<sup>28</sup>

On the powers of the federal executive he was succinct:

Generally speaking, the executive powers of the Commonwealth must extend to the execution of the provisions of the Federal Constitution and the federal laws. Wherever the Federal Parliament has power to pass laws, the federal executive should have power to give effect to them.<sup>29</sup>

He pointed to the content of the power as derived, in part, from the transfer of control of various executive departments from the States to the Commonwealth. They included military and naval defence, customs and excise, post and telegraphs and so forth. Garran made no reference to prerogative powers in what was a brief overview.

In his *Studies in Australian Constitutional Law* published in 1901, Andrew Inglis Clark discussed the source of prerogative discretions. Colonial governors derived their authority to exercise any portion of the Royal Prerogative from their commissions and were limited to the powers expressly or impliedly entrusted in them. The position was not the same where the gubernatorial authority was conferred by a statute, in this context the *Constitution* as a provision of an Imperial Statute, *The Commonwealth of Australia Constitutional Act*. Inglis Clark wrote:

[W]hen it is ... expressly declared by the statute that the executive power of the community in which the Governor or Governor-General holds office is vested in the Queen and is exercisable by the Governor or Governor-General as the Queen's representative, the question whether any powers and functions are inherent in the office of the Governor or the Governor-General in such a case assumes a very different aspect.<sup>30</sup>

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<sup>28</sup> Robert R Garran, *The Coming Constitution* (Angus and Robertson, 1897) 147 (emphasis in original).

<sup>29</sup> *Ibid* 152.

<sup>30</sup> Andrew Inglis Clark, *Studies in Australian Constitutional Law* (G Partridge & Co, 1901) 63–4 (footnotes omitted).

In a more expansive discussion in Quick and Garran's *Annotated Constitution* the form, powers and functions of the Executive Government were characterised as 'essentially national'.<sup>31</sup> The executive authority established by the Federal Constitution was said to include all the discretionary or mandatory acts of government which can be lawfully done or permitted by the Executive Government in pursuance of powers invested in it or in pursuance of duties imposed upon it partly by the *Constitution* and partly by federal legislation. The commentary on s 61 specifically referred to Barton's observation that executive acts were either (1) exercised by prerogative or (2) statutory.<sup>32</sup> The authors also observed that the executive authority reserved to the Governors of States was of the same origin but higher antiquity than the newly created authority conferred on the Governor-General. The State executive authority was of as much importance within its sphere as a federal authority was within the federal sphere. It was not of a subordinate nature or an inferior quality.<sup>33</sup>

The uncertain boundary of the executive power conferred by s 61 was one of its virtues according to the *Vondel* opinion signed by Alfred Deakin in his capacity as the first Commonwealth Attorney-General:

No exhaustive definition is attempted in the Constitution — obviously because any such attempt would have involved a risk of undue, and perhaps unintentional, limitation of the executive power ... The framers of that clause evidently contemplated the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define, flowing naturally and directly from the nature of the federal government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted.<sup>34</sup>

The opinion, which may have been drafted by Robert Garran, went on to say that the scope of the executive power was 'at least equal to that of the legislative

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<sup>31</sup> Quick and Garran, above n 23, 700.

<sup>32</sup> *Ibid* 701.

<sup>33</sup> *Ibid* 701–2.

<sup>34</sup> A Deakin, 'Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth' in Patrick Brazil and Bevan Mitchell (eds) *Opinions of Attorneys General of the Commonwealth of Australia*, (Australian Government Publishing Service, 1981) vol 1, 129, 130.

power — exercised or unexercised'.<sup>35</sup> The executive power 'independent of Commonwealth legislation was said to extend to every matter to which the legislative power of the Commonwealth extended'.<sup>36</sup> Garran, who was of that opinion, however told the Royal Commission on the Constitution of the Commonwealth in 1927:

I used to have the view that some common law authority might be found for the executive; but in view of those words in s 61, I think you must seek some support for it either in the Constitution itself or in an Act of Parliament.

In the event, the expansive view of executive power expressed in the *Vondel* opinion, was rejected in *Williams (No 1)*.

At the time of federation and the early years of the Commonwealth there was evidently an assumption that a number of the common law prerogatives of the Crown, including the powers to declare war, enter treaties or acquire territories, were to be exercised by the Crown upon the advice of Imperial Ministers.<sup>37</sup> Full executive independence did not come until the Imperial Conference of the British Dominions held in 1926 which passed resolutions sufficient to secure 'the independence of Dominion executives, in the conduct of both domestic and foreign affairs'.<sup>38</sup>

An evolved judicial approach to the relationship of the executive power to the prerogatives of the Crown is found in the judgment of Mason J in *Barton v Commonwealth* decided in 1974:

By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables 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. It includes

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<sup>35</sup> Ibid 131.

<sup>36</sup> Ibid.

<sup>37</sup> Leslie Zines, *The High Court and the Constitution* (Butterworths Sydney, 4<sup>th</sup> ed, 1997) 251.

<sup>38</sup> George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31, 35.

the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.<sup>39</sup>

The last sentence of that passage makes clear that the prerogative powers were not viewed as exhaustive of the non-statutory executive power.

*Victoria v Commonwealth*, the *AAP Case*,<sup>40</sup> decided in the following year, concerned the validity of a legislative appropriation of money for the Australian Assistance Plan. Under that Plan grants were to be made to regional councils for social development programs. Six member of the Court divided evenly on validity. Stephen J did not decide that question as he considered that the plaintiff, the State of Victoria, did not have standing to institute the challenge. McTiernan, Jacobs and Murphy JJ were of the opinion that the appropriation was valid and that the challenge should be dismissed. With Stephen J being of the opinion that it should be dismissed for want of standing on the part of the State of Victoria, the action as a whole was dismissed by a majority. Barwick CJ, Gibbs and Mason JJ were of the opinion that the appropriation was invalid. In the course of his judgment, Mason J made an observation relevant to the content of executive power and its intersection with the incidental power under s 51(xxxix) of the *Constitution*:

[I]n 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.<sup>41</sup>

In 1976, when delivering the Octagon Lecture at the University of Western Australia, Professor Geoffrey Sawer referred to the judgment of Mason J in the *AAP Case* and 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.<sup>42</sup>

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<sup>39</sup> (1974) 131 CLR 477, 498.

<sup>40</sup> (1975) 134 CLR 338.

<sup>41</sup> *Ibid* 397.

<sup>42</sup> Geoffrey Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government' (unpublished Octagon Lecture, University of Western Australia, 1976) 10 cited in George Winterton 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 430-1.

The attachment of s 61 to concepts of nationhood was also reflected in the observation of Jacobs J in the *AAP Case*, with which Brennan J expressly agreed in *Davis v Commonwealth*,<sup>43</sup> that the phrase ‘maintenance of the Constitution’ imports the idea of Australia as a nation. Jacobs J said:

Within the words ‘maintenance of this Constitution’ appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.<sup>44</sup>

The powers conferred on the Commonwealth directly by s 61 can be identified in part by reference to the common law prerogatives but only to the extent consistent with the federal distribution of powers. The common law prerogatives cannot tell the story of non-statutory executive power. Brennan J in *Davis v Commonwealth*,<sup>45</sup> in which the Court held that provision for the commemoration of the Australian bicentenary was within the executive power of the Commonwealth, made the point:

[T]he executive power of the Commonwealth includes that mass of powers which the Executive Government possesses to act lawfully without statutory authority, together with statutory powers and capacities.<sup>46</sup>

He identified three categories of powers or capacities:

- a statutory (non-prerogative) power or capacity;
- a prerogative (non-statutory) power or capacity;
- a capacity which is neither a statutory nor a prerogative capacity.

There was, he said, ‘no express criterion by which non-statutory powers and capacities may be classified as falling within the executive power of the Commonwealth.’<sup>47</sup>

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<sup>43</sup> (1988) 166 CLR 79, 110.

<sup>44</sup> (1975) 134 CLR 338, 406.

<sup>45</sup> (1988) 166 CLR 79.

<sup>46</sup> *Ibid* 108.

<sup>47</sup> *Ibid* 108-9.

In their joint judgment in *Davis*, Mason CJ, Deane and Gaudron JJ described s 61 as conferring on the Commonwealth all the prerogative powers of the Crown except those necessarily exercisable by the States under the allocation of responsibilities made by the *Constitution* and those denied by the *Constitution* itself. They approved of what Mason J had said in *Barton* about the executive power enabling the Crown to undertake all executive action appropriate for the position of the Commonwealth under the *Constitution* and the spheres of responsibility vested in it by the *Constitution*.<sup>48</sup>

The prerogatives historically attached to the Crown inform the analysis of the content of non-statutory executive power under s 61 which is embedded in the common law which Sir Owen Dixon once described as supplying principles in aid of the interpretation of the *Constitution*.<sup>49</sup> Deploying a cosmological metaphor, he said of the common law:

[It] is more real and certainly less rigid than the ether with which scientists were accustomed to fill interstellar space. But it serves all, and more than all, the purposes in surrounding and pervading the Australian system for which, in the cosmic system, that speculative medium was devised.<sup>50</sup>

That is not to say that the common law prerogatives define non-statutory executive power. As Gummow J said in *Re Ditford; Ex parte Deputy Commissioner of Taxation*:

In Australia ... one looks not to the content of the prerogative in Britain but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown.<sup>51</sup>

Accepting that the content of non-statutory executive power is informed by Crown prerogatives relevant to the functions of the Commonwealth, their unqualified incorporation in that power and the associated incorporation of criteria limiting its scope should be approached with caution. In this context mention should be made of *Cadia Holdings Pty Ltd v New South Wales*.<sup>52</sup> The case concerned the construction of the term

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<sup>48</sup> Ibid.

<sup>49</sup> Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420.

<sup>50</sup> Ibid 424-5.

<sup>51</sup> (1988) 19 FCR 347, 369.

<sup>52</sup> (2010) 242 CLR 195.

‘privately owned minerals’ in the *Mining Act 1992* (NSW) and whether it included copper from a copper mine which also contained gold. The answer depended upon the scope of the Crown prerogative in the royal minerals, gold and silver, received as part of the common law in the Colony of New South Wales subject to the effect of old English statutes which had modified the prerogative so far as it applied to copper mines which contained gold and silver.

The rationale of the prerogative, asserted by the Crown in England over gold and silver, was the requirement to finance defence forces and to control the coinage. An ancillary rationale was to prevent undue concentrations of wealth, and therefore power, in private hands. To the extent that the rationales had any continuing relevance at the time of federation, they might have pointed to the Commonwealth as the appropriate repository of the prerogative rather than the States. In their joint judgment in *Cadia*, Gummow, Hayne, Heydon and Crennan JJ said:

The executive power of the Commonwealth of which s 61 of the *Constitution* speaks enables the Commonwealth to undertake executive action appropriate to its position under the *Constitution* and to that end includes the prerogative powers accorded the Crown by the common law.<sup>53</sup>

That said, their Honours went on to refer to the historic event of Federation as presenting issues still not fully resolved of the allocation between the Commonwealth and States of prerogatives which prior to federation had been divided between the Imperial and colonial governments and of their adaptations to the division of executive authority in the federal system established by the *Constitution*. They suggested that if regard be had to the historical rationale for the royal metals prerogative in the *Case of Mines*, it might well have been thought that if it survived under the common law of Australia, it accrued to the executive authority of the Commonwealth.<sup>54</sup>

One lifeline, securing the present disposition, was noted emerging from the judgment of Evatt J in *Farley’s Case*.<sup>55</sup> He had observed that as a general rule prerogatives which partook of the nature of proprietary rights and which

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<sup>53</sup> Ibid 226 [86] (footnote omitted).

<sup>54</sup> Ibid 226 [87].

<sup>55</sup> *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278.

before federation had been exercisable by the executive governments of the colonials were exercisable by the executives of the various States.<sup>56</sup>

Ultimately, *Cadia* was determined on the assumption that the State of New South Wales was the repository of the relevant prerogative. The dispute was as to the scope of the prerogative with respect to copper. Accordingly, it was inappropriate to further consider the question of the appropriate repository.<sup>57</sup> In any event, the prerogative right appeared to have subsisted at the time of federation independently of the original justifications which had been offered in argument in the *Case of Mines*. Further, the constitutional powers of the States to dispose of the wastelands of the Crown and the proprietary character of the prerogative weighed in favour of the view that it remained with the States.

The general point emerging from the preceding is that while the prerogative may rightly be said to inform the content of executive power, it is not to be assumed that it reposes in it as a kind of neat organ transplant from the unwritten British Constitution into the *Constitution of the Commonwealth of Australia*.

The question whether non-statutory executive power extended to the exclusion of aliens arose in 2001 in the Full Court of the Federal Court in *Ruddock v Vadarlis*.<sup>58</sup> The critical issue in that case, in an application for *habeas corpus*, was whether the Commonwealth could, in the exercise of executive power, prevent the landing in Australia of persons aboard the Norwegian vessel *Tampa* who had been rescued at sea at the request of the Australian Coast Guard. The question really had two elements: did non-statutory executive power extend that far and if so, had it been abrogated by the legislative scheme regulating the entry of persons into Australia by the *Migration Act 1958* (Cth). The majority comprising Beaumont J and I held that the executive power of the Commonwealth, absent statutory extinguishment or abridgement, extended to the power to prevent the entry of non-citizens and to do what was necessary to effect such exclusion. Black CJ dissented.

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<sup>56</sup> *Ibid* 322.

<sup>57</sup> (2010) 242 CLR 195, 226–7 [88]–[89].

<sup>58</sup> (2001) 110 FCR 491.

It is not appropriate that I discuss the reasons of the majority at the time, save to point descriptively to its conclusion that ‘absent statutory authority there is a power at least to prevent entry to Australia’. It was not necessary to consider its full extent. It was sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting necessary means to achieve that result. It would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave.<sup>59</sup> It was not abrogated by the legislative scheme of the *Migration Act*.<sup>60</sup>

Black CJ in dissent held that the executive power did not extend to the exclusion of aliens. In a key passage his Honour held:

If it be accepted that the asserted Executive power to exclude aliens in time of peace is at best doubtful at common law, the question arises whether s 61 of the *Constitution* provides some larger source of such a power. It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the *Constitution* by virtue of general conceptions of ‘the national interest’. This is all the more so when according to English constitutional theory new prerogative powers cannot be created...<sup>61</sup>

The Chief Justice quoted the observation of Diplock LJ in *British Broadcasting Corporation v Johns*<sup>62</sup> that ‘it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.’ He went on to hold that, in any event, if there were such a power it would have been abrogated by the scheme of the *Migration Act*. There was a point of difference between the majority and the Chief Justice on the test for such abrogation. He held that the prerogative will be displaced where the statute covers the subject matter of the prerogative power.

The question of a non-statutory executive power to exclude aliens was the subject of some observations in 2015 in *CPCF v Minister of Immigration and Border Protection*,<sup>63</sup> which concerned the validity of action taken by

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<sup>59</sup> Ibid 544 [197].

<sup>60</sup> Ibid 544–6 [199]–[205].

<sup>61</sup> Ibid 501 [30].

<sup>62</sup> [1965] Ch 32, 79.

<sup>63</sup> (2015) 255 CLR 514.

Australian maritime officers pursuant to s 72 of the *Maritime Powers Act 2013* (Cth). The section authorised the detention of persons on vessels detained in Australia's contiguous zone and their removal to places in the migration zone or outside the migration zone, including places outside Australia. The power was subject to a constraint that a maritime officer must not place or keep a person in a place unless satisfied on reasonable grounds that it was safe to do so. Passengers on an Indian flagged vessel who claimed to be refugees were intercepted in the contiguous zone by a Commonwealth vessel. They were taken on board and detained on the vessel which after some time began to carry them towards India in accordance with a decision of the National Security Committee of Cabinet. At that time it was not known whether India would accept them. On a Special Case Stated, the High Court by majority held that s 72(4) of the *Maritime Powers Act* authorised the plaintiff passenger's detention during the material period. The fall-back question, namely whether the non-statutory executive power of the Commonwealth authorised an officer of the Commonwealth to take steps for the purpose of preventing the plaintiff from entering Australia and to detain the plaintiff for the purpose of taking the plaintiff to India, was held by majority to be unnecessary to answer.

Keane J, who was part of the majority, nevertheless relied upon *Ruddock v Vadarlis* to support his view that the non-statutory executive power did authorise the action taken. He rejected an argument by the plaintiff that *Ruddock v Vadarlis* was wrongly decided. Hayne and Bell JJ in dissent held that s 72 did not authorise the taking of a person to India when at the time that destination was chosen the person had neither right nor permission to enter that country.<sup>64</sup> Their Honours characterised the Commonwealth's reliance on non-statutory executive power as the Crown entering through the backdoor when it had failed to enter through the front door, quoting Roskill LJ in *Laker Airways Ltd v Department of Trade*.<sup>65</sup> They formulated the relevant question as whether an officer of the Commonwealth executive who purported to authorise or enforce the detention in custody of an alien without judicial mandate could do so outside the territorial boundaries of Australia without statutory authority. They said:

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<sup>64</sup> Ibid 560 [123].

<sup>65</sup> Ibid 564-5 [141] quoting [1977] QB 643, 719.

Reference to the so-called non-statutory executive power of the Commonwealth provides no answer to that question. Reference to the royal prerogative provides no answer. Reference to ‘the defence and protection of the nation’ is irrelevant, especially if it is intended to evoke echoes of the power to declare war and engage in war-like operations. Reference to an implied executive ‘nationhood power’ to respond to national emergencies is likewise irrelevant. Powers of those kinds are not engaged in this case. To hold that the Executive can act outside Australia’s borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.<sup>66</sup>

Kiefel J also concluded that there was no relevant non-statutory executive power. Her Honour held that the *Maritime Powers Act* authorised the use of the coercive powers of expulsion and detention for which the Commonwealth defendants contended and provided for their exercise in a detailed way.<sup>67</sup> Her Honour identified, as a constitutional principle, the proposition that ‘any prerogative power is to be regarded as displaced, or abrogated, where the Parliament has legislated on the same topic.’<sup>68</sup> Against the existence of a prerogative power to expel, deport or detain, her Honour cited the ‘detailed analysis’ undertaken by Black CJ in dissent in *Ruddock v Vadarlis*.

It may be noted that s 5 of the *Maritime Powers Act*, like s 7A of the *Migration Act* post-*Vadarlis*, provides ‘[t]his Act does not limit the executive power of the Commonwealth’. However, s 5 could hardly be construed as preserving an executive power exceeding the constraints imposed upon its exercise by the *Maritime Powers Act*.

The executive power of the Commonwealth in relation to expenditure has been explored in a trio of cases beginning with *Pape v Federal Commissioner of Taxation*.<sup>69</sup> *Pape* concerned the validity of the *Tax Bonus for Working Australians Act 2009* (Cth). The Act provided for payments to be made to a large number of Australian resident taxpayers. Its purpose was to create a ‘fiscal stimulus’, to support economic activity as a means of mitigating the effects of the Global Financial Crisis. Mr Pape, a law lecturer at the University of New England, contended that the payment and the legislation

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<sup>66</sup> Ibid 568 [150] (footnotes omitted).

<sup>67</sup> Ibid 601 [280].

<sup>68</sup> Ibid 600 [279].

<sup>69</sup> (2009) 238 CLR 1.

authorising it were beyond the executive and legislative powers of the Commonwealth. A majority of the High Court held that the determination by the Executive, supported by agreed facts in the case, that there was a need for a fiscal stimulus enlivened power to enact legislation pursuant to s 51(xxxix) of the *Constitution* as incidental to the exercise of executive power. An important holding by all members of the Court was that the appropriation provisions of the *Constitution*, ss 81 and 83, could not be relied upon as the source of substantive spending power. That had to be found elsewhere in the *Constitution* or in statutes made under it. Appropriation was a necessary, but not a sufficient condition of the power to expend public money. That holding set the scene for *Williams (No 1)*<sup>70</sup> and *Williams (No 2)*<sup>71</sup> in which challenges were made to the authority of the Commonwealth to expend funds on the provision of chaplaincy services in public schools.

In their joint judgment in *Pape*, Gummow, Crennan and Bell JJ posed the question about the respective spheres of the exercise of executive power by Commonwealth and State governments. They adopted the formulation by Brennan J in *Davis*, borrowing from Mason J in *AAP*, that s 61 confers on the executive government power 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.<sup>72</sup> They described the Executive Government as 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 of the Global Financial Crisis. It was said to have its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution*. Its form in Australia today is a power to act on behalf of the federal polity.<sup>73</sup> It was unnecessary to attempt an exhaustive description of the content of the power provided by s 61.

In his Garran Oration, delivered on 22 October 2010 on the topic of 'Public Law and the Executive', Chief Justice Spigelman of the Supreme Court of New South Wales observed, in the light of *Ruddock v Vadarlis* and *Pape* that the extent of the executive power of the Commonwealth appeared to have been

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<sup>70</sup> *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

<sup>71</sup> *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

<sup>72</sup> *Ibid* 87–8 [228].

<sup>73</sup> *Ibid* 89 [233].

cut free from the traditional conception of prerogative powers in a manner which meant there was now no source of guidance as to the boundaries of executive power. He said:

The delineation of the permissible scope of the executive power of the Commonwealth will develop on a case-by-case basis, albeit with reference to the traditional categories of the prerogative.<sup>74</sup>

He predicted that just as prerogative writs and *mandamus* and prohibition mentioned in s 75(v) of the *Constitution* have been rebadged as ‘constitutional writs’, prerogative power would be replaced with the terminology of executive power. He described this as a dramatic development in terms of our legal history. He said:

Identifying the scope and limits of executive power will now turn on a process of constitutional interpretation, rather than historical inquiry. In this respect the fundamental assumptions underlying the *Constitution* – including the rule of law and responsible government – will be of critical significance. Other presumptions in the law of statutory interpretation may also come to play a part.<sup>75</sup>

As appears from *Williams (No 1)* and *Williams (No 2)* the location of Commonwealth executive power in a federal constitution also has a part to play.

In *Williams (No 1)* the plaintiff, whose children were enrolled at a Queensland State Primary School, challenged the validity of an agreement made by the Commonwealth Government with the Scripture Union Queensland for the provision of funding under the National School Chaplaincy Program. Under the agreement the Scripture Union was to provide chaplaincy services and to ensure that they were delivered in accordance with the National School Chaplaincy Program Guidelines. The Commonwealth was obliged to provide the funding for those services, subject to the availability of sufficient funds and compliance by Scripture Union with the terms on which the funding was provided. The Court held that the agreement was beyond the executive

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<sup>74</sup> The Hon J J Spigelman AC, ‘The Garran Oration: Public Law and the Executive’ (Speech delivered at the Institute of Public Administration Australian National Conference, Adelaide, 22 October 2010) 24-5.

<sup>75</sup> *Ibid.*

power of the Commonwealth and that the making of payments by the Commonwealth pursuant to the agreement was not supported by s 61.

The Commonwealth argued that the Executive had a capacity similar to that of other legal persons which meant that its power to spend was effectively unlimited. In the alternative it argued that Commonwealth executive power mapped the contours of its legislative powers. The capacities argument was rejected by six members of the Court. In their joint judgment, Gummow and Bell JJ quoted from the plurality judgment in *Australian Woollen Mills Pty Ltd v Commonwealth* the observation that ‘the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved.’<sup>76</sup> Their Honours also observed that the Commonwealth’s submission on this point appeared to proceed from an assumption that the Executive branch had a legal personality distinct from the Legislative branch with a result that it was endowed with the capacities of an individual. The legal personality, as they said, is that of the Commonwealth of Australia, which is the body politic established under the *Commonwealth of Australia Constitution Act 1900* and identified in covering cl 6 of the *Constitution*. Hayne J queried the use of the term ‘capacity’ in the discussion of the executive power of the Commonwealth. The word ‘capacity’ was best used in the sense of ‘power’. To the extent that the Commonwealth parties’ submissions implicitly asserted that because the Commonwealth had some contractual and dispositive capacity it had power to act as it did in this case, they should be rejected. The submission conflated the question of contractual and dispositive capacity in the sense of absence of disability with the question whether there was power to enter into the contract and to make the payments at issue. It was not to be assumed and was not demonstrated that the Executive Government had all of the capacities, in the sense of powers, to contract and spend that a natural person has.<sup>77</sup>

Importantly, four of the Justices rejected the argument that the executive power follows the contours of Commonwealth legislative power. In my view, expressed in my judgment, there were consequences for the Federation flowing from attributing to the Commonwealth such a wide executive power to expend moneys on any subject of Commonwealth legislative

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<sup>76</sup> (2012) 248 CLR 156, 236 [151] citing (1954) 92 CLR 424, 461.

<sup>77</sup> *Ibid* 253-4 [203]-[204].

competency subject only to the requirement of a parliamentary appropriation.<sup>78</sup> Gummow and Bell JJ, in common with Crennan J, were concerned about the bypassing of the grants power in s 96 and the importance of the principle of responsible government in relation to the requirement of statutory authority for executive spending.<sup>79</sup>

The Commonwealth Parliament subsequently enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), an omnibus bill, purporting to provide broad legislative authority for the Executive to enter into contracts and to spend money on programs specified in regulations. The Chaplaincy Program was supported by this legislation. The program was challenged successfully in *Williams (No 2)*.

In *Williams (No 2)* the Court was invited to reopen *Williams (No 1)* but declined to do so. It held that the omnibus legislation, being the *Financial Framework Legislation Amendment Act*, in its application to the National Schools Chaplaincy Program was not supported by any head of legislative power and the making of payments for the purposes of the program was not within the executive power of the Commonwealth. Six Justices sat on the case.

In the joint judgment of five, the effect of *Pape* was summarised as follows:

- sections 81 and 83 of the *Constitution* do not confer a substantive spending power;
- the power to spend appropriated moneys must be found elsewhere in the *Constitution* or in statutes made under it;
- the determination of the Executive Government that there was a need for an immediate fiscal stimulus to the economy enlivened legislative power under s 51(xxxix) to enact the impugned law as a law incidental to that exercise of the executive power.

Rejecting the application to reopen *Williams (No 1)*, the plurality in *Williams (No 2)* said:

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<sup>78</sup> Ibid 192–3 [37].

<sup>79</sup> Ibid 234 [143].

[T]he decision in *Williams [No 1]* depended upon premises established in *Pape*, and the Commonwealth parties did not seek to reopen *Pape*. In these circumstances, there may be room for debate about the extent to which the Commonwealth parties were right to characterise *Williams [No 1]* as establishing a new principle. But, even if it is right to say that *Williams [No 1]* did not apply principles ‘carefully worked out in a significant succession of cases’, demonstrating this to be so would not show that the decision should be reopened. Rather, it would show only that the decision was not one which the Court should be especially reluctant to reopen. It would provide no necessary reason to reopen what has been so recently decided by six Justices.<sup>80</sup>

The plurality also rejected an argument that *Williams (No 1)* should be reopened because it did not give a single and comprehensive answer to when and why Commonwealth spending needs statutory authorisation, and it did not decide what powers the Executive Government of the States have to spend or contract. The decision, it was acknowledged, might not provide the Commonwealth with an answer to every question that might be asked about Commonwealth expenditure powers. Nor did it consider any question about State spending powers. How or why such observations pointed to a need to reopen could not be explained. The plurality did, however, record arguments which were advanced by the Commonwealth parties against what was said in *Williams (No 1)*.

The Commonwealth argued that it was necessary to ‘commence with an understanding of executive power at common law’ and to identify ‘the precise source of any limitation on Commonwealth executive power’. The plurality observed that this was a reference to executive power as exercised in Britain. It rejected the assumption that absent some limitation the executive power of the Commonwealth is the same as British executive power:

But why the executive power of the new federal entity created by the *Constitution* should be assumed to have the same ambit, or be exercised in the same way and same circumstances, as the power exercised by the Executive of a unitary state having no written constitution was not demonstrated.<sup>81</sup>

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<sup>80</sup> (2014) 252 CLR 416, 463–4 [60].

<sup>81</sup> *Ibid* 468 [79].

It was acknowledged that the history of British constitutional practice was important for a proper understanding of the executive power of the Commonwealth. It illuminated a number of provisions of the *Constitution*. But the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power.

There are, no doubt from an academic perspective, many unanswered questions about the scope of Commonwealth executive power in Australia and perhaps also the scope of the executive power of the States. Some of them may give rise to anxiety about future directions. The judiciary is unlikely to provide a comprehensive answer in any one case. The development of principle will proceed case-by-case. It may be that there will not be many more challenges to the expenditure of public moneys. In that connection, it may be noted that the Court recently dismissed challenges to the expenditure of Commonwealth moneys to fund a postal survey of electors on the question whether the definition of ‘marriage’ in the *Marriage Act 2004* (Cth) should be amended to extend to marriages between couples of the same sex.<sup>82</sup>

As to whether there will be further cases concerning the scope of the executive power, time will tell. In the meantime, however, the academy will continue with sometimes anxious scrutiny of those questions and, as they have always done, enrich the analysis that the judiciary must undertake in the determination of particular cases. It may be anticipated that future analyses will yield incremental exposition and a cautious approach.

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<sup>82</sup> *Wilkie v Commonwealth; Marriage Equality Ltd v Cormann* [2017] HCA 40 (28 September 2017).