EXECUTIVE POWER ISSUE

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INTRODUCTION

Dr Murray Wesson

We live in unsettled times. In recent years, we have witnessed a spate of Islamist terrorist atrocities, the resurgence of authoritarianism, increasing and apparently intractable concerns about inequality, and a weakening of the liberal consensus. In circumstances such as these, questions about executive power are likely to be particularly relevant. As the Honourable Robert French AC notes in his contribution to this special issue, anxieties about perceived threats to the social order are capable of fuelling expansive approaches to executive power, as the public seek the reassurance of ‘strong’ forms of government. On the other hand, executive power, especially non-statutory executive power, is itself anxiety provoking and may be a factor in democratic decay. In an oft-cited observation in the Communist Party Case, Sir Owen Dixon noted that ‘[h]istory, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it had been done not seldom by those holding the executive power.’

In this light, it is perhaps unsurprising that executive power and its attendant anxieties have featured prominently in many recent events. In the United Kingdom, the Supreme Court found in Miller that the government could not rely upon the prerogative to trigger withdrawal from the European Union but required an Act of Parliament. This decision was welcomed by some commentators on the basis that the prerogative is the ‘enemy of the people’, but was also resisted by others due to the ‘unanimity, strength and

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1 Senior Lecturer, School of Law, the University of Western Australia. Many of the contributions to this special issue of the University of Western Australia Law Review derive from an Executive Power workshop held at the Institute of Advanced Studies, the University of Western Australia, on 7 April 2017. The workshop, and hence the special issue, would not have been possible without the generous support of the Institute of Advanced Studies. I would also like to thank the University of Western Australia Law School for financially supporting the production of the special issue, and Professor Michael Blakeney as staff editor for his advice and encouragement. Finally, I would like to thank Stephen Puttick for his excellent work as student editor.

2 ‘Executive Power in Australia – Nurtured and Bound in Anxiety’.

3 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 187.


dispatch’ supposedly required by the executive to implement Brexit. In the United States, President Donald Trump’s executive orders creating a travel ban on people from six Muslim majority countries and two other countries have been criticised as abuses of power and challenged in the courts, but have also been defended as necessary to protect the American people against the threat of terrorism. Closer to home, albeit less dramatically, in Williams (No 1) the High Court of Australia fundamentally reshaped the Commonwealth executive’s authority to spend money and enter into contracts. This judgment was partly motivated by a concern to enhance responsible government and thereby make the exercise of executive power more accountable. However, it was also strongly resisted by the government, as demonstrated by the Commonwealth’s attempt to reopen Williams (No 1) in Williams (No 2).

Against this background, the articles in this special issue of the University of Western Australia Law Review make a valuable contribution to the literature on executive power, particularly in the United Kingdom and Australia. This introduction will not attempt to canvas all of the issues covered in the special issue. However, it will explore the following themes that emerge prominently from the articles: the content of executive power; judicial review of exercises of executive power; and limits that exist upon executive power. As we shall see, each of these issues are pivotal in understanding executive power, but they are also subject to flux, disagreement, and uncertainty.

I The Content Of The Executive Power

Many of the articles in the special issue are concerned with how to determine the content of executive power, especially the enigmatic category of non-statutory executive power. Interestingly, this issue raises similar considerations under the constitutions of the United Kingdom and Australia. The difficulties of determining the content of executive power under the United Kingdom’s

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6 At the time of writing the Supreme Court of the United States had allowed the latest iteration of the travel ban to go into effect while legal challenges against it continued. See ‘Supreme Court Allows Trump Travel Ban to Take Effect’, The New York Times (New York), 4 December 2017.


8 Ibid 206 (French CJ), 232-3 (Gummow and Bell JJ), 271 (Hayne J), 351-2 (Crennan J).

unwritten constitution are obvious; in the absence of a text, regard must be had to other considerations. However, the sparseness of s 61 of the Commonwealth Constitution – ‘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’ – means that the text is also not of great assistance in this jurisdiction.

Various approaches to determining the content of executive power are evident in this collection of articles. Firstly, in the context of s 61 of Commonwealth Constitution, there is a distinction between historical and autochthonous approaches. Historical approaches emphasise traditional conceptions of executive power sourced in the constitutional system of the United Kingdom, whereas autochthonous approaches emphasise the different context of Australia’s written, federal constitution to the United Kingdom’s unwritten, unitary constitution. There is also a distinction between approaches focused upon conceptual analysis and approaches resembling constructive interpretation. Conceptual analysis seeks a clearer understanding of concepts, in part through testing them against counter-examples.¹⁰ Constructive interpretation, in contrast, seeks the interpretation of a legal concept that best fits and justifies the relevant materials.¹¹ These methodologies are not mutually exclusive and there are overlaps in the analyses of the authors. They are also not exhaustive; there are no doubt other approaches to determining the content of executive power. Nevertheless, these labels are useful in making sense of the contributions of the authors and the challenges involved in giving content to executive power.

The historical approach is most evident in the contribution of Professor Peter Gerangelos, ‘Section 61 of the Commonwealth Constitution and an “Historical Constitutional Approach”: An Excursus on Justice Gageler’s Reasoning in the M68 Case.’ Gerangelos draws upon the work of J W F Allison¹² to advocate a ‘historical constitutional approach’ to s 61 of the Commonwealth Constitution. He argues that reliance should be

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placed upon ‘traditional conceptions’ in determining the content of s 61 such as the prerogative powers found in the common law, the capacities emanating from the Commonwealth’s juristic personality, the Australian understanding of the Crown at federation, the principles of responsible government, and ancient statutes that have restricted prerogative power so that it is no longer recognised at common law.\footnote{13}

Gerangelos argues further that this approach is exemplified by Gageler J’s exposition of executive power in the \textit{M68} case.\footnote{14} Indeed, Gerangelos notes that Gageler J makes no reference in his judgment to the ‘nationhood’ power recognised in the \textit{Pape} case,\footnote{15} which derives not from traditional conceptions of executive power but rather from the status of the Commonwealth as a national government. Gerangelos concedes that it is unclear whether this omission is telling of Gageler J’s views on the existence of such a power. However, he argues that Gageler J may implicitly regard the nationhood power as expanding the ‘breadth’ (that is, the subject matters over which executive power can be exercised) but not the ‘depth’ (that is, the types of actions that can be undertaken by the executive in relation to those subject matters) of executive power\footnote{16} – an analysis similarly advanced by Dr Peta Stephenson in her contribution to the special issue. Gageler J’s judgment may also implicitly relegate the nationhood power to circumstances of clear and unambiguous emergency. Overall, Gerangelos cautions against decoupling s 61 from traditional sources on the basis that this may result in conceptions of executive power that are amorphous, self-defining and potentially invasive of civil liberties.

The ‘historical constitutional approach’ favoured by Gerangelos contrasts with the contribution of the Honourable Robert French AC who, in ‘Executive Power in Australia – Nurtured and Bound in Anxiety’, gives greater emphasis to the autochthonous aspects of s 61. His Honour traces the drafting history of 61 of the \textit{Commonwealth Constitution} while noting that it ‘says
something, but not a lot, about its scope and content. His Honour observes that the prerogative informs the content of executive power but notes that it is not exhaustive of non-statutory executive power and does not repose ‘as a kind of neat organ transplant from the unwritten British Constitution into the Constitution of the Commonwealth of Australia.’ Indeed, his Honour cites authority that in Australia ‘one looks not to the content of the prerogative but rather to s 61 of the Constitution.’

Against this background, the Honourable Robert French AC discusses the development of the nationhood power in High Court decisions such as the AAP case and Davis v Commonwealth. His Honour also explores the vexed issue of whether non-statutory executive power extends to the exclusion of aliens, as exemplified by the decision of the Full Court of the Federal Court in Ruddock v Vadarlis. Finally, his Honour provides an analysis of the High Court’s seminal decisions on appropriation and spending in Pape v Federal Commissioner of Taxation, Williams (No 1) and Williams (No 2). In a marked contrast to the ‘historical constitutional approach’ favoured by Gerangelos, his Honour quotes the Honourable Justice James Spigelman AC to the effect that ‘[i]dentifying the scope and limits of executive power will now turn on a process of constitutional interpretation, rather than historical inquiry’ – albeit informed by fundamental assumptions of the Commonwealth Constitution such as the rule of law, responsible government, and federalism.

In ‘The Strange Death of Prerogative in England’, Professor Thomas Poole adopts an approach to determining the content of executive power under

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17 'Executive Power in Australia – Nurtured and Bound in Anxiety' at 22.
18 Ibid 32. In a similar vein, in Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 at 60 French CJ held that while history and the common law inform the content of s 61, ‘it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.’
19 Re Ditford; Ex parte Deputy Commissioner of Taxation (1988) 19 FCR 347, 369 (Gummow J).
24 (2012) 248 CLR 156.
the United Kingdom’s unwritten constitution that is more akin to conceptual analysis. Poole reviews canonical definitions of the prerogative emanating from A V Dicey, John Locke, and William Blackstone. On this basis, he constructs a central case of the prerogative, which he expresses in a series of propositions that may be summarised as follows: prerogative is the name the constitution gives to a specific bundle of executive powers; prerogative is an expression of peremptory authority and therefore results in a direction as opposed to a general norm; an exercise of the prerogative is directed at officials and can have no meaningful effect on legal rights and obligations; prerogative has a form that dispenses with special requirements and a function bound up with special power and jurisdiction; the elements of the prerogative function as a complex whole; and although prerogative operates within the constitution its open-textured nature reserves a degree of creativity to the executive.27

However, conceptual analysis is also concerned to refine our understanding of concepts by testing them against counter-examples. In the process, we may revise our provisional understanding of a concept, or we may conclude that some common uses of the concept are incorrect. In this vein, Poole tests the central case of the prerogative against a quartet of recent decisions of the Supreme Court of the United Kingdom, including the Miller decision.28 Poole’s conclusion is that the common law powers incorporated by the prerogative are intact but the extent to which these entail a claim to special authority and hence deference on the part of the courts may be weakening – a point returned to below in the discussion of judicial review of executive power. It follows that the prerogative is not a special category but rather an ‘inchoate set of executive capacities...’29

In contrast, in ‘Nationhood and Section 61 of the Constitution’, Dr Peta Stephenson adopts an approach to s 61 that may be analogised to Ronald Dworkin’s concept of constructive interpretation, although it should be noted that Stephenson does not expressly draw upon Dworkin’s work. In Law’s Empire, Dworkin argues that legal interpretation involves assembling the set of

29 ‘The Strange Death of Prerogative in England’ at 66.
principles that best fit and justify previous legislative and judicial decisions, thereby presenting the legal system in its best light when considered from the perspective of political morality. For Dworkin, constructive interpretation is not a matter of recovering the subjective intentions of individual decision-makers; rather, legal rights and duties should be identified on the assumption that ‘they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.’ Hence, Dworkin’s notion of ‘law as integrity.’

In her article, Stephenson arguably provides a constructive interpretation of the case law on the nationhood power that seeks to demonstrate that it does not have the amorphous and self-defining character feared by Gerangelos. Firstly, Stephenson reviews the key precedents on the nationhood power to demonstrate that Australia’s acquisition of national status has expanded the ‘breadth’ of Commonwealth executive power, or the range of subject matters over which executive power may be exercised. However, Stephenson also argues that the nationhood power has not expanded the ‘depth’ of Commonwealth executive power. Instead, the case-law is ‘best understood as confining the nationhood power to the established common law powers of the Crown.’ In other words, the nationhood power has not armed the Commonwealth with additional coercive powers but instead supports executive action that falls within existing common law capacities. Stephenson further argues that the High Court has avoided undermining the federal distribution of powers by applying Mason J’s ‘peculiarly adapted’ test in the AAP case, where his Honour referred to ‘a capacity to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation.’ Stephenson argues that this test incorporates federalism as a limit on the nationhood power.

In so doing, Stephenson provides a coherent and morally appealing account of the case law on the nationhood power. However, a difficulty is posed for her analysis by Ruddock v Vadarlis, in which a majority of the Full Court of the Federal Court found that the Commonwealth could exercise non-

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31 Ibid chs 6-7.
32 Nationhood and Section 61 of the Constitution' at 153.
statutory executive power to prevent the entry of non-citizens into Australia. Given that the case involved a coercive use of the nationhood power, it appeared to add to the ‘depth’ of non-statutory executive power. Stephenson’s solution is, in essence, to isolate Ruddock v Vadarlis as a decision falling outside the constructive interpretation of the relevant authorities. Put differently, the interpretation that best fits and justifies the precedents on the nationhood power does not include Ruddock v Vadarlis, thereby implicitly regarding it as wrongly decided.35

II JUDICIAL REVIEW OF EXECUTIVE POWER

The second theme that emerges from the articles in this special issue is judicial review of executive power, particularly non-statutory executive power. As we have seen, Poole is concerned with judicial review of exercises of prerogative power. The prerogative has been regarded as judicially reviewable by the English courts since the GCHQ case36 but has typically been approached with a high level of deference. Poole refers to this as the prerogative ‘two-step’: the assertion that ordinary legal principles apply to prerogative decision-making, coupled to the accommodation of government interests in the application of these principles. Put differently, ‘courts were disinclined to say that a challenge to a prerogative was non-justiciable, but were reluctant to decide against the government.’37 However, Poole argues that the common thread of the quartet of United Kingdom Supreme Court decisions discussed in his article is the absence of deference accorded to the category of prerogative. A weak reading of this development is that the prerogative has become a category of executive power that may sometimes evoke special authority in appropriate cases; a strong reading is that the prerogative no longer entails a claim to special authority and has simply begun to resemble other executive powers. Indeed, Poole speculates that invoking the prerogative may now even put the courts more on guard than they would otherwise have been, thereby becoming a liability for those tasked with defending government action.

35 Dworkin allows that the constructive interpretation that best fits and justifies the legal materials may identify some precedents as mistakes. See, for example, Law’s Empire (Harvard University Press, 1986) 230.
36 Council of Civil Service Unions v Minister for the Civil Service (GCHQ Case) [1985] AC 374.
37 ‘The Strange Death of Prerogative in England’ at 57.
In contrast, in ‘Judicial Review of Non-Statutory Executive Action: Australia and the United Kingdom Reunited?’, Amanda Sapienza explains that judicial review of exercises of non-statutory executive power is less developed in Australia than in the United Kingdom. Whether a non-statutory power exists (the constitutional question) is reviewable, but the High Court has never been required to decide whether the manner of exercise of non-statutory powers (the administrative law question) is reviewable by the courts. Given that judicial review of non-statutory executive power is now uncontroversial in the United Kingdom, one might expect that English cases may provide a source of guidance to Australian courts when they are called upon to review non-statutory executive action.

However, as Sapienza explains, especially in recent decades the laws of judicial review in the United Kingdom and Australia have steadily diverged. This divergence is bound up in the different constitutional arrangements of the United Kingdom and Australia, especially the absence of a written constitution in the United Kingdom. The divergence manifests itself in various ways, including the retention of the concept of ‘jurisdictional error’ by Australian courts to mark the limits of judicial and executive authority. As for what constitutes jurisdictional error, the High Court has maintained an ultra vires approach to judicial review that means that statutory interpretation is used to attribute an intention to Parliament regarding the limits of powers conferred upon the executive.

How then should jurisdictional error be given content in the context of non-statutory executive power? Sapienza argues that in Australia it is necessary to look to the Commonwealth Constitution to ascertain the ambit of executive power, although the interpretation of the Constitution may be informed by the common law. On this basis, principles of common law constitutionalism derived from English law such as parliamentary sovereignty, the presumption of reason, and the separation of powers may set limits on the exercise of non-statutory executive power. This would mark a convergence between the laws of judicial review in the United Kingdom and Australia, although Sapienza notes that the strict approach to judicial power entailed by the Commonwealth

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18 Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38, 47.
Constitution leaves less scope for the questions of deference that have preoccupied the English courts. The limits on executive power are explored further in the section that follows.

III THE LIMITS OF EXECUTIVE POWER

In Australian constitutional law, there are well-established limits on legislative power arising under the Commonwealth Constitution such as the implied freedom of political communication. To what extent, and in what manner, might the implied freedom restrict exercises of executive power? The High Court has often stated obiter that the implied freedom of political communication applies to executive power, but its decisions have mainly focused upon legislative power. In the recent case of Chief of the Defence Force v Gaynor, the Full Court of the Federal Court found that the implied freedom may function as a relevant consideration in judicial review of executive exercises of statutory power, although the Court declined to review the decision at issue in that case. The questions of whether and how the implied freedom restricts executive power therefore remain unresolved. A further issue is whether there is a distinction in this regard between statutory and non-statutory exercises of executive power.

The relationship between the implied freedom and statutory executive power is explored by Joshua Forrester, Lorraine Finlay and Professor Augusto Zimmermann in ‘Finding the Streams’ True Sources: The Implied Freedom of Political Communication and Executive Power.’ The authors reject the approach proposed, although not applied, by the Full Court of the Federal Court in Gaynor, whereby the implied freedom is treated as a relevant consideration in judicial review of executive decisions. In their view, this approach undervalues the implied freedom and allows it to be too easily

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39 The implied freedom of political communication impliedly arises under ss 7 and 24 of the Commonwealth Constitution and protects free political communication by limiting the legislative powers of the Commonwealth, State, and Territory legislatures. See Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
40 For example, Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 560.
41 Some of the early decisions also concerned the relationship between the implied freedom of political communication and the common law of defamation. See, for example, Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 and Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
42 (2017) 246 FCR 298.
43 Ibid 317 [80].
dismissed by the decision-maker. Instead, the authors argue that the High Court should adapt the ‘reasonably appropriate and adapted’ test introduced in *Lange v Australian Broadcasting Corporation*,\(^{44}\) and developed in *McCloy v New South Wales*\(^{45}\) to include proportionality testing, so that it applies to exercises of statutory executive power. In essence, their argument is that the constitutional significance of the implied freedom is such that a proportionality requirement should apply in Australian administrative law where an exercise of statutory executive power burdens free political communication. The test would apply to Commonwealth, State, and Territory exercises of executive power.

Forrester, Finlay and Zimmermann then apply their proposed approach to the case of *Gaynor*. The case concerned the termination of Major Bernard Gaynor’s commission as an officer of the Army Reserve under reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth). The termination was prompted by remarks made by Gaynor in press releases and on his personal website and social media that were critical of Defence Force policies promoting equality and diversity, especially in relation to homosexuals, transgender people, and women. The authors contend that the Full Court of the Federal Court erred by focusing upon the constitutionality of reg 85(1)(d) and by not subjecting the termination decision to their proposed development of the *Lange* test. The authors argue further that the termination decision would have failed the proportionality test, chiefly because it was not adequate in its balance. This is for various reasons, including that Gaynor’s remarks were made outside the workplace and did not bear upon his conduct within the workplace. The authors conclude by calling for the Defence Force to better accommodate the implied freedom in its laws and policies.

Forrester’s, Finlay’s and Zimmermann’s article on the extent to which the implied freedom restricts statutory executive power is complemented by Professor Gerard Carney’s contribution, ‘A Comment on How the Implied Freedom of Political Communication Restricts Non-Statutory Executive Power.’ At the outset, Carney distinguishes between coercive and non-coercive non-statutory executive powers. Coercive non-statutory executive powers are capable of affecting legal rights and duties and include the Crown’s prerogative

\(^{44}\) (1997) 189 CLR 520.  
powers. Non-coercive non-statutory executive powers are incapable of affecting legal rights and duties and include the Crown’s capacities, for example, the capacity to enter into contracts.

Coercive non-statutory executive powers are clearly capable of burdening the implied freedom of political communication. These include external prerogatives (such as the powers to declare and prosecute war) and domestic prerogatives (relating, for instance, to the Executive’s relationship with its ministers, officers, and employees). However, the Crown’s capacities, although non-coercive, are also capable of affecting the implied freedom. In this regard, Carney gives the example of a contract between the executive and other parties that imposes restrictions on communication. Given the potential for coercive and non-coercive non-statutory executive powers to burden free political communication, Carney concludes that the implied freedom of political communication constitutes an important constitutional safeguard upon the exercise of non-statutory executive power. However, Carney also discusses the Gaynor case to caution that the implied freedom should be asserted as an immunity rather than a right.

Apart from the implied freedom of political communication, there are also well-established limits relating to the separation of judicial power that arise under Chapter III of the Commonwealth Constitution. To what extent might these bear upon executive power? In ‘Ad Hominem Parole Legislation, Chapter III and the High Court’, Dr Sarah Murray discusses the recent decision of the High Court in Knight v Victoria. The case concerned s 74AA of the Corrections Act 1986 (Vic), which limits the Victorian Adult Parole Board’s ability to make a parole order for a specific individual, namely, Julian Knight. The legislation is therefore ad hominem in character and Knight sought to challenge its constitutionality by invoking the principle established in Kable v Director of Public Prosecutions. This may have appeared to be a promising line of argument because in Kable a majority of the High Court found that the Community Protection Act 1994 (NSW), which empowered the Supreme

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46 Separation of judicial power is a limit arising under Chapter III of the Commonwealth Constitution. At the Commonwealth level, the leading case is R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers Case) (1956) 94 CLR 254. At the State and Territory level, the leading case is Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.
47 (2017) 91 ALJR 824.
Court of New South Wales to make an ad hominem preventative detention order for Gregory Wayne Kable, was unconstitutional. However, the Kable principle protects the institutional integrity of state courts and the insuperable difficulty for Knight was that in the previous case of Crump v New South Wales the High Court had found that parole is an executive function that is distinct from the judicial sentencing role. Given that parole eligibility does not involve the courts, the Kable principle simply did not have application in Knight.

The extent to which the separation of judicial power might restrain the exercise of executive power is therefore not addressed by the High Court in Knight. Murray cites obiter authority that the Kable principle may prevent state legislatures from vesting certain judicial functions, such as the power to grant control orders, in the executive. At the federal level, it has been established since the Boilermakers’ Case that judicial power cannot be vested in the executive. However, strictly speaking, these are limits upon State and Commonwealth legislative power, rather than upon the exercise of executive power itself. Whether the exercise of statutory or non-statutory executive power is capable of infringing the separation of judicial power, and whether limits should apply analogous to those proposed by the contributors to this special issue on the implied freedom of political communication, are difficult and unresolved questions. However, it should be noted that in her contribution to the special issue Sapienza cites the separation of powers as a principle of common law constitutionalism derived from English law that may limit the exercise of non-statutory executive power in Australia.

Finally, few limits on executive power are as well-established as the proposition that the executive, in the exercise of its non-statutory powers, cannot displace statute law or common law. This principle is supported by an abundance of authority stretching from the Glorious Revolution of 1688 to the recent decision of the Supreme Court of the United Kingdom in Miller. However, with Zaccary Molloy Mencshelyi and Stephen Puttick, I explore an intriguing qualification to this proposition that may arise in the context of

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50 South Australia v Totani (2010) 242 CLR 1, 37-8 [76] (French CJ), 67 [147]-[148] (Gummow J).
51 R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers Case) (1956) 94 CLR 254.
treaty withdrawal or amendment under the *Commonwealth Constitution*. In ‘The Executive and the External Affairs Power: Does the Executive’s Prerogative Power to Vary Treaty Obligations Qualify Parliamentary Supremacy?’, we explain how under the *Commonwealth Constitution* treaties are implemented pursuant to the external affairs power. But, and following, we ask what is the status of the implementing legislation if the executive subsequently exercises its prerogative power to vary Australia’s treaty obligations, and the legislation cannot be supported by another aspect of the external affairs power or an alternative head of power?

In an attempt to resolve this issue, we explore three possibilities. First, domestic legislation that implements a treaty should be presumptively understood as abrogating the executive’s power to withdraw from or amend its treaty obligations. Second, the validity of legislation that implements a treaty should be determined by Australia’s treaty obligations at the date of assent of the Act. Third, the validity of legislation that implements a treaty should be determined by Australia’s treaty obligations at the date of challenge of the Act. On this view, the external affairs power is analogous to the defence power, which waxes and wanes in accordance with the exigencies facing the Commonwealth.

Notwithstanding the extensive authority that the executive cannot displace statute law through the exercise of its prerogative powers, we reach the perhaps surprising conclusion that the third possibility is the most persuasive understanding of the relationship between Australia’s treaty obligations and legislation implementing such obligations. The Commonwealth executive may therefore possess a power generally thought to be precluded by the constitutional law of modern democratic states, although the sense of unease engendered by this conclusion may to some extent be mitigated by implying a

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53 Section 51(xix) of the *Commonwealth of Australia Constitution Act*: ‘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 external affairs.’

54 Section 51(vi) of the *Commonwealth of Australia Constitution Act*: ‘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 the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.’

55 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 256 (Fullagar J).
legislative intention that the implementing statute should not endure beyond the facts that initially supported its validity.

**IV CONCLUSION**

As we have seen, all three of the themes explored in this special issue – the content of executive power; judicial review of exercises of executive power; and limits that exist upon executive power – are subject to flux, disagreement, and uncertainty. There are, for instance, disagreements about how to determine the content of executive power, especially non-statutory executive power. In Australia, these differences focus particularly on the emphasis that should be given to traditional conceptions of executive power derived from the constitutional system of the United Kingdom in interpreting the *Commonwealth Constitution*. However, from the contributions to the special issue it is also possible to distinguish between approaches resembling conceptual analysis and approaches more akin to constructive interpretation. Judicial review of exercises of non-statutory executive power is likewise subject to flux and uncertainty. In the United Kingdom, exercises of the prerogative powers are reviewable, although the level of deference accorded by the courts appears to be weakening. In Australia, the question of whether exercises of non-statutory executive power are reviewable remains unresolved, although principles of common law constitutionalism may have application. It is also unclear whether and how the implied freedom of political communication and the separation of judicial power may limit executive power at the Commonwealth, State, and Territory levels in Australia. However, a limit on executive power that is seemingly deeply entrenched – namely, the proposition that the executive cannot displace statute law through the exercise of its prerogative powers – may be subject to a qualification in the context of treaty withdrawal or amendment under the *Commonwealth Constitution*.

It is precisely these puzzles, differences, and uncertainties that make executive power such a rich and vital area of study, and the articles in this special issue a valuable and rewarding contribution to ongoing debates.
EXECUTIVE POWER IN AUSTRALIA – NURTURED AND BOUND IN ANXIETY

The Hon Robert French AC

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.’ The

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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.²

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.³ 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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¹ 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).

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.4

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.5

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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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. An important constitutional dimension was reflected in the decision in Kirk v Industrial Court (NSW) 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, 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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7 (2010) 239 CLR 531.
8 (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.\(^9\)

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.\(^10\) 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

\(^9\) Ibid 187.
\(^10\) 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.\(^{11}\)

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,\(^{12}\) 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.\(^{13}\) 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.

\(^{11}\) (2014) 254 CLR 28.
\(^{12}\) (2001) 110 FCR 491.
Its drafting history says something, but not a lot, about its scope and content. 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.

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.

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.

Clause 8 of the same chapter provided:

14 The drafting history is set out in more detail in Williams v Commonwealth (No 1) (2012) 248 CLR 156, 194–206 [40]–[61].
17 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.  

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.

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.

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.’ 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.’ His observations were summarised by Quick and Garran in their Annotated Constitution of the

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18 Ibid.
19 Ibid 425.
20 Official Record of the Debates of the National Australasian Convention, Adelaide, 6 April 1891, 777 (Sir Samuel Griffith).
21 Ibid 778.
Commonwealth published in 1901, in the proposition that ‘executive acts were either (1) exercised by prerogative, or (2) statutory’.  

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. The Colonial Office suggested a change, which was accepted at the Sydney Session of the Convention in 1897. 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.

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.

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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25 Inglis Clark, ‘Proposed Amendment to the Draft of a Bill to Constitute the Commonwealth of Australia’ reproduced in Williams, above n 16, 781.
26 Ibid 715, 719.
27 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.\(^{28}\)

**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.\(^{29}\)

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.\(^{30}\)

\(^{28}\) Robert R Garran, *The Coming Constitution* (Angus and Robertson, 1897) 147 (emphasis in original).

\(^{29}\) Ibid 152.

\(^{30}\) 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’. 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. 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.

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.

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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31 Quick and Garran, above n 23, 700.
32 Ibid 701.
33 Ibid 701–2.
power — exercised or unexercised’.\textsuperscript{35} The executive power ‘independent of Commonwealth legislation was said to extend to every matter to which the legislative power of the Commonwealth extended’.\textsuperscript{36} 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 \textit{Von del} opinion, was rejected in \textit{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.\textsuperscript{37} 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’.\textsuperscript{38}

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 \textit{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

\textsuperscript{35} Ibid 131.
\textsuperscript{36} Ibid.
\textsuperscript{37} Leslie Zines, \textit{The High Court and the Constitution} (Butterworths Sydney, 4\textsuperscript{th} ed, 1997) 251.
the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.\textsuperscript{39}

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

\textit{Victoria v Commonwealth}, the \textit{AAP Case},\textsuperscript{40} 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 \textit{Constitution}:

\begin{quote}
[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.\textsuperscript{41}
\end{quote}

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 \textit{AAP Case} and suggested that s 61 includes:

\begin{quote}
An area of inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of a modern national government.\textsuperscript{42}
\end{quote}

\textsuperscript{39} (1974) 131 CLR 477, 498.
\textsuperscript{40} (1975) 134 CLR 338.
\textsuperscript{41} Ibid 397.
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, 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.

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, 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.

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.’

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45 (1988) 166 CLR 79.
46 Ibid 108.
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*.48

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*.49 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.50

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.51

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*.52 The case concerned the construction of the term

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48 Ibid.
50 Ibid 424–5.
'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.\(^53\)

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.\(^54\)

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

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\(^{53}\) Ibid 226 [86] (footnote omitted).

\(^{54}\) Ibid 226 [87].

\(^{55}\) Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (1940) 61 CLR 278.
before federation had been exercisable by the executive governments of the colonials were exercisable by the executives of the various States.\textsuperscript{56}

Ultimately, \textit{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.\textsuperscript{57} 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 \textit{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 \textit{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 \textit{Ruddock v Vadarlis}.\textsuperscript{58} The critical issue in that case, in an application for \textit{habeas corpus}, was whether the Commonwealth could, in the exercise of executive power, prevent the landing in Australia of persons aboard the Norwegian vessel \textit{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 \textit{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.

\textsuperscript{56} Ibid 322.
\textsuperscript{57} (2010) 242 CLR 195, 226–7 [88]–[89].
\textsuperscript{58} (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. It was not abrogated by the legislative scheme of the Migration Act.

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…

The Chief Justice quoted the observation of Diplock LJ in British Broadcasting Corporation v Johns 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, which concerned the validity of action taken by...
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.\(^{64}\) 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*.\(^{65}\) 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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\(^{64}\) Ibid 560 [123].

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.\(^{66}\)

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.\(^{67}\) 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.’\(^{68}\) 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*.\(^{69}\) *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

\(^{66}\) Ibid 568 [150] (footnotes omitted).

\(^{67}\) Ibid 601 [280].

\(^{68}\) Ibid 600 [279].

\(^{69}\) (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)\(^2\) and Williams (No 2)\(^1\) 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 \(\text{Pape}\), 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 \(\text{Davis}\), borrowing from Mason J in \(\text{AAP}\), 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.\(^7\) 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.\(^3\) 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 \(\text{Ruddock v Vadarlis}\) and \(\text{Pape}\) that the extent of the executive power of the Commonwealth appeared to have been

\(^2\) \text{Williams v Commonwealth (No 1) (2012) 248 CLR 156.}
\(^1\) \text{Williams v Commonwealth (No 2) (2014) 252 CLR 416.}
\(^3\) \text{Ibid 87–8 [228].}
\(^4\) \text{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.\(^{74}\)

He predicted that just as prerogative writs and *mandamus* and prohibition mentioned in s 75(v) of the *Constitution* have been rebadge 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.\(^{75}\)

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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\(^{75}\) 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.’76 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.77

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

77 Ibid 253–4 [203]–[204].
competency subject only to the requirement of a parliamentary appropriation.\textsuperscript{78} Gummmow 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.\textsuperscript{79}

The Commonwealth Parliament subsequently enacted the \textit{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 \textit{Williams (No 2)}.

In \textit{Williams (No 2)} the Court was invited to reopen \textit{Williams (No 1)} but declined to do so. It held that the omnibus legislation, being the \textit{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 \textit{Pape} was summarised as follows:

- sections 81 and 83 of the \textit{Constitution} do not confer a substantive spending power;
- the power to spend appropriated moneys must be found elsewhere in the \textit{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(\textit{xxxix}) to enact the impugned law as a law incidental to that exercise of the executive power.

Rejecting the application to reopen \textit{Williams (No 1)}, the plurality in \textit{Williams (No 2)} said:

\textsuperscript{78} Ibid 192–3 [37].
\textsuperscript{79} Ibid 234 [143].
The 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.80

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.81

80 (2014) 252 CLR 416, 463–4 [60].
81 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.82

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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THE STRANGE DEATH OF PREROGATIVE IN ENGLAND

Thomas Poole*

This paper questions the continued existence of prerogative as a meaningful juridical category within UK constitutional law. It constructs a concept of prerogative out of canonical definitions, themselves instructive but incomplete, at the core of which is the idea of prerogative as a special category of executive power that evokes a special authority to which other political agents ought to defer. In light of recent prerogative cases, the paper advances two possibilities. A moderate reading suggests that prerogative has now become a special category of executive power that may evoke a special authority to which the court may in appropriate cases defer. A stronger reading advances the idea that prerogative is no longer a special category, but rather an inchoate set of executive capacities to which deference in general terms ought not to be given. It concludes by suggesting that we need to update our conceptual vocabulary. Just as we now speak about the executive's general administrative powers of contract and agency, we should prefer the terminology of the general executive powers of government to the vocabulary of royal prerogative.

There are more important sources of political authority, but prerogative may still represent the apotheosis of executive power. Parliament has successfully chipped away at prerogative powers for centuries and the courts have done much to bring them further into the constitutional fold. Since there has been no wholesale abolition of prerogative, to suggest the end of prerogative may seem foolhardy in the extreme. But it is just this line of inquiry that this paper proposes. Prompted by a quartet of United Kingdom Supreme Court cases that question the extent to which prerogative can still be said to operate as prerogative, it pursues as a kind of thought-experiment the proposition that

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what we are witnessing may not be the continued declension of prerogative so much as its incipient demise.

The more that argument succeeds, the more it diverges from previous analysis of the subject, including my own, which observed attempts by the courts in particular to normalise prerogative while noting the deference to government that still characterised prerogative cases. While the prerogative might be ordinary in principle, it remained special in practice.¹ What is apparent in the more recent jurisprudence is the almost complete absence of deference afforded to the category by the courts. So emptied, prerogative begins to look like any other executive power, especially since the national security terrain on which it often presents is increasingly subject to scrutiny by courts and other institutions on something close to ordinary principles. Indeed, pleading prerogative might even have the opposite effect from the one intended, putting the court more on guard than it otherwise might have been. Far from being the trump card it may have been once, prerogative may now be something of a liability for those charged with defending governmental action.

There is value in pressing this case. But I also offer a fall-back position that accepts the continued existence of prerogative as a distinct, formal source of authority, but tries to make sense of it given the demystification that has occurred in respect of both the prerogative category itself and the substantive claims for special powers in the interests of salus populi with which it was once conjoined.

Either alternative rests on assumptions about public law method. To get the argument going, I put both on the table now. The first assumption is that conceptual analysis in public law cannot just be about legal doctrine. Public law concerns how state power is instituted and exercised. To study a public law concept requires an account not just of what judges and jurists have said about it, but also an account of how what they said fits within the broader juristic framework of constitutional politics. It involves questions of jurisdiction but

¹ Thomas Poole, ’Judicial Review at the Margins: Law, Power and Prerogative’ (2010) 60 University of Toronto Law Journal 81. See also, from a slightly older vintage, Adam Tomkins, Public Law (Oxford University Press, 2003), 83: ’That the courts are prepared to grant to the Crown such elastic and ill-defined powers, and to subject their exercise to such modest – even superficial – review, constitutes the second way in which the executive will find the rule of law a much less onerous check on its powers than it might at first have seemed.’
also of justification. Certainly, this is true of prerogative. A *longue durée* concept,² prerogative is associated with sovereign capacities – war and peace, foreign relations, and empire – and touches on fundamental questions about trust and the generation of political authority. To read only the cases is to miss much of what is important about the concept.

The second assumption is that this style of conceptual analysis tends to take the form of a conversation between the present and the past. Most public law argument is situated, adopting an internal point of view to its subject. It may be more or less normatively committed, but its concern is with *this* political community and the ragbag of institutions, processes and norms – or what passes for constitutional wisdom – that makes it what it is. This is not nativist dogma – one can adopt an internal point of view without necessarily being an insider or participant.³ Nor does it devalue the contribution of comparative or more general philosophical inquiries, not least because these living traditions of thought and practice are not hermetically sealed and inspiration can be drawn from many sources. It is merely to observe the traditionality of much of what we do, our imbrication within juridical structures that ‘involve the authoritative presence of transmitted, real or purported past’.⁴ Other things being equal, public lawyers have a responsibility to cultivate the juristic tradition in which they operate. Their enterprise is a species of practical reason that entails the refraction of received juristic material in light of the concerns of the present.

I **THREE CONCEPTIONS OF PREROGATIVE**

I suspect I am not alone in finding the usual definitions of prerogative deficient. There must be something in them for us to go back to them so often. But the intuition developed in the first part of the paper is that each definition identifies an important aspect of prerogative but does not manage to capture the essence of the whole. I intend to sift through these conceptions in order to derive what I

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² For a defence of the study of which in the discipline of the history of ideas see Jo Guldi and David Armitage, *The History Manifesto* (Cambridge University Press, 2015).
call a central case of prerogative, which I later hold up against current practice.\(^5\) This process of exposition, criticism and recovery – of disassembling key parts of the existing conceptual apparatus in order to reassemble them more satisfactorily – is somewhat stylised, and may entail drawing sharper contrasts between certain positions than a more orthodox textual treatment might allow.

When speaking about prerogative we tend to remark first on how difficult it is to pin down – ‘a term which has caused more perplexity to students than any other expression referring to the constitution’,\(^6\) Dicey wrote – and on the incense-laden air of sanctity that surrounds it.\(^7\) It is as if we feel compelled to undergo ritual obeisance at the threshold of Blackstone’s altar of the *bona dea*\(^8\) before moving on to questions of substance. We now perform this ritual self-consciously and semi-ironically,\(^9\) a display of worldliness that only partially convinces, and I suspect that the numinous quality is part of the central case of prerogative.

Genuflection performed, our navigation of prerogative generally involves the interplay of three canonical statements or conceptions. These are more at variance with each other than we sometimes assume. In this game of competing definitions it is Dicey’s that predominates. He describes prerogative as ‘the remaining portion of the Crown’s original authority’ and therefore ‘the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers’.\(^10\) While illuminating in certain respects, the definition is incomplete. For one thing, it does not distinguish prerogative from third-

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\(^5\) For an elaboration of this method of sifting – and its application on a much more ambitious scale – see e.g. Alan Brudner, *Constitutional Goods* (Oxford University Press, 2004).


\(^7\) Lord Roskill said that with prerogative he could hear (quoting Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29) ‘the clanking of medieval chains of the ghosts of the past’: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417 (‘GCHQ’).


\(^9\) I go on to argue that we are inclined no longer to do it at all. See e.g. *Lord Carlile v Secretary of State for the Home Department* [2014] UKSC 60 (12 November 2014) [150] (Lord Kerr SCJ): ‘Although we must accord the Secretary of State’s view on this issue due deference, we are not required to genuflect in its presence.’ And that the prerogative with no trace of residual majesty is no longer really prerogative.

\(^10\) Dicey, above n 6, 189.
source power, but perhaps there is no real difference between them. More importantly, it does not get us much beyond the genuflection stage, though it does go some way towards describing the space in which prerogative operates. What it does usefully express, as I explain, is the idea of prerogative as a symbol. We can draw from Dicey the proposition that prerogative is essentially the residue of royal authority. It is a special sort of power that draws on the traditional or charismatic authority in principle embodied in the King.

‘Between “prerogative” and “privilege” there exists a close analogy’. We need to handle this insight carefully. Dicey noted how this authority had moved away from its original source. He always connected the prerogative of his day to the abstract entity of the Crown and not, as Blackstone tended to do, to the person of the monarch. He also said that those prerogative ‘powers now left in the hands of the Crown’ are ‘exercised in fact by the executive government’. And he acknowledged that the executive officers of government, while formally the Queen’s servants, in fact derive authority from a different source. As he wrote, in a discussion of conventions, ‘[t]heir end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is

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11 Ibid: ‘Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of its prerogative.’
12 Although the ‘general administrative powers’ of the Crown were recognized authoritatively in R (New College London) v Secretary of State for the Home Department [2013] UKSC 51 (17 July 2013) [28] (Lord Sumption SCJ). See also R v Secretary of State for Health, ex p C [2000] HRLR 400 (CA); Town Investments Ltd v Department of the Environment [1978] AC 359. Much of the day-to-day business of government falls under such powers, which include the power to form contracts to the power to convey property, and powers to circulate written material, consult with officials, give gifts, and create policies. For discussion see Bruce Harris, ‘The Third Source of Authority for Government Action’ (1992) 108 Law Quarterly Review 626; Adam Perry, ‘The Crown’s Administrative Powers’ (2015) 131 Law Quarterly Review 652.
13 Lord Reid made a similar criticism in Burmah Oil Company v Lord Advocate [1965] AC 75, 99, saying that Dicey’s definition ‘does not take us very far’.
14 On which, see eg, Ernst H Kantorowicz, The King’s Two Bodies: An Essay in Medieval Political Theology (Princeton University Press, 1995); Kenneth Pennington, The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition (University of California Press, 1993).
15 Dicey, above n 6, 190.
16 Martin Loughlin observes that although the idea of the Crown as a legal symbol of public power serves to differentiate between an institution of government and the personality of Her Majesty. But our related inability to distinguish properly between the State, Her Majesty and the Crown also entails that on fundamental issues our law is ‘thoroughly ambiguous’: ‘The State, the Crown and the Law’ in Maurice Sunkin and Sebastian Payne (eds), The Nature of the Crown: A Legal and Political Analysis (Oxford University Press, 1999) 33, 38-39.
17 Dicey, above n 6, 39.
the true political sovereign of the state – the majority of the electors, or (to use the popular though not quite accurate language) the nation.  

This is the background against which we must interpret the pivotal but elusive phrase in his definition where prerogative is defined as the ‘residue of [royal] discretionary authority’. Dicey pinpoints the idea of residue as crucial to understanding prerogative. But the term can be read more or less expansively. It might be read as saying simply, but not especially insightfully, that surviving prerogatives operate on a more restricted range than they once did, say under the Stuarts. I prefer a broader reading that also takes Dicey as saying that in those extant prerogatives we encounter a past world structured according to different political imperatives and principles. While prerogative continues to exist in attenuated form in the era of representative government and the rule of law, this reading suggests, its true home remains the age of kings. Prerogative is the unpurged relic of lordship within our constitutional structures. With it we come face to face with a political model that relied on twin medieval or ‘Gothic’ bases: control of territory (warlord) and control of land (overlord). This broader reading, which makes Dicey much less comfortable with prerogative than he is often made to appear, has the merit of bringing his definition of prerogative closer to his hostile position on martial law, increasingly prominent in later editions of the Law of the Constitution, which denied the executive any special prerogative capacity to declare martial law in time of peace.

John Locke provides the second conception of prerogative. His account remains idiosyncratic and some may cavil about its inclusion here. But we

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18 Ibid 191.
19 This corresponds to Sebastian Payne’s interpretation of Dicey on prerogative, which he calls ‘entirely descriptive and retrospective’: ‘The Royal Prerogative’ in Maurice Sunkin and Sebastian Payne (eds), The Nature of the Crown (Oxford University Press, 1999) 78, 94.
20 Dicey, above n 6, 39.
23 Not least in the way it seeks to separate the domestic (‘prerogative’) and foreign (‘federative’) aspects of the power: see John Locke, Two Treatises of Government (Peter Laslett ed, Cambridge University Press, 1988) II, chs XII, XIV.
frequently return to Locke on prerogative.\textsuperscript{24} I suspect we do so in part because of the canonical status of the \textit{Two Treatises of Government} and its author’s unparalleled reputation among English writers on the liberal constitution. But prerogative also provided Locke with a category through which he could explore foundational conditions of legitimate rule \textit{within} the constituted polity, and specifically the nexus between (executive) authority and (popular) trust. Though Locke does not provide a narrowly legal account of prerogative – for that we would turn to his contemporary Sir Matthew Hale\textsuperscript{25} – his theory is nonetheless juristic in its willingness to articulate how the prerogative might fit within the legal, institutional and normative architecture of the modern state patterned along English lines.

For Locke, prerogative was essentially a power to command that operates outside and against the laws, \textit{extra et contra legem}. The Prince, whether monarch or republican leadership, holds this power in reserve for use where the laws run out,\textsuperscript{26} most notably in times of war or public emergency.\textsuperscript{27} This account highlights that prerogative is to be distinguished by its \textit{form} and that what is distinctive about it is its \textit{formlessness}.\textsuperscript{28} It is a \textit{reserve} power – in contrast to Dicey’s \textit{residual} power – that operates as a kind of shadow to normal legal authority. ‘This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, \textit{is} that which is called \textit{Prerogative}.’\textsuperscript{29} What is characteristic about prerogative, Locke suggests, is that the agent who exercises it does not derive authority to act

\textsuperscript{24} A recent example is Timothy Endicott, ‘Parliament and the Prerogative: From the \textit{Case of Proclamations to Miller}’ (Judicial Power Project, 1 December 2016.).

\textsuperscript{25} See Sir Matthew Hale, \textit{Prerogatives of the King} (D E C Yale ed, Selden Society, 1976).

\textsuperscript{26} Locke’s account of the scope of this power is, to modern eyes, extraordinarily broad: ‘the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it. Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require’: Locke, above n 23, \textit{Second Treatise}, ch XIV, s 159.

\textsuperscript{27} It is remarkable, if little noted, how close this aspect of Locke’s theory mirrors a standard distinction in scholastic thought, derived from Roman Law, between \textit{imperium}, the ruler’s exceptional and ultimate authority, which was not subject to law; and \textit{jurisdiction}, or the ruler’s routine decisions, which remain subject to law. On the distinction see, eg, Michael Wilks, \textit{The Problem of Sovereignty in the Later Middle Ages} (Cambridge University Press, 1964) 209.

\textsuperscript{28} Making a similar point about Locke’s theory, Clement Fatovic talks about the ‘informality of prerogative’: \textit{Outside the Law: Emergency and Executive Power} (Johns Hopkins University Press, 2009) 52-55.

\textsuperscript{29} Locke, above n 23, \textit{Second Treatise}, ch XIV, s 160 (italics in the original).
from the normal legal source (typically statute) or by engaging the process associated with that source (typically parliamentary debate and assent). The Prince derives this special power directly from his capacity as supreme executive agent, drawing on that wellspring of power as need arises in order to fulfil his obligation to secure the public interest (\textit{salus populi}). Prerogative engages, that is to say, the Prince’s capacity as guardian of the state – what Cicero called \textit{custodes patriae}.

The tendency among common lawyers like Hale had been to carve up and classify prerogative into a bundle of particular, bespoke \textit{prerogatives}, a familiar strategy of disaggregation and normalization.\footnote{A not dissimilar strategy was also deployed in cases on prerogative from at least the time of Bates’s \textit{Case} (1606) 2 \textit{State Trials} 371.} Locke’s instincts ran in the opposite direction. He wanted to draw attention to what he took to be prerogative’s juridically exceptional nature. Locke must have been aware that this approach entailed risks for his political project of patterning political association according to settled and standing laws structured on a fiduciary relationship between government and governed. His chapter on prerogative offers a reflection on the limits of that model. He assumes that there must be a space beyond the realm of settled and standing laws and that the products of that space must by definition take non-legal shape. ‘Prerogative is nothing but \textit{the Power of doing publick good without a Rule}.’\footnote{Locke, above n 23, \textit{Second Treatise}, ch XIV, s 166.} It exists in the realm of decision and action – echoes of Carl Schmitt are inescapable\footnote{See in particular Carl Schmitt, \textit{Political Theology – Four Chapters on the Concept of Sovereignty} (George Schwab ed, University of Chicago Press, 1985).} – as opposed to deliberation and coordinated norm-production. Locke, enemy of the late Stuarts,\footnote{On which see Richard Ashcraft, \textit{Revolutionary Politics and Locke’s Two Treatises of Government} (Princeton University Press, 1986).} is naturally alert to prerogative’s dangers. He develops a political-theological narrative of trial and judgement where the assertion of prerogative tests the bonds of trust between sovereign and subject. His radical status is confirmed by an embrace of the potential upside of such moments of conflict-pregnant possibility that may produce disintegration but may equally lead to political and spiritual renewal. But Locke’s key conceptual insight is that prerogative denotes a legally unstructured species of authority that is a necessary and prior condition of rule-bound civil association.

\begin{footnotesize}
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\item\footnote{Marcus Tullius Cicero, \textit{De Re Publica} I. XLI. 64 (Clinton Walker Keyes ed, Harvard University Press, 1928) 94.} Marcus Tullius Cicero, \textit{De Re Publica} I. XLI. 64 (Clinton Walker Keyes ed, Harvard University Press, 1928) 94.
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\item\footnote{See in particular Carl Schmitt, \textit{Political Theology – Four Chapters on the Concept of Sovereignty} (George Schwab ed, University of Chicago Press, 1985).} See in particular Carl Schmitt, \textit{Political Theology – Four Chapters on the Concept of Sovereignty} (George Schwab ed, University of Chicago Press, 1985).
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The third conception derives from Blackstone, whose name has already cropped up in the company of those who highlight the symbolic or affective element of prerogative. That is appropriate, for it was not idly that contemporary critics called him ‘prerogative lawyer’,35 and he set value on the Gothic dimensions of English law and politics.36 But Blackstone also brings out a third element of prerogative. Consider this famous passage in the Commentaries, obliquely referenced earlier, where prerogative is described as:

[a] topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the arcana imperii; and, like the mysteries of the bona dea, was not suffered to be pried into by any but such as were initiated in its service; because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of rational and sober inquiry.37

There is mocking, sardonic note to this, without question,38 yet it still reinforces the now familiar idea of prerogative as tied to the dignity of the King, and his status as basileus or imperator.39 But Blackstone relates another essential idea, and this is that prerogative is a special type of authority claim. The claim has two parts. First, a claim of special power that is a mark of sovereignty – and it is for that reason that prerogative is ‘singular and eccentrical’40 – but even so would not otherwise be within the sovereign agent’s capacity to act. Second, a claim of special jurisdiction, that is, a power for the sovereign agent to determine whether that exercise of power is legitimate.41 As Blackstone elaborated, ‘in the exertion of lawful prerogative, the king is and ought to be

36 Even in the context of prerogative, where he wrote that the ‘limitation of the regal authority was a first and essential principle of all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent’ but not in England: Blackstone, above n 8, I, 231.
37 Ibid 230-1.
38 All the more so given the unmistakable echo of James I’s divine right defence of prerogative, and the secrecy that he thought ought to attend it, which Blackstone quotes in the same passage. See ‘The Trew Law of Free Monarchies’, 74-5 and especially ‘A Speech to the Lords of Commons of the Parliament’ (22 March 1610), 190-1 in King James VI and I, Political Writings (Johann P Sommerville, Cambridge University Press, 1994).
39 Blackstone, above n 8, I, 235.
40 Blackstone, above n 8, I, 239.
41 See, eg, The Zamora [1916] 2 AC 77, 108 (Privy Council): ‘Those who are responsible for the national security must be the sole judges of what the national security requires.’ (Lord Parker at p. 107). Although the court went on to reject the Crown’s claim ‘because the [Prize Court] judge had before him no satisfactory evidence that such a right was exercisable’.
absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.\textsuperscript{42} Note that Blackstone sees both elements I have highlighted as of equal importance. On one hand, prerogative is not legally unconstrained and must be sanctioned by law.\textsuperscript{43} On the other, if a prerogative is sanctioned by law the Sovereign is largely free to act within lawful bounds as he sees fit in the public interest. It is here, in conjunction with this two-headed claim of exceptional right, that the reverence that enwraps prerogative – all that wariness and unworthiness, \textsuperscript{44} the unfathomable numinousness – has real constitutional bite, for the ‘very strength of the prerogative lay in its vagueness, for to define was to limit.’\textsuperscript{45}

It is tempting to see this definition as simply expressing in different language Locke’s point about the essential juridical otherness of prerogative. True, there are connections between the two accounts, but whereas Locke’s theory is primarily political – indeed it interrogates foundational questions of obligation, force and right – Blackstone’s enquiry is essentially constitutional. Blackstone sees prerogative as the special preserve of constitutional grey areas. In as much as it is outside the remit of the ordinary law, it stays within the constitution. The prerogative claim revealed in the last paragraph remains a claim to intra-constitutional authority rather than extra-constitutional action. It operates with the cognizance of the legal constitution even if it neither derives its legitimacy entirely from that quarter, nor comes fully under its jurisdiction. For Blackstone, prerogative power comes nested within law and institutional structures more firmly and squarely than Locke’s theory seems to allow. ‘I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that in the execution of lawful prerogative, the king is and ought to be absolute’.\textsuperscript{46} Both writers think that prerogative is essential for a functioning political order. But Locke is attracted to what he takes to be prerogative’s extra-legal core, a precondition for political existence and the name we give to the political space in which basic authority is asserted.

\textsuperscript{42} Blackstone, above n 8, I, 243.
\textsuperscript{43} Indeed, this is how Blackstone starts the chapter in the Commentaries on the King’s prerogative, repeating a claim made in the first chapter about the ‘bounds so certain and notorious’ that protect civil liberty from the royal authority: Blackstone, above n 8, I, 230.
\textsuperscript{44} See Darnel’s Case (Five Knights Case) (1627) 3 How St Tr 1, 13: ‘We are too wise, nay, we are too foolish in undertaking to examine matters of State to which we are not born.’
\textsuperscript{45} Brian Levack, The Civil Lawyers in England, 1603-41: A Political Study (Oxford University Press, 1973) 98.
\textsuperscript{46} Blackstone, above n 8, I, 243 (emphasis added).
and tested. Blackstone instead takes as defining prerogative’s mediating capacity, regarding its skilled and prudential use as essential to preserving the balance of the constitution – or rather a series of balances, between law and politics, decision and deliberation, action and norm, king and parliament. When ‘balanced and bridled’, he claimed, prerogative ‘invigorates the whole machine, and enables every part to answer the end of it’s construction’.  

II  THE CONCEPT OF PREROGATIVE

So, what is prerogative? Three conceptions dominate, each suggestive but incomplete. The first (Dicey) sees prerogative as a residual power, expressive of the old marks of kingship some of which continue to operate in a changed world. The second (Locke) expresses an idea of prerogative as a plenary reserve power for use by the Prince when the law runs out or obstructs the public interest. The third (Blackstone) sees prerogative as a distinct juristic claim to special power and special jurisdiction and, reveling in its Gothic pedigree, suggests that the aura that encodes prerogative serves a useful function, freeing the Sovereign to act where necessary so as to rebalance the constitution.

Each conception tends to spotlight a different analytic property. The first conception’s idea of prerogative as the patrimony of kings, when played out in a constitutional monarchy that is effectively a republic in dress-up clothes,\(^48\) ends up emphasizing prerogative’s symbolic or affective aspects. The second conception of prerogative, as an open-ended power that allows the Prince to act outside law, draws attention to questions of form, specifically to its (at least relatively) informal nature. The third conception, like the first, highlights prerogative as a symbol but it does so the better to explain its functional role, understood as engaging a set of constitutionally permitted sovereign capacities.

\(^47\) Ibid 233.

\(^48\) I suspect that this idea that the United Kingdom is a monarchy in name only has been the dominant view among students of the United Kingdom constitution since at least Bagehot’s *The English Constitution* (Paul Smith ed, Cambridge University Press, 2001). But that perspective already had a long pedigree, a seminal influence being Montesquieu’s *De l’esprit des lois* [1748] in which England appears as the epitome of the modern republic in which a model of ‘extreme political liberty … is established by their laws’: *The Spirit of the Laws* (Anne M Cohler, Basia C Miller and Harold S Stone eds, Cambridge University Press, 1989) 166.
This is the material out of which I construct the central case of prerogative. By ‘central case’ I mean more than concentrating on core prerogative capacities (such as war and peace, foreign relations, some aspects of citizenship, defence of the realm), though this is where my attention is focused. My working premise has been that the three authors addressed so far are on to something and deserve to be taken seriously. So I intend to preserve as much as is valuable in the three conceptions, especially where they can be said to cohere. Out of that sifting process, I hope to identify an account of prerogative that is consistent with core principles of the modern constitution. I set down what I derive from that method in propositional form.

1. Prerogative is the name the constitution gives to a specific bundle of executive powers: those surviving or residual powers that were originally special to the king and which engage the executive not in its capacity as executor of the laws but in its capacity as guardian of the state (custodes patriae).

2. Existing conceptions of prerogative share a common root, not fully articulated in them, that prerogative is an expression of peremptory or

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49 See, eg, Lord Roskill in *GCHQ [1985] AC 374* at 417: ‘I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries.’ See also *Town Investments Ltd v Department of the Environment [1978] AC 359* (House of Lords).
imperative authority. The exercise of prerogative typically results in a direction or measure and not a law or general norm.\textsuperscript{50}

3. Whereas with statutes we understand the primary audience to be the legal subject, an exercise of prerogative may be said to be first and foremost directed at officials.\textsuperscript{51} It follows that – absent war\textsuperscript{52} and outside imperial law, both contexts where constitutional rules against domination are less clear and less consistently applied\textsuperscript{53} – an exercise of prerogative can have no meaningful or lasting effect on legal rights and obligations.\textsuperscript{54}

4. Prerogative, understood as a mode of peremptory authority, has corresponding analytic properties. It is \textit{affective} in that the style of decisive leadership it sustains still draws, albeit \textit{sotto voce}, upon an ideal of kingly rule. As a residual symbol of majesty and lordship, prerogative taps into a sentiment now barely glimpsed and almost shameful to modern constitutional sensibilities, but which is probably more alive than we care to admit.\textsuperscript{55} It has a distinctive \textit{form} in that it dispenses very largely with the formal requirements and processes that otherwise mark exercises of governmental power. And it has a distinctive \textit{function} – as a claim to a special power and jurisdiction that represents a primary decisionistic element within the constitution.

5. In practice, these properties tend to operate as a complex whole. The weakening of one element can weaken the whole. In particular, as the

\textsuperscript{50} In an early work, Carl Schmitt draws a helpful distinction between \textit{measures} or decrees, which are situation-specific and action-oriented, and legal \textit{norms}, which aim to give expression to a legal principle and are thus general in scope, in discussing the powers of the President of the German Reich under Article 48 of the Weimar Constitution: \textit{Dictatorship} (Michael Hoelz and Graham Ward trans, Polity Press, 2014) 213-7. Prerogative law-making is not unknown, under certain conditions, in colonial law – see Bancoult (No 2); \textit{Campbell v Hall} (1774) 1 Cowp 204 – but again, as a juristic structure that maps political domination, this represents the exception that proves the rule.

\textsuperscript{51} So, even something on the legislative side of the spectrum – such as the \textit{British Indian Ocean Territory Order 1965} (S I No 1 of 1965) at issue in the Chagos Island cases – is most reasonably read as a set of instructions first establishing and then directing the BIOT Commissioner to perform certain functions rather than a law directed at the population of BIOT (whose existence was in any case intermittently denied by those making the statutory instrument).

\textsuperscript{52} Even here, the governing idea is that (a) even here, statute is better (and more normal) as a basis for the actions of state agents and (b) while in urgent situations it may be possible through prerogative, eg, to issue regulations that may have a provisional force of law, these need to be confirmed by Parliament: \textit{Attorney General v De Keyser's Royal Hotel Ltd} [1920] AC 508; \textit{Burmah Oil Company v Lord Advocate} [1965] AC 75.

\textsuperscript{53} \textit{R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)} [2008] UKHL 61 (22 October 2008).

\textsuperscript{54} \textit{R (Miller) v Secretary of State for the Home Department} [2017] UKSC 5 (24 January 2017) [50].

\textsuperscript{55} But see Bagehot, above n 48, 30, 41.
affective part of the prerogative diminishes – the direction of travel for a long time – the greater the reliance on functional arguments. But that move only raises the stakes: why choose prerogative when you can accommodate almost any scenario within the more constitutionally orthodox form of statute plus regulations?

6. Prerogative operates within ordinary constitutional structures, and these are now densely textured with law. But Locke’s point about prerogative’s liminal character still has some relevance. Prerogativa regis retains trace elements of the constitutionally illicit in that it arguably retains a (greatly reduced) capacity to probe the boundaries of the constitution. It is too late to create prerogatives, but the open-textured nature of the category does not entirely preclude the possibility that the executive might make creative use of it to the extent that other elements within the constitution allowed.

Table 2: The Concept of Prerogative

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<thead>
<tr>
<th>Nature</th>
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<tr>
<td>Prerogative</td>
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56 See, eg, Endicott’s defence of Blackstone’s well-known articulation of the need for prerogative in the field of foreign affairs ‘for the sake of unanimity, strength and dispatch’.

57 This development occurred within the context of (a) war, (b) emergency powers and (c) martial law over a century ago: see, eg, (a) the Defence of the Realm Act 1914 (and subsequent provisions); (b) Protection of Life and Property (Ireland) Act 1871; An Act for the Better Protection of Person and Property in Ireland 1881; Prevention of Crime (Ireland) Act 1883; (c) the creation by statute of a Martial Law Board in the Second African (or Boer) War, discussed in Charles Townshend, ‘Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940’ (1982) 25 Historical Journal 167. For analysis see Thomas Poole, Reason of State: Law, Prerogative and Empire (Cambridge University Press, 2015) ch 6.

58 BBC v Johns [1965] Ch. 32, 79 (Diplock LJ). But see, eg, the Foreign Jurisdiction Act 1843, which delegated sui generis legislative (‘as though colonial prerogative’) powers to the Crown with extraterritorial utility, intended to give the Crown the prerogatives associated with conquest where there was none.

III THE PREROGATIVE TWO-STEP REVISITED

The first part of the paper identified a ‘central case’ of prerogative – that is, the strongest version of the concept consistent with existing constitutional fundamentals – by sifting through existing conceptions. In this second part, attention turns to practice. Where possible, the case is pressed that prerogative has ceased to function in a way that is consistent with its central case. But by concentrating on a number of recent United Kingdom Supreme Court cases this process of testing proceeds in a relatively limited way since a thorough appraisal would necessitate a full survey of not only all the relevant cases but also developments in other institutions, and these are only briefly recorded here.

With that qualification in mind, let us turn to the law. Contemporary judicial review principles relating to the prerogative date from the GCHQ case.\(^{60}\) The case involved a challenge to the use of the prerogative by the Prime Minister, in her capacity as Minister for Civil Service, to ban workers at signal intelligence headquarters, GCHQ, from belonging to a trade union. The case stands for the proposition that in principle an exercise of prerogative power is reviewable on ordinary public law grounds.\(^{61}\) In Lord Diplock’s words: ‘I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review.’\(^{62}\) But in fact what the case gives with one hand it all but takes back with the other, such were the riders and qualifications added to the principle. Many prerogatives, the Law Lords agreed, were beyond the reach of the judicial process altogether because review of their exercise would necessarily involve policy considerations. The best-known exclusionary device was Lord Roskill’s list of ‘excluded categories’, that is, those prerogatives that were judged by their nature to be unreviewable. The non-exhaustive list

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\(^{60}\) The previous modern jurisprudence held that the courts would inquire into whether a particular prerogative exists or not, and if it does exist, into its extent. But once the existence and extent of a power are established, the court cannot inquire into the propriety of its exercise: Attorney General v De Keyser’s Royal Hotel Ltd [1920] AC 508. The older authorities go back at least as far as Prohibitions del Roy (1608) 12 Co Rep 63 and the Case of Proclamations (1611) 12 Co Rep 74.

\(^{61}\) See Rahmatullah (No 2) and Serdar Mohamed v Ministry of Defence [2017] UKSC 1 (17 January 2017), discussed below, at [15] (Lady Hale DP): ‘After that case, the exercise of prerogative power might be excluded from the scope of judicial review, not because of its source, whether statute or the prerogative, but because of its subject matter’.

\(^{62}\) GCHQ [1985] AC 374, 410. See also Lord Scarman at 407 and Lord Roskill at 417.
included most of the powers that comprise what I would include in the central case of prerogative: ‘the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers’. Certainly, judges and contemporary commentators would have expected the core principle to evolve. But, there is no sign of anything more than that the judges might be prepared to nibble around the edges of prerogative.

A review the post-GCHQ case law a decade ago produced a mixed picture. Judicial oversight might have gone further than earlier dicta would have led one to expect; but there was still plenty of deference to prerogative on show. I argued that while there had been a genuine movement in a rule-of-law direction, you more often saw the courts performing a ‘prerogative two-step’. Step 1 the refusal to countenance the idea of a gap in the normal framework of the law and the assertion that ordinary legal principles apply to prerogative law-making; Step 2, the accommodation of government interests and equivocation or uncertainty in the application of those principles. In other words, courts were disinclined to say that a challenge to a prerogative non-justiciable, but were reluctant to decide against the government. Looking back, this was true of GCHQ itself. The House of Lords held that the exercise of prerogative was in principle reviewable – employees and trade unionists had a legitimate expectation of consultation – but that national security interests as defined by government took precedence. The government lost on the law, so to speak, but still managed to win at the close.

Many prerogative cases seemed to fit this mould. GCHQ had made inroads into prerogative but had left its basic structure for the most part intact. More specifically, at one level (corresponding to Step 1) the jurisprudence claimed to demystify and normalise prerogative, purporting to treat it as just another executive power (albeit one that in some contexts touched upon matters of political sensitivity). At another level (corresponding to Step 2), it accepted, often covertly or at least quietly, the continued existence of

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63 Ibid 418.
65 Thomas Poole, ‘Judicial Review at the Margins: Law, Power and Prerogative’ (2010) 60 University of Toronto Law Journal 81. In that assessment, I was certainly not alone. See also, eg, Adam Tomkins, Our Republican Constitution (Hart Publishing, 2005) 133: ‘[in no area of public law] are the courts as reluctant to review government actions and decisions as when they touch upon the prerogative.’
prerogative as a special category of executive power that evoked a special authority to which the court ought to defer. In the application of the law of prerogative then, there was some evidence to suggest the residual pull of the affective dimension of prerogative which, though now denied at the level of general principle, had been so long one of its core elements.

This jurisprudential analysis sat within a broader account of constitutional dynamics that contained two key aspects, both with considerable pedigree: the shrinking of prerogative, taking place largely at the political level but not only there,66 typically by turning prerogative into a statutory power;67 and the normalising of prerogative that occurs largely at the legal level but not only there, typically by subjecting the exercise of prerogative to more searching scrutiny.68 What I did not foresee was the pace of change. Examples of shrinkage include putting the right to manage the civil service, at issue in GCHQ, on a statutory footing,69 and the replacement of the dissolution prerogative through the Fixed-term Parliaments Act 2011 (UK). There have been significant normalising moves within Parliament, notably a (nascent) constitutional convention that would require House of Commons approval before armed force may be deployed,70 and the increased role for Parliament in the exercise of the foreign relations prerogative.71

Significant though some of these developments are, it remains possible to fit them into my earlier thesis – that we are witnessing the gradual, if increasingly frequent, reduction of prerogative, the assumption being that

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67 A process discussed in R v Secretary of State for the Home Department, ex p Fire Brigades Union [1995] 2 AC 513.
68 See, eg, R v Secretary of State for the Home Department, ex p Everett [1989] QB 811 (CA), where Taylor LJ summarised the effect of the GCHQ case as making clear that the powers of the court ‘cannot be ousted merely by invoking the word ‘prerogative’. See also R v Secretary of State for the Home Department, ex p Al Fayed [1998] 1 WLR 763.
69 Constitutional Reform and Governance Act 2010 (UK) s 3.
71 See, eg, Constitutional Reform and Governance Act 2010 (UK) pt 2 which enlarges the role for Parliament in the process of ratifying treaties and vesting an express power of veto in the House of Commons. See also Campbell McLachlan, Foreign Relations Law (Cambridge University Press, 2014) ch 5.
ultimately this normalising process would reduce the category to its hard core. But more recent jurisprudential developments question that analysis and make it possible to advance a stronger explanatory narrative. They make it plausible to argue, that is to say, that prerogative has no discernible core.

Exemplary in this regard are four cases handed down in the same week by the Supreme Court of the United Kingdom ('UKSC'), all of which touched on foreign relations powers. In *Miller* – the Brexit case – the UKSC upheld the lower court’s decision that the government did not have the power under the foreign relations prerogative to give notice to the European Union institutions of the United Kingdom’s intention to withdraw from the European Union, since to do so would compromise existing statutory rights. Much has already been said about the case. But what is interesting for present purposes is that – contrary to the expectations of many commentators, even those like me who thought that the government should lose on the law – neither court gave any leeway to the argument based on the affective dimension of prerogative, prominent though it was in government submissions. This represents a significant defeat for prerogative since this was a case decided on one of its strongest grounds – foreign relations being unquestionably part of its central case – and at the sharp end of governmental action. One of the government’s documents claimed that the matter was ‘of high, if not the highest, policy; a polycentric decision based upon a multitude of domestic and foreign policy and political concerns for which the expertise of Ministers and their officials are particularly well suited and the Courts ill-suited.’ In response, the UKSC repeated Lord Reid’s description of prerogative as ‘a relic of a past age,’ while being careful not to deny its functional importance as a ministerial power in the fields of diplomacy and war. The Court was not remotely persuaded that the category *in itself* did any work, holding with clarity and conviction that the functional concerns that might be said to support it must be subordinated to

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74 Other inroads have been made into the foreign affairs prerogative: see, eg, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (6 November 2002); *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279 (12 October 2006).
75 ‘Detailed Grounds of Resistance on Behalf of the Secretary of State’ (2 September 2016) s 5(3).
77 *R (Miller) v Secretary of State for the Home Department* [2017] UKSC 5 (24 January 2017) [49].
the constitutional arguments arraigned against it here. The judges denied the claim that the prerogative as a category reflects or embodies the custodial function of the executive in relation to which courts should tread warily, an argument that did have some traction among the dissenting judges.

The other three cases, handed down together – Belhaj, Rahmatullah and Serdar Mohamed – are less well known but in their own way equally significant. They arise out of the post-2001 counterterrorism climate and target specifically the United Kingdom’s complicity in the unlawful detention and rendition, assault, torture and cruel and inhuman treatment of individuals usually (in these actions) at the hands of officials of other states. In narrowly doctrinal terms, they engage the category of Act of State, a common law doctrine (or set of doctrines) that shelters from judicial oversight certain kinds of ‘sovereign’ acts done in the exercise of the foreign relations prerogative and the broadly comparable acts of other states. Constitutionally speaking, we might invoke Locke to suggest that those doctrines are part of the federative power and, as such, may be conceived if not as part of the prerogative then operating on precisely the same terrain, since both rest in the same hands (the executive) and derive their authority from the same source (its capacity as guardian of the state). This perspective acknowledges that Act of State is part of domestic law not public international law. It also tells us something useful about the legal terrain that Act of State is supposed to help map out. In these terms, Act of State can be understood as a principle (or set of principles) that is partly constitutive of that part of the state that comprehends and acts in the world outside it. As the term federative implies – it is centrally about agreements or pacts (foedera) – this capacity also has a non-domestic dimension. That is, it also patterns legal relations that result principally from the actions of other state agents but which touch on the legal capacities of the state’s own agents. It does so federatively – that is, as though it expects those patterns to be mirrored

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78 Ibid [92].
79 R (Miller) v Secretary of State for the Home Department [2017] UKSC 5 (24 January 2017) [240] (Lord Reed SCJ), [249] (Lord Carnwath SCJ).
80 For authoritative analysis see Amanda Perreau-Saussine, ‘British Acts of State in English Courts’ (2008) 78 British Year Book of International Law 176. There have been important recent Australian jurisprudence on the Act of State doctrine: Habib v Commonwealth (2010) 183 FCR 62; Moti v The Queen (2011) 245 CLR 456, [50] where French CJ for the majority held that there was no ‘general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law’. 
or replicated in the legal systems of other states (although that may or not be the case in practice, and is not determinative either way). In other words, the federative is unique among domestic constitutional capacities in that it deals with projections of juridical authority from the ‘outside in’ as well as the ‘inside out’.

The first case, Belhaj, engaged the foreign act of state doctrine. As such, it is an example precisely of the distinctive ‘outside-in’ operation of the federative just remarked upon. The central issue was the United Kingdom’s complicity in actions in relation to which foreign states (in Belhaj’s case, the United States and Libya) were the prime actors. The government argued that the Court should recognise a broad category of foreign acts of state that covered all sovereign acts by a foreign state. The Supreme Court refused to expand the existing categories recognised by the common law – and rejected a parallel international law claim of state immunity – although what those categories are now meant to look like varies from judge to judge. All the judges accepted, however, that there were certain acts – torture certainly among them – that could receive no protection from the Act of State doctrine. ‘The purpose of the foreign act of state doctrine is to preclude challenges to the legality or validity of the sovereign acts of foreign states. It is not to protect English parties from liability for their role in it.’

Lord Neuberger P seems to attract the most support, although Lord Mance SCJ’s is arguably the leading judgment. What is clear is that the Court rejected the contention that United Kingdom courts were precluded ‘from investigating any acts of a foreign state when and if the Foreign Office communicated the Government’s view that such investigation would “embarrass” the United Kingdom in its international relations’. (Although such a statement might be a factor a court would take into account when deciding whether to refuse to determine the issue.) That position came with a

82 Ibid [98] (Lord Mance SCJ), [168] (Lord Neuberger P), [262] (Lord Sumption SCJ).
84 Ibid [41] (Lord Mance SCJ), [241] (Lord Sumption SCJ) interpreting Buttes Gas and Oil Co. v Hammer (No.3) [1982] AC 1988. The government relied in particular on Yukos v Rosneft Oil Co. (No 2) [2012] EWCA Civ 855 (27 June 2012).
85 Ibid [149] (Lord Neuberger P). Another important diplomatic relations case, albeit arising in a different context with different arguments in play, is R (Corner House) v Director of Serious Fraud...
wider rejection of the straightforward equation between the exercise of sovereignty and the executive branch of the state, not just in the United Kingdom but more widely:

In states subject to the rule of law, a state’s sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres … A rule of recognition which treats any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state … could mean ignoring, rather than giving effect to, the way in which a state’s sovereignty is expressed.86

This is an important statement. It insists that the starting proposition within a constitutional state such as the United Kingdom must be that federative power is exercised on the basis of legality (or constitutionality) and not on the basis of prerogative (or sovereignty). This proposition only has direct bearing on United Kingdom law, of course, but as I said earlier it is a characteristic of the federative that it operates on the assumption that other similar legal orders will mirror or replicate the legal structure of the federative that is being articulated here. This statement does from the outside – and rather more boldly – something that Miller does from within. It dismantles the worldview that sustains the domestic prerogative in a strong sense, that is, the prerogative understood as an imperative and directive constitutional power. That view of the prerogative, when externalized and generalized, fits a model in which sovereign entities interact on the basis of their presumed imperative authority. Instead, the UKSC in Belhaj insists upon a standard for the United Kingdom’s interaction with other legal orders that corresponds to the United Kingdom constitution’s own principles.

The second Act of State case, Al-Waheed, concerned an action for damages against the United Kingdom government this time alleging unlawful detention and maltreatment by British forces.87 The first question concerned whether the United Kingdom had authority under relevant United Nations Security Council resolutions to adopt its own detention policy, above and beyond that already established in Afghanistan under the aegis of the

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86 Ibid [65] (Lord Mance SCJ). See also at [167] (Lord Neuberger P).
International Security Assistance Force. The Court held that it did. A second issue related to the applicability of the European Convention on Human Rights (‘ECHR’) to extraterritorial armed conflict. On this matter, the majority preferred the decision of the Grand Chamber in Hassan v United Kingdom over its earlier judgment in Al-Skeini. In Hassan, the European Court of Human Rights rejected the argument that Article 5 (the right to liberty) was displaced in such contexts, but held that it fell to be adapted to a context in which international humanitarian law provided the relevant safeguards against abuse. Applied to the situation in Al-Waheed, the UKSC found the detention processes deficient on the narrow basis that it failed to provide an adequate and practical means by which those detained could challenge the legality of their detention. The United Kingdom was therefore in breach of its obligations under ECHR Article 5(4).

There is considerable nuance here, as the UKSC tried to grapple with what is an almost intractable predicament. The relevant context is where, pursuant to the exercise of armed force, a signatory to the ECHR has gained some foothold, necessarily incomplete, within a foreign territory. In that context, it is likely to be impossible to guarantee the whole gamut of Convention rights. Does that mean that the only alternative is in effect the disapplication of those rights? Either option has considerable drawbacks. In line with the consistent disinclination in these cases to allow for legal black holes, the Court preferred an approach that insisted that a core set of rights must apply in extra-territorial conflicts and – equally important – that those rights are made meaningful to those who seek to engage them. The case was decided largely within the framework of European and international human rights law.

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88 Ibid [38] (Lord Sumption SCJ). In reaching this conclusion, the UKSC also worked through important points about authorisation in international law, distinguishing the ECtHR’s judgment in Al-Jedda v United Kingdom (2011) 53 EHRR 23. Lord Mance dissented on this point: see at [180].
89 Al-Skeini v United Kingdom (2011) 53 EHRR 18.
90 Hassan v United Kingdom (2014) 38 EHRR 358. Lord Reed SCJ (Lord Kerr SCJ in agreement) dissented on this point.
92 See, eg, Belhaj and Rahmatullah v Straw [2017] UKSC 3 (17 January 2017) [30] (Lord Mance SCJ): ‘The appellants’ case on state immunity in this jurisdiction would preclude suit against them anywhere.’
Even so, *Al-Waheed* manages to exemplify what now seems normal when it comes to judging activities within the prerogative/federative zone, where the urge to normalise and juridify is paramount and yet there is still sensitivity in the application of the (new) legal standards to often difficult operational contexts.

The third case, *Serdar Mohamed*, concerned extensive periods of detention of those initially captured by British forces in Iraq before being handed over to the United States. This part of the action related to the United Kingdom’s own treatment of those detained, as opposed to its complicity with other states that was the issue in *Belhaj*, and so engaged the Crown (or domestic) Act of State doctrine. Building on admittedly ‘shaky foundations’, Lady Hale DP in the leading judgment acknowledged the existence of a ‘rule that certain decisions of high policy in the conduct of foreign affairs are non-justiciable’. She continued, applying the rule to the context before her: ‘if act of state is a defence to the use of lethal force in the conduct of military operations abroad, it must also be a defence to the capture and detention of persons on imperative grounds of security in the conduct of such operations. It makes no sense to permit killing but not capture and detention, the military then being left with the invidious choice between killing the enemy or letting him go.’

So far so prerogative-minded, one might say. ‘It is necessary that the courts continue to recognise that there are some acts of a governmental nature, committed abroad, upon which the courts in England and Wales will not pass judgment.’ But there is a sting in the tail. Emphasising the need to keep domestic act of state within very narrow bounds, Lady Hale DP concluded:

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84 Ibid [148] (Lord Mance SCJ): ‘the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law.’
85 *Rahmatullah (No 2) and Serdar Mohamed v Ministry of Defence* [2017] UKSC 1 (17 January 2017).
86 The only real authority here was *Burton v Denman* (1848) 2 Exch 167, in which the Court shielded Captain Denman from an action for damages for liberating slaves in West Africa.
87 *Rahmatullah (No 2) and Serdar Mohamed v Ministry of Defence* [2017] UKSC 1 (17 January 2017) [31].
88 Ibid [33].
89 Ibid [33].
90 Ibid [33].
We are left with a very narrow class of acts: in their nature sovereign acts – the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law[.]

We need to examine carefully what is going on here. This is an ostensible win for the government – the only win in the quartet of cases examined so far. But it is really (or also) another example of normalisation. On one hand, the Supreme Court appears to accept a category of executive acts that escape the jurisdiction of the courts. And yet almost in the same breath the Court subjects that category to scrutiny that contains most of the core features of proportionality or irrationality review. In order to obtain the protection that this Act of State principle affords, the government must show a legitimate aim and it must not only connect the impugned measures to that aim but also show that they were necessary to achieve that aim. The last limb of that test in particular is no trivial hurdle. In any case, the test is identical to that applied to assess the legality of any significant executive decision or action.

IV GENERAL EXECUTIVE POWERS

I have argued that the prerogative in its true sense ought to be understood as a special category of executive power that evoked a special authority to which the court ought to defer (the central case). We might say that the initial post-GCHQ cases modified that understanding somewhat, so that prerogative came to be seen as a special category of executive power that evoked a special authority to which the court ought in appropriate cases to defer. But what might one say now, in light of the quartet of recent cases just examined, as well as the other developments referenced earlier? The moderate reading would suggest a further modification from the original position, so we might say that

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101 Ibid [37] (emphasis added). Compare Lord Sumption at [81], which seems to strip the test of some of its proportionality-like features.

102 Irrationality review has been considerably strengthened of late: see, eg, Pham v Secretary of State for the Home Department [2015] UKSC 19 (25 March 2015); Keyu; R (Evans) v Attorney General [2015] UKSC 21 (26 March 2015); Kennedy v Charity Commission [2014] UKSC 20 (26 March 2014). The difference between the new irrationality and proportionality (and reasonableness) tests is not clear, but the dominant school of thought is that whereas proportionality is tethered to the presence of a right or rights, irrationality is the test to apply where no right is engaged.
prerogative has now become a special category of executive power that *may evoke* a special authority to which the court *may in appropriate cases defer.*

The stronger reading presses the point further so that redefinition becomes deconstruction: prerogative is *no special category,* just an inchoate set of executive capacities to which deference in general terms ought *not* to be given.

It may not matter all that much whether the moderate or the stronger interpretation of the prerogative is right. But one difference between them may be that if the courts elect the stronger position over the more moderate one, the harder it is going to be for the executive to get traction in prerogative cases. The reason is simple. Whereas the moderate reading still permits deference, the stronger reading makes deference exceptional and marginal. Underlying this is a minor, but significant difference. The stronger reading presses more vigorously what we might call the claims of constitutional normality. It insists with fewer reservations than the alternative that any special authority claimed by the executive ought to be sourced through more legitimate forms of legal authority – statute principally, but also in the federative context (positive) international law. Either way, it may be time to stop talking about prerogative altogether. The term obscures more than it elucidates – but then again it has done that for a long time. We should update our legal categories to match our constitutional thinking. Just as we now speak about the executive’s general administrative powers as opposed to prerogatives of contract and agency, so too should we ditch prerogative and talk instead about the general executive powers of government.

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103 Supporters of this view might care to reference the Court of Appeal decision *Regina (XH and Another) v Secretary of State for the Home Department* [2017] EWCA Civ 4 (2 February 2017), an unsuccessful challenge to the Home Secretary’s use of the prerogative to withdraw passports from those suspected of terrorist links. The Court of Appeal held (distinguishing *Miller*) that the prerogative in this area had not been entirely displaced by terrorism prevention and investigation measures (‘TPIMs’) conferred on the Home Secretary by the Terrorism Prevention and Investigation Measures Act 2011. Note, however, that the category of prerogative is doing no work; it is the reason of state argument that is load-bearing. See especially at [116]: ‘We accept that the fundamental nature of the rights involved in the present case gives rise to a need for a strong justification for any interference. However, we consider that such a justification is clearly made out here. The grounds relied on by the Secretary of State [including in closed proceedings] demonstrate a genuine, present and sufficiently serious threat to a vital national interest.’


105 As somewhat shakily displayed in *Al-Waheed.* See also the discussion on sources of legal authority and the UK Constitution in *Miller,* discussed in Poole, Devotion, above n 73.
Unlike that of the United Kingdom, the Australian law on judicial review of exercises of non-statutory executive power is undeveloped. This article proposes a constitutional basis for judicial review of such power in Australia. It then argues that, despite their constitutional differences, there remain principles of common law constitutionalism that are applicable in both the United Kingdom and Australia that can provide guidance to Australian courts and lawyers as to the content of limitations on non-statutory executive action.

I INTRODUCTION

The applicability of principles of judicial review to exercises of non-statutory executive power is unclear in Australia. Whether a particular non-statutory power exists (‘the constitutional question’) is accepted as reviewable. But the High Court of Australia has never been required to decide whether the manner of exercise of non-statutory powers (‘the administrative law question’) is examinable by the courts. The Federal Court of Australia, as well as several State Supreme Courts and Courts of Appeal, have determined that there is nothing in the non-statutory source itself that shields non-statutory action from judicial review in the administrative law sense. But they have done so without any elaboration on the constitutional warrant for subjecting non-statutory action to judicial review, or on the basis on which standards for lawful government decision-making (being the rules that manifest as grounds of

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* PhD Candidate, University of Sydney, Sydney Law School. I am grateful for the financial assistance I receive from an Australian Government Research Training Program Stipend Scholarship. Parts of this article are based on a paper presented at the 2016 Public Law Conference, held at the University of Cambridge from 12-14 September 2016. This article, and my broader research, also benefitted from my attendance at the executive power workshop hosted by the Institute of Advanced Studies, The University of Western Australia, on 7 April 2017. I thank the organisers and participants at both events for the excellent programs and fruitful discussions. Attendance at both events was made possible by grants from the University of Sydney Postgraduate Research Support Scheme. For their comments on earlier versions of this article, I thank Professor Margaret Allars (my supervisor), Dr Dominique Dalla Pozza and fellow student Raymond Brazil. Any errors are my own.

† See, eg, the cases cited at below n 61.
judicial review, and hereafter referred to as ‘judicial review standards’) are to be imposed.

Courts of the United Kingdom, on the other hand, including the House of Lords and the Supreme Court, have long accepted that the manner of exercise of non-statutory power is susceptible to judicial review and have conducted such review in a number of cases. In these circumstances, one might expect that the British cases would provide a fertile source of assistance to Australian courts when they are called upon to conduct judicial review of non-statutory action.

However, the administrative law jurisprudence of Australia and that of the United Kingdom have been diverging since the later decades of the 20th century. The High Court of Australia, in particular, has been very cautious about transplanting English judicial review doctrines to Australian law, citing the significant constitutional differences between the two jurisdictions. When what is being reviewed is an exercise of executive power conferred by a statute, this is not necessarily a problem as the common law of Australia is very well-developed in that regard. However, when the executive action being reviewed is non-statutory action, Australian courts may find themselves in a different position.

This article demonstrates that, in the midst of seemingly intractable differences between the law of judicial review in the United Kingdom and its counterpart in Australia, there remain principles of common law constitutionalism that are applicable in both jurisdictions and these principles are capable of providing guidance to Australian courts and lawyers as to the content of limitations on non-statutory executive action. Limitations on executive action are usually derived from the language of the statute conferring the power to act, but such an approach is obviously inadequate for the task in respect of non-statutory action. The superior courts of the United Kingdom have had many more occasions than Australian courts to examine non-statutory executive action and establish its limits. This article explains how

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legitimate regard can be had to British legal developments in this area when considering judicial review of non-statutory executive action in Australia. It demonstrates the ongoing utility of the principles used in the British cases, despite differences that have appeared between the two jurisdictions in modern times, so that guidance can be sought from them when Australian courts are required to address these issues.

This article uses the terminology of ‘executive action’ when discussing action by the executive branch and judicial review of it, rather than ‘administrative action’. This is simply because the word ‘administrative’ has connotations of administration of a statutory scheme. And, indeed, most judicial review is of this kind of ‘administrative’ action. However, the focus of this article is on the exercise, by members of the executive branch of government, of power that has not been conferred by statute, or of ‘non-statutory executive power’. The descriptor ‘executive’ as opposed to ‘administrative’ captures more fully the action that I am exploring.

What is meant in this article by ‘non-statutory executive action’? For the purposes of United Kingdom analysis, it refers to an exercise of prerogative power and other common law powers of the Crown. In Australian terms, it is a reference to an exercise of the power of the executive branch of government that is not conferred by, or referable or incidental to, a statute. At the Commonwealth level, it is that part of the Commonwealth government’s executive power that, to use the terms of s 61 of the Commonwealth Constitution, ‘extends to the execution and maintenance of [the] Constitution’. In relation to the Australian States, it refers to the inherent power that State governments inherited by virtue of their colonial relationship to the government of the United Kingdom, affected by State constitutions (where applicable) and the Commonwealth Constitution. Non-statutory executive power generally encompasses aspects of prerogative power that are suitable to Australia’s constitutional context as a federal nation under a written

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3 In my analysis, I utilise the Blackstonian sense of the prerogative being only those powers that the executive has by virtue of royal or sovereign authority and that are not shared by the sovereign’s subjects: William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1765) vol 1, 232.

4 *Commonwealth Constitution* s 61.

5 For example, the Constitution of Queensland makes explicit provision for the content of state executive power: *Constitution of Queensland 2001* (Qld) s 51.
At the Commonwealth level, it has also been held to include what academics refer to as 'nationhood' power, being the 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.7 There is also a limited power, or capacity, to enter into contracts, and perhaps do other 'transactional' things that legal persons can do, without statutory authority.8 These powers might coincide, in nature if not in source, with what has been called 'de facto' or 'third source' powers in the United Kingdom9 and New Zealand.10 The focus of this article, however, is on the exercise of governmental non-statutory executive powers, rather than capacities that the government shares with other bodies vested with legal personality.

By 'common law constitutionalism', I am referring to the constitutional system that endures in the United Kingdom. The content of constitutional rules in this system is not provided by a written document but by a collection of co-existing, interacting and possibly competing11 principles and conventions that have developed over centuries through the interaction of the monarch, his or her servants, Parliament and the courts. Many of the principles and

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6. See, eg, Barton v Commonwealth (1974) 131 CLR 477, 490-1 (McTiernan and Menzies JJ), 498 (Mason J), 505-6 (Jacobs J); New South Wales v Commonwealth (1975) 135 CLR 337, in particular at 501 (Murphy J) (‘Seas and Submerged Lands case’).


11. For example, some of the judicial comments in R (Jackson) v Attorney General [2006] 1 AC 262 raised the question whether the Supreme Court could reject or fail to give effect to a law that attempts to ‘subvert the rule of law’: 318 [159] (Baroness Hale), and see also 302-3 [102] (Lord Steyn), 303 [104], [107] (Lord Hope). This sets up a competition between two principles of common law constitutionalism: parliamentary sovereignty and the rule of law. See Jeffrey Jowell, ‘The Rule of Law’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), The Changing Constitution (Oxford University Press, 8th ed, 2015) 13, 33-4; Mark Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), The Changing Constitution (Oxford University Press, 2015) 38.
conventions that today are said to be of ‘constitutional’ status are the product of battles between the King and Parliament in the Glorious Revolution of the 17th century. Consequently, these principles reflect the concessions that were won by, or values that prevailed in, those battles. For example, responsible government is designed to ensure the accountability of the executive branch of government to the Parliament, which represents the people. Parliamentary sovereignty is designed to ensure the pre-eminence of the will of the people (represented by Parliament) over the views of others, including the monarch and judges. Other examples of principles of common law constitutionalism include the separation of powers and the rule of law. Whether these principles fall into any hierarchy is a matter of ongoing debate, though since the writing of Dicey it has been accepted that the two pre-eminent principles of common law constitutionalism are parliamentary sovereignty and the rule of law.

Part II of this article provides a summary of the differences that have emerged between judicial review in Australia and the United Kingdom. How non-statutory executive power can provide the context in which judicial review developments in the United Kingdom may remain useful in Australia is the focus of Part III. Part IV explores which principles of common law constitutionalism that underpin decisions of the Supreme Court of the United Kingdom (‘UKSC’) can provide guidance in the Australian context. It discusses how parliamentary sovereignty, the presumptions of lawfulness and reason and the separation of powers have been used in cases to either impose or negate limitations on non-statutory executive action and speculates on how they might be used in appropriate Australian cases in the future. A brief conclusion is provided in Part V.

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12 See, eg, Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42, 93 [121] (Gageler J) (‘Plaintiff M68/2015’) quoting from Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410, 441.
13 See Elliott, above n 11, 55 for a suggestion that the rule of law, rather than being a stand-alone principle, overlaps with or is a synonym for ‘principles and traditions of the common law’ generally.
14 See, eg, Jowell, above n 11, 13.
II  JUDICIAL REVIEW IN AUSTRALIA AND THE UNITED KINGDOM: A BRIEF SUMMARY OF THE DIVERGENCE

Australia began its life as a federation of six British colonies and, for much of its early life, the law of judicial review in Australia developed largely in tandem with that of the United Kingdom.\(^{15}\) However, particularly since the later decades of the 20\(^{th}\) century, the law of judicial review in the two jurisdictions has steadily grown apart. The divergence has been explored in depth elsewhere\(^ {16}\) and it suffices here to mention a few of the suggested reasons for it.

Most of them derive from the impact of European Union law on the law of the United Kingdom.\(^ {17}\) This prompted the enactment of the *Human Rights Act 1998* (UK) and is the motivating factor behind the rise of proportionality analysis by British courts in the course of determining whether a right identified in that Act has been unlawfully breached,\(^ {18}\) and perhaps even as a common law ground of judicial review in the absence of a human rights claim.\(^ {19}\)

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\(^{17}\) On 29 March 2017, the UK government informed the European Union of its intention to withdraw from the EU. What the exit of the UK from the EU (commonly known as ‘Brexit’) will actually look like, in fact and in law, will take several years to determine. In particular, to what extent it is possible and desirable to detangle UK law from the European influences of the last half century is likely not to be known for many years. Accordingly, this article proceeds on the basis of the current state of UK law rather than speculates about what may follow Brexit.


This in turn has prompted discourse in the United Kingdom on the appropriateness of judicial deference to executive assessments and variable intensity of judicial review depending on the nature and impact of the executive action being reviewed.\textsuperscript{20} The closer relationship of the judiciary to the administrative branch in European countries has been perceived by Australian judges to be behind the British courts’ embrace of giving substantive protection to a person’s legitimate expectations of government conduct\textsuperscript{21} and their focus on the quality of decision-making and, thus, the merits of outcomes.\textsuperscript{22}

Put that way, the differences between judicial review in the United Kingdom and judicial review in Australia are stark. In Australia, at the Commonwealth level, there is no Bill of Rights, so it lacks the ‘rights anchor’ on which a proportionality analysis in respect of administrative action could hang in any orthodox way.\textsuperscript{23} Clearly, neither the Commonwealth of Australia nor the Australian states have any need to accommodate the law of the European Union and the more substantive role for courts that seems to accompany it. And, insofar as legitimate expectations are concerned, the High Court has made extremely clear that it sees no use for the concept in Australian administrative law at all.\textsuperscript{24}


\textsuperscript{21} Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1, 23-4 [72]-[76] (McHugh and Gummow JJ) (‘\textit{Lam}’).

\textsuperscript{22} See \textit{Minister for Immigration and Citizenship v Li} (2013) 249 CLR 332, 352 [30] (French CJ), 366 [73]-[74] (Hayne, Kiefel and Bell JJ).

\textsuperscript{23} See \textit{Greg Weeks, ‘What Can We Legitimately Expect from the State?’ in Matthew Groves and Greg Weeks (eds), \textit{Legitimate Expectations in the Common Law World} (Hart Publishing, 2017) 147147, 159-61.}
But the most crucial difference between the two jurisdictions is the absence, in the United Kingdom, of a written constitution that expressly allocates power to different branches of government and that divides power between two spheres of government. The High Court of Australia pins its approach to the role of courts when conducting judicial review of executive action on the *Commonwealth Constitution*. This has, extra-judicially, been referred to as the ‘constitutionalisation’ of Australian administrative law. It is the process whereby constitutional principles have infused Australian administrative law, and particularly the law of judicial review, to the point where the *Commonwealth Constitution* is now accepted as entrenching a minimum provision of judicial review of executive action at both the State and Commonwealth levels.26 The *Commonwealth Constitution* is also accepted to require, at least at the Commonwealth level, the separation of judicial power from legislative and executive power and this has been considered to necessitate a narrow role for the federal courts on judicial review.27

Most relevant for present purposes is the effect of the separation of judicial power from executive power. Australian courts conduct judicial review of executive action to ensure that the executive branch remains within its jurisdiction; that is, within the limits of the law (including the relevant written constitution) conferring on the executive the power or authority to act.28 The High Court has made plain that the rule of law, as a concept upon which the *Commonwealth Constitution* is based, requires no less.29 And this is where

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28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J); *Minister for Aboriginal Affairs v Peko-WallSEND Ltd* (1986) 162 CLR 40-1 (Mason J).

another area of Australian ‘exceptionalism’, the retention of the distinction between jurisdictional error and non-jurisdictional error becomes relevant. The High Court has utilised the concept of jurisdictional error to mark both the limits of the authority of the executive branch and the province of the executive upon which the judiciary cannot trespass when conducting common law judicial review. Thus, any error by which either the executive or the judiciary transgresses the limits of its respective authority is a jurisdictional error. Jurisdictional error is a concept that Australia received from its British legal heritage. However, in the case of Anisminic Ltd v Foreign Compensation Commission, the House of Lords gave ‘jurisdictional error’ an interpretation that resulted in all legal errors being jurisdictional errors, and British courts have since recognised that the distinction between jurisdictional and non-jurisdictional errors has been abolished. Outside the confines of a written


30 See Taggart, above n 16.
31 For the High Court’s decision that the abolition of the distinction between jurisdictional error and other legal errors in England should not be followed in Australia, see Craig v South Australia (1995) 184 CLR 163, 179. For a very recent application of the distinction, see Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4 (14 February 2018).
32 See, eg, Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ); Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, particularly 142-3 [168]-[169] (Hayne J) (‘Aala’).
34 Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.
35 See, eg, R v Hull University Visitor; Ex parte Page [1993] AC 682, 701-2 (Lord Browne-Wilkinson, Lord Keith and Lord Griffiths agreeing) and 705-6 (Lord Slyn, Lord Mustill agreeing). For a recent rejection of a return to the distinction between jurisdictional and non-jurisdictional errors, see, eg, Regina (Cart) v Upper Tribunal [2012] 1 AC 663, 683-684 [39]-[40] (Baroness Hale SCJ), 702-3 [110]-[111] (Lord Dyson SCJ). It should be noted, however, that neither does the High Court limit errors that can be jurisdictional to the narrow, pre-Anisminic, approach of errors that negated a decision-maker’s authority to make the relevant decision from the outset. While the High Court has maintained the distinction between jurisdictional error and non-jurisdictional error, it is accepted that ‘an error of law may amount to a jurisdictional error even though the tribunal which made the
constitution, the English courts have been freer in modern times to conduct judicial review for 'good administration',36 or for 'the maintenance of the highest standards of public administration'.37 That is, they have taken a normative approach to judicial review rather than an enforcement approach.

The High Court has expressly disavowed the appropriateness for Australia of the British courts’ dismissal of the distinction between jurisdictional error and non-jurisdictional error.38 It has justified its retention of the distinction in the case of Commonwealth executive action by reference to the remedies provided for in the section of the Commonwealth Constitution that confers original jurisdiction on the High Court to conduct judicial review: s 75(v). Section 75(v) provides that the High Court has jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. The High Court has identified the role that jurisdictional error plays in the issue of the writs of prohibition and mandamus39 and has justified its retention of the concept accordingly.40 The

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36 See, eg, Mandalia v Secretary of State for the Home Department [2015] 1 WLR 4546, 4556 [29] (Lord Wilson SCJ, with whom Baroness Hale DP, Lord Clarke SCJ, Lord Reed SCJ and Lord Hughes SCJ agreed) and Attorney-General (Hong Kong) v Ng Yuen Shiu [1983] 2 AC 629 (PC), 637. See also Jason Varuhas, ‘Against Unification’ in H Wilberg and M Elliott (eds), The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow (Hart Publishing, 2015) 91, particularly at 106, where he states that ‘[a] central concern [of common law judicial review] is to ensure public power is exercised according to basic expectations of good administration’; and the references to ‘principles of good administration’ in Elliott, above n 9, 28, 180-1, 193-4.

37 R v Lancashire County Council; Ex parte Huddleston [1986] 2 All ER 941, 945 (Donaldson MR); see also Parker L at 947.


40 Ibid and, more explicitly justifying the retention of jurisdictional error by reference to s 75(v), see Lam (2003) 214 CLR 1, 24-5 [76]-[77] (McHugh and Gummow JJ). Though for examples of dicta questionning the need to retain the distinction between jurisdictional error and other errors of law, FCT v Futuris (2008) 237 CLR 146, 184 [129]-[130] (Kirby J); Re Minister for Immigration and
concept’s retention has also been justified by reference to the reach of the label ‘officer of the Commonwealth’ in s 75(v). As this label extends to Commonwealth judicial officers as well as officers in the executive branch, and because fewer legal errors are jurisdictional errors when made by a judicial officer, it has been argued that it is necessary to maintain the distinction to ensure that only jurisdictional errors of Commonwealth judicial officers are examinable by the High Court in its original jurisdiction.

In the case of State executive action, the High Court determined in Kirk v Industrial Court (NSW) (‘Kirk’) that Chapter III of the Commonwealth Constitution, which provides for the judicial branch of government (and in which s 75(v) appears), requires the ongoing existence of a body that meets the description of a ‘Supreme Court of a State’. A ‘defining characteristic’ of this body is the inherent supervisory jurisdiction that the colonial Supreme Courts inherited by virtue of their having the same jurisdiction as the Courts of Queen’s Bench in England at the time of federation. The supervisory jurisdiction of the courts is the jurisdiction to ‘grant certiorari for jurisdictional error’; the mechanism for the determination and enforcement of the limits on the exercise of executive power. At the State level, the retention of jurisdictional error operates to mark a limitation on the competence of State Parliaments: ‘Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power’. However, the effect of the decision in Kirk was to reinforce the notion that judicial review by Australian courts is about identifying and enforcing the

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47 Kirk (2010) 239 CLR 531, 580 [97].
48 Ibid 580 [98].
49 Ibid 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
limits of executive power, again reinforcing the contrast between Australian judicial review and the normative approach of British courts to judicial review.

III NON-STATUTORY EXECUTIVE POWER: PROVIDING SCOPE FOR CONVERGENCE?

In such an environment, and at least until any changes to United Kingdom judicial review law consequent upon 'Brexit' come to be, it might be difficult to see how the law of judicial review in Australia and the law of judicial review in the United Kingdom could even re-align, let alone converge to an extent that would preserve the utility of British legal developments for Australian courts and lawyers grappling with judicial review of non-statutory executive action. However, judicial exploration of the justiciable limits of non-statutory executive power provides a context in which such convergence could take place.

Perhaps perversely, the scope for convergence arises from the formal difference identified above between the approach to judicial review in the two jurisdictions: Australia’s maintenance of the distinction between jurisdictional error and non-jurisdictional error, and the focus on the determination and enforcement of limits on executive power. To understand how these aspects of Australian judicial review law might lead us back to our common law comparators, it is necessary to look at what the retention of the distinction means for judicial review.

In Australia, the High Court has made clear that the effect of a jurisdictional error is that the decision-maker acted beyond its jurisdiction, or acted in a way in which it did not have power, or jurisdiction, to act. Where a breach of the judicial review standards constitutes jurisdictional error, the result of the breach is that the impugned decision 'lacks legal foundation and is

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50 See above n 17.
51 The potential for convergence between the laws of Australia, the United Kingdom and New Zealand in respect of what she called 'inherent executive power' was recognised by Saunders, above n 15, 164.
properly regarded, in law, as no decision at all’.

The imposition of judicial review standards is therefore to apply at the point of determining the extent of the power (purportedly) exercised. Judicial review standards inform the limits of the power ab initio, such that any departure from a judicial review standard that properly applies to an exercise of power will render the action invalid.

The standards operate as limitations on the executive power itself. This means that, for example, an attempt to make a decision in breach of the applicable standards of procedural fairness has the result that the power to make the decision in the way that it was made did not exist at all.

Thus, in Australia, the ‘administrative law question’ of whether a judicial review standard has been breached has become subsumed in the ‘constitutional law question’ of whether power existed. Looking at the relevant question in this way, to consider whether the decision-maker had the power to do what he or she did in the way that he or she did it, it is clear that the focus is on the identification of limits on power. The relevant question here is: how are these limitations to be identified in respect of non-statutory executive power?

The role of jurisdictional error in establishing the limits of executive power has always been discussed by the High Court in statutory terms. The High Court has spoken of the importance of statutory construction and presumptions as to Parliament’s intention when determining whether an error is jurisdictional.

Judicial review standards manifest as limits on power, as Parliament is presumed to have intended that a power will not be exercised, for example, for an unauthorised purpose or without taking into account all

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54 This is consistent with the approach taken by Elliott in his analysis with respect to the basis for imposing judicial review standards on the ‘legal’ category of non-statutory power, as opposed to de facto power: see Elliott, above n 936, 180-1. The UKSC has recently commented on the legal basis for judicial review of prerogative power (see Youssef [2016] UKSC 3 at [37]) but in terms that neither assert or deny the soundness of this approach.

relevant considerations. To this extent, the High Court has maintained an ultra vires approach to judicial review, meaning they have used statutory construction principles to attribute an intention to Parliament regarding the limits of powers conferred by Parliament on the executive branch.

This statutory focus is to be expected for two reasons. First, jurisdiction is generally conceived of as being conferred or created by a statute. It is therefore logical to look to the statute to determine the limits of a decision-making body’s jurisdiction. Secondly, and more relevantly for present purposes, the High Court has not yet been called upon to conduct judicial review of exercises of non-statutory executive power, as opposed to its existence. The High Court has not even yet been required to determine whether it will apply the principle of the House of Lords decision in Council for Civil Service Unions v Minister for the Civil Service (‘the GCHQ case’) that permits judicial review of non-statutory executive action in an appropriate case. This case involved a decision by the Minister, pursuant to prerogative power, to prevent staff members of the intelligence headquarters of the Government (Government Communications Headquarters) from belonging to a national trade union. The decision was made without consulting with the unions, as had been the practice in the past when variations to conditions of

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56 See, eg, Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, 347-8 [73]-[74] (McHugh, Gummow and Hayne JJ) in relation to the ground of relevant and irrelevant considerations and 351 [82] for the role of jurisdictional error in marking the limits of power conferred by statute. The joint judgment in Plaintiff S157 (2003) 211 CLR 476 also equated jurisdictional error with marking limits on power: see 506 [76].

57 Although see Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44, 65 [69] (McHugh, Gummow and Hayne JJ) for obiter recognising the principle and supporting its application in Australia.


59 The High Court has, however, endorsed other aspects of the GCHQ case. There are instances of recognition of the GCHQ case by the High Court in relation to procedural fairness: Lam (2003) 214 CLR 1, 20 [61] (McHugh and Gummow JJ); Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648, 659 (Dawson J) (‘Haoucher’); Attorney-General (NSW) v Quin (1990) 170 CLR 1, 20 (Mason CJ); Kioa v West (1985) 159 CLR 550, 583 (Mason J); unreasonableness: Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, 646 [124], [127] (Crennan and Bell JJ) (‘SZMDS’); Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45, 76 [89] (Kirby J, dissenting in result); areas of executive power suggested in the GCHQ case not to be subject to judicial review: Coutts v Commonwealth (1985) 157 CLR 91, 99-100 (Wilson J), 105 (Brennan J); Thorpe v Commonwealth of Australia (No 3) (1997) 144 ALR 677, 692; and the requirement for judges to show restraint where a dispute requires the application of policy rather than law: Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 73 ALD 1, 34 [149] (Kirby J, dissenting in result).
employment were being contemplated. A majority of the House of Lords held that an exercise of prerogative power was not immune from judicial review simply on account of the power’s non-statutory source, but that factors such as the subject matter of the power and its nature may render a particular power non-justiciable. The result in that case was that, while the action under scrutiny may ordinarily have been subject to procedural fairness obligations, the national security considerations that attended the functions of the GCHQ excluded these obligations in this case. This was the first time the House of Lords had accepted the availability of judicial review in respect of an exercise of prerogative power in an appropriate case.60

There can be little doubt that, when required to determine the question, the High Court will endorse the principle from the GCHQ case that legal source alone should not determine whether government action is amenable to judicial review. Not only has the principle been endorsed by intermediate appellate courts,61 but to decide otherwise would be inconsistent with dicta from the High Court that is concerned not to create ‘islands of power immune from judicial supervision and restraint’.62 It is not so much a question of whether such action can be reviewed, but how.

In terms of the ‘how’, the cases in which Australian intermediate superior courts have considered judicial review of non-statutory executive action have not explicitly engaged with the concept of jurisdictional error. They have not conceptualised grounds of review in terms of jurisdictional error or ‘limits on power’. They seem to have preferred the more orthodox administrative-law approach of first establishing that there was power (‘the constitutional question’) and then examining the administrative law question of

60 It had earlier been accepted by the Queen’s Bench Divisional Court in Lain [1967] 2 QB 864.
62 Kirk (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Aala (2000) 204 CLR 82, 103 [45] (Gaudron and Gummow JJ): ‘Indeed, an important exercise of the judicial power of the Commonwealth is its utility in controlling actions by the executive branch of government beyond the exercise of the executive power vested by s 61’.
how the power was exercised to determine whether any of the traditional grounds of judicial review relied upon had been established.63

But this does not mean that the utility of jurisdictional error is limited to its role in establishing the limits of power conferred by statute. The ‘constitutionalisation’ of the role of the court on judicial review must surely also apply to judicial review of non-statutory executive action. Neither the jurisdiction of the High Court that is conferred by s 75(v) of the Commonwealth Constitution nor the supervisory jurisdiction that is a ‘defining characteristic’64 of a State Supreme Court is limited by reference to the source of the power being reviewed. Conceptually, it would not be ideal to have a different explanatory principle for review of the exercise of powers conferred by statute on the one hand, and non-statutory powers on the other, when Chapter III of the Constitution makes no such distinction. Further, at least at the Commonwealth level, given that all non-statutory executive power is derived from the Constitution it is not necessarily incongruous to use the language of jurisdiction and jurisdictional error when conceptualising the limits of that power. So the concept of ‘jurisdictional error’ needs to be given content for application in a non-statutory context. We need a way to determine what are the ‘inviolable limitations’65 of non-statutory executive power. It is here that I see a role for the principles of common law constitutionalism in Australian judicial review.

IV THE UTILITY OF PRINCIPLES OF COMMON LAW CONSTITUTIONALISM UNDER AUSTRALIA’S WRITTEN CONSTITUTION

What is meant by ‘principles of common law constitutionalism’ was discussed in the introduction, and it will be recalled that such principles include the

63 See, eg, Bristol-Myers Squibb Pharmaceuticals Pty Ltd v Minister for Human Services and Health (1996) 42 ALD 540, 552 (procedural fairness) (’Bristol-Myers’); Victoria v Master Builders Association [1995] 2 VR 121, 169 (Eames J) (unauthorised purpose), 172 (Eames J), 142 (Tadgell J) (unreasonableness); Arts v Peko-Wallsend (1987) 15 FCR 274, 282 (Sheppard J), 308 (Wilcox J) (procedural fairness); Thurgood v Director of Australian Legal Aid Office (1984) 56 ALR 565, 572 (unreasonableness) (’Thurgood’).
65 R v Coldham; Ex parte Australian Workers’ Union (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J).
separation of powers, responsible government, parliamentary sovereignty and the rule of law.

When British colonies received the British legal system, these principles formed part of the system received to the extent allowed and with the variations required by local institutions and arrangements. Upon its federation, the Commonwealth of Australia became governed under a written constitution that incorporated many of these principles, whether explicitly or as ‘assumption[s]’ in accordance with which the Constitution is framed, such as is the case with the rule of law. These principles thus provided limitations on Australia’s governing institutions.

This, of course, is not to say that all principles of common law constitutionalism will constitute limitations on executive power in Australia. Nor does it mean that the common law principles that constitute limitations on non-statutory power in the United Kingdom will constitute such limitations in Australia. The High Court has made clear that in Australia it is necessary to look to the Constitution to ascertain the ambit of executive power. The Constitution is not as fertile a source of fundamental principles as is the common law of England, particularly in light of the European influence on the latter. However, the High Court has also said that ‘[t]he history of British

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68 Such as Commonwealth Constitution s 64, which requires ministers to become members of a house of Parliament within three months of becoming a minister, enshrining responsible government.

69 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 193 (Dixon J) (’Communist Party case’), though the High Court’s linking of the rule of law to s 75(v), see Plaintiff S157 (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), has given the principle a more explicit operation.


71 See Kennedy v Charity Commission [2015] AC 455, 504 [46] (Lord Mance SCI) for discussion of the relationship between the common law and the European Convention for the Protection of
constitutional practice is important to a proper understanding of the executive power of the Commonwealth'.

To this I would add the executive power of the States, given their historic colonial status.

More explicitly, in Assistant Commissioner Condon v Pompano Pty Ltd, French CJ stated that ‘[t]he common law informs the interpretation of the Constitution... It carries with it the history of the evolution of independent courts as the third branch of government and, with that history, the idea of a court, what is essential to that idea, and what is not’. The High Court identified in Kirk that an essential characteristic of a State Supreme Court is its supervisory jurisdiction that it inherited from the common law tradition. In Re Refugee Review Tribunal; Ex parte Aala, the Court identified an essential characteristic of the ‘constitutional expression’ of the writs provided for in s 75(v) of the Constitution as being their ability to issue where there has been jurisdictional error. This suggests that common law principles relating to supervisory jurisdiction and jurisdictional error can bear upon the construction of executive power and judicial power on a judicial review application in Australia.

That it is permissible for the common law to assist in the interpretation of the Commonwealth Constitution is thus clear. What is impermissible is the automatic transplantation of the development of judicial review principles

Human Rights and Fundamental Freedoms (the ‘Convention’) insofar as the richness of the common law as a source of fundamental rights is concerned.

73 Williams [No 2] (2014) 252 CLR 416, 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also at 469 [81]: ‘Consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history’.


76 Aala (2000) 204 CLR 82.


78 Ibid 101 [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing at 89 [5]), 135 [142] (Kirby J), 140 [159] (Hayne J).

79 For a further example, see Condon v Pompano (2013) 252 CLR 38, 47 [3] (French CJ): the Court’s decisions as to limits of, relevantly in that case, legislative power ‘will be informed by the text of the Constitution, implications drawn from it, and principles derived from the common law’.
in the United Kingdom to Australian judicial review. However, as outlined above, the constitutional and administrative law questions in Australia have now fused. This is particularly so in relation to questions regarding non-statutory executive power, the judicial review of which must involve interpreting the Commonwealth Constitution, whether s 61\(^{80}\) or other provisions that may bear upon the contours of state executive power. Thus, provided the common law principles to be deployed are those that have either survived the operation of a written constitution that ‘effects a distribution of powers and functions between the Commonwealth and the States’,\(^{81}\) or are applicable in such a constitutional context, such principles can still be used to determine the limits on non-statutory executive power and, therefore, to conduct judicial review of non-statutory action. Three examples of such principles follow.

A Parliamentary Sovereignty

A common law principle that can provide common ground for Australian and British courts in respect of limitations on non-statutory executive action is parliamentary sovereignty. This is an unusual claim in at least two respects. In the first place, this article focuses on non-statutory executive action. Non-statutory action, of course, involves no parliamentary action that could be argued to be sovereign. In the second place, parliamentary sovereignty is commonly regarded as a key point of difference between the constitutional systems of the United Kingdom and Australia. Parliamentary sovereignty, understood as the power of the Parliament to enact whatever laws it deems suitable to make, is considered to be one of, if not the, corner stones of the unwritten British constitution.\(^{82}\) Australia’s legal systems make no claim to operate under a principle of parliamentary sovereignty, so understood. Both Commonwealth and State parliaments are limited in their powers by the Commonwealth Constitution. State parliaments may also be limited by their own constitutions.\(^{83}\) The High Court routinely invalidates Commonwealth legislation due to its inconsistency with the Commonwealth Constitution, and


\(^{82}\) See the resources in above n 11 and the text accompanying above n 14.

\(^{83}\) Consider manner and form provisions consistent with Australia Acts 1986 s 6.
State legislation for its inconsistency with Acts made thereunder. But a lack of parliamentary involvement in conferring a power may determine what can and cannot constitute a limitation on that power. If parliamentary sovereignty is understood as short form for the importance attached to the involvement of a democratically-elected body in the activities of government, there may be more that unites the two jurisdictions than separates them in the context of non-statutory executive action.

In *Pape v Federal Commissioner of Taxation* (‘*Pape’), Gummow, Crennan and Bell JJ gave several well-known examples of limitations on non-statutory power derived from the absence of legislative involvement: the executive branch is incapable, without statutory authority, of interfering with an individual’s liberty (for example by arresting fugitive offenders for extradition from Australia) and of dispensing its officers from obedience to the law. The rationale for such limitations is that only the body representing the people can curtail a person’s rights or exempt a person from laws of general application. Their source lies deep in the common law, in the victories won by the English Parliament in the 17th century. However, the present focus is on an aspect of executive decision-making that has received less attention in this context: application of an executive policy. Courts in Australia have taken an ultra vires-like approach to the application of policies to guide the exercise of statutory discretions. While policies themselves are not legally binding, they can inform the content of procedural fairness obligations or constitute relevant considerations in the exercise of a statutory discretion, and misapplication of such policies can constitute a reviewable error. The reason that policies are able to have such an effect is because the legislature is presumed to have

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85 Ibid 87 [227] (Gummow, Crennan and Bell JJ).
intended that such policies will be created and used to guide the exercise of a broadly conferred discretion.\(^8^9\)

Predictably, then, policies and other documents that might form part of the context for decision-making but that do not have this implicit support of Parliament have been held in Australia not to constitute a basis for any limits on power. This has been made clear in the cases challenging decisions made under non-statutory schemes that operate pursuant only to guidelines.\(^9^0\) Thus, where the policies or documents on which the executive decision-maker wishes to rely in the exercise of his or her non-statutory power have a statutory foothold, they can form part of the context from which limits on the power can be drawn. If this statutory foothold is lacking, they are unlikely to be able to form the basis for any justiciable limitations in Australia.\(^9^1\)

A recent decision of the UKSC demonstrates an approach to executive policies that is, in principle, consistent with this approach of Australian courts. The reverse of the coin by which the legislature is presumed to have intended that policies will be created to guide the exercise of discretion, is that the legislature is also presumed to have intended that such policies will be applied flexibly with regard to all the relevant circumstances of the case, rather than to exclude a decision without considering its merits.\(^9^2\) This ‘no fettering’ side of the coin has not been considered in Australia with respect to a non-statutory executive policy. But it was the application of the ‘no fettering’ rule to an exercise of non-statutory executive power that the UKSC was required to consider in \(R\ (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs\)\(^9^3\) (‘\(Sandiford\)’). This case involved a policy not to provide financial

\(^8^9\) MILGEA v Gray (1994) 50 FCR 189, 206 (French and Drummond JJ).


\(^9^2\) See, eg, Minister for Immigration and Ethnic Affairs v Tagle (1983) 67 FLR 566; British Oxygen Co Ltd v Board of Trade [1971] AC 610.

assistance to British citizens facing legal issues abroad. The Court made clear that the lack of a legislative source for the power meant that the usual implication made in respect of statutory action, that Parliament intended a discretionary power to be exercised ‘in different senses in different circumstances’,94 can have no application to non-statutory action. The consequence was that the policy requiring the refusal of funding to a British citizen on death row in Indonesia was not subject to the requirement that it be flexible to permit exceptions in an appropriate case.95

The reasoning of the Supreme Court in this case has been, in my view soundly, criticised for its return to a focus on the source of power and for its lack of engagement with other justifications for the rule against fettering besides legislative intent.96 The omission of references in the judgment to the case of R v Foreign Secretary; Ex parte Everett97 was singular. In that case, the Court of Appeal determined that fair exercise of a policy guiding the exercise of the prerogative power to refuse to issue a passport required the applicant to be afforded an opportunity to provide information of any exceptional circumstances that would warrant departure from the policy. However, the Court’s narrow approach in Sandiford makes it a good example of the importance of legislative involvement to judicial scrutiny of matters relating to executive policies. In both jurisdictions, the courts have declined to derive limitations on the government’s non-statutory power from non-statutory policies: the decision-makers have been free to apply or depart from such policies as they wish.

Outside the context of the application of policies in the making of discretionary decisions, but equally demonstrative of the weight attached by British courts to documents with legislative support when identifying limits on non-statutory action, is the recent case of Youssef v Secretary of State for

94 Ibid [61] (Lord Carnwath SCJ and Lord Mance SCJ, with whom Lord Clarke SCJ and Lord Toulson SCJ agreed).
95 Ibid [62].
97 R v Foreign Secretary, Ex parte Everett [1989] QB 811.
Foreign and Commonwealth Affairs\textsuperscript{88} (‘Youssef’). While Sandiford demonstrates that a lack of statutory basis for a policy negates the derivation from that policy of limitations on the power being exercised, Youssef demonstrates that even remote statutory support is all that is required for contextual documents to provide legal limitations on the exercise of a non-statutory power. The case involved the Secretary’s decision in the exercise of his prerogative power regarding the designation of persons on the United Nations’ Consolidated List of members of Al-Qaeda and its associates. The appellant, a United Kingdom resident, challenged the Secretary’s decision to lift the hold that the United Kingdom had previously placed on his designation on the list.\textsuperscript{99} The result of the decision was that the appellant became subject to the asset freeze imposed on such persons under the Charter of the United Nations and implemented by European and United Kingdom legislation.\textsuperscript{100}

In determining whether the Secretary had applied the incorrect standard of proof in making his decision, Lord Carnwath, giving the only judgment of the five-member Court, looked to the basis for and purpose of the power that the Secretary exercised and gleaned from that context the standard that the Secretary was required to apply. In this case, that context included the language of the Security Council resolution to which the exercise of power was ultimately directed, and other documents referred to in that resolution.\textsuperscript{101} It also included other Security Council resolutions relating to financial sanctions and the views of the Ombudsperson responsible for assisting the international committee in its consideration of delisting requests.\textsuperscript{102}

What is significant about this approach is that, although the action under review was non-statutory, the resolutions that comprised the relevant context had statutory force, by virtue of their incorporation into British law by the European Communities Act 1972 (UK).\textsuperscript{103} In relying on the resolutions and their supporting documents to provide the context needed to establish

\textsuperscript{88} Youssef\textsuperscript{[2016]} UKSC 3 (27 January 2016).

\textsuperscript{99} Lord Carnwath proceeded on the basis that the Secretary’s decision was amenable to judicial review, but explicitly stated that he was not deciding the point: ibid [22]-[26].

\textsuperscript{100} See ibid [1]-[3].

\textsuperscript{101} Ibid [38]-[39], [50].

\textsuperscript{102} Ibid [38]-[50].

\textsuperscript{103} Ibid [34].
whether the Secretary had acted fairly and rationally, Lord Carnwath was acutely aware that the scheme itself had statutory backing. This decision thus demonstrates the reflection of Sandiford and the Australian cases: whereas in those cases the lack of a statutory basis for the relevant policies meant that the policies could have no bearing on limitations on the exercise of the powers in question, the presence of some statutory support for contextual documents in Youssef, even though the statutory support did not itself authorise the relevant decision, meant that the contextual documents could form the basis for limitations on the exercise of a non-statutory power.

When the opportunity arises for an Australian court to consider the content of limitations on non-statutory action, the court can legitimately seek guidance from this approach by the UKSC. Provided the legislation that provides some statutory backing to the context of a decision is constitutionally valid, there is nothing in Australia’s constitutional context that would prevent the court from using that context to identify limitations on the non-statutory power being exercised.

B  The Presumption of Reason

In conducting judicial review, the High Court has often invoked a common law principle of statutory construction: the legislature is presumed to have intended that the powers it confers will be exercised according to reason and justice. That this principle of statutory construction has its origins in the common law has been stressed in several High Court judgments. However, ultimately, like the UKSC’s understanding of the rule against fettering discussed in the

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104 See, eg, ibid [49].
105 For an earlier example of a British court using contextually relevant legislation to determine whether a non-statutory policy is reasonable, see R v Criminal Injuries Compensation Board; Ex parte P [1995] 1 WLR 845.
106 Indeed, for an analogous approach in Australia, see Thurgood (1984) 56 ALR 565.
107 See, eg, R v Anderson; Ex parte Ipec-Air Pty Limited (1965) 113 CLR 177, 189 (Kitto J); Applicant Szo/2002 (2003) 73 ALD 1, 17 [67] (McHugh and Gummow JJ); Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 349 [24] (French CJ), 362-3 [64]-[65] (Hayne, Kiefel and Bell JJ), 371 [90] (Gageler J).
108 See, eg, Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 370 [90], 371 [92], 375 [105] (Gageler J); S10 (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bel J).
previous section, it is a common law rule that relies for its operation on the implied intention of the legislature.\textsuperscript{109}

The imposition of the requirements of ‘reason and justice’ on this basis has been traced by the High Court back to a statement by Lord Halsbury LC in \textit{Sharp v Wakefield}.\textsuperscript{110} The word ‘justice’ appears to have been used by Lord Halsbury LC as a synonym for ‘law’, as the Lord Chancellor cited \textit{Rooke’s Case}\textsuperscript{111} as authority for the proposition. In \textit{Rooke’s Case}, Coke LJ stated that, even though the words of the relevant instrument granted a discretion, ‘yet their proceedings ought to be limited and bound with the Rule of Reason and Law…’.\textsuperscript{112} In a later decision; arising from a dispute with King James I as to whether the King, rather than the courts, could determine any case he saw fit;\textsuperscript{113} Coke LJ said that the law is founded on reason, but not ‘natural reason’ with which the King was endowed. Rather, cases are to be decided ‘by the artificial reason and judgment of the law’.\textsuperscript{114} From this early time, therefore, it was recognised that what is reasonable in the legal sense in a particular case is coloured by the requirements and logic of the law. This is consistent with 19\textsuperscript{th} century cases that equated acting unreasonably with exceeding the powers conferred by a statute,\textsuperscript{115} which cases have been referred to with approval by High Court justices in recent times.\textsuperscript{116}

\textsuperscript{109} What is being implied is not ‘the collective mental state’ of the legislature when it enacted the relevant provision, but the intention that is presumed following the application of accepted principles of statutory construction: seeZheng v Cai (2009) 239 CLR 446, 455 [28].

\textsuperscript{110} Sharp v Wakefield [1891] AC 173, 179 (Lord Halsbury LC)

\textsuperscript{111} Rooke’s Case (1597) 5 Co Rep 99b.

\textsuperscript{112} Ibid 100.

\textsuperscript{113} See Prohibitions del Roy 12 Co Rep 64.

\textsuperscript{114} Ibid 65. In response, King James I told Coke LJ that it was treason to suggest that the King was subject to the law. Lord Justice Coke responded with Bracton’s now well-known maxim: \textit{Quod Rex non debet esse sub homine, sed sub Deo and Lege} (‘that the King ought not to be subject to man, but subject to God and the law’).

\textsuperscript{115} See, eg, Vernon v Vestry of St James, Westminster (1880) 49 LJ Ch 130 (‘Vernon’), 136 where Malins VC cited Biddulph v Vestry of St George, Hanover Square (1863) 33 LJ Ch 411 (‘Biddulph’) as an example of a court examining whether powers were exercised in a reasonable manner. The Lords Justice in \textit{Biddulph} in fact did not state their analysis in terms of reason or reasonableness. Rather, they focused on whether the public body exceeded the powers conferred on it by statute or acted for an improper motive.

\textsuperscript{116} See, eg, Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 349 [25], where French CJ cited Vernon (1880) 49 LJ Ch 130 to demonstrate the canons of rationality to be applied when considering exercise of a statutory discretion and referred to early High Court authority applying
Two things are thus clear: first, that the unstated requirements intended by the legislature to attend the exercise of a statutory discretion are reason and lawfulness; and, secondly, that this principle of statutory construction is a common law principle that the High Court accepts has survived the differences between the British and Australian constitutional contexts. Indeed, in the Australian context, lawfulness, to the extent that it encapsulates more than a requirement to act reasonably,\textsuperscript{117} can be dealt with shortly: given Australia’s written constitution and the High Court’s approach to the jurisdiction of the High Court and State Supreme Courts, summarised above, it is trite to say that exercises of non-statutory power are attended by the requirement of lawfulness. The rest of this section will therefore focus on the basis for imposing a requirement of reason on the exercise of non-statutory power.

To state the position in terms of statutory construction is to highlight the challenge in identifying a basis for imposing such requirements on non-statutory executive action. With the exception of \textit{Prohibitions del Roy}, all of the cases cited above regarding the imposition of a requirement of reason involved the conferral and exercise of a statutory discretion. They make clear that the requirement of reasonableness attends the exercise of a statutory discretion unless it is excluded by the terms of the Act. They say nothing about the imposition of a reasonableness requirement on the exercise of non-statutory executive power. When Coke LJ in \textit{Prohibitions del Roy} referred to the ‘artificial reason and judgment of the law’, his Lordship was discussing the exercise of judicial power, not executive power. To presume a standard of reasonableness on this basis is therefore questionable in a non-statutory context – how can the presumed intention of the legislature have any bearing on the limits of a power that the legislature did not confer? Indeed, this was the crux of the reasoning in \textit{Sandiford}, discussed above. But, I argue that the proper question is not how the presumed intention of the legislature can be of use, but rather whether the requirement of reason can be attributed to the executive

\textsuperscript{117} Or rationally – there is a difference in terminology between French CJ and the plurality in \textit{Minister for Immigration and Citizenship v Li} (2013) 249 CLR 332. French CJ viewed unreasonableness and other judicial review standards, such as failing to consider a mandatory consideration, as going to an overarching standard of rationality (see at 350-1 [26]-[28]), whereas the plurality contemplated that other judicial review standards could find a home as indicators of unreasonableness: see at 364-6 [69]-[72] (Hayne, Kiefel and Bell JJ). Nothing turns on this difference in approach for present purposes.
branch independently of the legislature. This is where the development by British courts of the common law principle imposing this requirement can play an informative role in Australia.

There is no authority in Australia denying the possibility of imposing a requirement of reason on the exercise of non-statutory executive power. Indeed, there are lower court decisions in which the application of a reasonableness standard has been contemplated, though such decisions did not consider the basis on which the standard was imposed. Most cases that refer to the possibility of seeking judicial review of prerogative (or, in more modern times, non-statutory) power date the engagement of Australian courts with the issue back to the High Court decision in *R v Toohey; Ex parte Northern Land Council.* In this case, Mason J made comments in obiter that can be read as supporting, in principle, the amenability of non-statutory action to judicial review while doubting the courts’ ability, in practice, to assess whether judicial review standards ordinarily applicable to the exercise of statutory power (such as reasonableness) have been met in a case involving non-statutory action.

However, as seen above, the High Court has considered it appropriate to invoke authority dating back to decisions of Coke LJ in *Rooke’s Case* to impose a reasonableness requirement on the exercise of statutory discretions. It could therefore seek guidance of decisions of a similar era to support imposing such requirements on exercises of non-statutory power.

To find an early imposition of a reasonableness requirement on exercises of non-statutory executive power, it is necessary to refer to another

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119 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 (‘*R v Toohey*’). This case was cited in submissions in *GCHQ case* [1985] 1 AC 374.
120 *R v Toohey* (1981) 151 CLR 170, 218-21 (Mason J). This approach, of conceptually accepting that all grounds of review are available in respect of non-statutory action while noting that certain issues and evidentiary difficulties would render review on many of the grounds near impossible, has also been taken in other Australian decisions: see, eg, *Arts v Peko-Wallsend* (1987) 15 FCR 274, 278 (Bowen CJ), 281 (Sheppard J); *Victoria v Master Builders Association* [1995] 2 VR 121, 158-9 (Eames J) and the cases there cited, Tadgell J agreeing at 142 and Ormiston J agreeing at 149. See also *GCHQ case* [1985] 1 AC 374, 411 (Lord Diplock).
In this case, Coke LJ referred to precedents of Proclamations ‘which are utterly against law and reason, and for that void: for que contra rationem juris introducta sunt, non debent trahi in consequentiam’ (‘what is introduced that is contrary to the reason of the law ought not be ascribed consequences/drawn into precedent’). This is an early statement of the requirement of lawfulness and reason in the exercise of non-statutory executive power. He concluded by proffering his famous statement that ‘the King hath no Prerogative, but that which the law of the land allows him’. This made clear that the criterion of lawfulness, with all of the limits that that criterion imposes (including a requirement to act reasonably), applied to exercises of prerogative power.

It is this tradition that, it seems to me, Laws LJ in the England and Wales Court of Appeal in R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs drew on when he referred, without citing authority, to ‘reason and fairness’ as the cornerstones of the standards of the common law that form the basis for judicial review of prerogative powers. And, it is this tradition that can inform the determination of limits of non-statutory executive action in Australia. None of the judicial statements on which the imposition of requirements of lawfulness and reason on non-statutory activity proceeds depends upon or is affected by constitutional conditions in the United Kingdom that do not obtain in Australia. Statements such as that of Laws LJ make clear that Coke LJ’s imposition of a reasonableness requirement on the executive survived the assumption by Parliament of its supreme role in the years that followed. They are not affected by European influences on British law. Nothing about a requirement of reason is excluded by a written constitution that divides power
between three branches of government or is affected by the division of power between two spheres, federal and state. Use of such authorities is entirely consistent with the High Court’s statements as to how British constitutional history can be used to inform the Australian conception of executive power.

The requirement of reason can be understood, as a result of the above analysis, to be as much a condition on the lawful exercise of non-statutory executive power as it is on the exercise of power conferred by statute. That is, it is a precondition for the lawful exercise of non-statutory power. Whether other judicial review standards, such as taking into account irrelevant considerations and acting for an improper purpose, are subsets of the requirement of rationality, or themselves directly negate the lawfulness of a decision, there is now an articulated legal basis, reasoned from common law authority, on which such standards can constitute limitations on non-statutory executive action in the Australian context. How, on a practical level, such standards can be established in respect of an exercise of non-statutory executive action is beyond the scope of this article but the subject of my broader research.

C Separation of Powers

The separation of powers is capable of bearing two meanings in Australian constitutional law. The first is the separation of judicial power from executive and legislative power at the Commonwealth level, mandated by the text and structure of the Commonwealth Constitution. This separation comprises two limbs. The first limb requires that federal judicial power be vested in no body other than a court constituted under Chapter III of the Commonwealth Constitution. The second limb precludes non-judicial functions from being conferred on courts constituted under Chapter III of the Commonwealth Constitution. Both limbs operate as limitations on Commonwealth

127 See, eg, Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 350 [26] (French CJ).
130 See, eg, R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1. See also Groves and Boughey, above n 33; Gleeson, above n 29.
legislative power, in that the Commonwealth Parliament can validly confer neither judicial functions on a body other than a Chapter III court nor non-judicial functions on a Chapter III court.\textsuperscript{131}

The second meaning of the phrase ‘separation of powers’ refers to the common law distribution of powers and functions between the legislative, executive and judicial branches of government. It is this meaning that I employ in the present analysis. This ‘small c’ constitutional principle informs the exercise of power at the State level also. It notes that each branch has its own institutional competence and each is required to respect the integrity of other branches by not trespassing on their functions. This is the separation to which Brennan J (as he then was) alluded in \textit{Attorney-General (NSW) v Quin},\textsuperscript{132} an appeal in a State matter, in what has been referred to as 'the most frequently cited general proposition underlying contemporary Australian administrative law'.\textsuperscript{133}

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.\textsuperscript{134}

The common law separation of powers underlies the important role of a superior court’s supervisory jurisdiction.

In judicial review, the separation of powers often manifests as discussions of ‘institutional competence’ and reasons for courts to desist from entering the zone of executive activity: formulating and administering government policy. This principle comes into play most often in Australia

\textsuperscript{131} See, eg, \textit{Huddart, Parker & Co Proprietary Limited v Moorehead} (1909) 8 CLR 330, 355 (Griffith CJ).

\textsuperscript{132} \textit{Attorney-General (NSW) v Quin} (1990) 170 CLR 1.

\textsuperscript{133} Spigelman, above n 26, 84.

\textsuperscript{134} \textit{Attorney-General (NSW) v Quin} (1990) 170 CLR 1, 35-6.
when the court is faced with a claim that certain executive action is not justiciable. Modern approaches to justiciability provide a good illustration of the focus on limits of power. Justiciability is a concept that can have different meanings depending on the context in which it is used, but one way of putting it in the context of judicial review of executive action is to say that something is not justiciable if there are no limits on it that a court can or will enforce.\textsuperscript{135} On its face, this does not sit well with the notion of courts having supervisory jurisdiction, the purpose of which is to police the boundaries of powers to ensure that the body entrusted with the power does not breach its limits. Consistently with supervisory jurisdiction, in both the United Kingdom and Australia it is no longer common to speak of entire powers that are ‘non-justiciable’ (though decisions of ‘high policy’ such as the entry of treaties\textsuperscript{136} and committing armed forces to war\textsuperscript{137} may remain exceptions). Rather, what is spoken of is the justiciability of a particular decision, particular claims or grounds of review alleged in respect of an exercise of non-statutory power.\textsuperscript{138} A more substantive approach to justiciability is evolving in both jurisdictions, in which justiciability concerns are merged with the consideration of grounds of review or, more correctly, with consideration of the limits of power. That is, it may be that a certain claim is not justiciable because the claim does not relate to a judicially-enforceable limit on the power exercised. The aspect of the exercise of power about which the claim is made (for example, in Sandiford, the application of a policy in making a decision) may well not have justiciable

\textsuperscript{135} See, eg, Mark Aronson, Matthew Groves and Greg Weeks, Judicial Review of Administrative Action and Government Liability (Lawbook Co, 6\textsuperscript{th} ed, 2017), 122 [3.60].


limits. This does not mean that the entire exercise of power is not justiciable; it simply means that the power was not subject to the legal limitations claimed.

Lord Neuberger P has recently cautioned against the United Kingdom adopting the approaches of jurisdictions with written constitutions in relation to certain aspects of justiciability.\(^{139}\) Certainly there are constitutional differences between the United Kingdom and Australia, as outlined above. In the sphere of justiciability, it is notable that Australia’s written constitution requires a strict approach to what constitutes judicial power and when it must be exercised. It leaves no room for notions of judicial abstention, self-restraint or deference. However, underlying these differences, one can identify in the case law of each jurisdiction the common law separation of powers manifesting as questions of the institutional competence of the various branches of government.

Australian examples include the first Australian decision on the justiciability of non-statutory executive action, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*.\(^{140}\) The case at first instance was brought as a challenge to Cabinet’s decision to list Stage 2 of Kakadu National Park on the World Heritage List, thus affecting the value of interests held by the mining company applicant. On appeal to the Full Federal Court, each justice commented on the Court’s lack of expertise when dealing with decisions of this kind. Bowen CJ focused on the polycentric nature of Cabinet decisions such as this,\(^{141}\) while Wilcox J held that the impact of the decision on Australia’s international relations took it outside the competence of the Court.\(^{142}\) More recently in *Aye v Minister for Immigration and Citizenship*,\(^{143}\) a case involving the consequences of a decision to impose sanctions on the military regime in Burma, the justices of the Federal Court were concerned that the applicant’s submissions were directed to the decision to impose sanctions itself, rather than whether she fell within the policy’s terms. The decision whether to impose

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\(^{139}\) *Belhaj v Straw* [2017] UKSC 3 (17 January 2017) [133] (Lord Neuberger P) regards the foreign act of state doctrine. Lord Neuberger P criticised the High Court’s approach to this issue at [246]-[247].

\(^{140}\) *Arts v Peko-Wallsend* (1987) 15 FCR 274.

\(^{141}\) Ibid 278-9 (Bowen CJ).

\(^{142}\) Ibid 308 (Wilcox J).

sanctions was a policy decision that ‘[a] court is not equipped to determine’.\textsuperscript{144} The concern for the institutional competence of the court when reviewing executive conduct has been said to be reflective of the separation of powers ‘as an institutional means essential to securing the effectiveness of the rule of law in Australia’.\textsuperscript{145}

The common law separation of powers was a feature of the British cases on judicial review of non-statutory executive action prior to the introduction of the \textit{Human Rights Act 1998} (UK)\textsuperscript{146}. However, I argue here that the common law separation of powers and its concern for the respective institutional competencies of courts and executive branch remains entrenched in the case law of the United Kingdom even following the changes wrought by their proximity to European systems. This is best demonstrated by a case brought under the \textit{Human Rights Act} rather than a case of common law judicial review: \textit{R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department}\textsuperscript{147} (‘\textit{Carlile}’). This case involved an exercise of statutory power, though it was a power cast in extremely broad terms.\textsuperscript{148} Review was sought of the decision of the Home Secretary not to allow an Iranian, described in the agreed Statement of Facts as a ‘dissident Iranian politician’,\textsuperscript{149} to enter the United Kingdom. The decision was made on the grounds that her presence would not be conducive to the public good due to its impact on relations between the United Kingdom and Iran. The case was based entirely on art 10 of the \textit{European Convention of Human Rights}, which protects freedom of expression. The Secretary claimed that the interference with this right was ‘justified as a proportionate response to the threat to national security, public safety and the rights of others which would be posed by a hostile reaction from
the Iranian government and other forces in Iran”. In the result, this argument, and thus the Secretary’s decision, was upheld.

The case centred on the application of proportionality analysis required by claims of breach of rights under the Convention. However, even in the course of proportionality analysis when dealing with a claim of a breach of the freedom of expression under the Convention, common law constitutional principles came into play. Lord Sumption SCJ noted that, setting apart any notions of ‘deference’ accorded to the executive, the assignment of weight to be attributed to the view of the government as to why infringement of a fundamental right was necessary was sourced in the separation of powers (as well as the pragmatic view about the evidential value of certain judgments of the executive). His Lordship stated that ‘the Human Rights Act 1998 did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was passed’ and ‘[e]ven in the context of Convention rights, there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable’.

These concerns reflect those that apply in Australia at the point of querying the justiciability of a particular claim: does resolution of the claim require ‘an extension of the court’s true function into a domain that does not belong to it’? Thus, it can be seen that the common law constitutional principles that inform the justiciability of claims in respect of non-statutory executive action in Australia are still being utilised in the United Kingdom even in the course of judicial review under the Human Rights Act 1998 (UK). But this occurs not as part of the justiciability analysis, which is a given in

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151 For examples of concerns of institutional competence reflected in judicial reasoning outside the Human Rights Act 1998 (UK) context, see R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756, 841 [31] (Lord Bingham); Bancoult [No 2] [2009] 1 AC 453, 488 [58] (Lord Hoffman), 525 [163] (Lord Mance).
153 Ibid, 968 [28] (Lord Sumption SCJ). See also Lord Sumption SCJ at [31]-[33], [46], [49] for concern to establish the different institutional competencies of the judicial and executive branch, especially in the context of a Convention-rights claim in which the court is required to undertake a proportionality analysis of government action.
allegations that a person’s Convention rights have been infringed. Rather it occurs as an aspect of the proportionality analysis that requires weight to be assigned to the view of the government that ‘the objective of [its] measure is sufficiently important to justify the limitation of a protected right’. So what in Australia is relevant at the point of justiciability is, in the United Kingdom in a claim under the Human Rights Act 1998 (UK), relevant at the later stage of assigning weight to the government’s view. But whether language of ‘deference’ or ‘appropriate weight’ or ‘justiciability’ is used, the same questions of institutional competence come into play.

This is not to negate the substantial differences between traditional, process-oriented judicial review, of the kind that still obtains in Australia, and the more substantive review that obtains under the Human Rights Act 1998 (UK), as Lord Sumption SCJ went on to note. Indeed, Lady Hale DP was careful to distinguish this case from those to which Australian judicial review is limited: judicial review of the lawfulness of a decision of a government officer. But even Lady Hale DP recognised the value of ‘wise observations of distinguished judges’ in cases of the lawfulness review kind as to the respective competencies of courts and the executive, and noted that such observations help the Court in their ‘approach to some at least of the questions which’ they have to answer in rights cases. ‘That is, the Court can use the jurisprudence on the respective roles and institutional competencies of the executive and the judiciary legitimately to accord ‘great respect’ to judgments that ‘the primary decision-makers are better qualified to make than are the courts’. Even Lord Kerr SCJ, in dissent, accepted that the different institutional competencies of the executive and judicial branches called for ‘very considerable respect’ to be accorded to the executive’s view when assessing the risks that might flow from government action in a particular case. But his Lordship emphasised also the

156 Bank Mellat v Her Majesty’s Treasury [No 2] [2014] AC 700, 791 [74] (Lord Reed SCJ).
158 Ibid 988-989 [84] (Lady Hale SCJ).
159 Ibid 989 [88] (Lady Hale SCJ).
160 Ibid 989 [88]. Lord Neuberger P also devoted his reasons to the need to maintain the distinct roles of the executive and the judiciary (see especially at 981-2 [56]) and recognised the ongoing utility of traditional judicial review grounds in some Human Rights Act 1998 (UK) cases (see 985 [68]-[69]). Lord Clarke SCJ largely agreed with the reasons of Lord Neuberger P: see 995 [111].
161 Ibid 1007 [150] (Lord Kerr SCJ).
court’s competence in assessing whether executive action breaches a Convention right and the importance to be attached to the right.\footnote{Ibid 1007-8 [152] (Lord Kerr SC)).}

The separation of powers is thus an example of a principle of common law constitutionalism that continues to pervade British cases on the limits of executive power, even in statutory Human Rights Act cases. It would be too hasty, therefore, to dismiss such cases as having no relevance to judicial review in Australia when they might provide insights into the allocation of responsibilities between the different branches of government, an understanding of which is of great utility when giving content to justiciable limits of non-statutory power.

V CONCLUSION

Principles of common law constitutionalism can provide meaningful, justiciable limitations on exercises of non-statutory executive power both in Australia and the United Kingdom, despite different constitutional contexts and approaches to judicial review. Common law principles including parliamentary sovereignty, the requirement of reason and the separation of powers can assist in determining the limits on non-statutory executive action in both jurisdictions and thus whether the limits have been breached. None of the arguments put negate the significance of the constitutional differences between the two jurisdictions or suggest that all common law principles at play in the United Kingdom can constitute limitations on non-statutory executive action in Australia. An obvious source of limitations that Australia will not be adopting in the near future, if at all, is the doctrine of substantive protection of legitimate expectations. For as long as Australian courts tie their approach to judicial review on Australia’s written constitution and European law has an influence on the law of the United Kingdom, judicial review in Australia and the United Kingdom are unlikely to converge to a meaningful extent. But there remain basic common law principles that still apply in both jurisdictions. And when statutes conferring power and controlling judicial review are stripped away, these principles still provide enough commonality to render British cases helpful to Australian courts and lawyers considering the application of judicial review principles to non-statutory executive action.
SECTION 61 OF THE COMMONWEALTH CONSTITUTION AND AN ‘HISTORICAL CONSTITUTIONAL APPROACH’: AN EXCURSUS ON JUSTICE GAGELER’S REASONING IN THE M68 CASE

Peter Gerangelos*  

This paper seeks to supplement the other papers in this Special Edition by reflecting upon the value of the interpretative methodology articulated by J W R Allison, ‘the historical constitutional approach’, that appears to be particularly suited to resolving difficult questions about the ambit of the Commonwealth’s executive power. It articulates an approach to constitutional interpretation that explains why and how constitutional history, historical sources of law, their interplay with the evolution of forms of government and the relationship between its various branches, may be very useful, if not essential, in resolving contemporary legal issues. It will examine this approach by comparing it with the reasoning of Gageler J in the M68 Case which exhibits very interesting parallels with this approach.

‘Yet to know is properly to understand a thing with reason and through its cause.’1

I INTRODUCTION

The aim of this paper is modest. It seeks to supplement the other papers in this Special Edition by reflecting upon the value of the interpretative methodology articulated by J W R Allison, ‘the historical constitutional approach’2 that appears to be particularly suited to resolving difficult questions arising from s

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2 This was set out in J W F Allison, The English Historical Constitution (Cambridge University Press, 2007).
61 of the *Constitution* and the ambit of the Commonwealth’s executive power.\(^3\)

It articulates an approach to constitutional interpretation that explains why and how constitutional history, historical sources of law, their interplay with the evolution of forms of government and the relationship between its various branches, may be very useful, if not essential, in resolving contemporary legal issues. Dr Allison’s thesis will be explored in more detail in Part II. Its gist can be stated thus: constitutional arrangements that have had a continuing history, whether from the distant or recent past, and in which change or reform are inherent, constitute legitimate and necessary sources of current constitutional law and principle. In other words, it confirms the legitimacy of such sources and also makes them more prominent in contemporary legal debates about the nature of the constitution. Although Allison’s work is centred on the unwritten United Kingdom constitution, it will be shown that it has much significance for Australia’s written constitution, especially in provisions such as s 61 which cannot be interpreted accurately by recourse to the text alone.

My interest in Dr Allison’s work was engaged when considering the problems which arise from the very meagre text of s 61 and its failure to provide much more than general guidance as to the content and ambit of the non-statutory power for which it provides. How are these important issues to be resolved when the text simply states that the power ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’? The problem is compounded by the fact that little, if any, assistance can be derived from a purely abstract conceptual analysis of ‘executive power’ to determine whether any particular powers are inherent in the notion – unless one is speculating about an ideal polity. That ‘the executive’, the government, is able validly to exercises a particular power in any particular polity from time to time is purely a function of the constitution, laws, conventions and usages, as they have evolved over time and by reference to the political and constitutional history of that polity, which pertain at the time the power is being exercised.\(^4\)

In light of s 61’s meagre text, recourse to such sources becomes particularly material and clearly warrants a serious consideration of the value of a ‘historical constitutional approach’.

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\(^3\) Formally vested in the Queen and made “exercisable by the Governor-General” as her representative.

The sparseness of s 61 is of course not a new problem. Academic and judicial reflection upon it has variously sought definition and resolution in extra-textual, though not necessarily extra-constitutional, sources consistent with the text, often historical and sometimes English. Having been referred to as ‘traditional conceptions,’ there are numerous examples of use being made of these when considering s 61 and executive power. Dixon J stated that the character of the broad division of power, for which the Constitution provides, ‘is determined according to traditional British conceptions’; or, as paraphrased by Professor Campbell, ‘conceptions founded in the common law of England and its overlay of constitutional convention’. These include those residual prerogative powers of the Crown, known to the common law, that define the ambit of non-statutory executive power, and to the principles of responsible government and parliamentary supremacy that subject executive power to legislative control. In Cadia Holdings, French CJ interpreted s 61 to ‘include…the prerogative powers accorded the Crown by the common law’ and approved of Dixon J’s reference to the ‘common law prerogatives of the Crown of England’ being “carried into the executive authority of the Commonwealth”.

This echoed Mason J in Barton who had stated that s 61 ‘includes the prerogative powers of the Crown, that is, those powers accorded to the Crown by the common law.’ Professor Winterton was able to say, in similar vein, that “[b]ecause the Constitution is a British statute operating in a common law environment, the vesting of the executive power in the Crown automatically… brought to the Crown in right of the Commonwealth the common law or prerogative powers of the Crown’. Professor Zines more recently referred to the Commonwealth’s inheritance of these ‘Crown prerogatives and capacities’ by virtue of the Commonwealth being ‘a government of the Queen’.

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5 See Australian Communist Party v Commonwealth (1951) 83 CLR 1, 230; R v Kirby; Ex Parte Boilermakers’ Society of Australia (1956) 94 CLR 254, 276.
6 R v Kirby; Ex Parte Boilermakers’ Society of Australia (1956) 94 CLR 254, 276.
9 Barton v Commonwealth (1947) 131 CLR 477, 498.
reference has been made by Australian courts to English constitutional history and related common law developments, the 1688 settlement and the Bill of Rights, the historical subjection of common law powers and capacities to Parliament, and to Lord Diplock’s dictum that ‘[i]t is 350 years and civil war too late for the Queen’s courts to broaden the prerogative.’

Of course, the nature and content of the prerogative is presently determinable by reference to the Australian common law, albeit reference may be made to English cases in this regard.

If the usefulness of ‘traditional conceptions’ is already accepted by the Court in its jurisprudence on executive power, what then does Allison’s thesis usefully add? Its value lies in the provision of a structured theoretical and jurisprudential methodology which articulates and justifies, in legal terms, this recourse to historical sources and ‘traditional conceptions’. It also explains the circumstances and preconditions determinative of their present relevance as sources of law and the basis upon which they may be distinguished from past law which is of historical and antiquarian interest only, ‘old law’.

My appreciation of its current usefulness as an explanatory and interpretative method was enhanced upon reading Gageler J’s judgment in Plaintiff M68/2015 v Minister for Immigration and Border Protection, & Ors, the first expansive analysis of non-statutory executive power following Pape and Williams. In its reasoning there can be discerned an application of Allison’s approach to Australian circumstances, and current Australian issues, uncanny as it is inadvertent. It placed heavy, indeed almost exclusive, reliance on ‘traditional conceptions’ to interpret s 61: the prerogative powers known to the common law, the capacities which emanate from the Commonwealth’s juristic personality, the Australian understanding of ‘the Crown’ at federation, the principles of responsible government implied in the Constitution as understood in light of Australian colonial experience and as reflected in the deliberations of the framers, as well as ancient statutes which have either...

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14 (2016) 257 CLR 42.
Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach'

curtailed or abrogated prerogative executive power such that it is no longer recognised by the common law.

Interestingly, no express mention was made of any inherent executive ‘nationhood power,’ recognised in the Pape case,\(^\text{16}\) derived not from the common law incorporated therein but directly from s 61, its content determinable by reference to the status of the Commonwealth as a national government. It is not certain whether this is telling of his Honour’s view on the existence of such a power, or whether his silence reflects its irrelevance to the resolution of the precise issue before the Court – even though it would appear to be very relevant. Also absent was any statement, increasingly common in more recent cases, that downplayed or discounted the contemporary relevance, as sources of law, of ‘traditional conceptions’. Whether so intended by their authors or not, that is the impression that they may have given: there is Gummow J’s dicta in Re Ditford that ‘in Australia … one looks not to the content of the prerogative in Britain but rather to s 61 of the Constitution….. ’\(^\text{17}\) There is the High Court’s continuing injunction since Marquet’s case to trace constitutional principles to Australian sources, principally the Constitution, whatever their historical origins might otherwise be.\(^\text{18}\) If these statements conveyed nothing more than that recourse can only be had to ‘traditional conceptions’ following an initial reference to s 61, and that reference to otherwise extra-constititutional sources must be grounded in the Constitution itself, they are unexceptionable.

On the other hand, there are those more pointed judicial statements to the effect that the Commonwealth executive power in s 61 ‘cannot be treated as a species of the royal prerogative’;\(^\text{19}\) that the prerogative is the ‘common law ancestor’ of s 61 power;\(^\text{20}\) that ‘[w]hile history and the common law inform its

\(^\text{16}\) While this terminology will be used here, it is noted that this single term to refer to the power does not reflect the nuances in the various judgments which gave recognition to such a power, some more expansive of the power than others. These nuances are explained carefully by Professor Twomey in ‘Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers’ (2010) 34 Melbourne University Law Review 313, especially in Part IV.


\(^\text{18}\) Attorney-General (WA) v Marquet (2003) 217 CLR 545, 570 [66].

\(^\text{19}\) Ruddock v Vadarlis (2001) 110 FCR 491, 543.

\(^\text{20}\) Ibid 539
content, it is not a locked display cabinet in a constitutional museum ... [that] it has to be capable of serving the proper purposes of a national government';\(^{21}\) and that 'the executive power of the Commonwealth conferred by s 61 involves *much more than the common law prerogatives of the Crown.*'\(^{22}\) With the former remarks as accompaniment, a more expansive view of the executive power of the Commonwealth is envisaged, one not limited in ambit by the common law, one which enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and one that interprets ‘s 61 import[ing] more than a species of what is identified as “the prerogative” in constitutional theory.’\(^{23}\) These reinforce Professor Sawer’s prescient perception of a ‘preponderant drift’ toward recognition of an ‘area of inherent authority’ in s 61 which derives ‘partly from the Royal Prerogative’, but ‘probably even more from the necessities of a modern government.’\(^{24}\) Sawer was not sympathetic to the notion of inherent executive power, preferring it to be confined to powers conferred by statute.\(^{25}\)

What is to be made of these statements? First, their impact ought not to be overstated given that the continuing role of the prerogative has not been denied.\(^{26}\) Secondly, it may be possible, and plausible, to interpret the foundational dicta from which ‘nationhood’ has been derived as simply expanding *the sphere* (‘breadth’), in a federal sense, in which the Commonwealth Executive may exercise its non-statutory powers as opposed to adding power already derived from the prerogative and from juristic

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\(^{21}\) *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].

\(^{22}\) *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J) (emphasis added).

\(^{23}\) *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ).


personality (‘depth’). Thirdly, it is understandable that constitutional discourse, in order better to reflect present constitutional realities, should prefer a more contemporary lexicon to expressions which may seem archaic. But in discounting too far, to the point of making irrelevant, those traditional sources that provide legally discernible principles determinative of both the content and ambit of executive power, there arises the potential danger of supplanting these with powers – ‘nationhood’ – which, while sounding modern, provide but vague and politically-charged definitional criteria, often subjective, ‘amorphous’ and potentially self-defining. Not only may their application not be best suited to judicial determination, in the absence of clear legally-discernible criteria, but also they make it more difficult for a court to second-guess a government pressing for greatly enlarged executive powers, impacting civil liberties, in circumstances of an emergency or crisis, real or exaggerated. The ‘traditional conceptions’ on the other hand have been very solicitous of civil liberties and the legal rights of the subject, limiting interference with these only to exercises of prerogative power in extraordinary circumstances, usually war or such like emergency; and even then in the more extreme scenarios.

It is worthwhile, therefore, to reflect upon the value of historical and ‘traditional conceptions’ of executive power in order to determine the extent to which these ought to be maintained as the bedrock of interpretational methodology with respect to Ch II of the Constitution. Herein lies the value of Allison’s work and the reason for its present examination in the context of Gageler J’s reasoning in *M68*. When considered in the context of previous judicial reasoning, it may contain significant signposts as to the possible future retracing and refinement of the jurisprudence of the High Court on the ambit

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27 The terms ‘breadth’ and ‘depth’ derived from Professor Winterton’s analysis in Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 29-30, elaborated upon in chs 2-3. ‘Breadth’ relates to the sphere of operation of the power, the subject matters in relation to which it may operate upon. ‘Depth’ refers to the actual content of the power, what actions can be undertaken. For a detailed and more recent post-*Pape* analysis of the various powers and capacities see Twomey, above n 16, 315-27 and Geoffrey Lindell, ‘The Changed Landscape of the Executive Power of the Commonwealth after the *Williams Case*’ (2013) 39 *Monash University Law Review* 348. See also the important articles, albeit pre-*Pape*, of George Winterton, above n 25 and Zines, above n 11, 279.


30 See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 where even though it was held that the war prerogative permitted the compulsory destruction of property to prevent it falling into enemy hands, compensation was still payable only except if the destruction resulted from actual combat.
of the Commonwealth’s executive power in s 61. But first it is necessary to examine those aspects of Allison’s thesis which are presently relevant.

II INTERPRETATIONAL METHODOLOGY AND ‘THE HISTORICAL CONSTITUTIONAL APPROACH’

As indicated above, the central tenet of Dr Allison’s thesis presently relevant may be stated succinctly thus: ‘constitutional arrangements that have continued from the recent or distant past into the present with change or reform intrinsic to those arrangements’ are legitimate, indeed necessary, sources of current constitutional principle and law.\(^{31}\) Whilst Allison’s thesis was framed as an interpretative methodology for the evolving unwritten constitution of the United Kingdom, its tenets nevertheless may be applied to the provisions of written constitutions, such as s 61, which provide little textual guidance as to their precise meaning and which can only be understood by recourse to extra-textual sources which they incorporate or to which they refer. With a provision such as s 61, especially in light of the context of its origins, recourse must be had to ‘historical’ constitutional sources, even those pre-dating the instrument, to achieve accurate contemporary interpretation.\(^{32}\) But, as Allison’s thesis emphasises, this is only the case where those sources remain presently relevant as recognised sources of law. An unintended manifestation of this approach to Australian circumstances can be seen in the following statement by Professor Zines:

The principle that the executive government has no power at common law to levy a tax is not derived from contemplating the concept of the executive power. It is because of English historical development, particularly the struggles of the 17\(^{th}\) century. If the executive power in Britain and Australia includes the declaration of war, it is because the English Parliament was prepared to leave this power with the King, content with the control it had of the standing army and the appropriation of money to conduct the war.\(^{33}\)

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\(^{31}\) Allison, above n 2, 16 (emphasis added).


\(^{33}\) Zines, above n 11, 279.
Section 61 of the Commonwealth Constitution and an ‘Historical Constitutional Approach’

Such an approach is not necessarily exclusive of others. It does not constitute an ‘all-embracing and revelatory theory’ of the type that Gummow J warned against, the ‘victorious theory’ being placed ‘upon a high ground occupied by the modern, the enlightened and the elect.’ But, it is an approach more apposite to s 61 than one which is purely analytical or textual. Indeed, Allison’s work invites a reconsideration of Dicey’s analytical legacy in constitutional law to the extent that it discounted historical considerations in its emphasis to determine the current state of the law.

In seeking to reconcile the analytical with the historical, Allison reinvigorates theoretical approaches which pre-date Dicey and which may yet yield a better contemporary understanding of constitutional law. Resort to historical considerations, in addition to ‘traditional conceptions’, has certainly resonated in Australian constitutional jurisprudence where reference is made, in addition to traditional English sources, to the framers intentions, the political context of the establishment of the Commonwealth and the consequences of the establishment of the new polity, as well as to colonial experience. In Jesting Pilate, Sir Owen Dixon wrote:

> [a]n enquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical. But if a theoretical answer be adopted by a system of law as part of its principles, it will not remain a mere speculative explanation of juristic facts. It will possess the capacity of producing rules of law.

This is an approach which, as Allison pointed out, is consistent with the etymology of ‘constitution’, likely being Cicero’s coining of the word constitutio as the Latin translation of the Greek politeia referring to political community. The Latin, however, carries the primary connotation of ‘establishment’ and ‘gathering up past experience’ which was assimilated into

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the English word ‘constitution’ to refer both to the establishment and ‘the composition of the political community.’ Thus, posited Allison:

The historical constitution [may be] plausibly conceived to embrace the forms of government that are established, in the connotation of Cicero’s constitution, to accumulate past experience in such a way as to compose the politeia, the body politic. ... Qualifying the constitution as historical emphasises, in addition, the dynamic — the process of establishing forms and modes of formation integral to it in the accumulation of past experience and the composition of the political community. ... The historical constitution is ... the varying and variable forms of government — the legal and political rules, principles, and practices relating to government — that are established through being given constitutional significance by a political community in view of their historical formation — the modes by which they were attained and the normative historical accounts of their attainment. 38

The general appeal and legitimacy of a written constitution such as Australia’s cannot, however, be referenced to ‘the historical constitution’ in the same unqualified way as it may in Britain. For ‘[a] codified constitution’s appeal would seem to depend significantly upon appreciation of the singularity of its original formulation...’ 39 This is especially perceptive in that it provides due recognition to the watershed moment of the coming into force of a new written constitution, the profundity of the constitutional moment which resulted in the establishment of the new polity, the Commonwealth of Australia; and that the quest for constitutional law and principle must ultimately be traced to this source henceforth, as emphasised in Marquet.40 Thus, any historical constitutional approach must be qualified by ultimate recourse to the written instrument and its interpretation.

Nevertheless, the door is left open for the ‘historical constitutional approach’ in circumstances where the ‘codified’ constitution itself permits, or indeed requires, recourse to ‘historical’ sources and ‘traditional conceptions’ which it impliedly incorporates, albeit they pre-date it and evolve independently of it; and even though they are ultimately subject to it.

38 Allison, above n 2, 18-9.
39 Ibid.
40 Attorney-General (WA) v Marquet (2003) 217 CLR 545, 570 [66].
Moreover, the *Australian Constitution* came about within a tradition which was true to the etymology of the word – accumulating past experience to compose the *politeia* – and not from that revolutionary tradition in which the past is sought to be obliterated by the establishment of a new utopian order, history itself being restarted from ‘the Constitution of the Year 1’. The Anglo-Australian tradition has been on the whole – excepting the more extreme puritan moments of the Great Rebellion in seventeenth century England – one of evolutionary gradualism. Even ‘revolutions’ in that tradition, including those of 1642, 1688 and the American Revolution, are regarded more as ‘restorations’ of the proper established constitutional order and of traditional civil liberties – not the clearing away of all past legal forms and institutions to set up a constitutional *tabula rasa*.

Resort to ‘traditional conceptions’ and historical sources to interpret the *Commonwealth Constitution* is therefore very much a part of the very tradition from which it derived. Bradley Selway, for example, when Solicitor-General for South Australia, stated that s 61 can only be understood ‘in the context of Imperial and colonial history, including the law relating to the common law prerogative’. Thus, in the case of s 61 vesting executive power in ‘the Queen’, it would support recourse to the non-statutory prerogative powers of the Crown known to the common law, to those limitations to executive power which resulted from previous parliamentary abrogation of prerogative executive power, such as taxation and imprisonment, and to those other aspects of British constitutional history which define the relationship between executive and legislative power – principally responsible government adapted to the particular Australian constitutional establishment of a federal system. Access to such sources does not undermine the singularity of the original formulation of the *Constitution*, nor deny the import of the establishment by written compact of the Commonwealth as a polity with three branches of government. It does not undermine the final appeal to Australian sources in its interpretation. For at the core of this approach is the recognition of the current interpretative influence of constitutional arrangements that have had a continuous relevance from the recent or distant past into the present and in which resides the vital attribute that change or reform is intrinsic to those arrangements.

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41 Selway, above n 32, 505.
Allison is careful to avoid two pitfalls in his approach which may otherwise render historical analysis of little current analytical value, which pitfalls are also avoided by Gageler J in M68 as will be seen. First, reliance is not placed on a conception of the ‘ancient’ constitution which derives validity, venerability or transcendent quality solely from its very (or mere) antiquity, embedded in the ancient common law or preeminent ancient statutes.\textsuperscript{42} Secondly, neither is reliance placed on a conception of the constitution which existed in some past golden age or classical era and which ought to be revived — ‘revolutionary in an old sense of the word’.\textsuperscript{43} Both views have been prevalent at certain times, not uncommonly when used as adversarial justifications for positions taken in constitutional and political conflicts. By contrast, Allison emphasised only those constitutional arrangements that have continuing legal relevance because evolution and reform is intrinsic to them.

A similar approach had been evident before the influence of Dicey gave pre-eminence to the analytical over the historical. One example is the work of Earl John Russell\textsuperscript{44} during the political debates which culminated in the Reform Acts in the nineteenth century. Russell advocated a form of evolutionary gradualism which sought to reform the constitution by correcting abuses through ‘amendments strictly conformable to its spirit’. He opposed the devising of a constitution \textit{a priori}, refusing ‘to deviate from \textit{the track of the Constitution} into the maze of fancy, or the wilderness of abstract rights’.\textsuperscript{45} Part of this historical constitutional understanding is the need for comparative study, at least to the extent that foreign sources have been influential: ‘the dynamic interaction of political communities and their respective constitutional forms’.\textsuperscript{46} Allison referred to this as the ‘external perspective’ in contrast to purely English sources, ‘internal’. In the United Kingdom, its interaction with the European Union and its constituent instruments, and the law emanating from these, provides a most compelling example, although now being reversed. In Australia, the influence of federal constitutions (the United States of America, Canada, Switzerland) in comparison, emulation and avoidance, American doctrines such as the separation of powers, British

\begin{itemize}
\item[42] Allison, above n 2, 15.
\item[43] Ibid 15–6.
\item[44] Ibid 16–7.
\item[45] Ibid (emphasis in the original).
\item[46] Ibid 9.
\end{itemize}
principles of responsible government, remain clearly important for Australian constitutional jurisprudence. Of course, the evolution of British constitutional principle transitions from the status of an ‘internal’ to an ‘external’ point of view as Australia’s legal independence from the United Kingdom has evolved. In M68, for example, Gageler J made reference to the ‘external’ point of view to refer to the influence of Swiss and American models on Australian federalism.47 Professor Winterton, when writing specifically about s 61, referred to Canadian, Indian, Irish and South African analogues to highlight the lack of definition of ‘executive power’ in those constitutions and the need to rely on traditional conceptions to understand its content, thus reinforcing the need to resort to common law historical threads to appreciate current meaning.48 Allison’s particular reflections on Dicey are relevant to Australian perspectives both ‘internal’ and ‘external’: in relation to the former, to appreciate the dominant British constitutional mindset at the time of federation when considering responsible government and parliamentary supremacy49; and, with respect to the ‘external’, to appreciate the American influence relating to the separation of powers and federalism. In addition, there remains the continuing importance of developments in the United Kingdom, and other Commonwealth jurisdictions, to the extent they may be relevant or influential — these presently being ‘external’.

By contrast, Dicey was very influential, according to Allison, in discounting, even separating, the historical from the legal by his analytical approach. He did this by giving primacy to the determination of ‘the law as it now stands’ and relegating historical analysis to secondary concern.

Dicey aspired to a scientific approach in pursuit of a consistent and logically coherent scheme of legal rules and principles. His method was that of observation and objective description through the composition of sets or categories and the division or subdivision of their components.50

This is in itself remarkable given the ascendancy of historicism at the time Dicey was writing, at least on the Continent; although perhaps not so surprising

47 (2016) 257 CLR 42, 91 [115].
49 See Aroney et al, above n 4, 431-42.
50 Allison, above n 2, 8.
in the atmosphere of the more pragmatic philosophical approaches ascendant in Britain, principally the positivism and empiricism of the post-Benthamite nineteenth century. While this strictly analytical approach may be more appropriate for private law, constitutional law is another matter. It is of the very nature of a constitution that it is a legal and political blueprint for the organisation of a polity which is meant to last. It must be couched in terms of sufficient generality that enable its continued efficacy in evolving circumstances; to provide for principles which, while sourced therein, are intrinsically permitted to evolve. Yet, in order to maintain fidelity to the original compact, it must allow for the maintenance of those historical sources and principles – ‘traditional conceptions’ – which are permitted by any constitution to remain intrinsic to its evolution and interpretation. The principle of responsible government is an excellent illustration.51

Moreover, a purely analytical approach gives rise to three problems, each of which can be avoided by ‘the historical constitutional approach’. The first is the problem of ‘fidelity’: If Dicey’s method sought only objectively to describe legal principles and their scheme, it could not prescribe or maintain ‘fidelity’ to that scheme. A constitution’s sources of fidelity were ‘left analytically obscure or indistinct, as was the normative force of a judicial or other claim that official conduct can be constitutional or unconstitutional.’52 To a certain extent, this problem is obviated in Australia simply by the fact that fidelity to a constitutional text remains, to varying degrees, a paramount concern, even by those who would otherwise advocate a ‘living tree’ approach to constitutional interpretation. And because ‘traditional conceptions’ are appreciated as evolving in the historical approach, the issue of fidelity will not arise.

The second problem is more immediately compelling: Dicey’s analytical scheme ‘was rendered static by his relegation of the historical view and consequent focus on constitutional form, not formation. It was imposed upon an evolving constitution at a relatively arbitrary and fleeting moment — the moment of analysis.’53 This danger of ossification within the purely analytical approach can apply also with respect to Australia’s written constitution. For example, the extent of the Commonwealth’s non-statutory executive power in

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52 Allison, above n 2, 8.
53 Ibid 9 (emphasis added).
61 to engage in external affairs can only be understood by reference to the historical evolution of Australia’s political and legal independence from the United Kingdom and the Imperial Parliament. The content of that prerogative expanded from its extremely limited scope in 1900, given Australia’s dominion status within the Empire, to its present full extent as appropriate to an independent nation. It is now only subject to the common law’s limitation on that power, and possibly ‘nationhood’, and to parliamentary regulation – not to imperial limitations. To have ignored this, and to have insisted on a definition at a particular moment based on a purely analytical approach, would not only be inaccurate by not accounting for evolutionary factors, but would lead to a totally distorted view of the correct legal position.

This leads to the third major difficulty:

Dicey’s analytical method neglected the dynamic interaction of political communities and their respective constitutional forms. … He presented other jurisdictions, not as actual or potential sources of influence, but as anti-models [eg, American federalism v English unitarianism, French droit administratif v English rule of law] with which to demonstrate the peculiarity of the set of rules and principles and accompanying distinctions that made up his analytical scheme of the English law of the constitution.

A historical constitutional approach, in contrast, gives appropriate recognition to those external influences which were integral in the process of formation of the Constitution, as well as ‘internal’ sources, and enables an appropriate recognition be given to them in contemporary interpretation of an ambiguous text.

One further problem with the purely analytical approach is that it lends itself to a certain bias to perceive the historical approach as of purely antiquarian interest. Ironically, the political theorist to whom Dicey expressed indebtedness, William Hearn, juxtaposed the analytical with the historical as


55 Allison, above n 2, 9.
being of equal importance, albeit without reconciling them. An important contemporary of Dicey, Homersham Cox, adopted an analytical method which expressly incorporated the historical by reference to Coke’s dictum, quoted in the epigraph to this article: ‘yet to know is properly to understand a thing with reason and through its cause.’ In other words, this conception of causa is ‘intrinsic to proper understanding’ and ‘a historical causa for an established principle or institution of government would have made a proper understanding of it necessarily historical.’ This may very well be a most appropriate articulation of recourse to ‘traditional conceptions’ to interpret s 61, and, as will be seen, the approach taken by Gageler J in M68. Ironically, Dicey’s work makes constant reference to history, especially the seventeenth century conflicts and other constitutional landmarks, yet strangely kept ‘strictly extraneous to his legal analysis’.

That the relevance of an historical constitutional approach is not limited to purely British concerns can be seen in Professor Winterton’s defence of his exclusive use of ‘traditional conceptions’ to define the ambit of non-statutory executive power in s 61. In response to the more recent tendency to discount the common law in this regard, he famously wrote:

While constitutional discourse should reflect present constitutional realities, one of these is that the Constitution was not inscribed upon a tabula rasa. It was born into a common law world, albeit one capable of development, for adaptability is one of the common law’s most fundamental and valuable qualities.

Note how Allison’s thesis resonates here. This, he continued,

is especially true of Ch II of the Constitution, which was deliberately drafted to reflect the supposed law of the Constitution, not its practice, even in 1900. An interpretation of Ch II which ignores British and Australian constitutional history by taking its words at face value is not ‘postcolonial’, but rather one which judges the constitutional architecture merely by its façade. Moreover, it is

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57 Ibid.
58 Ibid 14.
59 Winterton, Parliament, the Executive and the Governor-General, above n 10, ch 1. The ‘historical constitutional approach’ within an orthodox analysis resonates throughout Professor Winterton’s major work.
potentially dangerous, for it could lead to grossly exaggerated views of
the Governor-General’s independent powers . . . Even if one rejects an
‘originalist’ interpretation of the Constitution and interprets it in light
of contemporary constitutional requirements, Ch II of the
Constitution, including s 61, cannot be interpreted sensibly without
reference to the Crown’s prerogative powers, whether or not the
‘maintenance’ element of Commonwealth executive power is confined
to those powers.61

Other scholars in analogous jurisdictions have advocated a similar approach.
Thus, in the United States, Ernest Young wrote that

This kind of flexibility is essential to avoid the fallacy of treating the
Constitution as a document that was created at a single time with a
single set of premises and goals. The text of many provisions, for
example, is sufficiently clear that almost all questions involving them
can be resolved without recourse to other interpretative methods. In
other areas, the values historically associated with a provision, as well
as its tradition of interpretation over time, may require that some
types of arguments count more than others.62

To what extent then is this type of reasoning evident in Gageler J’s judgement,
and, more importantly, to what extent is it useful in that very difficult
determination of whether impugned executive action is authorised by the non-
statutory executive power of the Commonwealth?

III THE ‘HISTORICAL CONSTITUTIONAL APPROACH’ APPLIED

A Context: The M68 Case

In M68, a majority of the High Court, including Gageler J, held valid
retrospective legislation that authorised the continued off-shore detention of an
‘unlawful non-citizen’ pursuant to arrangements with Nauru and independent
security contractors.63 Because the principal issue decided by the Court was
whether the law was authorised by the aliens power, s 51 (xix), and whether it

61 Ibid 34-35 (emphasis added).
62 Ernest Young, ‘Rediscovering Conservatism: Burkean Political Theory and Constitutional
63 French CJ, Kiefel, Bell, Gageler, Keane, and Nettle JJ. Gordon J dissenting.
contravened the evolving principle in *Lim’s case,* it was not necessary to decide on whether the detention was authorised by s 61. But as the Commonwealth did not concede that it lacked authority from that source, Gageler J regarded it as appropriate to consider the issue in more detail. Gordon J also considered the issue, but only briefly to conclude that the Executive did not have power to detain a person without statutory authorisation, confirming similar statements made in the *CPCF case.* Her Honour acknowledged that the limits of s 61 power ‘have not been defined’, and that there are ‘undoubtedly significant fields’ where the Executive can act without statutory authorisation. No explicit reference was made to any inherent national power in s 61 to support any such executive detention.

Gageler J held that the ‘procurement’ of the plaintiff’s detention on Nauru by ‘the Executive Government’ pursuant to prior agreements was ‘beyond the executive power of the Commonwealth’ in the absence of statutory authorisation. It is possible to discern an approach in his Honour’s reasoning which relies predominantly on ‘traditional conceptions’ and historical sources, particularly the political and constitutional context relating to the establishment of the Commonwealth and the Convention Debates. It manifested certain threads in his 2009 Byers Lecture in which reasoned articulation was given to such an approach when interpreting the Commonwealth’s legislative power, the form of representative and responsible government for which the Constitution provides and the precise constitutional principles and limitations which can be implied from this source, as well as the nature of the relationship between executive and legislative power. But his Honour’s approach to the protracted problem of the ambit and content of the Commonwealth’s executive power in the instant case of executive detention finds a deeper jurisprudential resonance in Allisons’ approach that justifies its use as a basic methodology. It accommodates historical enquiry and ‘traditional

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64 *Lim v Minister for Immigration* (1992) 176 CLR 1, 27.
65 (2016) 257 CLR 42, 90 [114].
66 Ibid 158 [372]-[373].
67 *CPCF v Minister for Border Protection* (2015) 255 CLR 514, 567-8 [147]-[150], 595-600 [258]-[276].
68 (2016) 257 CLR 42, 158 [368]. See also *Williams v The Commonwealth* (2012) 248 CLR 156, 191 [34], 184-5 [22], 226-7 [121], 342 [483], 362 [560].
69 (2016) 257 CLR 42, 109 [175]
conceptions’ with an analytical approach to s 61. While his Honour’s judgment proceeded by a type of deductive legal reasoning, it is deductive not in the sense of drawing conclusions about the particular from the general by way of abstract conceptualisation of executive power. Rather the conceptualisation proceeded from a consideration of the common law, history, custom and usage – ‘traditional conceptions’ – incorporated within the Constitution and from the nature of the form of government for which it provides. This deductive approach was also manifested in the structure of the judgment, which is set out here before the more detailed examination which follows.

Commencing with a general examination of the Executive Government in the Constitution, his Honour analysed the external influences on Australian conceptions of responsible government at the time the Constitution was framed, the Australian colonial experience with responsible government, Australian conceptions of ‘the Crown’, and the relationship between it, Parliament and the judicial branch. From this he refined his examination to ‘the nature of executive power’ in which again he referred to historical opinions, early decisions, the work of English writers Blackstone and Dicey and historical English conceptions of the royal prerogative, as well as Professor Winterton’s ‘depth/breadth’ analysis to explain the dimensions of the power based on federalism and the separation of powers. Proceeding further toward the particular, the limitations on Executive Power were then explored making reference to those limitations ‘rooted in constitutional history and the tradition of the common law’, and to High Court reasoning which emphasised the ‘impossibility of understanding [s 61] … other than by reference to common law principles bearing on the operation of responsible government’ and ‘the general principles of the constitutional law of England’ which pre-date the Constitution but which nevertheless remain presently pertinent. Thence narrowing his focus to the precise legal issue, he examined ‘executive power and liberty’ and again reference was made to cases, including English cases, which referred to ‘fundamental freedoms guaranteed by ancient principles of the common law or ancient statutes’, including the English Habeus Corpus acts which are part of the ‘accepted constitutional framework’ and thence to ‘the common law of Australia’ to inform the content of s 61 and the extent of any

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21 (2016) 257 CLR 42, 90 [115].
22 Ibid 99-100 [138]-[140].
power to detain. He thus reached the conclusion that s 61 did not authorise the offshore detention and deprivation of liberty of a friendly alien by the Executive Government of the Commonwealth. As each of these is explored in more detail, the application of ‘the historical constitutional approach’ will become most apparent.

B  ‘The Executive Government in the Constitution’

Historical considerations and traditional conceptions are woven into the fabric of his Honour’s reasoning throughout. His examination of the ‘Executive Government in the Constitution’ provided for in Ch II explored the framers’ intentions in that regard and how these were influenced by Allison’s ‘internal’ and ‘external’ perspectives; that is, the use made by the framers ‘in no slavish spirit’ (quoting Bryce) of English doctrines, including those applied in the colonies (internal) and American, Swiss and Canadian rules (external) as suited to their circumstances. Their ‘careful appropriation and adaptation of constitutional precedent to local circumstances’ was most influential in the drafting of Ch II, and remains central to understanding the relationship between the Executive Government and Parliament. By tracing the evolution of responsible cabinet government in the Australian colonies, he was able to discern ‘that peculiarly functionalised Australian conception of “the Government” and the practical approach to its status ‘untroubled by concerns as to the juristic nature of the “the Crown”’.

Instead of ‘the Crown’, Gageler J made reference to ‘the Executive Government’, and to ‘the Commonwealth’ when referring to the polity established by the Constitution, including its three branches. In adopting this usage, his Honour relied upon Australian colonial experience to gain a sense of the predominant denotation of ‘the Crown’. This is significant because it helps to ameliorate the problems with the notion of ‘the Crown’ which emerge in the United Kingdom. These arise from the evolving nature of the role of the Monarch from personal rule to a constitutional role which yet acknowledged a

23 Ibid 101-7 [147]-[166].
24 Ibid 90-1 [115].
25 Ibid.
'separate' personal capacity in the Queen. In the absence of a theory of 'the state' in the common law or British constitutionalism, 'the Crown' was required to carry the definitional (and legal) burden of various manifestations of power and constitutional status.77 Thus, in addition to the person of the Monarch, 'the Crown' denotes various aspects of the polity, including the polity itself, and particularly its government and its executive arm. Nevertheless, as Professor Saunders has pointed out, '[h]owever convenient and explicable', this 'has had consequences for the British Constitution, at least some of which have proved problematic and all of which continue to generate criticism and proposals for change.'78 Nevertheless, three principal historical developments, identified by Professor Saunders,79 remain fundamental to present understandings. First, there is the recognition of the legal personality of the Crown 'whether justified by reference to the person of the Monarch' or, 'by characterisation of the Crown as a corporation sole (or, occasionally aggregate).80 Secondly, there is the removal of the power of the Monarch to the courts and Parliament respectively, alone to exercise judicial and legislative power. Thirdly, in tandem with the evolution of responsible government, relevantly inherited by Britain’s constitutional progeny, there is 'the progressive constitutionalisation of the monarchy, through acceptance that the powers held by the Crown would always, or almost always, be exercised on the advice of Ministers with the support of the majority of the House of Commons.'81

77 See the discussion in Cheryl Saunders, 'The Concept of the Crown' (2015) 38 Melbourne University Law Review 873. Professor Saunders makes reference to an extensive literature on this issue, especially in the United Kingdom, and to which further reference may be made.

78 Ibid 876.

79 Ibid.

80 Ibid. On the Crown as corporation sole or aggregate, see Sir William Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne (eds), The Nature of the Crown: A Legal and Political Analysis (Oxford University Press, 1999) 23, 24 referred to by Professor Saunders. Dr Allison also discusses this question: Allison, above n 2, 46-7, 50-4, 55-6, 58-9, 60-2, 68, 71, 238. Professor Lindell, above n 27, 361, stated that the recognition that the Commonwealth was an emanation of the Crown as a corporation sole acknowledged that it enjoyed at least some of the capacities enjoyed by natural person and that '[i]t is necessary so as to give the Commonwealth the legal capacities needed to exist and carry on its functions.' He also indicated that this appears to be assumed position in the United Kingdom, despite the conceptual difficulties indicated. An examination of this question of the Crown as corporation aggregate is contained in S Bradbury, Clarifying the Source and Scope of the Commonwealth Executive’s Capacity to Contract Absent Statutory Authorisation (Unpublished LLB Honours Thesis, The University of Sydney, 2016) which also contains a valuable discussion on the Williams cases and the Commonwealth’s capacity to contract and spend.

81 Saunders, above n 77, 876.
Without discounting the difficulties arising from the various usages of ‘the Crown’, Gageler J noted that in Australia, the term was appreciated almost exclusively from a ‘practical’ perspective heavily influenced by the diverse imperatives and singular burdens placed upon the government of a colony to develop the colony — providing for infra-structure, essential services and so on —which in more mature economies could be left to private enterprise. This was a point not lost on the Privy Council. This pragmatic approach to ‘the Crown’ and its juristic personality resulted in the predominant understanding of the term to mean ‘the government’. It was an approach apparently untroubled by the metaphysical niceties that sometimes accompany the consideration of these terms. It could not afford to do otherwise. As Professor Saunders noted more generally: ‘the concept of the Crown thus was part of the assumed institutional fabric of government in the former colonies, shaping the powers of executive government and its relationship with the other branches.’

Although this approach made up in terms of efficacy what it may have lacked in subtlety and theoretical sophistication, it could also be said that it simply accommodated this subtlety and inevitable ambiguity to achieve an efficacious application to Australian circumstances: a workable, though still engimatic in part, conception of ‘the Crown’. Such compromises are certainly not unknown in Anglo-Australian constitutionalism. From this, his Honour was able to remark that the ‘practical setting’ enabled ‘that peculiarly functionalised Australian conception of “the Government” [to] take root’ and that ‘Chapter II of the Constitution was framed against that political and practical background.’ Thus, while ‘the Crown’ did not have autochthonous origins, its adaptation into the peculiar setting of the establishment of the federal Commonwealth led to an autochthonous understanding of it, an understanding which continues to be informed by the common law powers of the Crown as applicable in 1900 and as developed by Australian courts.

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82 (2016) 257 CLR 42, 91-2 [118].
83 Farnell v Bowman (1887) 12 App Cas 643, 649.
84 Saunders, above n 77, 882.
86 Ibid 92 [119] (emphasis added).
87 Condylis, above n 13. This article presents a persuasive thesis as to how to achieve some reconciliation between the view which would advocate that the ambit of s 61 be determined by the common law and the current view of the High Court that, ultimately, it is determinable by reference to the implied ‘nationhood’ power. The reconciliation is achieved without compromising the requirement to locate the sources of power ultimately to Australian ones. This is not the place to
was because, in the absence of clear textual definition to ‘executive power’ in s 61, it was necessary to provide a legally discernible source for the power which could be exercised by ‘the Crown’ as government.

This was manifested in the High Court’s identification in Sue v Hill of the various usages of ‘the Crown’ adopted in Australia. The third usage identified therein reflected in particular that which Gageler J referred to as the dominant and ‘peculiarly functionalised’ conception of the ‘the Government’ in Australia: ‘the Crown ... identifies... “the Government”, being the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business.’ Significant interpretative assistance was derived by the plurality also from the following statement of Professor Pitt Cobbett, reinforcing Gageler J’s emphasis on Australian understandings: ‘In Australia, these [prerogative] powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King.’ Thus, ‘the Crown’ was predominantly used to refer to the ‘entire executive organisation of the Commonwealth’, to ‘the Government’ within a system of responsible government; a ‘shorthand expression for the executive government’.

The alternate usage of ‘the Crown’ to denote the body politic was less evident. ‘The Commonwealth’ was a ready substitute, the term achieving prominence by its adoption in the Constitution. It is these two conceptions of ‘the Crown’ – as polity and government – which appear to be reconciled, at least in so far as separate terminology is concerned, in Williams (No 1) where reference to ‘the Crown’ as ‘body politic’ was replaced by ‘the Commonwealth’ explore this issue further, although it should be noted that a further examination and discussion of Mr Condylis’s arguments is certainly warranted.

89 Ibid 499 [87].
90 Ibid 499 [88] quoting from the ‘The Crown as Representing the State’ (1904) 1 Commonwealth Law Review 145, 146-7 (emphasis added.) The confusion between the public and private capacity of the supreme magistrate is of course not a new problem, being known in Roman Law. Roman Law simply resolved the problem by the private/public distinction: ‘Public authority stemmed from the office, not the man personally... Contrary to what is routinely asserted by modernist theorists regarding the personal nature of pre-modern polities, nothing could be more “public” in the Roman tradition than the res publica, which could not belong to the emperor privately.’: see Kaldellis, above n 37, 40.
91 James Stellios, Zines’s The High Court and the Constitution (Federation Press, 2015) 471.
92 Winterton, Parliament, the Executive and the Governor-General, above n 10, 207. See also Peter W Hogg, Liability of the Crown (Carswell, 2nd ed, 1989) 9.
93 Sue v Hill (1999) 199 CLR 462, 498 [84].
to refer to the Australian polity with its three branches of government. It is the Commonwealth as polity which has legal personality, its executive power being exercised by its executive branch, that is, the Executive Government, in whom it is invested by s 61 when interpreted consistently with responsible government. This would mean that the previously common usage of ‘the Commonwealth’ to refer, as Dixon J did in the Bank Nationalisation Case, to “the central Government of the country” understood in accordance with “the conceptions of ordinary life” may now be best substituted by ‘the Executive Government’. And, when considering the ambit of the non-statutory executive power of the body politic, the principal emphasis is on the executive branch which exercises that power: ‘the Executive Government’.

‘[F]ramed against that political and practical background’, Ch II therefore could only be interpreted as the formal establishment of a government of the Queen, executive power being exercised by the Governor-General, but in substance establishing parliamentary cabinet government which would exercise substantive executive power pursuant to the principles of responsible government. Moreover, this executive power was to be interpreted as belonging to a government ‘which was to have its own distinct national identity and its own distinctly national sphere of governmental responsibility.’ The historical approach is plainly manifested in this summary statement of the position:

The overall constitutional context for any consideration of the nature of Commonwealth executive power is therefore that … the executive power of the Commonwealth is and was always to be permitted to be exercised at a functional level by Ministers and by other officers of the Executive Government acting in their official capacities or through agents. It is and was always to involve broad powers of administration, including in relation to the delivery of government services. Its exercise by the Executive Government [and its officers and agents] … is and was always to be susceptible of control by Commonwealth statute. And its exercise is and was always to be capable of exposing the Commonwealth to common law liability determined in the exercise of jurisdiction under s 75(iii) and

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94 Williams (No 1) (2012) 284 CLR 156, 184 [21].
95 (2016) 257 CLR 42, 94 [124].
96 Ibid 92 [119]-[120].
97 Ibid 92 [119].
of exposing officers of the Executive Government to writs issued and orders made in the exercise of jurisdiction under s 75(v). In ‘the last resort’ it is necessarily for a court to determine whether a given act is within constitutional limits.\(^\text{98}\)

Two of the observations above deserve particular attention: First, the interpretation of the ambit of Commonwealth executive power must be consistent with the requirement that it have broad administrative powers to deliver government services. It is not therefore to be interpreted unnecessarily narrowly. Secondly, it must be defined consistently with the imperatives of responsible government by which the executive is always subject to statutory regulation and control, that by ‘its very nature in a system of responsible government... it is susceptible to control by the exercise of legislative power by Parliament.’\(^\text{99}\)

This last point is particularly significant in light of the recognition in *Pape* of an inherent ‘nationhood’ power derived directly from s 61, a power to which, interestingly, his Honour does not refer. Whatever its content, being a power directly derived from s 61, arguably it is not susceptible to complete legislative regulation, at least not legislative abnegation. And being a direct grant of executive power similar to others in the Constitution, it cannot be removed from the Governor-General. The extent to which it may be regulated or otherwise interfered with by the legislature, is uncertain.\(^\text{100}\) A rigorous application of the separation of powers would also tend to protect it from such interference, certainly from legislative abnegation as has already been argued by some commentators.\(^\text{101}\) In this struggle between constitutional principles – responsible government and the separation of powers – it is clear that reference to such historical considerations and the principles informing the written text\(^\text{102}\) alone may assist in determining the primacy of responsible

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\(^\text{98}\) Ibid 95-6 [128] (emphasis added).

\(^\text{99}\) *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 441 (Dawson, Toohey and Gaudron J) (emphasis added).

\(^\text{100}\) Aroney et al, above n 4, 490-5.


\(^\text{102}\) See Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 3 where it is noted that the framers stated merely the formal position relating to the executive branch and its
government in interpreting s 61 to ensure that any interpretation ensures complete legislative control over any non-statutory executive power. ‘That political and practical background’ pursuant to which Chapter II was framed included the prevailing historical constitutional narrative of the supremacy of Parliament over the executive. This unambiguously defended the position that the power emanating from 61, including any implied ‘nationhood’ power, is not immune from legislative control; that responsible government trumps any separation of legislative and executive power, that parliamentary supremacy over the Crown remains (even presently) triumphant even as against any separation between legislative and executive power; and it is a settlement whose constitutional importance, even as an aid to interpretation, is not diminished by its age.

Reinforcing his point, his Honour stated that the supremacy of Parliament was ‘not left to chance in the design of the Constitution’.

Reference was made to the power of Parliament to legislate for the appointment and removal of all officers of the Executive Government (excepting the Governor-General and Ministers), to the enumeration of subject matters of legislative power pursuant to which the Parliament may confer statutory authority on an officer of the Executive Government, and to s 51(xxxix) which gives specific legislative power with respect to matters “incidental to the execution” of power vested by the Constitution in the “the Government”. It provides for ‘legislative facilitation of the execution of the executive power of the Commonwealth’ and also provides for ‘legislative regulation of the manner and circumstances of the execution of the executive power of the Commonwealth’.

This last point is very significant for three reasons: first, it removes any doubts that might arise as to the supremacy of Parliament over the executive post Pape. Secondly, his Honour reinforced legislative supremacy by reference to another express constitutional provision: Chapter I of the Constitution

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103 (2016) 257 CLR 42, 92 [119], 93-4 [121]-[123].
104 Ibid 93 [121].
105 Ibid.
specifically conferring on Parliament incidental legislative power by s 51(xxxix). This provides control over the manner and circumstances of the execution of the Commonwealth’s executive power in s 61 and elsewhere in specific grants of power to the Governor-General. That result was expressed in the majority judgment in Brown v West which his Honour expressly approved:

Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope.

C ‘The Nature of Executive Power’

As for the nature of the power for which s 61 provides, Gageler J stated that it ‘can only be understood within that historical and structural constitutional context’ abovementioned. He quoted with approval Alfred Deakin’s ‘profound’ Opinion as Attorney-General that ‘[s 61] “would be dangerous, if not impossible, to define” because it contains ‘merely an inclusive definition, not an exhaustive one.’ While the ‘execution’ limb of s 61 remains relatively straightforward, this is not the case with the limb providing for the ‘maintenance’ of the Constitution and of Commonwealth laws. This point about lack of definitional clarity is not made to add to the extensive chorus of similar sentiment from both judicial exegesis and academic commentary. Rather, it is to highlight his Honour’s appreciation of the need, therefore, to engage with sources beyond the text, to historical antecedents, to the structural aspects of the Constitution, to the evolution of underlying constitutional convention and principle, in order to appreciate the nature of the power. Not
doing so would render s 61 meaningless and attempts at definition “dangerous”.114

Reference to the historical origins of the Constitution also enabled a rejection of any notion that s 61 does not provide for any non-statutory power at all, that the Executive Government has no power except that provided by statute or the Constitution itself. Drawing upon a further observation by Deakin, the power provided for by s 61 is ‘administrative’ in addition to being ‘executive’ in the strict sense. That is, ‘it must obviously include the power … to effectively administer the whole Government’.115 While statute may well provide for much of its powers and capacities in this regard, in order to be able effectively to govern, its powers cannot be said to be limited to those provided by statute. In addition to major prerogative powers relating to foreign affairs, war and defence, the Executive Government must have the capacity to administer departments, to own, manage and dispose of property, enter into contracts, employ personnel, conduct enquiries, spend money and undertake activities which a natural person or corporation may need to undertake, although the extent of such capacities cannot simply be equated with those of a natural person.116

What then are the sources of its content and how does the federal nature of the polity interplay with this question? Gageler J acknowledged two dimensions to this problem. The first related to the relationship between the executive and legislature at the federal level: what can the former actually do without the prior authorisation of the latter? The second related to the limitations on Commonwealth executive power resulting from the federal distribution of powers, that is, vis-à-vis that of the States. His Honour relied on Professor Winterton’s schema by which the first dimension was referred to as ‘depth’ and the latter ‘breadth’, reinforcing its express endorsement by Heydon J in Williams (No 1) — ‘not only neat but illuminating’117 — and other academic commentators.118

114 (2016) 257 CLR 369, 96 [129].
115 Ibid quoting from 130-1 of the Opinion.
116 See Twomey, above n 16, 316 and accompanying text.
118 See for example, inter alia, ibid, 176-82.
The continuing relevance of this approach may have been in doubt following Pape and the Williams cases. The majority finding in the former case rejected Winterton’s position that the depth of the power was limited by the common law prerogatives and capacities because it also included a ‘nationhood’ power derived not from these, but directly from s 61. In Williams (No 1), contrary to the position – the ‘common assumption’ – apparently overwhelming assumed to be settled and maintained by Winterton and others, it was held that the ‘breadth’ of Commonwealth executive power, at least in so far as non-prerogative capacities to contract and spend were concerned, was not determinable purely by reference to the reach of Commonwealth legislative power. Despite this, his Honour did not see this as a rejection of the dimension of power which these terms described, albeit Winterton’s view of the ambit of each was not presently shared by a majority of the Court. Gageler J thus confirmed the continuing usefulness of ‘depth/breadth’ analysis to refer respectively to the substantive content of the power and to the sphere of its operation, the subject matters in respect of which it could take action ‘having regard to the constraints of the federal system’. While Winterton acknowledged that these two dimensions have occasionally been blurred, executive action had to fall within the definitional ambit of each to be valid. And this appears to have been maintained by Gageler J.

But there is something more profound in the maintenance of this usage than the neat categorisation for which it may provide. It is an application of fundamental principles in the Constitution to fill out a proper appreciation of executive power: the separation of powers (in the context of responsible government) and federalism. It also reflects important underlying normative tenets of political and constitutional morality. In Winterton’s Parliament, the Executive and the Governor-General, in which this formulation first appeared, the persistent underlying theme is the fundamental importance of subjecting executive power to law, including even the reserve powers. This is reflective of the consistent narrative within the constitutional tradition of which the Constitution is a product: It was no good thing for representative government

119 Assuming that the power was intended to add to depth, and was not intended simply to add breadth to executive ‘capacities’.  
120 (2012) 248 CLR 156, 189 [30], 232-3 [134]-[137], 358 [544].  
121 (2016) 257 CLR 42, 96 [130].  
122 Winterton, Parliament, the Executive and the Governor-General, above n 10, 29.  
123 Ibid.
and civil liberties if non-statutory executive powers were interpreted too broadly, their limits left vague, thus possibly to permit of a slow aggrandisement of the power and of pockets of immunity from parliamentary control. Witness Winterton’s insistent rejection of the existence of any inherent power in the ‘maintenance’ limb of s 61 beyond that which was recognised by the common law. Otherwise, it would be ‘virtually limitless’ in ambit, ‘a vague and uncertain power if ever there was one’, ‘dangerous for civil liberties and the equilibrium of government for the executive to exercise a virtually unlimited power to “[maintain] ... this Constitution”’.124 While such dangers may be ameliorated by the government’s political responsibility and accountability to Parliament for their exercise, these are but a ‘weak instrument of control’, incapable of curtailing the overreach of executive power during troubled times when government might invoke the ‘protection of ‘national security’ as a smokescreen’ for its actions, including the use of military power to enforce its will.125 Albeit such enormities remain unlikely in a mature democracy, ‘it is well to bear in mind that a democratic polity may need protection from its own executive almost as much as from outside subversion.’126 Important as they may be as tenets of constitutional morality, Winterton argued that surer reliance alone derived from the legal effect of the Constitution and the (evolving) constitutional settlement it represents ‘involving the rule of law, and responsible and representative government’ to hinder any interpretation of s61 ‘as would create a field of executive independence from parliamentary control.’127

The ‘depth/breadth’ methodology thus was framed precisely within the context of these policy preferences and normative justifications, themselves based on an appreciation of historical and comparative precedents, the efficacy of ‘traditional conceptions’ in this regard, and the general trend of constitutional norms in Anglo-Australian constitutional history.128 The continued reliance upon these by Gageler J therefore clearly reflected the identification of his methodology with relevant aspects of ‘the historical constitutional approach’.

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124 Ibid 97.
125 Ibid 32-3.
126 Ibid 33.
127 Ibid 3-34.
128 Ibid 29.
The particular concern to limit executive power in the depth dimension was very apparent in Winterton’s rejection of a functional approach to s 61, that is, one which would define its powers to include those ‘which of necessity inhere in governments’. This would be contrary to the principles and policy underlying the ‘depth/breadth’ formulation as originally stated. And its indeterminate nature might hinder the establishment of any clear ambit to executive power in either dimension. Hence Winterton’s insistence that reference should be made strictly to the common law, as presently determined by Australian courts, to determine both the content and ambit of this power. To do otherwise would result in two unacceptable alternatives: either the rejection of any executive power beyond that provided for by statute or expressly by the Constitution, or the recognition of certain powers that inhere in government, their content impossible to ascertain by purely legal criteria, and running the (not inconsiderable) risk of ‘giving the executive “carte blanche”’. Permitting a self-defining executive power, one which, even if it condescended to judicial review, was open to be defined by the philosophical (and political) proclivities of judges, was neither prudent, nor good policy.

While Gageler J did not expressly engage with this particular issue, what can be made of the omission in his reasoning of any reference to an implied nationhood power in s 61? Does his express reference to ‘depth/breadth’ constitute an endorsement of Winterton’s precise limitation of depth to the prerogative (in the broad sense) in addition to his policy and normative preferences? It may be telling in this regard that he interpreted Mason J’s frequently cited statement in Barton – that executive power in s 61 ‘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’ – purely in the context of the ‘breadth’ dimension. This may be suggestive, although by no means certain, of a certain reticence to acknowledge the existence of purely inherent power in s 61. Immediately following he noted Mason J’s discrete reference to the depth dimension when Mason J stated that s 61 ‘includes the prerogative powers of

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129 Ibid 35.  
130 See Condylis, above n 13.  
131 Winterton, Parliament, the Executive and the Governor-General, above n 10, 35.  
132 (2016) 257 CLR 42, 97 [131].  
133 Barton v Commonwealth (1947) 131 CLR 477, 498.
the Crown, that is, those powers accorded to the Crown by the common law.\footnote{134} While Gageler J did not then say that s 61 includes only those power prerogative powers and capacities recognised by the common law, he also completely omitted reference to any ‘nationhood’ power. Instead, he proceeded to make some very useful observations about the various categories of non-statutory executive power and the adoption of a nomenclature to ease confusion.

D A Word About Nomenclature: ‘The Prerogative’ in Gageler’s Reasoning

The term ‘the prerogative’ has been problematic. It has been plagued by a shifting definition over time that has resulted in inevitable ambiguities and inaccuracies in usage.\footnote{135} This is a consequence of Dicey’s revision of Blackstone’s definition to expand the meaning beyond those powers and rights which the common law recognised as belonging uniquely to the Crown, in contradistinction to subjects, to include all those capacities shared with natural persons that the Crown could exercise without statutory authorisation.\footnote{136} Judicial reasoning in the United Kingdom (variably, though less so than previously) and to a certain extent in Australia (though no longer so)\footnote{137} took to Dicey’s nomenclature. Professor Winterton also did so in \textit{Parliament, the Executive and the Governor-General}, there being, at the time of publication ‘[i]n fact … neither a rational basis nor any utility’ in Blackstone’s distinction.\footnote{138} On this view, the most important discrimen was that power could be exercised without statutory authorisation, not whether it was unique to the Crown. The common law determined the ambit of any particular power or capacity, including whether it had to be exercised pursuant to the general law or otherwise.

However, Winterton’s initial assessment of this debate as sterile’ was tempered in his later writings, implying a utility in Blackstone’s distinction for

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\item\footnote{134} (2016) 257 CLR 42, 97 [131] quoting \textit{Barton v Commonwealth} (1947) 131 CLR 477, 498.
\item\footnote{135} For a recent exposition, see Wade, above n 80.
\item\footnote{136} Aroney et al, above n 4, 445-6; Winterton, ‘The Relationship’, above n 25, 26.
\item\footnote{137} Winterton, ‘The Relationship’, above n 25, 26.
\item\footnote{138} Winterton, \textit{Parliament, the Executive and the Governor-General}, above n 10, 112.
\end{itemize}}
Professor Zines adopted Blackstone’s approach, given judicial imprimatur in Australia by Brennan J in his careful analysis in *Davis.* This is the approach expressly supported by Gageler J in *M68.* The rationale behind the present acceptance of Blackstone’s definition in Australia was the recognition of the important differences between the Crown’s unique ‘prerogative’ power and its shared (with other legal persons) ‘capacities’ which may resonate in the determination of their nature, content and ambit: The former alone may, in certain circumstances, interfere with the legal rights and duties of others whereas the latter are always subject to the general law and do not permit of coercive action. Moreover, equating the ‘capacities’ with those of a natural person has always been problematic given the very different impact and import of those capacities resulting from the fact that they are being exercised by government; a point emphasised in *Williams (No 1)* – and which constituted one basis for the majority decision to limit the non-statutory component of the capacity to spend and contract to the ordinary course of the administration of government. As a result, it has been suggested that policy considerations should be taken into account to limit the non-statutory component of the ‘capacities’ of the Executive Government. For example, it has led to suggestions that where any capacity by the Government may interfere with individual freedoms and civil liberties, statutory authorisation should be required before it can be exercised.

For these reasons, Gageler J also adopted Brennan J’s preference for Blackstone’s approach, reinforcing its express adoption by French CJ and

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140 As did Professor Stellios in Stellios, *Zines’s The High Court and the Constitution,* above n 91, 374-5.
142 Zines, above n 11; Stellios, *Zines’s The High Court and the Constitution,* above n 91, 374-5.
143 French CJ quoted Professor Winterton’s statement that ‘governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character.’ The various dimensions to this problem were explored by Professor Zines in Zines, above n 11, 283-6 where he drew upon the work of Professor Winterton and the following important papers: C A Saunders and K K F Yam, ‘Government Regulation by Contract: Implications for the Rule of Law’ (2004) _15 Public Law Review_ 51 and Margit Cohn, ‘Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive’ (2005) _25 Oxford Journal of Legal Studies_ 97.
144 This view was expressed by Cohn: ibid 120. Zines in Zines, above n 11, 285 said that there was ‘much to be said’ for Cohn’s view, it being analogous to the rule of statutory interpretation solicitous of such rights.
145 (2016) 257 CLR 42, 97 [132]-[133], 98-9 [136].
Crennan J in *Williams (No 1)*. His Honour proceeded deliberately to set out a very useful nomenclature reinforcing previous judicial tendencies in this regard:

1. ‘a statutory power or capacity’, that is, a non-prerogative statutory power;
2. ‘prerogative (non-statutory) executive power or capacity’, denoting the prerogative in the narrow Blackstonian sense; and
3. ‘non-prerogative executive capacity’, denoting those non-statutory capacities shared with other legal persons though not necessarily equivalent to them.

In relation to the second category, this includes actions which would otherwise be placed in category (iii) as ‘capacities’ if these were not being exercised pursuant to prerogative power. The second and third categories, his Honour stated, constituted the residue of discretionary or arbitrary authority left in the hands of the Executive Government and thereby encompassed every act which it may lawfully undertake without statutory authorisation. His Honour confirmed the proposition that ‘prerogative executive power or capacity’ is capable of interfering with the legal rights and duties of others. A ‘non-prerogative executive capacity’, on the other hand, is to be regarded as ‘the utilisation of a bare capacity or permission, which can also be described as ability to act or as a “faculty”’. The absolute requirement that the exercise of a ‘capacity’ is subject to the general law, both common law and statute, assists in qualifying it as a concept discrete from ‘power’ in this context. That is, ‘power’ denotes the ability to take action which may affect legal rights and obligations and may not be subject to them in certain circumstances. ‘Capacity’ denotes a mere faculty subject to the general law. The effects of a non-prerogative

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146 (2012) 248 CLR 156, 186 [25], 344 [488].
147 See, eg, (2016) 257 CLR 42, 99 [138]. It is a little uncertain whether his Honour regards the ‘nationhood’ power as a subset of ‘prerogative executive power’, albeit not sourced in the common law but directly from s 61, or whether it is to be treated as a separate sui generic category.
148 Ibid 97 [133].
149 Ibid 98 [135]. His Honour cited Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410, 439 quoting Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (1940) 63 CLR 278, 308.
150 While not possible to explore this here, in a very interesting article Adam Perry, ‘The Crown’s Administrative Powers’ (2015) 131 Law Quarterly Review 652, examines the different aspects of ‘capacities’, drawing a distinction between the Crown’s non-prerogative, non-statutory ‘legal’
‘capacity’ on legal rights and relations ‘result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor.’\(^{151}\) In other words, ‘the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.’\(^{152}\)

To emphasise the fundamental nature of this attribute, his Honour referred to it as an ‘inherent’ characteristic\(^ {153}\) supported in both Australia and the United Kingdom by the denial of any prerogative executive power to dispense with the operation of the general law.\(^ {154}\) Therefore, the Executive Government cannot suspend the operation of the general law when it seeks to exercise its non-prerogative capacities in circumstances where the law may frustrate its policy. That general proposition was not disturbed, although elaborated upon, by the finding in Williams (No 1) that the non-prerogative capacities of the Executive Government is not to be equated for all purposes with the capacities of a natural person,\(^ {155}\) a point which had in any event already been appreciated by academic commentators.\(^ {156}\) Whether this should lead to further limitations to the capacities in the depth dimension is not something his Honour elaborated upon. But his response to the proposition from Williams (No 1) – that many, but not all, instances of executive spending and contracting require legislative authorisation – was not quite an endorsement of that position as settled: ‘[w]hether that characterisation is warranted need not be explored.’\(^ {157}\) While that aspect of Williams was not relevant to decide the present case, nevertheless there is a certain enigmatic quality to the response which may reinforce his Honour’s enigmatic omission of ‘nationhood’ in his

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\(^{137}\) Section 61 of the Commonwealth Constitution and an ‘Historical Constitutional Approach’

\(^{151}\) (2016) 257 CLR 42, 98 [135] (emphasis added).

\(^{152}\) Ibid (emphasis added) citing Clough v Leahy (1904) 2 CLR 139, 155-6.

\(^{153}\) Ibid 98 [136].

\(^{154}\) A v Hayden (1984) 156 CLR 532, 580 (Brennan J), 593 (Deane J).

\(^{155}\) (2016) 257 CLR 42, 101 [145].

\(^{156}\) See, eg, above n 135-6 and accompanying text. Professor Winterton, prior to the Williams cases, had stated that the source of the capacities was that the Crown was a corporation sole and shared those legal capacities belonging to natural persons. But he had warned that this ‘general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so because governmental action is inherently different from private action.’: Winterton, Parliament, the Executive and the Governor-General, above n 10, 121.

\(^{157}\) (2016) 257 CLR 42, 101 [145].
reasoning. However, it cannot be said that it is reflective of a preference for the ‘common assumption’ (at least in the narrow sense) which was rejected in that case. On the other hand, to the extent that it could, it may reinforce his Honour’s apparent preference for the hitherto more traditional approach to s 61, emphasising ‘traditional conceptions’ and the common law.

Despite these uncertainties, the nomenclature set out in the reasoning, as well as the important distinctions noted above, do constitute a very useful basis upon which to achieve an understanding of any executive action which may be in issue, as his Honour did in this case. Before looking at the precise issue of executive detention, he explored the more general question of limitations in which the application of a historical constitutional approach becomes most apparent.

E ‘Limitations on executive power’

To appreciate the limits on the Commonwealth’s executive power in its ‘depth’ dimension, his Honour referred to the abiding similarity between the prerogatives and the capacities which lay ‘in the identity of their provenance.’ While both derive indirectly from s 61, in the absence of any guidance from the section, how are these limits to be determined? These, his Honour stated, are ‘to be understood (as distinct from merely interpreted) in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and in light of constitutional history and the tradition of the common law.’ Note here again the consistency with Allison’s approach.

His Honour’s choice of particular past decisions and judicial statements reflecting this approach is also telling. Approving reference was first made to Isaacs J’s reasoning in the Wooltops case that s 61 can only be understood by reference to ‘common law principles bearing on the operation of responsible government’. The ‘constitutional domain’ for which s 61 provides cannot itself determine whether any exercise of executive power is valid and hence

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158 Ibid 99 [137] (emphasis added).
160 (1922) 31 CLR 421 cited at (2016) 257 CLR 369, 99-100 [140].
161 (1922) 31 CLR 421, 440.
reference had to be made to those executive powers recognised by the common law incorporated therein. Could the Commonwealth validly enter into a contract with a private company by which it agreed to consent to the sale of its products in consideration for which the Commonwealth would receive a share of profits? Because in substance this was characterised as taxation without prior statutory authorisation, it was invalid: the common law no longer recognised a prerogative power to tax. Gageler J quoted approvingly from the reasoning of Starke J, which made more expansive reference to the common law and constitutional history to establish that Parliament had clearly won the historical struggle to deny prerogative taxation and had made it impossible for the Monarch to exact, extort, or raise moneys from the subject for the Monarch’s use as the price of exercising his control in a particular way or as consideration for permitting the subject to carry on his trade or business. In accord, Gageler J approvingly referred to the statement of Isaacs J that s 61 simply marked out the field of Commonwealth executive action, the precise content of which, absent statute, had to be determined by reference to the prerogative powers of the Crown.

This reference is ultimately to Australian sources. In the words of Professor Zines:

[A]nything that comes under the rubric of Crown prerogative is seen as now having a statutory, in the sense of constitutional [ s 61], basis in so far as it pertains to the Commonwealth. Yet it is clear that in applying s 61 in this area one must go to common law principles to determine the existence of prerogative power, privilege or immunity, its extent and limitations.

In similar vein, Gummow J, did not think it contrary to this proposition to state that ‘it is settled that in certain respects the executive power has limitations which follow those established in the United Kingdom.’

The enigmatic nature of the omission by Gageler J of express reference to an inherent ‘nationhood’ power in s 61 is reinforced by his emphasis on the prerogative and the common law found in the foundational reasoning in

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139 (2016) 257 CLR 42, 100 [141]-[142].
164 Gummow, above n 17, 167.
Wooltops. Moreover, he stated, “t]his analysis of the executive power of the Commonwealth… is not, I think, affected by recent cases focussed on the capacity of the Executive Government of the Commonwealth to expend appropriated funds.” He was referring to Pape and Williams. What does he mean? The principal significance of the former, in his Honour’s reasoning, was not its interpretation of s 61 to include an inherent ‘nationhood’ power, which he did not mention, but rather its finding that ss 81 and 83 of the Constitution cannot be interpreted as a source of power to authorise executive expenditure. In other words, the Executive Government’s expenditure of public funds is more than the mere execution of an appropriation law and must be authorised by power found elsewhere in the Constitution or valid statute. His Honour, however, did not state where the power was found in that case nor did he refer to the conclusion of the majority that the common law was no longer the determinant of the ambit of s 61 power. The case, rather, ‘was focussed on the capacity of the Executive Government of the Commonwealth to expend appropriated funds’. If his Honour is using the word ‘capacity’ pursuant to his own nomenclature, then this may be suggestive that he regarded Pape as doing no more than recognising a capacity to spend money, and that the Commonwealth (as opposed to the States) could do so by way of the ‘tax bonus’ because ‘nationhood’ provided the necessary ‘breadth’. However, on the other hand, in his own nomenclature he referred to ‘prerogative powers and capacities’ and if he was using ‘capacity’ in this sense, the view may be maintained that the spending of money in Pape was an exercise of a prerogative capacity by virtue of ‘nationhood’ in the depth dimension beyond any power recognised by the common law. But which precise usage his Honour meant remains unclear and firm conclusions are elusive. But what is clear is the emphasis on, and possibly preference for, the common law as the determinant of non-statutory executive power.

Yet, given that the precise issue in the case was the ambit of executive power to detain non-citizens and that the enquiry related to prerogative power in the depth dimension, should not something have had to be said about the ‘nationhood’ power? For it was this very issue and related issues of border-

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165 (2016) 257 CLR 42, 100-1 [143].
166 Ibid.
167 This may be a manifestation of the approach advocated by Condylis, above n 13, in which the interpretation even of an inherent nationhood power is melded with an examination of the relevant common law prerogatives, maintaining their continuing primacy.
protection which first gave rise to the express articulation and acceptance of such a power by the majority in the *Tampa* case. Did it not need to be questioned whether there was a power in s 61 beyond the prerogative powers and non-prerogative capacities ‘which form part of, but do not complete, the executive power’ in s 61, as French CJ put it in *Pape*. Did it not warrant some consideration of the power described more expansively by the plurality which ‘enables the undertaking of action appropriate to the position of the Commonwealth of a polity created by the Constitution’? Did it not need to be considered whether the Commonwealth actions in issue here were peculiarly adapted to the government of the country and which otherwise could not be carried out for the public benefit – the predominant test for valid application of any executive nationhood power? While not an express denial of ‘nationhood’, it appears to constitute a serious discounting of it and a reaffirmation of the common law prerogatives and capacities as principal, not peripheral or ‘last resort’, sources of the depth of s 61 power.

As for *Williams (No 1)*, his Honour appears to have restricted its impact very much to its facts: Noting that in *Williams (No 2)* it was interpreted to have held that ‘many, but not all, instances of executive spending and contracting require legislative authorisation’, his Honour did not engage further with that decision. It did not have any bearing on executive deprivation of liberty. Apart from its rejection of a simple equation of the capacities of the Executive Government with those of a natural person, as mentioned above, *Williams* was otherwise relevant only on the question of ‘breadth’; that is, that breadth was not to be determined solely by reference to the reach of Commonwealth legislative power. But if not Commonwealth legislative competence, what then is the determinant of ‘breadth’s’ ambit? Given that his Honour did not mention ‘nationhood’ in the context of ‘depth’, does it reinforce the perception that ‘nationhood’ now plays only a role as the determinant of ‘breadth’? That is, the sphere of Commonwealth executive competence in the exercise of its capacities is determinable by reference to what

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169 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].
170 Ibid.
171 Ibid 50 [95], 61 [129], 62 [131], 63 [133], 87 [228], 91 [241], 92 [242], 116 [329], 180-1 [519] – [520].
173 (2016) 257 CLR 42, 101 [145].
is peculiarly adapted to the government of a nation and which otherwise could not be carried out for the public benefit. Independently of his Honour’s view on this, there is a case which may nevertheless be made in support of this proposition based on a particular reading of the foundational cases and dicta which led to the eventual recognition of the ‘nationhood’ power.¹⁷⁴

Whatever one is to make of this, at least his Honour unambiguously rejected the existence of a sphere of executive power beyond the reach of legislation, no matter how ‘breadth’ is defined, as his remarks about s 51(xxxix) noted above make very clear. And in terms of the limits on executive power, it is clear that his Honour was making principal reference to ‘traditional conceptions’, to the common law, whether it was prerogative power or simply executive capacities, in the depth dimension. The breadth dimension, however, remains unsettled.

F  “Executive power and liberty”

It is apparent from Gageler J’s reasoning here, and in the preceding sections, that it is not a refutation of the imperative ultimately to look to Australian sources to say that the Constitution does incorporate those aspects of the English legal and constitutional inheritance which, even if they have acquired the veneer of antiquity, are very much active within Australian constitutional arrangements. To the extent that they are ‘active’, they remain important sources of both law and interpretative assistance because evolution and reform are intrinsic to them, whether they derive from the recent or distant past: a clear application of ‘the historical constitutional approach’.

This is most clearly evident in his Honour’s consideration of those legal principles governing the liberty of the subject and executive detention. For example, he quoted with approval the observations of Brennan J in Re Bolton, Ex Parte Beane in which a Commonwealth officer was ordered to discharge from custody an alien who had been detained in Australia without statutory authorisation:

Section 61 of the Commonwealth Constitution and an ‘Historical Constitutional Approach’

Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force. 175

In the same way that the common law no longer recognised a prerogative to tax, so now it did not recognise any non-statutory executive power to deprive a person of liberty. The informing principle was that ‘the common law of Australia knows no lettre de cachet or executive warrant pursuant to which either the citizen or alien can be deprived of his freedom by mere administrative decision or action.’ 176 This precise point became the foundational proposition in the seminal plurality judgement of Brennan, Deane and Dawson JJ, with whom Mason CJ agreed, in Lim v Minister for Immigration et al 177 which Gageler J adopted as presenting the current law: Excepting in circumstances of the execution of prerogative powers in wartime, an alien who is unlawfully within the country is not an outlaw and the common law does not permit such a person to be deprived of liberty or property without some other positive legal authorisation or judicial mandate.

In argument in M68 it was submitted that the inability of a Commonwealth officer to authorise or enforce a deprivation of liberty was not the result of some incapacity on the part of the Executive Government. It was rather because Commonwealth officers were subject like everyone else to common law sanctions for the invasion of common law rights. But where the writ of the common law did not run, such as on Nauru, the Executive Government was not hindered by the common law’s impediments. Echoing Lord Diplock’s dictum that ‘[i]t is 350 years and civil war too late for the Queen’s courts to broaden the prerogative’, 178 Gageler J stated that this argument similarly was ‘three centuries too late’. 179 He made reference in this context to the various United Kingdom Habeus Corpus Acts and the Petition of Right 1627 which severely curtailed any Executive capacity to deprive a person of liberty. These were examples of those ‘ancient statutes’ to which Brennan J

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176 In Re Bolton; Ex parte Bean (1987) 162 CLR 514, 528 (Deane J).
177 Lim v Minister for Immigration (1992) 176 CLR 1, 19.
179 (2016) 257 CLR 42, 103 [154].
referred and which ‘remain of undiminished significance within our current constitutional structure.’\(^\text{180}\) The former act made available the writ of habeus corpus on demand to the judges of the King’s Bench or Common Pleas. The latter Act rendered inadequate the orders of the Monarch as a justification for the imprisonment of the subject. More than that, his Honour noted that these statutes and the history of the great writ had a more fundamental structural affect.\(^\text{181}\) Put simply, they abolished any executive capacity to order detentions without authorisation by law, subject to any exception under the war prerogative.\(^\text{182}\) This principle was accepted and applicable to Australian colonial governments and the Commonwealth Executive and is encompassed within those general fundamental principles which, although not expressly stated in the Constitution, nevertheless – quoting from Isaacs J in Ex Parte Walsh; in re Yates – ‘form one united conception for the necessary adjustment of the individual and social rights and duties of members of the State.’\(^\text{183}\) Thus,

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[The] inability of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is not simply the consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. It is the consequence of an inherent constitutional incapacity which is commensurate with the availability, long settled at the time of establishment of the Commonwealth, of habeus corpus to compel release from any executive detention not affirmatively authorised by statute.\(^\text{184}\)
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The essential indicator of the limits on the Executive Government provided for by the Constitution were thus those ancient English statutes that curtailed the capacity of the Crown to infringe upon the liberty of the subject and which emerged from past constitutional battles within the political community from which Australian constitutional arrangements had their source: a clear manifestation of Allison’s ‘historical constitutional approach’ to interpret s 61.\(^\text{185}\) Significantly, this inherent incapacity, reflected in the common law, is a limitation in the depth dimension. It cannot be removed by statute, and nor can it be removed by the law of another state. On the other hand,

\(^{180}\) Ibid 103 [155].
\(^{181}\) Ibid 104 [156].
\(^{182}\) Ibid 104 [157].
\(^{183}\) Ibid 104-5 [158] quoting Ex Parte Walsh; in re Yates (1925) 37 CLR 36, 79.
\(^{184}\) Ibid 105 [159].
\(^{185}\) Ibid 106 [162] – [163].
Parliament may confer by statute on the Executive Government a power or authority to detain, subject to the existence of a relevant head of power and compliance with Ch III of the Constitution.\textsuperscript{186}

On the facts in issue, there was no suggestion of the availability of any prerogative to justify the detention as might be the case in situations of enemy aliens in war time, or which ‘might be argued to arise as an incident of a prerogative power to prevent an alien from entering Australia.’ \textsuperscript{187}

IV CONCLUDING REFLECTIONS

From this examination of Gageler J’s reasoning, it is clear that the method adopted in both the overall structure and in the reasoning relating to each issue discussed, from the general to the particular, correlates with the approach advocated by Dr Allison. It is interwoven in the reasoning, almost as an underlying assumption. Allison’s thesis may thus provide jurisprudential justification and validation of an approach to s 61 executive power which makes principal reference to historical considerations and sources, to ‘traditional conceptions’, both essential and respectable in a modern context. It certainly rejects any attempt to diminish, or discount entirely, such considerations; not simply because it defends them from any charge that they are archaic, ‘old law’, but because it acknowledges and explains their continuing constitutional relevance in interpreting and understanding s 61 and indeed the rest of Chapter II. It reinforces the views of those commentators who press the case for interpreting the Constitution pursuant to these, who may be sceptical of discovering inherent power (in the depth dimension) in s 61 purely on the basis of the ‘national’ or ‘nationhood’ considerations which are ill-defined and lack legally-discernible principles to inform their precise content and ambit. Nicholas Condylis, for example, recently pressed the case for a reinterpretation of ‘nationhood’ by reference purely to common law principles based on what he referred to as the ‘indigenous prerogative’.\textsuperscript{188} It also reinforces the normative position which underlies the traditional depth/breadth schema; that is, to adopt an interpretation which ensures government action is always subject to

\begin{itemize}
  \item \textsuperscript{186} Ibid 106 [164].
  \item \textsuperscript{187} Ibid.
  \item \textsuperscript{188} Condylis, above n 13.
\end{itemize}
legislative regulation and control, and that the validity of such action is not dependent on the opinion of the government. Such an approach is most consistent with basic principles of responsible government implied from the Constitution and with the broader, dominant, constitutional tradition in which the Constitution was framed.

This is not to suggest that resort to the common law prerogatives is ideal: rather, as Professor Winterton argued, ‘there is no more satisfactory alternative’. The difficulties involved in ascertaining these in hard cases is also acknowledged. But it must also be accepted that those which are most commonly referred to – conducting foreign relations, concluding treaties, conducting war and defending the nation – have a clear identifiable core of meaning, albeit there may be some uncertainty on the periphery. And the difficulties which arise with the non-prerogative capacities, such as the extent to which they can or should be equated with those of a natural person, are both acknowledged and being addressed. This reinforces an approach to the executive power of the Commonwealth which rejects any attempt to interpret the Constitution as if it were written upon a tabula rasa. Allison’s thesis provides reasoned jurisprudential support for such a view, at least with respect to constitutions based on Westminster models.

But what more can be said about the parallels between Gageler J’s approach and that of Allison? It was remarked above that Gageler J made no explicit reference to an inherent ‘nationhood’ power in s 61. Why this is remarkable is that the issue of executive detention in the context of border protection is the very same issue that first called forth the articulation of such a power by the majority in the Full Federal Court in the Tampa case and the first express rejection of the common law prerogatives as the ambit of s 61 power in its ‘maintenance’ limb. This position was subsequently adopted it would seem in Pape and confirmed in Williams. Why did Gageler J then resort exclusively to the ‘traditional conceptions’ to determine the issue? There are a number of possible explanations: For example, first, it might be concluded that His Honour did not regard ‘nationhood’ as arising except in exceptional emergency situations which somehow threatened the polity itself, whether it be in terms of national security in the traditional sense, or in the sense of a serious threat to

189 Winterton, Parliament, the Executive and the Governor-General, above n 10, 115.
190 Ibid.
the nation’s economic security (as in the ‘Global Financial Crisis’ in *Pape*.) The facts of this case therefore did not warrant its consideration. Secondly, it might simply be the case that his Honour could resolve the issue simply and with certainty by reference to the common law and to those ancient statutes which simply removed any prerogative power in the Crown to detain subjects and deprive them of liberty. Thus deprived of power, reminiscent of the deprivation of any prerogative power to tax, the common law no longer recognised the power without statutory authorisation, certainly at the time the *Constitution* became operative, and indeed long before. He was therefore able to avoid the complexities which may arise in seeking to justify his position by reference to the ‘nationhood’ power and its uncertain definition. Thirdly, it could be argued that his reasoning evinces a more general preference to avoid the utilisation of an ‘amorphous’ power such as ‘nationhood’ because he is in accord with the normative and policy preferences underlying Winterton’s breadth/depth analysis which he expressly adopted. Fourthly, perhaps his own interpretational methodology, as revealed in his Byers Lecture abovementioned, coupled with his apparent (inadvertent) alignment with Allison’s approach, has led him to a clear preference for the more traditional approaches to s 61 which places sole reliance on ‘traditional conceptions’ and constitutional history. If recognition is to be given to ‘nationhood’, it should be only in the dimension of breadth when considering the ambit of executive capacities.

But, it should be emphasised, it cannot be said with any certainty whether any or all of the above reflections upon his reasoning are in fact accurate assessments of his Honour’s position. To the extent that any or all of the above are, there appears to be a relegation – or elevation depending on one’s viewpoint – of ‘nationhood’ to those rare circumstances of clear and unambiguous situations of emergency, akin to ‘Locke’s prerogative’. But in any event, would not all these circumstances be covered by the existing emergency prerogatives relating to war, defence, the preservation of the polity as well as those express constitutional provisions which may provide for this? If so, this would reinvigorate an approach which resorts principally to ‘traditional conceptions’, which were clearly able to settle this case quite

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192 See eg, s 119 and also those Commonwealth institutions, departments, courts, installations the protection of which may be authorised by the maintenance limb of s 61: Aroney et al, above n 4, 433-4.
comfortably. But if that is so, why did his Honour not just deal with the precise issue of executive detention and deprivation of liberty, without first examining, as he did, questions of a far more general nature, and in historical context, in the sections on 'the Executive Government in the Constitution' and 'the Nature of Executive Power'? Was he attempting to indicate that the traditional approach is the most efficacious and accurate approach to these questions, the one most attune to Australian constitutional principles and history, to the broader tradition of constitutionalism to which Australia’s belongs? Whatever else one may say, the approach certainly runs counter to any more recent attempts to downplay and discount 'traditional conceptions' and the common law to determine the content and ambit of s 61 executive power. Whether this may be reflective of a possible future trend in the High Court's jurisprudence, it is too difficult to tell. But it may at least be a signpost in that direction.
This article explores the relationship between the nationhood power and s 61 of the Constitution. It argues that, in the majority of decided cases, the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law. The key issue that has arisen in the case law has been whether an executive act fell within a subject matter of Commonwealth executive power. In this regard, the Court has found that Australia’s attainment of nationhood expanded the areas of Commonwealth responsibility over which the executive power could be exercised. It is further shown that the nationhood power has not undermined the federal distribution of powers. The Court has, in ascertaining whether an executive act is supported by the nationhood power, consistently applied Mason J’s ‘peculiarly adapted’ test, which was set out in Victoria v Commonwealth and Hayden (‘AAP Case’). This test incorporates federalism to condition and limit the nationhood power.

I     Introduction

Section 61 is the principal repository of Commonwealth executive power in the Constitution. It vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the Governor-General and ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’. Section 61 ‘marks the external boundaries’ of

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1 Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (1922) 31 CLR 421, 437–40, 447–8 (Isaacs J) (‘Wooltops Case’).

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* Lecturer, School of Law, Faculty of Law, Queensland University of Technology. Special thanks are due to Anne Twomey, Jonathan Crowe, Benjamin Saunders and the anonymous reviewer for their helpful comments on an earlier version of this article. This article was presented as a paper at the Institute for Advanced Studies Executive Power Workshop at The University of Western Australia on 7 April 2017. I am grateful to all who participated in the discussion. All errors and opinions expressed are my own.
Commonwealth executive power but does not define it.² The meaning of s 61 can only be properly understood if it is considered in the light of British constitutional history, conventions and the common law.³

Consistent with our British heritage, it is now generally accepted that, in addition to executive powers sourced directly in the Constitution and conferred by statute, s 61 incorporates all of the common law or ‘non-statutory’ powers of the Crown that are appropriate to the Commonwealth, subject to the federal distribution of powers effected by the Constitution.⁴ In a classification that has since received judicial endorsement, Sir William Blackstone divided the common law powers into two categories, namely, the prerogative powers and capacities of the Crown.⁵ The ‘prerogative’ was understood as referring to ‘those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects’, such as the power to declare war and peace, enter into treaties and confer honours.⁶ ‘Capacities’, on the other hand, were those powers that the Crown shared in common with its subjects. Of the Crown’s common law capacities, the power to contract and spend has received the most judicial consideration in

recent years, following a spate of High Court challenges to controversial Commonwealth spending programs.7

In Victoria v Commonwealth and Hayden (‘AAP Case’),8 four Justices of the High Court confirmed that the executive power in s 61 also incorporated an implied executive power derived, in part, from Australia’s national status.9 Mason J gave the most precise formulation of it, describing it as ‘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’.10 This aspect of the executive power has been described as the ‘inherent power’,11 or ‘implied national power’.12 More commonly, scholars have referred to it as the ‘nationhood power’13 notwithstanding that, until fairly recently, this description was not adopted by a majority of the High Court of Australia.14

8 (1975) 134 CLR 338.
9 Ibid 397.
10 Ibid 397.
In his important and influential monograph, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, Professor George Winterton articulated a framework of analysis for determining whether executive action falls within the execution and maintenance limb of s 61. Winterton suggested that the content and scope of s 61 could be ascertained having regard to its ‘breadth’ and ‘depth’. 'Breadth' describes the subject matters over which the executive power can be exercised. It reflects the federal distribution of powers between the Commonwealth and the states effected by ss 51, 52 and 122 of the Constitution. 'Depth' describes the types of action that can be undertaken by the Executive in relation to those subject matters. Winterton’s core thesis was that executive action undertaken to ‘maintain’ the Constitution and Commonwealth laws needed to be supported by the prerogative.

Winterton was of the view that the virtue of the prerogative is that it is subject to limits on its exercise, well established in the common law, and can be abrogated, displaced or regulated by statute. He argued that confining the executive power to the common law powers of the Crown promoted greater...
parliamentary oversight of executive action and greater scope for judicial review, which was consistent with the principles of responsible government and the separation of powers.\textsuperscript{20} Winterton’s breadth and depth analysis has not always been strictly applied by Australian courts.\textsuperscript{21} Nevertheless, it remains a helpful conceptual framework for explaining and understanding the relationship between nationhood and s 61 of the \textit{Constitution}.

Scholars have expressed concern that the nationhood power has added ‘depth’ to the executive power and can support executive action that would otherwise be denied to it by the common law.\textsuperscript{22} Furthermore, as these activities appear to fall outside the areas of responsibility allocated to the Commonwealth by ss 51, 52 and 122 of the \textit{Constitution}, it has been suggested that the nationhood power could potentially undermine the federal distribution of powers. This article aims to address these concerns by providing an account of the nature and scope of the nationhood power. In particular, it argues that the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. It develops and expands on similar arguments made by Professors Leslie Zines and Anne Twomey and demonstrates that the weight of authority suggests that the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law.\textsuperscript{23} The constitutional significance of Australia’s acquisition of nationhood is that it expanded the subject matters or ‘breadth’ of Commonwealth executive power.\textsuperscript{24} It is further shown that the nationhood power has not undermined the federal distribution of powers. The Court has consistently applied Mason J’s ‘peculiarly adapted’ test, which was set out in the \textit{AAP Case}, in ascertaining whether an executive act is supported by the nationhood power. This test incorporates federalism as a limit on the nationhood power.


\textsuperscript{23} Zines, ‘Inherent’, above n 6; Twomey, ‘\textit{Pape}’, above n 6, 339.

\textsuperscript{24} Zines, ‘Inherent’, above n 6, 281; Twomey, ‘\textit{Pape}’, above n 6, 339.
In contrast to s 51, which clearly enumerates the subject matters of Commonwealth legislative power, the text of s 61 does little to clarify the areas of responsibility that are allocated to the Commonwealth Executive by the Constitution and the nature of the action that can be undertaken in relation to those areas. In this part, it is demonstrated that the High Court has had regard to Australia’s attainment of nationhood in interpreting s 61 of the Constitution, and it has expanded the subject matters or ‘breadth’ of the executive power of the Commonwealth.  

A The Constitutional Significance of Australia’s Attainment of Nationhood

When the Constitution was enacted in 1901, the Commonwealth of Australia was ushered into existence as a self-governing colony within the British Empire. The Constitution did not have the effect of making Australia a nation ‘internationally or independent’, although it was ‘a major step towards each’. It vested the Commonwealth with all of the powers that were necessary for an independent nation-State. These included powers relating to defence and external affairs. Consistent with its colonial status, however, not all of these powers were immediately exercisable by the Commonwealth. The Commonwealth could not, for example, negotiate or enter into agreements
with foreign countries.\textsuperscript{28} Nor could it declare war or peace\textsuperscript{29} or acquire territory.\textsuperscript{30} These powers were exercisable only by the King on the advice of the British Government.\textsuperscript{31}

As Australia grew in political status, the prerogative powers relating to Imperial matters that had traditionally only been exercised by the British Government gradually came to be exercisable by the Commonwealth Government.\textsuperscript{32} The 1926 Imperial Conference was, in this regard, a particularly important step taken in Australia’s ‘evolution’\textsuperscript{33} into nationhood.\textsuperscript{34} The Conference issued the Balfour Declaration of 1926 which had the effect of securing the autonomy of the Dominion Executives in the conduct of their internal and external affairs. At the 1926 Imperial Conference it was resolved, among other things, that there would be a change to the constitutional conventions regarding the role of the Governors-General of the Dominions. Instead of being representatives or agents of the British Government, it was resolved that they would act on behalf of the Crown and could exercise powers, including powers relating to external affairs, on the advice of Dominion ministers.\textsuperscript{35} As a result of the resolutions adopted at the 1926 Imperial Conference, the Commonwealth Government could exercise its executive power in relation to matters that had previously fallen within the scope of the external prerogatives of the Crown in its Imperial capacity.\textsuperscript{16}


\textsuperscript{31} Zines, ‘Nationhood’, above n 26, 25-7; Winterton, ‘Independence’, above n 28, 41-2. See also \textit{Bonser v La Macchia} (1969) 122 CLR 177, 224 (Windeyer J).


\textsuperscript{34} Zines, ‘Nationhood’, above n 26, 16; Winterton, ‘Independence’, above n 28, 41-6; Mason, above n 25, 753. See also \textit{R v Burgess; Ex parte Henry} (1936) 55 CLR 608, 682-4 (Evatt and McTiernan J)) (‘\textit{Burgess}’).


\textsuperscript{36} Zines, ‘Nationhood’, above n 26, 32.
Full Dominion independence in the exercise of executive power was attained at the Imperial Conference of 1930.37 The passage of the *Statute of Westminster 1931* (Imp) on 11 December 1931 and its subsequent adoption by the Commonwealth in the *Statute of Westminster (Adoption) Act 1942* (Cth)38 secured the legislative independence of the Commonwealth Parliament. Scholars have, therefore, suggested that Australia was effectively independent, in the sense of being ‘free from external restraint,’ on the date of the enactment of the *Statute of Westminster* on 11 December 1931.39 The High Court, on the other hand, has been more conservative, preferring to date Australia’s independence at some time ‘subsequent to the passage and adoption of the Statute of Westminster’ and has noted the difficulty in pinpointing ‘precisely’ when this occurred.40

At the latest, the Commonwealth of Australia secured substantive independence upon the passage of the *Australia Acts 1986* (UK and Cth) (‘*Australia Acts*’) on 3 March 1986.41 By this legislation, the United Kingdom relinquished its power to legislate for Australia,42 and appeals to the Privy Council from state courts were terminated.43 The states were authorised to enact legislation repugnant to the laws of the United Kingdom.44

As Zines has explained, Australia’s attainment of independence did not result in any change to the text of the *Constitution*. Instead, it altered the constitutional convention as to who would give advice to the Crown.45

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37 Bonser v La Macchia (1969) 122 CLR 177, 224 (Windeyer J); Winterton, ‘Independence’, above n 28, 41-2; Twomey, ‘Sue v Hill’, above n 32, 102-3.
38 The Statute of Westminster was retrospectively adopted on 3 September 1939, following the enactment of the *Statute of Westminster Adoption Act 1942* (Cth).
40 See, eg, Bonser v La Macchia (1969) 122 CLR 177, 189 (Barwick CJ), 223-4 (Windeyer J); Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J); Seas and Submerged Lands Case (1975) 135 CLR 337, 373 (Barwick CJ); China Ocean Shipping Co (1979) 145 CLR 172, 183 (Barwick CJ), 194-5 (Gibbs J) 208-14 (Stephen J); Southern Centre of Theosophy Inc v South Australia (1979) 145 CLR 246, 257 (Gibbs J); Sue v Hill (1999) 199 CLR 462, 527 [170] (Gaudron J).
42 *Australia Act 1986* (Cth), s 1; *Australia Act 1986* (UK), s 1.
43 *Australia Act 1986* (Cth), s 11; *Australia Act 1986* (UK), s 11.
44 *Australia Act 1986* (Cth), s 3; *Australia Act 1986* (UK), s 3.
45 Zines, ‘Commentary’, above n 4, C3.
Accordingly, in order to ascertain the content and scope of the executive power of the Commonwealth in s 61, the Court had to consider Australia’s evolving national status, as evidenced by ‘political action, conference declarations, intra-imperial agreements and recognition of the international personality’ by other nations.\textsuperscript{46} Windeyer J summarised the relevance of nationhood to the Court’s interpretation of the Constitution in the following terms:

> Australia has grown into nationhood. With the march of history the Australian colonies are now the Australian nation. The words of the Constitution must be read with that in mind and to meet, as they arise, the national needs of the “one indissoluble Federal Commonwealth” under the Crown … The law has followed the facts. The Statute of Westminster has, by removing restrictions, real or supposed, affirmed the legal competence of the Commonwealth Parliament. The Commonwealth has become, by international recognition, a sovereign nation, competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty.\textsuperscript{47}

An important consequence of Australia’s attainment of national status was the ability to exercise control over its external affairs. This was evident in the decision of \textit{R v Burgess; Ex parte Henry} (‘\textit{Burgess}\textsuperscript{48}'). It was held in that case that the Commonwealth could exercise its executive power to ‘deal administratively with the external affairs of the Commonwealth’.\textsuperscript{49} This included ‘the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane’.\textsuperscript{50} Several members of the Court were of the view that the prerogative power to negotiate and enter into treaties became exercisable by Commonwealth Executive when Australia attained international personality, as early as 1919, when it had signed the \textit{Treaty of Versailles}.\textsuperscript{51}

The prerogative of extradition also became exercisable by the Commonwealth Government when Australia attained national and sovereign

\textsuperscript{46} Ibid C2.

\textsuperscript{47} \textit{Bonser v La Macchia} (1969) 122 CLR 177, 223-4 (Windeyer J). See similar remarks made in \textit{R v Foster; Ex parte Eastern and Australian Steamship Company} (1959) 103 CLR 256, 305 (Windeyer J); \textit{Spratt v Hermes} (1965) 114 CLR 226, 247 (Barwick CJ).

\textsuperscript{48} \textit{Burgess} (1936) 55 CLR 608, 643-4 (Latham CJ).

\textsuperscript{49} Ibid 635, 643-4 (Latham CJ), 682-4 (Evatt and McTiernan JJ).

\textsuperscript{50} Ibid 643-4 (Latham CJ).

\textsuperscript{51} Ibid 682-4 (Evatt and McTiernan JJ); \textit{Jolley v Mainka} (1938) 49 CLR 242, 282-3 (Evatt J).
status. In *Barton v Commonwealth*,\(^{52}\) the Court accepted that the Commonwealth Government could make a request for extradition from a country with which it did not have an extradition treaty. Mason J remarked that that the executive power of the Commonwealth:

> [E]nables 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 the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.\(^{53}\)

The immediate significance of Australia’s attainment of nationhood for the High Court’s interpretation of s 61 was that the ‘Imperial’ prerogatives, including those relating to external affairs,\(^{54}\) extradition\(^{55}\) and war,\(^{56}\) became exercisable by the Commonwealth Government.\(^{57}\)

### B Nationhood and the Expansion of the 'Breadth' of the Executive Power

In its more contemporary constitutional jurisprudence, the High Court has had regard to Australia’s acquisition of national status to expand the subject matters, or ‘breadth’, of Commonwealth executive power.\(^{58}\) In ascertaining the scope of the executive power of the Commonwealth in the *AAP Case*, Mason J began with the text of s 61, and in particular, the phrase ‘extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth’. In Mason J’s view, the Commonwealth’s executive power was ‘not unlimited’\(^{59}\) and that its content:

> [D]oes not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the

\(^{51}\) (1974) 131 CLR 477.

\(^{52}\) Ibid 498.


\(^{54}\) *Barton v Commonwealth* (1974) 131 CLR 477.


\(^{56}\) See also Zines, ‘Inherent’, above n 26, 30-1; Twomey, ‘*Sue v Hill*’, above n 32, 80-7.

\(^{57}\) This point has also been made by Zines, ‘Inherent’, above n 6, 281; Twomey, ‘*Pape*’, above n 6, 339-40.

\(^{58}\) *AAP Case* (1975) 134 CLR 338, 396.
distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government.\(^60\)

In this passage, Mason J does not appear to be suggesting that nationhood is a source of executive power. He is simply demonstrating that the scope of Commonwealth executive power should not be regarded as being confined to the subject matters of Commonwealth legislative power, which are expressly enumerated in ss 51, 52 and 122 of the Constitution.\(^61\) It extended to an area of responsibility derived from the ‘character and status of the Commonwealth as a national government’.\(^62\)

In that same case, Jacobs J also suggested that s 61 of the Constitution needed to be interpreted having regard to the ‘the idea of Australia as a nation’.\(^63\) His Honour was referring to the ‘breadth’ of Commonwealth executive power where he stated that:

> The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values.\(^64\)

In this passage, Jacobs J is employing the concept of nationhood to expand the areas of responsibility over which the executive power of the Commonwealth could be exercised, to include ‘national coordination’.\(^65\) A consequence of Australia’s acquisition of nationhood was that the Commonwealth, as the

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\(^61\) See also Williams (No 1) (2012) 248 CLR 156, 357 [540] (Crennan J); Plaintiff M68 (2016) 257 CLR 42, 96 [131] (Gageler J).

\(^62\) AAP Case (1975) 134 CLR 338, 396.

\(^63\) Ibid 412-3.

\(^64\) Ibid 412 (emphasis added).

\(^65\) Ibid. See also Commonwealth v Tasmania (1983) 158 CLR 1, 109 (Gibbs CJ) (‘Tasmanian Dam Case’).
national government, could undertake activities that required national coordination rather than local planning.

Subsequent decisions of the High Court have also employed the concept of nationhood to add ‘breadth’ to the executive power of the Commonwealth. In *Davis v Commonwealth* (‘Davis’), the majority found that the Commonwealth could exercise its executive power to engage in activities associated with the organisation and commemoration of the 1988 Bicentenary of European settlement in Australia (‘Bicentenary’). In his judgment, Brennan J was quite explicit that Australia’s attainment of nationhood had expanded the areas of responsibility over which the executive power extended. This was evident where he stated that:

The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite “in one indissoluble Federal Commonwealth”, melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood – a flag or anthem, e.g. – or the benefit of many national initiatives in science, literature and the arts.

According to Brennan J, Australia’s acquisition of national status meant that the subject matters of ‘national protection’ and ‘national advancement’ were considered appropriate to the position of the Commonwealth as the national government. While the remainder of the Court in *Davis* fell short of recognising that the executive power extended to ‘national advancement’, they

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67 Ibid 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).
68 Ibid 111.
69 Ibid 110.
accepted that the Commonwealth could exercise its executive power for the purpose of commemorating an event of national significance.\textsuperscript{70}

The influence of Australia’s attainment of nationhood on the ‘breadth’ of the executive power is also evident in \textit{Pape v Commissioner of Taxation} (‘\textit{Pape}’).\textsuperscript{71} \textit{Pape} concerned the validity of an aspect of the Commonwealth Government’s financial stimulus package that was implemented in 2009 to mitigate the effects of the Global Financial Crisis (‘GFC’) on the national economy. The High Court held that the executive power of the Commonwealth in s 61 supported the Commonwealth distributing one-off tax bonus payments to individual taxpayers, and the incidental power in s 51(xxxix) supported the associated legislation, the \textit{Tax Bonus for Working Australians Act (No 2) 2009} (Cth).

In his judgment, French CJ had regard to the ‘character and status of the Commonwealth as the national government’ in finding that the executive power of the Commonwealth needed to be ‘capable of serving the proper purposes of a national government’.\textsuperscript{72} The Commonwealth could exercise its executive power to spend appropriated funds, provided that it was for a purpose that fell within an area of Commonwealth responsibility. Decades earlier, the High Court had decided in the \textit{AAP Case} that the ‘national economy’ was not a subject matter within Commonwealth power.\textsuperscript{73} However, the executive power was being exercised in \textit{Pape} for the purpose of responding to a national economic emergency. The Chief Justice concluded that the Commonwealth could exercise its executive power to spend in order to meet an ‘urgent national economic problem’,\textsuperscript{74} but cautioned that this finding did not mean that the Commonwealth was conferred with a general power to manage the ‘national economy’ or address problems of ‘national concern’.\textsuperscript{75}

In their joint judgment, Gummow, Crennan and Bell JJ likened the financial crisis to war or a natural disaster and concluded that the Executive was

\begin{footnotes}
\item[70] \textit{Ibid} 93 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 119 (Toohey J).
\item[71] \textit{AAP Case} (1975) 134 CLR 338, 362 (Barwick CJ).
\item[72] \textit{Pape} (2009) 238 CLR 1, 60 [127], 63 [133].
\item[73] \textit{AAP Case} (1975) 134 CLR 338, 362 (Barwick CJ).
\item[74] \textit{Pape} (2009) 238 CLR 1, 60 [127], 63 [133].
\item[75] \textit{Ibid} 48-9 [92]. See also \textit{AAP Case} (1975) 134 CLR 338, 362, 364 (Barwick CJ).
\end{footnotes}
the branch ‘capable of and empowered’ to respond to the crisis.\textsuperscript{76} According to their Honours, the case could be ‘resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.’\textsuperscript{77} The plurality characterised the short-term fiscal measures as being necessary for the protection of the nation from a global financial and economic crisis.\textsuperscript{78} The significance attributed to Australia’s acquisition of nationhood was that it expanded the areas of responsibility over which the capacities of the Commonwealth, and in particular, the capacity to appropriate and spend money could be exercised.\textsuperscript{79} The majority accepted that the Commonwealth could exercise its capacity to contract and spend without statutory authorisation for the purpose of responding to a national economic emergency.

The influence of Australia’s attainment of nationhood on the ‘breadth’ of the executive power of the Commonwealth was summarised by French CJ in \textit{Williams (No 1)}. His Honour was of the view that:

\begin{quote}
\[T\]he character and status of the Commonwealth as a national government is an aspect of the power and a feature informing all of its aspects, including the prerogatives appropriate to the Commonwealth, the common law capacities, powers conferred by statutes, and the powers necessary to give effect to statutes.\textsuperscript{80}
\end{quote}

### III Nationhood and ‘Depth’

It has been suggested that Australia’s acquisition of national status has not only expanded the ‘breadth’ of the executive power of the Commonwealth, but also its ‘depth.’ This section examines the judicial observations and statements that have been made regarding the content and scope of the nationhood power. It is demonstrated that, while there are judicial statements which suggest that the nationhood power has expanded the ‘depth’ of the executive power, the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. The weight of authority, with the notable exception of \textit{Ruddock v Vadalis} (‘\textit{Tampa

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\textsuperscript{76} \textit{Pape} (2009) 238 CLR 1, 89 [233].
\textsuperscript{77} Ibid 89 [233], 91 [241].
\textsuperscript{78} Ibid 89 [233].
\textsuperscript{79} See also Twomey, ‘\textit{Pape}’, above n 6, 339.
\textsuperscript{80} \textit{Williams (No 1)} (2012) 248 CLR 156, 189 [30].
s suggest that the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law.

A  The Content and Scope of the Nationhood Power

In his judgment in the AAP Case, Mason J described the nationhood power as a capacity to engage in enterprises and activities ‘peculiarly adapted’ to a national government and which could not otherwise be carried on for the national benefit. As discussed at the beginning of this article, Blackstone distinguished the Crown’s common law capacities from the prerogative on the basis that the capacities were powers that the Crown shared in common with its subjects.

The Commonwealth is a ‘juristic person’ that can exercise power to contract and spend, hold and dispose of property, create trusts, register a company, enter into partnerships and sue and be sued, provided that it complies with relevant laws.

Blackstone observed that, in contrast to the prerogative, the Crown could not override the legal rights and duties of others in the exercise of its common law capacities.

In Plaintiff M68 v Minister for Immigration and Border Protection (‘Plaintiff M68’) Gageler J similarly observed that the ‘essential difference’ between an act done in the execution of prerogative power and an act done in execution of a capacity, is that the former ‘is an act which is capable of interfering with legal rights of others’ whereas the latter ‘involves nothing more than the utilisation of a bare capacity or permission, which can also be described as an ability to act or as a “faculty”’.

The activities that have been held by Australian courts to be supported by the nationhood power have included: the celebration of an event of national significance and the establishment of a corporation for this purpose and the

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81 (2001) 110 FCR 491, 543 [193].
82 See also Zines, ‘Inherent’, above n 6, 280; Twomey, ‘Pape’, above n 6, 339.
83 (1975) 134 CLR 338, 397.
84 Blackstone, above n 5, 232.
85 Zines, High Court, above n 3, 345-6; Twomey, ‘Pape’, above n 6, 322-4, 326-7; Appleby and McDonald, above n 13, 254.
87 (2016) 257 CLR 42.
88 Ibid 98 [135].
89 Davis (1988) 166 CLR 79.
direct payment of money appropriated from the Consolidated Revenue Fund ('CRF') to individual taxpayers. There is obiter authority that suggests that the nationhood power would also support the Commonwealth establishing national research and cultural programs and institutions, including the Commonwealth Scientific and Industrial Research Organisation ('CSIRO'), exploring foreign lands or seas and carrying out public inquiries and investigations.

It would appear, then, that the nationhood power has not supported executive action aimed at preventing, prohibiting, controlling or regulating the actions of individuals. To the extent that the execution of the executive power has involved coercive measures, they have been contained in legislation enacted under the incidental power in s 51(xxxix) of the Constitution. Even then, the High Court has struck down any aspect of legislation that unduly interferes with the rights and freedoms of individuals or the states. That is because, as Twomey has suggested, 'the incidental power could not be used to convert a non-coercive executive power into a coercive one'.

This was evident in Davis. In Davis, the majority found that the activities associated with the organisation and commemoration of the Bicentenary fell within the ‘peculiar province of the Commonwealth in its capacity as the national and federal government’ and were supported by the nationhood power. These activities included the incorporation of a private corporation, namely, the Australian Bicentennial Authority ('Authority'). In commenting on the nature of the activities undertaken in Davis, Zines was of the view that ‘the executive like anyone else had power to have incorporated a company to engage in a celebration if the purpose was within a sphere of federal responsibility’. The nationhood power supported executive action that

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91 AAP Case (1975) 134 CLR 338, 362 (Barwick CJ), 397 (Mason J); Davis (1988) 166 CLR 79, 111 (Brennan J).
92 AAP Case (1975) 134 CLR 338, 362 (Barwick CJ), 412-3 (Jacobs J).
93 Ibid 397 (Mason J).
94 See also Twomey, 'Pape', above n 6, 339; Zines, 'Inherent', above n 6, 280.
95 See especially Tasmanian Dam Case (1983) 158 CLR 1; Davis (1988) 166 CLR 79.
96 Twomey, 'Pape', above n 6, 326-7.
97 Davis (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).
98 Zines, 'Inherent', above n 6, 280.
fell within the common law capacities of the Crown and, therefore, within the ‘depth’ of the executive power.\textsuperscript{99}

While the executive action undertaken in \textit{Davis} was non-coercive, the associated legislation had coercive aspects to it. Section 22 of the \textit{Australian Bicentennial Authority Act 1980} (Cth) (‘Bicentennial Authority Act’) made it an offence to use certain expressions and symbols relating to the Authority and the Bicentenary. particular, s 22(6)(d)(i) prohibited the use of broad expressions such as ‘Bicentenary’, ‘Bicentennial’, ‘200 years’, ‘Australia’, ‘Sydney’, ‘Melbourne’, ‘Founding’, ‘First Settlement’, ‘Exposition’, ‘Expo’, or ‘World Fair’ when used in conjunction with ‘1988’, ‘1788’, or ‘88’.\textsuperscript{100} Section 23 made provision for the forfeiture of all articles and goods to the Commonwealth where an offence under s 22(1) had been committed. The Commonwealth alleged that the object of the provisions was to ‘protect and enhance’ the Authority and the commemoration of the Bicentenary.\textsuperscript{101}

The majority accepted that s 51(39) was capable of supporting measures that were necessary for the protection of the Authority, such as prohibitions on the unauthorised use of the Authority’s name or symbols.\textsuperscript{102} Brennan J was of the similar view that provisions designed to ‘suppress fraud, deceit or the misapplication of Commonwealth funds’ were other examples of matters incidental to the execution of the executive power and the commemoration of the Bicentenary that would be supported by the incidental power.\textsuperscript{103} However, Brennan J was adamant that ‘where the Executive Government engages in [an] activity in order to advance the nation – an essentially facultative function – the execution of executive power is not the occasion for a wide impairment of individual freedom’.\textsuperscript{104}

Accordingly, the Court held that the incidental power could not support s 22(6)(d)(i) of the \textit{Bicentennial Authority Act} because it constituted an unreasonable interference with the liberties of individuals and, in particular,

\textsuperscript{99} Ibid 281.
\textsuperscript{100} \textit{Australian Bicentennial Authority Act 1980} (Cth) s 22(6)(d)(i).
\textsuperscript{101} \textit{Davis} (1988) 166 CLR 79, 92.
\textsuperscript{102} Ibid 98-9 (Mason CJ, Deane and Gaudron JJ).
\textsuperscript{104} (1988) 166 CLR 79, 112-3 (Brennan J). See also Twomey, ‘\textit{Pape}’, above n 6, 327.
freedom of expression and political communication. The majority reasoned that the effect of the provision was to confer power on the Authority to proscribe the use of common expressions. These measures constituted ‘an extraordinary intrusion into freedom of expression’ and were regarded as being ‘grossly disproportionate’ to achieving the legitimate purpose of the Bicentennial Authority Act, namely, the protection of the commemoration and the Authority.\textsuperscript{105} The regime in s 22(6)(d)(i) was not, therefore, considered as being reasonably appropriate and adapted to achieving the ends within the limits of constitutional power.\textsuperscript{106} The purpose of the Bicentennial Authority Act may have been constitutionally valid, but the extent of the intrusion on free expression was held as being beyond the power of the Parliament.\textsuperscript{107} In his judgment in \textit{Davis}, Brennan J summarised the position regarding the executive power and incidental power as follows:

\begin{quote}
In my opinion, the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the efficacy of the execution by the Executive Government of its powers and capacities.\textsuperscript{108}
\end{quote}

Therefore, while Brennan J was willing to concede that freedom of speech may sometimes be a ‘casualty’ of legislation enacted for the purpose of protecting the nation, he was not prepared to allow freedom of speech to be a casualty of an activity undertaken by the Executive Government for the purpose of advancing a nation ‘which boasts of its freedom’.\textsuperscript{109} The ‘excessive and unjustified restriction of free expression’\textsuperscript{110} through the prohibition and imposition of criminal penalties in s 22(6)(d)(i) could not be characterised as being incidental to the execution of the nationhood power in this case.\textsuperscript{111}

\begin{footnotes}
\item\textsuperscript{105} \textit{Davis} (1988) 166 CLR 79, 99-100 (Mason CJ, Deane and Gaudron JJ).
\item\textsuperscript{106} Ibid 99-100 (Mason CJ, Deane and Gaudron JJ), 101 (Wilson and Dawson JJ), 116-7 (Brennan J), 117 (Toohey J).
\item\textsuperscript{107} See also Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality,’ (1997) 21 \textit{Melbourne University Law Review} 25.
\item\textsuperscript{108} \textit{Davis} (1988) 166 CLR 79, 112-3 (Brennan J). See also Twomey, ‘Pape’, above n 6, 327.
\item\textsuperscript{109} \textit{Davis} (1988) 166 CLR 79, 116 (Brennan J).
\item\textsuperscript{110} Kirk, above n 107, 32.
\item\textsuperscript{111} \textit{Davis} (1988) 166 CLR 79, 116-7.
\end{footnotes}
The majority judgment in *Davis* cohered with the earlier decision of the Court in the *Commonwealth v Tasmania* (‘Tasmanian Dam Case’). The judges were unanimous that the legislative nationhood power could not support s 6(2)(e) of the *World Heritage Properties Conservation Act 1983 (Cth)* (‘Conservation Act’), which drastically curtailed the legislative and executive powers of the state of Tasmania to authorise or regulate conduct on its own land. In the opinion of Gibbs CJ, the nationhood power could not authorise the Commonwealth Parliament ‘to prevent a State from making or permitting such lawful use of its land as it chooses’. Wilson J was not aware of any occasion ‘when a coercive law declaring certain conduct to be unlawful and imposing penalties has been enacted by the Parliament otherwise than pursuant to a given head of power’. In similar vein, Deane J declared that the Commonwealth could not rely on the nationhood power to:

> arrogate to itself control of such property, achievement or endeavour or to oust or override the legislative and executive powers of the State in which such property is situate or such achievement to endeavour has been effected or is being pursued.

In contrast, the legislation in *Pape* was regulatory, rather than coercive, in nature. While the *Tax Bonus Act* created rights for individual taxpayers to receive the payments and imposed a duty on the Commissioner to distribute the payments, the provisions did not proscribe certain conduct in the same way as the impugned provisions in the *Bicentennial Authority Act* and *Conservation Act*. The legislation was accordingly upheld as a valid exercise of the nationhood power and incidental legislative power.

In *Pape*, four Justices suggested that the nationhood power expanded the ‘depth’ of the executive power. This was evident where French CJ observed that ‘the collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power’. According to French CJ, s 61 ‘is not limited to statutory powers and the prerogative. It has

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113 Ibid 109 (Gibbs CJ), 203-4 (Wilson J), 252-3 (Deane J).
114 Ibid 109 (Gibbs CJ).
116 Ibid 253 (Deane J).
117 Twomey, ‘*Pape*’, above n 6, 342.
118 Ibid 341.
119 *Pape* (2009) 238 CLR 1, 60 [127].
to be capable of serving the proper purposes of a national government'. In similar vein, Gummow, Crennan and Bell JJ observed that the executive power extends beyond:

[T]he preferences immunities and exceptions which are denied to the citizen and are commonly identified with ‘the prerogative’; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it.

However, the executive action that was undertaken in Pape was characterised by French CJ as the withdrawal of funds from the CRF and the distribution of direct payments to taxpayers. These activities fell within the common law capacities of the Crown and, therefore, within the ‘depth’ of the executive power. The issue in Pape was whether the capacity to spend could be exercised for the purpose of protecting the nation against the adverse effects of the GFC, as ‘national protection’ was not included in the catalogue of powers enumerated in ss 51, 52 and 122 of the Constitution. That is, it concerned the issue of ‘breadth’ rather than ‘depth’.

Gummow, Crennan and Bell JJ characterised the executive act as ‘determining that there is the need for an immediate fiscal stimulus’. This act was ‘analogous to determining a state of emergency in circumstances of a natural disaster’. The plurality was satisfied that this executive action was supported by the nationhood power. The nationhood power had, in the past, been held to support measures taken to protect the Commonwealth and the Constitution. This particular executive act also fell within the ‘depth’ of the executive power. Section 61 incorporates all of the prerogatives appropriate to the Commonwealth, subject to the federal distribution of powers, including the prerogative powers relating to emergencies and the maintenance of the peace.

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120 Ibid.
121 Ibid 83 [214].
122 Ibid 83 [214].
123 Ibid 83 [214].
124 Ibid 83 [214].
125 Ibid 83 [214].
126 Ibid 83 [214].
127 See especially Burns v Ransley (1949) 79 CLR 1; R v Sharkey (1949) 79 CLR 121; Australian Communist Party v Commonwealth (1951) 83 CLR 1.
While new prerogatives cannot be created, they can adapt to meet changing circumstances.\textsuperscript{127} It is plausible that the act of determining that there is a need for an emergency fiscal stimulus would fall within the scope of the prerogative powers of the Crown.\textsuperscript{128}

It is a separate question as to whether the Commonwealth could exercise those prerogative powers. In contrast to the United Kingdom, the \textit{Australian Constitution} divides and distributes power between the Commonwealth and the states relating to internal security.\textsuperscript{129} However, as the action in \textit{Pape} was taken to protect the nation as a whole from the effects of a global financial and economic crisis, it fell within the 'breadth' of the executive power of the Commonwealth. That is because, as discussed above, a consequence of Australia’s attainment of nationhood was that it expanded the subject matters of executive power to include the area of 'national protection'.

The preceding discussion has demonstrated that the nationhood power has not, in fact, added 'depth' to the executive power of the Commonwealth. The weight of authority suggests that the nationhood power has not supported the Commonwealth engaging in activities (particularly coercive activities) that would otherwise be denied to it by the common law. There is, however, one decision of the Federal Court of Australia which indicates that the nationhood power has added 'depth' to the executive power, and it is considered below.

\textbf{B The \textit{Tampa Case}: Expanding the 'Depth' of Executive Power?} 

In the decision of the Full Court of the Federal Court in the \textit{Tampa Case}, French J (with whom Beaumont J agreed) found that the Commonwealth could, in the absence of statutory authorisation, exercise its executive power to prevent the entry of non-citizens into Australia. This included detaining non-citizens on board a vessel in order to effect their exclusion and expulsion from Australian territorial waters and the deployment of officers from the Australian

\textsuperscript{127} Winterton, \textit{Parliament}, above n 3, 120-2; Twomey, \textit{‘Pape’}, above n 6, 319-20.
\textsuperscript{128} See also Twomey, \textit{‘Pape’}, above n 6, 339.
Special Air Service Regiment (‘SAS’) for this purpose. The power was described by French J as being ‘central’ to Australia’s status as a sovereign nation. While French J made no express reference to the nationhood power in his judgment in the *Tampa Case*, his reliance on the reasoning of Jacobs J in the *AAP Case* and Brennan J in *Davis* suggest that the nationhood power provided the constitutional basis for the executive action undertaken by the Commonwealth and there is support for this contention in the academic literature.

In the *Tampa Case*, French J seemingly rejected the proposition that the ‘depth’ of the executive power of the Commonwealth was limited to the Crown’s prerogative powers, quoting with approval remarks made by Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* that ‘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’. French J elaborated on this statement where he explained that:

> The Executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative...While the Executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written *Constitution* distributing powers between the three arms of government reflected in Chs I, II and III of the *Constitution* and, as to legislative powers, between the polities that comprise the federation. The power is subject, not only to the limitations as to subject matter that flow directly from the *Constitution* but also to the laws of the Commonwealth made under it.

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130 The majority concluded that the executive action taken by the Commonwealth could not ‘constitute a restraint upon their liberty’; *Tampa Case* (2001) 110 FCR 491, 547-8 [212], 548 [214] (French CJ), 514 [95] (Beaumont J). This is arguable, especially as the rescued persons had no access to external communications while on board the *MV Tampa* and could not leave the vessel. See further *Tampa Case* (2001) 110 FCR 491, 511 [75], 511-2 [80] (Black CJ); Ernst Willheim, ‘*MV Tampa*: The Australian Response’ (2003) 15 *International Journal of Refugee Law* 159, 181-8.


133 Ibid 369 (Gummow J) quoted with approval in the *Tampa Case* (2001) 110 FCR 491, 538-9 [179]. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J).

134 *Tampa Case* (2001) 110 FCR 491, 540 [183].
In his examination of the executive power of the Commonwealth, French J referred with approval to the remarks of Jacobs J in the AAP Case and Brennan J in Davis that s 61 imports ‘the idea of Australia as a nation’ and assigns to the Executive functions relating generally to ‘the protection and advancement of the Australian nation’.\(^\text{135}\) According to French J, the depth of the executive power conferred by s 61 was not limited to the Crown’s prerogative powers, but was ‘to be measured by reference to Australia’s status as a sovereign nation and by reference to the terms of the Constitution itself’.\(^\text{136}\)

The majority decision in the Tampa Case has been criticised by scholars as significantly expanding the scope of the executive power of the Commonwealth.\(^\text{137}\) As Ernst Willheim has observed, ‘issues of external sovereignty are legally distinct from issues as to the internal distribution of powers as between the executive and the legislative branches of government’.\(^\text{138}\) It may be that in international law the Commonwealth, as a sovereign polity, possesses the ‘right’ to determine who may enter its territory.\(^\text{139}\) That fact alone does not resolve the question of which branch of government, namely, the Parliament or the Executive, should be conferred with the power to exercise that right.\(^\text{140}\)

French J reasoned that Australia’s acquisition of sovereignty had assigned ‘the gatekeeping function’ to the Commonwealth Executive.\(^\text{141}\) The ‘gatekeeping function’ – which was described as the power to determine who may enter Australian territory and the Australian community – was reflected in the conferral of powers on the Commonwealth Parliament to make laws with


\(^{136}\) *Tampa Case* (2001) 110 FCR 491, 542 [191].


\(^{140}\) See also Evans, above n 22, 97; Willheim, above n 130, 186-7.

\(^{141}\) *Tampa Case* (2001) 110 FCR 491, 541.
respect to naturalisation and aliens (s 51(xix)), immigration and emigration (s 51(xxvii)) and the influx of criminals (s 51(xxviii)).\textsuperscript{142} French J was satisfied that the executive power of the Commonwealth extended to these subject matters which were, in his opinion, ‘central to the expression of Australia’s status and sovereignty as a nation’.\textsuperscript{143}

However, the question as to whether the executive power of the Commonwealth extended to the subject matters of ‘aliens’ and ‘immigration’ is a question of ‘breadth’.\textsuperscript{144} There was no dispute in the \textit{Tampa Case} that these subject matters fell within an area of Commonwealth responsibility. The main issue in the \textit{Tampa Case} was whether the coercive activities of exclusion, detention and expulsion could be undertaken by the Commonwealth Executive in the absence of statutory authorisation.\textsuperscript{145} French J concluded, in this regard, that ‘the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect exclusion’.\textsuperscript{146}

As demonstrated in the preceding part of this article, prior to the \textit{Tampa Case} being decided, the nationhood power had not been held to support activities aimed at preventing, prohibiting, controlling or regulating the actions of individuals.\textsuperscript{147} This was the view of the sole dissentient, Black CJ, in the \textit{Tampa Case}. His Honour observed that:

The Australian cases in which the Executive power has had an “interest of the nation” ingredient can be contrasted with those in which such a power has been asserted for coercive purposes. Thus, this Executive power has been validly used to set up the Australian Bicentennial Authority…and the CSIRO, but has been held not to be available to sustain deportation; detention or extradition of a fugitive; the arrest of a person believed to have committed a felony abroad; the

\textsuperscript{142} Ibid 542-3 [192].
\textsuperscript{143} Ibid.
\textsuperscript{144} See also Winterton, \textit{Parliament}, above n 3, 27-47; Zines, ‘Inherent’, above n 6, 281; Evans, above n 22, 97.
\textsuperscript{145} Simon Evans observed that French J did not distinguish between the subject matters of executive power and the activities which can be undertaken in relation to those subject matters in Evans, above n 22, 97.
\textsuperscript{146} \textit{Tampa Case} (2001) 110 FCR 491, 543 [193].
\textsuperscript{147} See also Twomey, ‘\textit{Pape}’, above n 6, 339; Zines, ‘Inherent’, above n 6, 280.
This statement of Black CJ recognises that, apart from the majority decision in the *Tampa Case*, the authorities do not support the finding that the nationhood power extends to the coercive activities of exclusion, detention and expulsion of non-citizens in the absence of statutory authorisation. In the cases that have been considered in this article, the executive action that was supported by the nationhood power would also have been supported by the common law powers of the Crown. The executive action undertaken by the Commonwealth in the *Tampa Case*, on the other hand, extended beyond the prerogative. As the dissent of Black CJ demonstrates, the persons on board the *MV Tampa* were, in effect, being detained by the Commonwealth. It is a principle of the common law that the Executive cannot, through the exercise of its prerogative power alone, deprive an individual of liberty. The majority’s finding that the nationhood power supported the executive action that was taken in the *Tampa Case* sits uncomfortably with the statements that have been made by the High Court about its nature and scope.

Two recent decisions of the High Court concerning the Commonwealth’s controversial border protection policy, ‘Operation Sovereign Borders’, cast further doubt on whether the nationhood power could support coercive executive action taken to prevent the entry of non-citizens in Australia. The first of these decisions, *CPCF v Minister for Immigration and Border Protection* (*CPCF*) is highly significant because, of the five judges that considered the scope of the non-statutory executive power of the Commonwealth, three judges held that the detention and removal of non-citizens to a place outside Australia could not be supported by the nationhood power. This view was affirmed by Gageler J in the second of these decisions, *Plaintiff M68*. 

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149 Twomey, ‘*Pape*’, above n 6, 339.
150 *Tampa Case* (2001) 110 FCR 491, 511 [75], 511-2 [80].
153 Ibid 568 [150] (Hayne and Bell JJ), 597-9 [266]-[271], 600 [277] (Kiefel J).
154 (2016) 257 CLR 42.
The majority decision in the *Tampa Case* should not, therefore, detract from the weight of authority that suggests that the nationhood power is confined to the established common law powers of the Crown. This is an important limit on the content and scope of the nationhood power. It also provides an explanation as to why the main issue in cases involving the nationhood power has typically concerned whether the executive activity falls within an area of Commonwealth responsibility, rather than the legality of the activity itself.\textsuperscript{155} As I demonstrate below, the High Court has consistently applied Mason J’s ‘peculiarly adapted’ test to assess whether an executive act is supported by the nationhood power. The operation of this test is examined in the final part of this article.

IV  
**ASERTING THE SCOPE OF THE NATIONHOOD POWER:  
THE ‘PECULIARLY ADAPTED’ TEST**

The concept of nationhood has been an influential factor in the High Court’s interpretation of s 61 of the *Constitution*. While it has expanded the subject matters over which the executive power of the Commonwealth could be exercised, it has not undermined the federal distribution of powers.\textsuperscript{156} In order to ascertain the validity of the impugned executive action, Mason J formulated his ‘peculiarly adapted’ test in the *AAP Case*. Mason J stated, in dicta that has proven to be of enduring significance, that:

\begin{quote}
[T]here 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.\textsuperscript{157}
\end{quote}

Mason J’s ‘peculiarly adapted’ test has received judicial endorsement in a series of subsequent cases concerning the scope of the non-statutory executive power of the Commonwealth decided in the decades following the *AAP Case*.\textsuperscript{158} This

\textsuperscript{155} See also Twomey, ‘*Pape*’, above n 6, 339.
\textsuperscript{156} Stephenson, above n 13, 175-6, 183-8 contra Twomey, ‘*Pape*’, above n 6, 330.
\textsuperscript{157} *AAP Case* (1975) 134 CLR 338, 397.
\textsuperscript{158} Ibid endorsed in *Davis* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J) *Tasmanian Dam Case* (1983) 158 CLR 1, 108-9 (Gibbs CJ), 203-4 (Wilson J), 321-3 (Dawson J); *Pape* (2009) 238 CLR 1, 23 [8], 50 [95], 60-1 [128], 63 [133] (French
is because it strikes a balance between ensuring that the Commonwealth Executive has the flexibility to function effectively as the national government, while maintaining the federal distribution of powers and responsibilities effected by the Constitution. As I demonstrate below, the High Court has consistently found that the nationhood power cannot be exercised in a way that interferes with, or undermines, the continued existence of the states as independent entities in the federation, or the exercise of powers and functions within their spheres of responsibility. The ‘peculiarly adapted’ test has, in fact, played an important role in confining the scope of the nationhood power.

A The First Limb: ‘Peculiarly adapted to the government of a nation’

The first limb of the ‘peculiarly adapted’ test requires that the enterprise or activity in question be ‘peculiarly adapted’ to a national government. Mason J did not set out specific criteria to assist in applying the first limb of the test. Instead, he provided some examples of activities that would, in his view be supported by the nationhood power, such as scientific research, including the establishment of the CSIRO and the expenditure of money on inquiries, investigations and advocacy related to public health.

Mason J did not intend to confine the nationhood power to these particular examples. Instead, he suggested that the activities that would be supported by the power would be decided on a case-by-case basis because:

The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government.

Mason J’s remarks are reminiscent of an earlier observation made by Isaacs J that it was, in fact, the Court’s ‘duty’, in interpreting the Constitution, to ‘recognise the development of the Nation and to apply established principles to

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CJ), 87-8 [228], 91-2 [242] (Gummow, Crennan and Bell JJ), Williams (No 1) (2012) 248 CLR 156, 191 [34], 216 [83] (French CJ); 250-1 [196] (Gummow and Bell JJ), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J).

159 See further Stephenson, above n 13, 183-8.

160 AAP Case (1975) 134 CLR 338, 397 (Mason J), 412-3 (Jacobs J).

161 Ibid 397-8. See also Davis (1988) 166 CLR 79, 111 (Brennan J).
the new positions which the Nation in its progress from time to time assumes.\textsuperscript{162} The nationhood power was not, however, unlimited. Indeed, in the AAP Case, Mason J ultimately found that it could not support the Commonwealth formulating and administering the Australian Assistance Plan (‘AAP’).\textsuperscript{163} Under the AAP, the Commonwealth made direct grants to Regional Councils for Social Development. The Regional Councils had been established to provide a wide range of social welfare services across Australia that had traditionally been the responsibility of the states and, indeed, could have been carried out by the states had a conditional grant been made to them under s 96.

Mason J was one of three dissentients that struck down the AAP. He was not prepared to find that the nationhood power could support the Commonwealth engaging in activities that were beyond its area of responsibility, merely on the basis of convenience.\textsuperscript{164} Nor could it support the Commonwealth engaging in activities that it regarded as being ‘of national interest or concern’ or of a ‘national nature’.\textsuperscript{165} Something more was required to demonstrate that it was ‘peculiarly adapted’ to a national government. In commenting on this aspect of Mason J’s judgment, Zines has observed that:

\begin{quote}
We are told that national need is not the test; nor apparently is the ‘national nature of the subject matter’. Whether an enterprise can only be carried on by a national government is a vital factor, but mere convenience of national administration is not enough.\textsuperscript{166}
\end{quote}

An analysis of the cases that have applied Mason J’s test reveals that the High Court has taken into account certain factors in determining whether an activity is ‘peculiarly adapted’ to a national government. First, the Court has considered whether the activity is substantively connected with Australia’s national identity.\textsuperscript{167} It appears to be accepted that activities associated with national symbols, events, heritage and culture would satisfy the first limb of the peculiarly adapted test.\textsuperscript{168}

\begin{footnotes}
\item[162] Wooltops Case (1922) 31 CLR 421, 438.
\item[163] AAP Case (1975) 134 CLR 338, 400-1.
\item[164] Ibid 398 approved in Tasmanian Dam Case (1983) 158 CLR 1, 109 (Gibbs CJ). Cf AAP Case (1975) 134 CLR 338, 412-3 (Jacobs J) where national coordination was held to be sufficient.
\item[165] AAP Case (1975) 134 CLR 338, 362 (Barwick CJ).
\item[166] Zines, High Court, above n 3, 417.
\item[167] Davis (1988) 66 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).
\item[168] Ibid. Twomey has argued that national symbols would be supported by the prerogative powers of the Crown: Twomey, ‘Pape’, above n 6, 336.
\end{footnotes}
Second, the *complexity* of the activity, and the extent to which it requires *national coordination* has been a relevant factor for the Court’s consideration.\(^\text{169}\) In the *AAP Case*, Jacobs J suggested that executive activities would be supported by the nationhood power if they required national coordination rather than local planning. National inquiries, research and exploration were examples given by Jacobs J as activities with a ‘national flavour’ that were supported by the nationhood power. In the opinion of Jacobs J, the AAP also satisfied this test. Its purpose was to coordinate the provision of social welfare services across the nation. It was, therefore, an example of an initiative that required national coordination rather than local planning.\(^\text{170}\)

In the *Tasmanian Dam Case*, Gibbs CJ attributed significance to the fact that the protection of the parks within Tasmania was not ‘so complex’ or involved ‘action on so large a scale, that it requires national coordination to achieve, assuming that to be a test’.\(^\text{171}\) In contrast to Jacobs J in the *AAP Case*, who found that it was sufficient that the activity required national coordination, even though there may have been other means of carrying it out, Gibbs CJ was of the view that it needed to be shown that national coordination was the *only* way that the activity could have been implemented. Indeed, the availability of other means for the protection and conservation of the parks in the *Tasmanian Dam Case* militated against the finding that this was an activity that was, in fact, ‘peculiarly adapted’ to a national government.\(^\text{172}\) It was also significant in *Davis* and *Pape*, that the executive action concerned the nation as a whole.

Increasingly, however, the nationhood power has been defined as a power to protect the nation and respond to *national emergencies*.\(^\text{173}\) As discussed above, the urgent nature of the GFC was a crucial factor for the majority in *Pape* in finding that the nationhood power supported the tax bonus

\(^{169}\) *AAP Case* (1975) 134 CLR 338, 412-3 (Jacobs J); *Tasmanian Dam Case* (1983) 158 CLR 1, 109 (Gibbs CJ); *Davis* (1988) 166 CLR 79, 111 (Brennan J).


\(^{172}\) Ibid.

\(^{173}\) This raises questions that are beyond the scope of this article about the appropriate role for the Court in determining whether there is an emergency and justiciability more generally; see *Pape* (2009) 238 CLR 1, 123 [353] (Hayne and Kiefel JJ); Hanna, above n 13.
payments.\footnote{Ibid 60 \[127\], 63 \[133\] (French CJ), 89 \[233\] (Gummow, Crennan and Bell JJ).} It was also significant for the majority in Williams (No 1) that the case did not involve ‘a natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response’.\footnote{Williams (No 1) (2012) 248 CLR 156, 235 \[146\] (Gummow and Bell JJ), 250-1 \[196\], 267 \[240\] (Hayne J), 346-7 \[499\] (Crennan J), 362 \[599\] (Kiefel J).} The provision of school chaplaincy services was not, therefore, an activity ‘peculiarly adapted’ to a national government. There was nothing on the facts of the case to suggest that only the Commonwealth had the means to implement a school chaplaincy program. The notion of a national ‘crisis’ or ‘emergency’ has proven to be an influential, if not determinative, factor for the Court in applying the ‘peculiarly adapted’ test.\footnote{See also Twomey, ‘Post-Williams’, above n 13, 24.} Indeed, in CPCF, Hayne and Bell JJ referred to the ‘implied executive “nationhood power” to respond to national emergencies’.\footnote{CPCF (2015) 255 CLR 514, 568 \[150\] (Hayne and Bell JJ).} Kiefel J similarly found that the case did not enliven the nationhood power, which, according to her Honour, was ‘capable of responding to events such as a national emergency’.\footnote{Ibid 596 \[260\] (Kiefel J).}

\section*{B \hspace{1em} The Second Limb: ‘And which cannot otherwise be carried on for the benefit of the nation’}

While the nationhood power may have expanded the ‘breadth’ of the executive power, it has not done so in a way that is inconsistent with federalism. This was evident in the AAP Case, where the Chief Justice remarked that ‘the federal distribution of power for which the Constitution provides must be maintained’.\footnote{AAP Case (1975) 134 CLR 338, 364 (Barwick CJ).} Gibbs J similarly observed that ‘the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution’.\footnote{Ibid 378 (Gibbs J).} Mason J was also reluctant to confer unbounded power on the Commonwealth Executive and observed that the scope of the nationhood power needed to be consistent with the federal character of the polity. In Mason J’s view:

\begin{quote}
It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this [nationhood]
aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth’s area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.\textsuperscript{181}

The second limb of the ‘peculiarly adapted’ test requires that the activity ‘cannot otherwise be carried on for the benefit of the nation’.\textsuperscript{182} The High Court has, in its application of this aspect of the test, considered whether the activity involved any competition with the executive competence of the states and whether there were other constitutional mechanisms that could have been utilised which gave the states the opportunity to consent to the activity. The second limb of Mason J’s test, then, has acted as an important safeguard against the unmitigated expansion of the ‘breadth’ of the executive power. It has prevented the nationhood power from being exercised in a way that interferes with, or undermines, the continued existence of the states as independent entities in the federation, or the capacity of the states to exercise powers and functions within their spheres of responsibility.

\textit{Competition with the Executive Competence of the States}

In ascertaining whether the impugned executive activity could otherwise have been carried on for the national benefit, the High Court has considered whether the exercise of Commonwealth executive power involved any competition with the executive competence of the states.\textsuperscript{183} In his application of the ‘peculiarly adapted’ test in the \textit{AAP Case}, Mason J expressed some concern that the Regional Councils would be ‘operating not under the aegis of the States, but independently of and perhaps in competition with them and their institutions’.\textsuperscript{184}


\textsuperscript{182} \textit{AAP Case} (1975) 134 CLR 338, 397.

\textsuperscript{183} Stephenson, above n 13, 183-8.

\textsuperscript{184} \textit{AAP Case} (1975) 134 CLR 338, 400.
The effect of the AAP was to reconfigure the Australian community into regions for the purpose of coordinating and providing a wide range of social welfare services. The Regional Councils would be established and directly funded by the Commonwealth to provide these services, which extended to child care, parent education, family counselling and housekeeping services, all of which fell within the executive competence and capacity of the states. This was a crucial factor for Mason J in striking down the AAP. He was not prepared to find that the nationhood power could be exercised to interfere with or undermine the federal distribution of powers for which the Constitution provides.

The exercise of the legislative nationhood power by the Commonwealth in the Tasmanian Dam Case also involved competition with the capacity of the Tasmanian Government to manage its own land. In an influential passage that has received judicial endorsement in Davis and Pape, Deane J considered that:

As one moves away from those matters which lie at the heart of the inherent powers of the Commonwealth, it becomes increasingly predictable that any such powers will be confined within areas in which there is no real competition with the States. There are, no doubt, areas within the plenitude of executive and legislative power shared between the Commonwealth and the States…which, while not included in any express grant of legislative power, are of real interest to the Commonwealth or national government alone. Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours.

In their application of the ‘peculiarly adapted’ test in the Tasmanian Dam Case, several members of the Court conceptualised the states as having responsibility over areas of legislative and executive competence that could not be interfered with by the exercise of Commonwealth power. In both Davis and Pape, the Court also considered whether there was any intrusion by the Commonwealth power.

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185 Davis (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).
186 Pape (2009) 238 CLR 1, 90 [239] (Gummow, Crennan and Bell JJ).
on the executive competence of the states, but concluded that there was not. However, it is significant that in applying the ‘peculiarly adapted’ test, the Court considered whether the states had the real and practical capacity to carry out the activities in question or, indeed, whether that capacity was already being exercised.\[188\] The Court was careful to ensure that the nationhood power was not being exercised by the Commonwealth in a way that would interfere with the capacity of the states to function in their sphere of responsibility.

In their joint judgment in *Davis*, Mason CJ, Deane and Gaudron JJ considered whether the states could have effectively organised and commemorated the Bicentenary. The plurality noted that while the states had a ‘part to play, whether as part of an exercise in co-operative federalism or otherwise’,\[189\] this could not be allowed ‘to obscure the plain fact that the commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government’.\[190\] The interest of the states in the commemoration of the Bicentenary was ‘of a more limited character’.\[191\] Brennan J also observed that the second limb of the ‘peculiarly adapted’ test invited ‘consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit’.\[192\]

Similarly, in *Pape*, the majority was sensitive to the need to confine the Commonwealth Executive to those areas of responsibility allocated to it by the *Constitution* and ‘the character and status of the Commonwealth as the national government’, in its application of the nationhood power. However, the majority ultimately held that the stimulus payments satisfied the ‘peculiarly adapted’ test and did not interfere with the federal distribution of powers.\[193\] The majority’s judgment in *Pape* has been the subject of criticism from

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\[189\] *Davis* (1988) 166 CLR 79, 94.

\[190\] Ibid.

\[191\] Ibid.

\[192\] Ibid 111.

\[193\] *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 91-2 [241]-[242] (Gummow, Crennan and Bell JJ).
scholars\textsuperscript{194} and members of the judiciary,\textsuperscript{195} on the basis that the second limb of the ‘peculiarly adapted’ test was not strictly applied. It has been argued that the Commonwealth could have stimulated the economy through other means, namely, by enacting legislation pursuant to the taxation power in s 51(ii)\textsuperscript{196} or by increasing social welfare payments under ss 51(xxiii) and 51(xxiiiA).\textsuperscript{197} Alternatively, the Commonwealth could have utilised s 96 of the Constitution and made conditional grants to the states.\textsuperscript{198}

However, as discussed above, a critical feature of the judgments of French CJ and Gummow, Crennan and Bell JJ was their acceptance that the GFC posed an imminent threat to Australia’s economic security. Indeed, it was accepted by all parties that there was a threat posed to the national economy by the GFC and it was akin to a ‘national emergency’.\textsuperscript{199} This invited the Court to consider whether the states had the capacity to respond, as swiftly and urgently as was required, in order to prevent a national economic recession. The influence of federalism is, therefore, still evident in \textit{Pape}. It is significant that the majority felt compelled to explain why the states were not capable of addressing the immediate threat to the national economy posed by the GFC.\textsuperscript{200}

The majority in \textit{Pape} also ascribed relevance to the fact that there was no competition, in a practical sense, with the executive competence and authority of the states.\textsuperscript{201} French CJ concluded, in this regard, that the states did not have the capacity or the resources to implement, within a short timeframe, measures that were ‘rationally adjudged’ as ‘avoiding or mitigating’ the adverse effects of the GFC in Australia.\textsuperscript{202} In similar vein, Gummow, Crennan and Bell JJ considered whether the states could have responded effectively to the GFC, but concluded that only the Commonwealth had the resources to respond expeditiously to the emergency before it.\textsuperscript{203} Both limbs of the ‘peculiarly adapted’ test were satisfied. The threat posed by the GFC to the nation as a whole

\textsuperscript{194} See especially Twomey, ‘\textit{Pape}’, above n 6, 330.


\textsuperscript{196} Ibid.

\textsuperscript{197} Ibid 123–4 [355]-[356] (Hayne and Kiefel JJ).

\textsuperscript{198} Ibid 178–9 [513] (Heydon J).

\textsuperscript{199} Ibid 123 [355] (Hayne and Kiefel JJ).

\textsuperscript{200} See also Hume, Lynch and Williams, above n 188, 83–4; Stephenson, above n 13, 186.

\textsuperscript{201} \textit{Pape} (2009) 238 CLR 1, 62 [131].

\textsuperscript{202} Ibid 63 [133].

\textsuperscript{203} Ibid 90-1 [239], 91-2 [242].
warranted a national response, and importantly, there were no other practical means available, either to the Commonwealth or the states, that could have been implemented within the requisite timeframe.

Mason J’s ‘peculiarly adapted’ test incorporates the principle of federalism to condition and constrain the scope of the nationhood power. It can be, as demonstrated by the decisions discussed above, an effective constraint on the scope of the nationhood power. What is striking about the recent decision of the High Court in Williams (No 1) is that the Court has used federalism to constrain the scope of executive power more broadly. A majority of the Court considered in that case whether the services covered by the National School Chaplaincy Program (‘NSCP’) fell within an area of responsibility allocated to the Commonwealth by the Constitution.

In his judgment, French CJ was concerned that an expansive Commonwealth spending power had the potential to ‘diminish the authority of the States in their fields of operation’. His Honour concluded that the Commonwealth and states:

[H]ave concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the Constitution. The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of “a truly federal government”.

Gummow and Bell JJ referred approvingly to the observations made by Mason J on this point in the AAP Case and concluded that the states had the ‘legal and practical capacity to provide for a scheme such as the NSCP’. This consideration, in their Honours’ view, reflected ‘concern with the federal

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204 Stephenson, above n 13, 175-6, 183-8.
205 The relationship between federalism and Commonwealth executive power more broadly has been discussed in Hume, Lynch and Williams, above n 188; Appleby and McDonald, above n 13.
206 Williams (No 1) (2012) 248 CLR 156, 192-3 [37].
207 Ibid 216-7 [83].
208 Ibid 235 [146].
structure and the position of the States’. Furthermore, their Honours were of the view that the conduct of the public school system in Queensland was the ‘responsibility’ of that state. Similar observations were made by Hayne, Crennan and Kiefel JJ in their respective judgments. They were of the view that the states were capable of providing the services covered by the NSCP, as underscored by Queensland’s own funding scheme for school chaplaincy services. There was, therefore, ‘direct competition’ with an area of state competence and the capacity of the executive government of the states.

2 Availability of Other Constitutional Mechanisms and State Consent

The Court has, in applying the second limb of the ‘peculiarly adapted’ test, also considered the availability of other constitutional mechanisms that gave the states the opportunity to consent to the implementation of the impugned enterprise or activity. In the AAP Case, for example, both Barwick CJ and Mason J thought that the activities associated with the AAP could have been made the subject of conditions attached to a s 96 conditional grant and implemented by the states, instead of the Regional Councils.

For the Chief Justice in particular, the appropriate constitutional mechanism for expenditure on and engagement in policy areas beyond the areas allocated to it by the Constitution was pursuant to a s 96 grant. In his Honour’s opinion, apart from s 96, the Commonwealth could not ‘enter that residual area left by the Constitution to the States, either by legislative or by executive act’. Mason J adopted a similar view. The establishment and direct financing of the Regional Councils was not the only way in which the Commonwealth could have implemented the AAP. It was a scheme which could have been effectively administered by the states, had a conditional grant...
been made to them under s 96.\textsuperscript{215} According to Mason J, a s 96 grant was in fact, the appropriate way for the AAP to have been carried out.\textsuperscript{216}

Since the AAP Case was decided, several members of the Court have placed varying degrees of emphasis on the ‘consensual’ nature of s 96 grants.\textsuperscript{217} The Court has employed s 96 to constrain the scope of the nationhood power, and executive power more broadly, in order to preserve the autonomy of the states and their capacity to choose when, and under what conditions, they will participate in the implementation of Commonwealth policy objectives.\textsuperscript{218} In Williams (No 1), the majority found that the NSCP, like the AAP, could have been made the subject of a conditional grant to the states.\textsuperscript{219} Hayne J placed a particular emphasis on the ‘consensual nature’ of s 96.\textsuperscript{220} His Honour noted that if the Commonwealth was afforded a wide spending power, it ‘would not only give s 96 of the Constitution a place in the constitutional framework very different from the place it has hitherto been understood to occupy but also render it otiose’.\textsuperscript{221} For Hayne J, s 96 was an ‘immediate textual foundation for limiting the power to spend’.\textsuperscript{222}

Other members of the Court reasoned that there was nothing to support or justify the bypassing of s 96 in Williams (No 1).\textsuperscript{223} The spending on the NSCP was not in the same category of urgency as the direct payments in Pape. Crennan J noted, in this regard, that there was no evidence to suggest that the Commonwealth was the level of government ‘exclusively, best or uniquely authorised’ to engage in this particular activity.\textsuperscript{224} Kiefel J similarly observed that the funding for the NSCP could have been ‘accommodated by grant on condition under s 96’.\textsuperscript{225} Her Honour was satisfied that the NSCP fell within the

\begin{footnotesize}
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\item \textsuperscript{215} Ibid 400.
\item \textsuperscript{216} Ibid 398.
\item \textsuperscript{218} See also Hume, Lynch and Williams, above n 188, 79; Appleby and McDonald, above n 13, 267, Williams (No 1) (2012) 248 CLR 156, 348 [503] (Crennan J), 373 [591]-[593] (Kiefel J). See also 270-1 [251] (Hayne J).
\item \textsuperscript{219} Ibid 270 [248].
\item \textsuperscript{220} Ibid 267 [243].
\item \textsuperscript{221} Ibid 270-1 [251] (Hayne J).
\item \textsuperscript{222} Ibid 234 [143], 235 [146] (Gummow and Bell JJ), 348 [503] (Crennan J), 373 [592]-[593] (Kiefel J).
\item \textsuperscript{223} Ibid 348 [503].
\item \textsuperscript{224} Ibid 373 [593].
\end{itemize}
\end{footnotesize}
‘province of the States’. Accordingly, there was no justification for Commonwealth incursion into an area of state competence by executive action alone.

The importance of state consent is also evident in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.* In that case, Mason J found that the nationhood power could support the Commonwealth’s entry into an intergovernmental agreement with the states on matters of joint interest, provided that ‘the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution’. In finding that the nationhood power supported the agreement, Mason J placed emphasis on its consensual nature. The nationhood power was not being used to override or circumvent the federal distribution of powers, but to facilitate joint co-operative executive (and legislative) action on certain matters that fell outside the competence of both the Commonwealth and the states.

**V Conclusion**

This article has provided an account of the nature and scope of the nationhood power. In particular, it has demonstrated that the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. The constitutional significance of Australia’s acquisition of nationhood is that it expanded the subject matters of Commonwealth executive power, beyond those enumerated in ss 51, 52 and 122 of the *Constitution*, to include an area derived from the ‘character and status of the Commonwealth as the national government’. In ascertaining whether a sufficient connection exists between that area of responsibility and the impugned executive action, the Court has consistently applied Mason J’s ‘peculiarly adapted’ test. This test incorporates federalism as an important limit on the scope of the nationhood power.

There may not, therefore, be continuing utility in referring to the nationhood power as a separate category of executive power. With the

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226 Ibid.
228 Ibid 560.
exception of the *Tampa Case*, the activities that have been supported by this power would also have been supported by the existing categories of non-statutory executive power, namely, the capacities or prerogative powers of the Crown. It may be preferable to refer to the nationhood ‘aspect’ of the executive power, where a case involves the exercise of the non-statutory executive power within that area of responsibility derived from the ‘character and status of the Commonwealth as the national government’.

Following the decision of *Williams (No 1)*, Commonwealth contracts and associated expenditure will require prior legislative authorisation, unless they fall within an ‘exempt class’.\(^{230}\) It has been suggested that activities supported by the ‘nationhood power’ may fall within an exempt class.\(^{231}\) It is plausible that the Commonwealth may increasingly seek to rely on the nationhood aspect of the executive power to support direct spending on programs, in order to circumvent the requirement of obtaining prior legislative authorisation. However the principle of accountability, which underpinned the majority’s reasoning in *Williams (No 1)*, would seem to require that contracting and spending supported by the nationhood aspect of the executive power have prior legislative authorisation, unless it is an emergency situation of the *Pape* kind.\(^{232}\) It may, therefore, be necessary to distinguish between executive action undertaken for the purpose of national protection, and those activities connected with national identity or national coordination, in the post-*Williams* constitutional landscape.

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\(^{230}\) Twomey, ‘*Post-Williams*’, above n 13, 9-10, 23-5; James Stellios, *Zines’s The High Court and the Constitution* (6th ed, Federation Press, 2016), 398-9; Appleby and McDonald, above n 13, 276.

\(^{231}\) *Williams (No 1)* (2012) 248 CLR 156, 180 [4], 184-5 [34] (French CJ), 249-50 [194], 250-1 [196] (Hayne J), 342 [485] (Crennan J), 370 [582]-[583] (Kiefel J). See also 319 [402] (Heydon J). See further Twomey, ‘*Post-Williams*’, above n 13, 9-10, 23-5; Stellios, above n 230, 398-9; Appleby and McDonald, above n 13, 276.

\(^{232}\) See further Twomey, ‘*Post-Williams*’, above n 13, 24-5; Appleby and McDonald, above n 13, 270-2, 276.
FINDING THE STREAMS’ TRUE SOURCES:
THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION AND EXECUTIVE POWER

Joshua Forrester,† Lorraine Finlay‡ and Augusto Zimmerman‡

In this article, we explore the implied freedom of political communication’s (‘implied freedom’s’) application to executive power at the Commonwealth, State and Territory levels. We propose that the proportionality test used by the plurality in McCloy v News South Wales¹ be adapted to executive actions affecting the implied freedom. We then illustrate our proposed approach by applying it to the case of Chief of the Defence Force v Gaynor.²

I  INTRODUCTION

Over the past 25 years, the implied freedom of political communication (‘implied freedom’) has become an established part of Australia’s constitutional landscape. It is well accepted that the implied freedom limits Commonwealth, State and Territory legislation. However, its effect on Commonwealth, State and Territory executive powers is somewhat less clear.

In this article, we examine the current approach to the implied freedom and executive power. We also propose an approach that, in our view, is more firmly grounded in the text and structure of the Commonwealth Constitution. We then apply our proposed approach to the topical case of Chief of the Defence Force v Gaynor.³

²  [2017] FCAFC 41 (8 March 2017) (‘Gaynor’).
³  Ibid.
This article is split into the following parts. In Part II, we cover the current state of the law concerning the implied freedom, specifically the test provided by the plurality in *McCloy v New South Wales*.\(^4\) In Part III, we note important points about the implied freedom. The implied freedom is not a right but a restriction on Commonwealth, State and Territory legislative and executive power. However, it is also a strong and wide-ranging freedom. Further, common law freedom of expression is itself of constitutional importance, and is relevant to assessing proportionality in the *McCloy* test.

In Part IV, we note the current approach to the implied freedom and executive power, specifically noting the approach in *Wotton v Queensland*.\(^5\) In Part V, we propose another approach to the implied freedom and executive power. We model this approach on that of the plurality in *McCloy*. We note here that the sources of executive power differ between the Commonwealth on the one hand, and the States and Territories on the other. In Part VI, we consider some issues concerning our proposed approach. These issues include whether our proposed approach applies to State and Territory executive power, and to non-statutory executive power. That said, our focus in this article is on the implied freedom’s effect on the execution of laws and not its effect on non-statutory executive power. In Part VII, we argue that the High Court’s approach in *Wotton* does not bar adopting our proposed approach.

In Part VIII, we apply our proposed approach to *Gaynor*. We also explore issues arising from *Gaynor*, including accommodating the implied freedom in the Australian Defence Force (‘ADF’) and other government agencies.

## II The *McCloy* Test

In *McCloy*, the plurality adopted a proportionality test as a tool for determining whether or not legislation impermissibly infringed the implied freedom.\(^6\) This test was modified in *Brown v Tasmania*,\(^7\) and reads as follows:

\(^{4}\)(2015) 257 CLR 178 (‘*McCloy*’). In this article, we refer to the test that the plurality used in *McCloy* as the ‘*McCloy* test’.

\(^{5}\)(2012) 246 CLR 1 (‘*Wotton*’).


\(^{7}\)*Brown v Tasmania* [2017] HCA 43 (18 October 2017) [104] (Kiefel CJ, Bell and Keane JJ), [277] (Nettle J) (‘*Brown*’) cf [155]-[156] (Gageler J). Because of her Honour’s views about how to determine
1. Does the law effectively burden the implied freedom of political communication in its terms, operation or effect?

2. If ‘yes’ to the first question, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government?

3. If ‘yes’ to the second question, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government?

The third stage of the test requires what the plurality in McCloy termed ‘proportionality testing’. A law justifies its burden on the implied freedom if it is:

- **Suitable** — there is a rational connection between the provision and its purpose.
- **Necessary** — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom.
- **Adequate in its balance** — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

It should be noted that other members of the High Court in McCloy did not share the plurality’s approach to proportionality. However, the plurality’s approach is, for now, authoritative concerning whether or not a law is reasonably appropriate and adapted to its purpose.

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whether or not the implied freedom had been impermissibly infringed, Gordon J did not see the need to reconsider McCloy: see ibid [471]-[482]. In this article, when we mention the ‘McCloy test’ it should be taken to mean ‘the McCloy test as modified in Brown’.

6 McCloy (2015) 257 CLR 178, 195 [2]. It appears that Brown did not alter these steps in ‘proportionality testing’.

7 See ibid 236-9 [145]-[152] (Gageler J), 269-70 [254]-[255] (Nettle J), 281-2 [309]-[311] (Gordon J). It should be noted that, in Brown, Nettle J appeared to support proportionality by adopting applying the McCloy test: see [2017] HCA 43 (18 October 2017) [236]. Gageler J furthered his Honour’s criticism of the proportionality approach: ibid [158]-[165]. Gordon J applied the same approach her Honour had applied in McCloy; that is, one anchored in the Lange test: ibid [312]-[324].
III  IMPORTANT POINTS ABOUT THE IMPLIED FREEDOM

There are a number of important points to note about the implied freedom.

A  It Restricts Legislative and Executive Power; It Is Not a Right

The implied freedom is sometimes referred to as the ‘implied right of political communication’. This is not how the implied freedom works. Rather, the implied freedom is a restriction on legislative and executive powers. The implied freedom, in effect, creates a line that Commonwealth, State and Territory legislative and executive actions cannot cross. Any such action that crosses this line is invalid.

As the High Court noted in Lange v Australian Broadcasting Corporation:10

[The sections creating the implied freedom] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in Theophanous, they are ‘a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a ‘right’ in the strict sense’.11

B  It Is a Strong and Wide-Ranging Freedom

We have mentioned that the implied freedom creates a line. To continue the metaphor, that line is not easily broken, and the area it surrounds is very large. Indeed, we daresay many in the legal establishment do not fully appreciate just how strong, and just how wide-ranging the implied freedom is.

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10 (1997) 189 CLR 520 (‘Lange’).
In Monis v The Queen, Hayne J observed that while implied freedom was not absolute, this did not mean ‘it must yield to accommodate the regulation of conduct which a majority of members of the Australian community may consider to be repugnant.’ Further, he observed that the freedom being implied rather than express did not:

…it make it brittle or otherwise infirm, or make it some lesser or secondary form of principle. Rather, accepting that the freedom is not absolute recognises that it has boundaries. But within those boundaries the freedom limits legislative power.

In Coleman v Power, McHugh J observed:

In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom. Freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom.

But, how is the strength and width of the implied freedom determined? We have examined the effect of popular sovereignty and the plenary powers of Australian Parliaments on the implied freedom in our other work. Implications from the Commonwealth Constitution must clearly arise from its text and structure. Popular sovereignty and the plenary powers of Australian Parliaments...
Parliaments clearly arise from the *Commonwealth Constitution*. We have noted:  

Under the *Commonwealth Constitution*, the Australian people are sovereign. That is, it is they alone who have the power to change the *Commonwealth Constitution*. Further, it is the Australian people who elect representatives to the Commonwealth Parliament to legislate in their name. It is also the people of the various Australian States and Territories who elect representatives to their respective Parliaments to legislate in their name.

In addition, Commonwealth, 21 State 22 and Territory 23 Parliaments each have the plenary power to make laws. The Commonwealth Parliament’s legislative powers are limited to those matters specified in the *Commonwealth Constitution*. However, its scope to legislate with respect to such matters is very wide. 24 State and Territory Parliaments may legislate with respect to any matter, subject to the *Commonwealth Constitution* and any limitations in their respective constitutions. 25 The content of laws with respect to matters within the legislative scope of Commonwealth, State or Territory Parliaments may be whatever the respective Parliament desires. Further, in executing laws, the

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21 *Commonwealth Constitution* s 51.
22 *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 5; *Constitution Act 1975* (Vic) s 16; *Constitution Act 1889* (WA) s 2(1). The plenary power of the Tasmanian Parliament is found in the *Australian Constitutions Act 1850* (Imp) s 14, which provides that the Tasmanian Parliament has the authority ‘to make laws for the peace, welfare and good government of Tasmania’: see *Strachan v Graves* (1997) 141 FLR 283, 289. The constitution of each colony continued as a State constitution at the establishment of the Commonwealth of Australia: see *Commonwealth Constitution* s 106.
23 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22(1); *Northern Territory (Self-Government) Act 1978* (Cth) s 6.
25 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (‘Union Steamship’).
respective Commonwealth, State or Territory executive may be given wide-ranging powers. Finally, members of Parliament have parliamentary privilege to discuss past or proposed legislative and executive action fully, frankly, and robustly. 26

It follows that, as sovereign, the Australian people must also be able to discuss government and political matters fully, frankly and robustly. 27 As we have noted: 28

Put another way, it borders on absurdity to say that, under the Commonwealth Constitution, Parliament may pass outrageous laws, the executive may do outrageous things, and members of Parliament may say outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may not speak outrageously. 29 If anything, in a democracy, a sovereign people must be free to speak even the unspeakable. 30

To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited. 31

In our view, the plenary powers of Australian Parliaments, and the popular sovereignty of the Australian people, give the implied freedom both content and weight. The Australian people may speak about any matter, and any restriction on this freedom must clear a high bar.

26 See, for example, Commonwealth Constitution s 49; Parliamentary Privileges Act 1987 (Cth) s 16; Parliamentary Privileges Act 1891 (WA) s 1. Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 122-3; Forrester, Zimmermann and Finlay, ‘An Opportunity Missed?’ above n 17, 286-9.

27 Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 123.


29 Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 130.

30 Ibid. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, ‘18C is too broad and too vague, and should be repealed’, The Conversation (online), 31 August 2016 <https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>. Indeed, this must be so with respect to any idea that may influence, or be the subject of, legislative or executive action. This must also be so with respect to any person or group of people who may influence, or be the subject of, legislative or executive action.

31 Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 130.
Common Law Freedom of Expression Is of Constitutional Importance

Common law freedom of expression is itself of constitutional importance. In *Minister for Immigration & Citizenship v Haneef*, the Full Court of the Federal Court endorsed the following statement by Trevor Allan:

Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.

Further, the extent to which a law infringes common law freedom of expression is a factor relevant when assessing its proportionality. As argued below, the extent to which executive action affects an individual’s common law freedom of expression is especially important when assessing its constitutional validity.

IV THE CURRENT APPROACH TO THE IMPLIED FREEDOM AND EXECUTIVE POWER

Perhaps unsurprisingly, most High Court cases concern legislative and not executive power. *Wotton* is the case that comes closest to a decision on the implied freedom’s effect on executive power, in particular the execution of laws. That said, the High Court’s comments in *Wotton* amount to obiter dicta, albeit authoritative obiter dicta.

*Gaynor* is a recent decision of the Full Court of the Federal Court dealing with the implied freedom’s effect on executive power. Under a section

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31 (2007) 163 FCR 414 (‘Haneef’).
34 *Wills* (1992) 177 CLR 1, 30-1 (Mason CJ); *Adelaide Preachers’ Case* (2013) 249 CLR 1, 31-2 [43]-[44] (French CJ).
titled ‘The implied freedom as a relevant consideration in the individual exercise of a statutory power conditioned by the freedom’ the Full Court stated:

We deal with this issue in this section of our reasons because of the overlap with what might be called the “purely” constitutional question. However, conceptually, this is a judicial review issue. There are dicta to the effect that the freedom may be seen as a relevant consideration, or as conditioning an individual exercise of statutory power in a way that requires a decision-maker to consider the effect of a particular exercise of power on the freedom.37

That is, to the Full Court, administrative law principles should be used to resolve the issues concerning the implied freedom and executive power. The implied freedom is, at the very least, a relevant consideration for decision-makers. However, the Full Court noted that the implied freedom may inform grounds of review other than just failure to consider a relevant consideration.38 The Full Court did not specify these grounds. However, as an example, ‘reading down’ a statute’s scope to comply with the implied freedom39 could render executive action taken pursuant to it beyond power.40 This is because the executive action’s validity may have depended on the statute’s original scope.

To support their approach, the Full Court relied on certain statements in Wotton.41 The Full Court quoted with approval42 this statement by the majority in Wotton, which accepted a Commonwealth submission that:

(i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of

37 Ibid [73].
38 Ibid [80].
39 Interpreting a statute in such a way is permissible under the Acts Interpretation Act 1901 (Cth) s 15A.
40 See Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5(d) (‘ADJR Act’).
42 Ibid [78].
power thereunder in a given case... does not raise a constitutional question, as distinct from a question of the exercise of statutory power.45

Hence, at the very least, it appears that the implied freedom is to be treated as a relevant consideration when exercising executive power. In Minister for Aboriginal Affairs v Peko-Wallsend Ltd.,44 Mason J provided an influential restatement of the principles relevant to this ground of review. To summarise these principles:

- A decision-maker must be bound to take into account the relevant consideration when making the decision.
- What a decision-maker is bound to consider is determined by the construction of the relevant statute.
- Failing to consider a relevant consideration does not automatically lead to setting aside a decision and ordering another be made accounting for the relevant consideration.
- The court does not substitute its judgment for the decision-maker’s. This is because the legislature has vested the decision-maker with the discretion to make the decision. Generally, it is for the decision-maker, not the court, to give weight to the relevant consideration. However, when a decision-maker fails to consider a greatly important consideration, the preferred ground for review is that the decision is manifestly unreasonable.45 The court’s preference for a different result will not suffice.
- A Crown Minister can account for broader policy considerations that may be relevant to exercising their discretion when making decisions.46

For a practicing lawyer, the approach in Gaynor and Wotton – that is, failing to treat the implied freedom as a relevant consideration – is the ‘safe bet’. The

43 Wotton (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
44 (1986) 162 CLR 24 (‘Peko-Wallsend’).
45 Since Peko-Wallsend, serious irrationality or illogicality has been used as an alternative to manifest unreasonableness: see Mark Aronson and Matthew Groves, Judicial Review of Administrative Action (Lawbook Co, 5th ed, 2013) 253-63 [4.690]-[4.760].
approach is supported by the obiter dicta of five justices in Wotton, as well as Kiefel J (as she then was) in that case.47

Given that it is derived from the text and structure of the Commonwealth Constitution itself, the implied freedom should be regarded as a ‘standing consideration’. Recalling Peko-Wallsend, a decision-maker must be bound to consider the relevant consideration. What a decision-maker is bound to consider is determined by the construction of the relevant statute. However, if a statute affects the implied freedom but says nothing about freedom of expression, then a decision-maker should nevertheless consider the implied freedom.

Further, a decision-maker should place significant weight on the implied freedom as a relevant consideration. As noted above, the implied freedom is a strong and wide-ranging freedom. In addition, common law freedom of expression is itself of constitutional importance.

This all said, treating the implied freedom as a relevant consideration arguably gives the decision-maker too much latitude to dismiss it. Again recalling Peko-Wallsend, it is for the decision-maker, not the court, to give weight to the relevant consideration. A decision-maker may perfunctorily mention that freedom of expression is important, thus indicating it has been considered, and then, in effect, ignore it. In such cases, a court will only interfere if the decision-maker’s approach is manifestly unreasonable.48 This is a very high threshold to meet for those seeking to challenge a decision. Even if this threshold is met, a court will be cautious about invalidating the decision.49

Ultimately, treating the implied freedom as a relevant consideration does not properly account for its importance in Australia’s constitutional order. A more systematic approach is required, and one that accords significant weight to the implied freedom.

47 Wotton (2012) 246 CLR 1, 33 [88] (Kiefel J).
48 Or, alternatively, seriously irrational or illogical: see Aronson and Groves, Judicial Review of Administrative Action, above n 45, 253–63 [4.690]–[4.760].
V Our Proposed Approach to the Implied Freedom and Executive Power

In our view, there is another, better, approach to the implied freedom and executive action. This approach is based on the comments of a unanimous High Court in *Lange*. It is more firmly grounded in the text and structure of the *Commonwealth Constitution*. This approach can also be more readily reconciled with the implied freedom’s approach to legislation.

A The Implied Freedom Limits Executive As Well As Legislative Power

As noted above, implications from the *Commonwealth Constitution* must clearly arise from its text and structure.50 In *Lange*, the High Court held that ss 7, 24, 64 and 128 of the *Commonwealth Constitution* implied a freedom to communicate about government and political matters.51 Sections 7 and 24 provide for popular elections to the House of Representatives and the Senate, thereby implying representative government. Section 64 provides for Ministers of the Crown be drawn from Parliament, thereby implying responsible government. Section 128 provides for amending the *Commonwealth Constitution* by referendum, thereby implying (along with ss 7 and 24) the sovereignty of the Australian people.

In *Lange*, the High Court noted that:

The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form “one system of jurisprudence”. Covering cl 5 of the Constitution renders the Constitution “binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State”. Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.52


51 In *Lange*, the High Court noted that ss 1, 7, 8, 13, 25, 28, 30 also gave rise to implications concerning representative government: *Lange* (1997) 189 CLR 520, 557-8, 560. And further, that ss 6, 49, 62 and 83 also gave rise to implications concerning responsible government: ibid 558-9, 561. However, the High Court focused on the implications arising from ss 7, 24, 64 and 128.

52 Ibid 564.
The implied freedom is an indispensable incident to the operation of representative and responsible government. The High Court noted the following with respect to the need for the implied freedom for the maintenance of responsible government:

[T]hose provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.53

On this point, we note the Chapters in the Commonwealth Constitution in which the sections giving rise to the implied freedom are found. Sections 7 and 24 are found in Chapter I, which concerns the Commonwealth’s Parliament. Section 64 is found in Chapter II, which concerns the Commonwealth’s executive government. Section 128 is found in Chapter VIII, which concerns altering the Commonwealth Constitution. That is, the freedom implied from sections found in different Chapters of the Commonwealth Constitution limits the legislative powers of Parliament found in Chapter I. These legislative powers include, notably, the plenary powers in s 51.

Given this, there is no reason in logic or principle why the implied freedom does not also limit the executive powers found in Chapter II. These powers include, of course, those found in s 61 of the Commonwealth Constitution, which we cover in more detail below.

So what is the effect of the implied freedom on Commonwealth, State and Territory executive power? It is said metaphorically in relation to such matters that ‘a stream cannot rise higher than its source’.54 But what is that source? In our view, in Australia there is not one but two streams, and not one but two sources. Each stream and each source must first be understood before examining the effect of the implied freedom on them.

53 Ibid 561.
54 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 258 (Fullagar J).
B  The Streams’ True Sources: A Tale Of Two Settlements

Not surprisingly, English case law concerning the failure to consider a relevant consideration has greatly influenced Australian case law. However, the source of the power of the Commonwealth to execute laws differs from that in the United Kingdom.

In the United Kingdom, the constitutional settlement following the Glorious Revolution resulted in the supremacy of the Westminster Parliament. That is, Parliament’s laws are supreme, and the Crown is obliged to execute them. The source of the executive’s power to execute laws is by Act of Parliament. To illustrate, the Act of Settlement provides:

And whereas the Laws of England are the Birthright of the People thereof and all the Kings and Queens who shall ascend the Throne of this Realm ought to administer the Government of the same according to the said Laws and all their Officers and Ministers ought to serve them respectively according to the same.

This constitutional settlement carried over into the Australian colonies that were granted responsible government and later became States. It also applies to the grant of responsible government to the Territories. As was noted in Union Steamship, ‘A power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself.’

By contrast, the Commonwealth Constitution created a new constitutional settlement for Australia. The old English constitutional

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55 An example of this is the significant number of English cases cited by Mason J in his summary of the principles concerning the failure to consider a relevant consideration in Peko-Wallsend: see Peko-Wallsend (1986) 162 CLR 24, 39-42 (Mason J).
56 Act of Settlement 1700, 12 & 13 Will 3, c 2 s 4 (emphasis added) (‘Act of Settlement’). The Act of Settlement was enacted in 1701, long after ‘the dust had settled’ from the Glorious Revolution. However, the Act of Settlement usefully restates the principles of the constitutional settlement that Parliament and the Crown had observed since the Glorious Revolution. It was also upon the terms of the Act of Settlement that the heirs of Princess Sophia of Hanover assumed the Crown.
57 Union Steamship (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). To be clear, the ‘territory’ referred to in Union Steamship means ‘jurisdiction’. This quoted principle in Union Steamship is applicable to Australian States and Territories.
settlement survived, but subordinated to the *Commonwealth Constitution*, the supreme law.\(^{58}\)

The *Commonwealth Constitution* created three distinct branches of government: the legislature, executive and the judiciary. The *Commonwealth Constitution* conferred upon the Commonwealth Parliament the power to make laws. However, unlike in the United Kingdom, the source of the Commonwealth executive’s power to execute laws is *not* an Act of Parliament (specifically, the Commonwealth Parliament).\(^{59}\) Rather, the source is the *Commonwealth Constitution* itself, s 61 of which 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.\(^{60}\)

Under the *Commonwealth Constitution*, the executive is obliged to execute the laws of the legislature. However, *both* the legislature and the executive are themselves subject to the *Commonwealth Constitution*. Given this, there are in fact *two* ways that the implied freedom restricts executive power:

- By limiting the scope of *laws* passed by Parliament (under s 51 or other provisions) that the executive is obliged to execute.
- By limiting the scope of *executive action itself* under s 61.

\(^{58}\) The High Court in *Lange* noted that ‘[t]he Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature.’ *Lange* (1997) 189 CLR 520, 564.

\(^{59}\) The *Commonwealth Constitution* was an Act of the British Parliament, specifically the *Commonwealth of Australia Constitution Act 1900* (UK). However, as was recognised by Justice McHugh in *McGinty* (1996) 186 CLR 140 at 237 since the passage of the *Australia Act 1986* (UK) ‘the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people’. This reflects similar observations made by Mason CJ in *ACTV* (1992) 177 CLR 106 at 137-8.

\(^{60}\) *Commonwealth Constitution* s 61 (emphasis added). Does the nature of executive power differ between the Commonwealth and the States (and, by extension, the Territories)? In *Williams v Commonwealth* (2012) 248 CLR 156, 203 [57] French CJ noted: ‘Quick and Garran distinguished the “Federal Executive power” conferred by s 61 from “the Executive power reserved to the States.” The executive power of the Commonwealth as a united political community was divided into two parts: “that portion which belongs to the Federal Government, in relation to Federal affairs ... and that portion which relates to matters reserved to the States”. Nevertheless, federal executive power and State executive power were “of the same nature and quality”’ (citations omitted). Hence – and continuing our metaphor – while the water streams from two different sources, the quality of that water is the same.
Hence, a law that does not impermissibly infringe the implied freedom could be executed in a way that does impermissibly infringe it. This result should not surprise. A law may not, on its face, infringe the implied freedom. However, that law may be executed in a wide variety of situations. In certain situations, the law’s execution may impermissibly infringe the implied freedom.

C. What, Then, Is the Test?

English and Australian case law concerning failure to consider a relevant consideration emerged in the context of Parliamentary supremacy. Parliaments could enact legislation affording great latitude to the executive. Failure to consider a relevant consideration remains applicable in situations where executive actions are taken pursuant to Commonwealth, State or Territory laws that are not subject to express or implied constitutional restrictions. That is, this ground of review remains applicable in a great many situations.

However, executive action affecting the implied freedom is not one of those situations. As noted above, relying on the failure to consider a relevant consideration affords the decision-maker too much latitude to disregard the implied freedom. With the implied freedom, the judiciary is not assessing whether a decision-maker has accounted for a consideration (albeit an important one). Rather, the judiciary is assessing whether the decision-maker has breached a strong and wide-ranging constitutional restriction – an important difference.

In our view, the test for whether legislation impermissibly infringes the implied freedom should be adapted, with the necessary changes, to executive power. This approach finds support in the judgment of the plurality in McCloy, who observed, relevantly:

> The term ‘proportionality’ in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. [Such] criteria have been applied... to powers exercised

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61 In Commonwealth v Grunseit, Latham CJ (with whom McTiernan J agreed) observed: ‘[t]he general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.’: Commonwealth v Grunseit (1943) 67 CLR 58, 82 (Latham CJ), 94 (McTiernan J).
The McCloy test adapted to executive power (which we refer to as the ‘adapted McCloy test’) would be as follows:

1. Did the executive action effectively burden the implied freedom of political communication?
2. If ‘yes’ to the first question, was the purpose of the executive action legitimate, in the sense that it was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If ‘yes’ to the second question, was the executive action reasonably appropriate and adapted to advance that legitimate object in a manner that was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

There are five points to note here. First, unlike the test for legislation, the test for executive action is phrased in the past tense. This is because it is likely the test will be employed after executive action has taken place.\(^6\) That said, there is no reason why the test cannot be employed to forestall proposed executive action (noting of course the jurisdictional limitations that prevent the consideration of purely hypothetical cases).

Second, the third stage of the test uses the three stages of ‘proportionality testing’ noted above (again, with the necessary changes). The tests for whether the executive action is necessary and adequate in its balance remain unchanged, except for being phrased in the past tense for the reasons noted above. However, the test for whether executive action is suitable becomes ‘there was a rational connection between the executive action and its purpose’.

Third, it is very important to note the importance of common law freedom of expression to executive action. This is because laws are usually of general application, being directed to groups of various sizes ranging up to the

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\(^6\) Unlike legislation, which is ‘always speaking’ and hence is in the present tense: see, eg, Interpretation Act 1984 (WA) s 8.
entire population of a jurisdiction. Executive action often concerns groups. However, the executive also enforces laws on individuals. In such cases, an individual’s common law freedom of expression is of especial significance when determining proportionality.

Fourth, and contrary to Gaynor and Wotton, the question is indeed constitutional and not administrative, and one resolved by applying constitutional principle. That said, remedies associated with administrative law apply. Executive actions that impermissibly infringe the implied freedom are ultra vires, and the remedies of prohibition, mandamus, and certiorari (amongst others) are available.

Fifth, the test adapted for executive action can be reconciled with the test for legislation. The test whether legislation impermissibly infringes the implied freedom assesses the ‘terms, operation or effect’ of the law. In practice, this means that judges make reasonable inferences from the statute itself and certain other materials about the law’s terms, operation or effect. This test may miss particular instances where the law’s execution impermissibly infringes the implied freedom. Our proposed approach fills this gap.

VI SOME ISSUES WITH THE PROPOSED APPROACH

The proposed approach for whether or not executive action impermissibly infringes the implied freedom raises a number of issues.

A State and Territory Executive Action

As noted above, the Australian colonies adopted the English constitutional settlement concerning Parliamentary supremacy upon being granted responsible government. This constitutional settlement arguably also applies to the grant of responsible government to the Territories. Hence, State and Territory Parliaments can grant considerable latitude to the executive branch similar to the English Parliament. Added to this is the fact that state and territory constitutions, unlike the Commonwealth Constitution, do not formally split legislative and executive powers.

65 Ibid. See also Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 121.
66 See, eg, the materials referred to in the Acts Interpretation Act 1901 (Cth) s 15AB.
Can it be argued that the implied freedom affects s 61’s conferral of executive power on the Commonwealth, but not State and Territory executive power? The better view is the implied freedom also affects State and Territory executive power. As noted above, the *Commonwealth Constitution*, Commonwealth, State and Territory laws, and the common law form ‘one system of jurisprudence’.67 The State and Territory laws referred to include their respective constitutions. As also noted above, *Lange* stated that the implied freedom affects executive as well as legislative power.68

B  
Section 61, Unlike ss 51 and 106, is Not ‘Subject to This Constitution’

Section 51 confers plenary powers ‘subject to this Constitution’. Likewise, s 106, which is to the effect that colonial constitutions continue as State constitutions, contains the same provision. Section 61 does not contain this provision. Could it be argued that the implied freedom cannot apply (at least) to the Commonwealth executive?

There are two replies here. First, the effect of s 106 had been considered in some judgments concerning the implied freedom.69 However, *Lange* and *Unions NSW*70 suggest that, as regards the implied freedom, the provision in s 106 is, in effect, irrelevant. This is because Australia’s constitutional arrangements create not only one system of jurisprudence but also one polity. In *Lange*, the High Court noted:

> Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social,

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68 Ibid 560.
70 (2013) 252 CLR 530.
economic and political matters in Australia make this conclusion inevitable.\textsuperscript{71}

In \textit{Unions NSW}, a majority of the High Court noted:

The reality is that there is significant interaction between the different levels of government in Australia and this is reflected in communication between the people about them.\textsuperscript{72}

They later noted:

The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in \textit{Lange}, these factors render inevitable the conclusion that the discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments.\textsuperscript{73}

By the same measure, like State and Territory legislation, Commonwealth executive action may affect the implied freedom.

The second reply is related to the first: the implied freedom also applies to provisions of the \textit{Commonwealth Constitution} that are not drafted ‘subject to this constitution’. For example, s 30 of the \textit{Commonwealth Constitution} provides, in effect, that Parliament may legislate concerning the qualifications of electors for the House of Representatives. However, s 30 is not drafted ‘subject to this Constitution’. Despite this, the implied freedom would apply to it. Suppose legislation made pursuant to s 30 provided that, to be enrolled, electors must undertake in writing never to offend anyone in public debate.\textsuperscript{74} Further, if an elector breached this undertaking, then the Commonwealth may bring proceedings in court to strike them from the electoral roll. Such legislation would undoubtedly impermissibly infringe the implied freedom.

\textsuperscript{71} \textit{Lange} (1997) 189 CLR 520, 571-2.


\textsuperscript{73} Ibid 550 [25] (citations omitted).

\textsuperscript{74} For the purposes of this example, we consider that the qualification of electors is a separate issue from whether there is an implied universal adult franchise: see \textit{Roach v Electoral Commissioner} (2007) 233 CLR 162; \textit{Rowe v Electoral Commissioner} (2010) 243 CLR 1; \textit{Murphy v Electoral Commissioner} [2016] HCA 36 (5 September 2016).
C Does the Implied Freedom Apply to Non-Statutory Executive Power?

Section 61 not only obliges the executive to execute laws. It is also a source of the Crown’s non-statutory executive powers, including the prerogative powers. For the reasons noted above, the implied freedom applies to the entirety of s 61. Further, and also for the reasons noted above, the implied freedom extends to State and Territory non-statutory executive power. This means, for example, certain exercises of the prerogative power may impermissibly infringe the implied freedom. Unfortunately, space precludes us further exploring this intriguing aspect of the implied freedom and executive power.

VII BUT WHAT ABOUT WOTTON?

The case history in Wotton appears somewhat unusual, but makes it possible for a court not to follow it. In Wotton, the appellant appears to have initially raised the point concerning the implied freedom and the relevant executive action. However, the appellant did not proceed with this point.

As noted above, the High Court majority accepted the Crown’s submissions concerning the implied freedom and executive power. However,

76 In the hearing for Special Leave in Gaynor, Nettle J asked whether a Commonwealth Minister could challenge his dismissal for comments disparaging government policy: see Transcript of Proceedings, Gaynor v Chief of the Defence Force [2017] HCATrans 162 (18 August 2017). The answer to this question is ‘yes’, as the implied freedom affects all parts of the Commonwealth Constitution, including s 64. As we noted above, s 64 itself gives rise to the implied freedom, and the implied freedom affects Chapter II of the Commonwealth Constitution as it does Chapter I. However, it is unlikely a challenge would succeed. This is because the ability to dismiss Commonwealth Ministers is critical to executive accountability under the responsible government implied from the Commonwealth Constitution. We posit another intriguing situation. Suppose a Prime Minister made political comments that were racist or sexist. Suppose further that the Governor-General used their reserve powers to dismiss the Prime Minister for these comments. Could the Prime Minister challenge their dismissal under the implied freedom? The answer, again, is ‘yes’. Once again, the implied freedom affects all parts of the Commonwealth Constitution. Here, the High Court could quash the dismissal. The situation is unlike that of dismissing the Minister, as the Governor-General is not acting on the advice of their Prime Minister. Thus, the argument on the basis of responsible government does not apply. Further, in the case of a Prime Minister, a good argument can be made that the Governor-General can only act if the House of Representatives votes that it has no confidence in the Prime Minister because of the racist or sexist comments. In the absence of such a vote in the House of Representatives, the Prime Minister should only be held accountable for their remarks at a regular election.
because the appellant did not proceed with their point, the Crown’s submissions may not have been challenged in written or oral argument. That is, the High Court may have been deprived of the benefit of opposing argument.

As has been discussed, there are significant problems with treating a failure to consider the implied freedom as not considering a relevant consideration. The proposed approach is more firmly grounded in the text and structure of the Commonwealth Constitution, and supported by comments of a unanimous High Court in Lange.

Wotton was ultimately decided on whether or not the relevant law was unconstitutional. The point concerning executive power was not in issue and therefore not decided upon. The words of a judgment must be read secundum subjectum materiam, that is, in their context. It is therefore open for the High Court to consider our proposed approach to the implied freedom and executive power.

VIII Gaynor

Gaynor usefully illustrates our proposed approach, being a case that concerned the implied freedom and Commonwealth executive power. Gaynor also raises intriguing public policy issues, specifically the extent to which:

- Members of the ADF can speak about issues of public controversy;
- The Acts and legislative instruments governing the ADF (which together we call the ‘governing laws’), and ADF policies, should accommodate the implied freedom;
- The ADF can involve itself in matters of public controversy; and
- The findings in Gaynor can be applied to public agencies other than the ADF.

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78 Specifically the Corrective Services Act 2006 (Qld) ss 132(1)(a), 132(1)(d) and 200(2): see Wotton (2012) 246 CLR 1, 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 27 [66] (Heydon J), 34-5 [92] (Kiefel J).
80 As defined in the Legislation Act 2003 (Cth) s 8.
81 We note that many will find the comments for which Major Gaynor was dismissed objectionable. However, we regard ourselves as zealous advocates for freedom of expression. This means we will scrutinise legislative, executive or judicial actions that restrict this fundamental freedom.
As noted above, Gaynor is a decision of the Full Court of the Federal Court.\(^82\) At first instance, Buchanan J in the Federal Court held that the Chief of the Defence Force (‘CDF’) had unlawfully terminated Major Bernard Gaynor’s\(^83\) commission as an officer in the Army Reserve.\(^84\) This was because the CDF’s decision dated 10 December 2013 terminating Major Gaynor’s commission (‘Termination Decision’)\(^85\) impermissibly infringed the implied freedom.\(^86\)

The Full Court unanimously overturned Buchanan J’s decision. The Full Court held that reg 85(1)(d)(ii) of the Defence (Personnel) Regulations 2002 (Cth) (‘Defence Personnel Regulations’)\(^87\) did not impermissibly infringe the implied freedom.\(^88\) Consequently, the Termination Decision made pursuant to reg 85(1)(d)(ii) was valid.

The High Court refused Major Gaynor’s application for special leave to appeal on the grounds that he had no reasonable prospects of success, and that his case was not an appropriate vehicle to explore the implied freedom.\(^89\) Hence, the decision of the Full Court was not disturbed.

In our view, both the Federal Court and the Full Court were in error. As to the Federal Court, Buchanan J applied the McCloy test as if the Termination Decision was a law.\(^90\) With respect, this was not the correct approach. Rather, Buchanan J needed to develop the McCloy test with respect to executive action.

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\(^82\) We refer to the Full Court of the Federal Court in Gaynor from this point onwards as the ‘Full Court’.

\(^83\) We use ‘Major Gaynor’ from this point onwards to distinguish the person from the case name.

\(^84\) Gaynor v Chief of the Defence Force (No 3) [2015] FCA 1370 (4 December 2015) (‘Gaynor v CDF’). We refer to the Federal Court in Gaynor v CDF as the ‘Federal Court’ from this point onwards.

\(^85\) The Termination Decision can be found as Annexure C to ibid.

\(^86\) Ibid [284]-[289] (Buchanan J).

\(^87\) We refer to reg 85(1)(d)(ii) of the Defence Personnel Regulations as then enacted as ‘reg 85(1)(d)(ii)’ or ‘regulation 85(1)(d)(ii)’ as the case may be.

\(^88\) Gaynor [2017] FCAFC 41 (8 March 2017) [112], [115] (Perram, Mortimer and Gleeson JJ). The Full Court held that reg 85(1)(d) generally did not impermissibly infringe the implied freedom. However, we focus on reg 85(1)(d)(ii) as it is the most appropriate to Major Gaynor’s case. In the Termination Decision, the CDF concluded that Major Gaynor’s continued service was not in the interests of the Australian Army; Termination Decision, [16]-[25]. Regulation 85(1)(d)(ii) provides for the termination of an officer if the chief officer of that officer’s service is satisfied that retention of the officer is not in the interests of the Service (see below in Part VIII.B).


\(^90\) Gaynor v CDF [2015] FCA 1370 (4 December 2015) [280] (Buchanan J).
along the lines of our proposed approach, and then apply it to the Termination Decision.

As to the Full Court, its focus on the constitutional validity of reg 85(1)(d)(ii) was in error.\(^1\) The correct level of analysis was the CDF’s application of reg 85(1)(d)(ii) to Major Gaynor’s case. Here, and as with the Federal Court, the Full Court needed to develop the McCloy test with respect to executive action along the lines of our proposed approach, and then apply it to the Termination Decision.

Our analysis principally focuses on the Termination Decision. Specifically, we focus on the CDF’s reasoning and findings of fact in the Termination Decision. That said, we refer to other parts of the record\(^2\) and the Federal Court, Full Court and High Court decisions as necessary.

By way of general background, at the time his commission was terminated Major Gaynor served in the Army Reserve as an Intelligence Officer. He had served in Iraq and Afghanistan, and was decorated with the United States Meritorious Service Award. At the relevant time, Major Gaynor was also politically active.\(^3\)

The Termination Decision concerned certain remarks Major Gaynor had made on his personal website, in press releases, on Twitter and on Facebook (the ‘Published Remarks’).\(^4\) The remarks mentioned in the

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\(^{1}\) Our view is that reg 85(1)(d)(ii) did not impermissibly infringe the implied freedom, though not necessarily for the same reasons that the Full Court stated. However, the Full Court needed to consider whether the CDF’s application of the law impermissibly infringed the implied freedom. Gaynor is a case where the law itself did not impermissibly infringe the implied freedom, but the law’s execution did impermissibly infringe it.

\(^{2}\) As that term is discussed in Aronson and Groves, Judicial Review of Administrative Action, above n 45, 225–31 [4.370]–[4.400].

\(^{3}\) Major Gaynor was a member of Katter’s Australia Party who had nominated to be endorsed as a Senate candidate. It should be noted that at the time, and now, ADF policy allows Defence members to join political parties, express views in their private capacities, and run for elected office: see Department of Defence, Defence Instruction (General) PERS 21-1 Political activities of Defence personnel (‘The Political Activities Instruction’). At the time, Defence members were prohibited from attending events of a political nature in uniform. ADF Policy now allows the CDF to permit uniformed attendance at political events: Department of Defence, Military Personnel Policy Manual, Part 7-1 [1.9a].

\(^{4}\) These were a website post dated 6 March 2013 and titled ‘Domestic betrayal a waste of soldiers’ sacrifices’; a press release dated 8 March 2013 and titled ‘Defence shows hypocrisy with gay officer’; a website post dated 13 March 2013 and titled ‘Defence’s gender-bending preoccupation comes at the cost of a real equity issue: fair indexation’; a press release dated 22 April 2013 and titled ‘Australian
Termination Decision appear to be part of a spiraling sequence of events. We identify the Published Remarks, and the apparent cause of the spiral in the footnotes.  

We note that the Published Remarks refer to material from the Chief of Army’s Notice to Show Cause for Termination of Appointment as an Officer in the Australian Army dated 30 May 2013 (‘Termination Notice’). However, the Termination Decision did not specify which particular remarks in the material referred to in the Termination Notice were of concern. This was a significant issue for the reasons we discuss below.

As we also discuss below, the CDF terminated Major Gaynor’s commission because of his behaviour. However, before going further, it is useful to clarify what this case was not about.

A What Gaynor Was Not About

As the Termination Decision makes clear, and put broadly, Major Gaynor did not do the following:

1. Make public information sensitive to the ADF or national security;
2. Engage in workplace harassment;
3. Disobey lawful orders; or
4. Breach ADF defence instructions regarding social media.

We now examine each of these matters in turn.

Defence Force disciplines Reserve Intelligence Officer for discussing Islam’; a website post dated 16 May 2013 and titled ‘Malcolm can’t be a Cate’; a press release dated 23 May 2013 titled ‘Government and Defence blinded on Islam’; certain Twitter messages Major Gaynor made between 8 March 2013 and 6 May 2013; and certain Facebook posts Major Gaynor made between 8 March 2013 and 16 May 13: see Termination Decision, [22].

95 Ibid. The ‘spiral’ appeared to commence in early January 2013, when Major Gaynor was counseled by his commanding officer for views that Major Gaynor made in relation to proposed changes to Commonwealth anti-discrimination laws: see Gaynor v CDF [2015] FCA 1370 (4 December 2015) [19]-[27] (Buchanan J). It appeared to escalate after the ADF hierarchy permitted uniformed Defence personnel to march in the 2013 Sydney Gay and Lesbian Mardi Gras: see ibid [28]-[33].

96 The Termination Notice can be found as Annexure A to Gaynor v CDF [2015] FCA 1370 (4 December 2015).
1 Gaynor Did Not Make Public Information Sensitive to the ADF or National Security

In the Termination Decision, the CDF found that Major Gaynor had not disclosed ‘official information’ in contravention of extant Defence instructions. Official information is defined as:

[...] any fact, document or image in electronic or other form, which comes to the knowledge of, or into the possession of Defence personnel, in the course of their duties and:

- which carry a security, privacy or handling caveat;
- which are likely to be sensitive to policy, strategic or operational security issues; or
- the disclosure of which may reasonably be foreseen to be prejudicial to:
  - the effective working of Government, including the formulation or implementation of policies or programs;
  - the security or the defence of Australia and its interests; or
  - Defence’s reputation.

To be clear, governing laws protecting information sensitive to ADF operations or national security would not impermissibly infringe the implied freedom in all but exceptional cases, and rightly so. The same applies to executive actions taken pursuant to such governing laws.

Had Major Gaynor disclosed ‘official information’, the CDF’s case for terminating him would have been compelling. However, this is not what happened.

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87 Termination Decision, [13e]. The relevant Defence instructions appear to be the Department of Defence, Defence (General) ADMIN 08-1 Public comment and dissemination of official information by Defence personnel (‘Public Comment Instruction’); and Department of Defence, Defence Instruction (General) ADMIN 08-2 Use of social media by Defence personnel. (‘Social Media Instruction’).

88 Social Media Instruction (definition of ‘official information’). It continues: ‘[t]his definition in no way limits the provisions of relevant regulations, including the Crimes Act 1914, the [Defence Force Discipline Act 1982 (Cth)], the Public Service Act 1999 and the Public Service Regulations 1999.’ ibid. We would also note the Public Service Regulations 1999 (Cth) reg 2.1(1) prohibits an employee of the Australian Public Service (‘APS’) disclosing information generated during the course of their employment prejudicial to the effective operation of government or the formulation or implementation of its policies or programs. Regulation 2.1(4) prohibits an APS employee from disclosing confidential information obtained or generated during their employment.
2  **Major Gaynor Did Not Engage in Workplace Harassment**

In the Termination Decision, the CDF found that Major Gaynor:

- Had performed well on overseas deployments;\(^{99}\)
- Was a competent officer in the Intelligence Corp and spoke Arabic;\(^{100}\)
- Had reported well as an Intelligence Officer;\(^{101}\)
- Had interacted with male and female Defence members in a cordial and respectful manner in the workplace;\(^{102}\)
- Prior to the matters disclosed in the Termination Notice, had not been subject to an ‘equity and diversity complaint’ in the ADF;\(^{103}\) and
- Had not breached Defence Instruction (General) PERS 35-3 *Reporting and Management of Unacceptable Behaviour* (the ‘Unacceptable Behaviour Instruction’).\(^{104}\)

To all appearances, Major Gaynor conducted himself professionally in the workplace. Had Major Gaynor had engaged in bullying, harassment or abuse in the workplace, the CDF’s case would have been more compelling. However, the issue was only Major Gaynor’s comments outside the workplace.

3  **Major Gaynor Did Not Disobey Lawful Orders**

Here, we note a disparity between the findings in the Termination Decision on the one hand, and the Federal Court and the Full Court on the other. For the reasons that follow, our view is that:

1. The Termination Decision did not conclude that Major Gaynor disobeyed lawful orders; and
2. The Full Court and the Federal Court erred in concluding that Major Gaynor had disobeyed lawful orders.\(^{105}\)

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\(^{99}\) Termination Notice, [13].
\(^{100}\) Ibid [13a].
\(^{101}\) Ibid [13b].
\(^{102}\) Ibid [13c].
\(^{103}\) Ibid [13d].
\(^{104}\) Ibid [13g]. Essentially, there was no finding that Major Gaynor had engaged in workplace harassment.
\(^{105}\) The conclusion that Major Gaynor had been lawfully ordered forms part of the overall conclusions of both the Federal Court and the Full Court: *Gaynor v CDF* [2015] FCA 1370 (4 December 2015)
Our reasons are broken into the following sections:

1. The relevant actions;
2. The military justice system;
3. The CDF’s findings in the Termination Decision; and
4. The Federal Court and the Full Court conclusions.

(a) The Relevant Actions

On 6 February 2013, Major Gaynor’s commanding officer (‘CO’), Lieutenant Colonel Christopher Buxton, advised him not to make any further inflammatory or intemperate remarks on social media (the ‘CO Action’). On 22 March 2013, the Deputy Chief of Army (‘DCA’), Major General Angus Campbell, directed Major Gaynor to remove material identifying him as an Army officer that could reasonably be expected to breach defence policy, contravene ADF values or not be in the Army’s interests (the ‘DCA Action’).

Both the Federal Court and the Full Court held that both the CO Action and the DCA Action were lawful orders. The High Court, in refusing the special leave application, did not disturb these findings.

(b) The Military Justice System

The military justice system has ‘two distinct but interrelated branches: the discipline system and the administrative system’. The discipline system includes offences for which there is no civilian counterpart, such as disobeying a command. It is a separate and distinct justice system that enforces military discipline.

As to the administrative system, the Senate inquiry into the effectiveness of Australia’s military justice system noted that it ‘is designed to encourage
[ADF] personnel to maintain high standards of professional judgment, command and leadership".\(^{110}\)

The Senate inquiry also noted:

> It should be emphasised that the administrative system should not operate as a mechanism through which disciplinary offences committed by individuals are punished, nor should it be used to investigate whether ADF members have committed an offence against the [*Defence Force Discipline Act 1982* (Cth) ("DFDA")]] or civilian criminal laws. The administrative system is primarily aimed at improving ADF processes – any adverse findings or recommendations concerning the conduct of members is incidental to this primary purpose.\(^{111}\)

Adverse administrative action may be taken within the administrative system. It is ‘taken… where conduct falls below the standards required by the ADF, but does not constitute criminal conduct or warrant the initiation of disciplinary proceedings under the DFDA’.\(^{112}\) Adverse administrative action may result in an ADF member being discharged.\(^{113}\)

It appears that action was taken under the discipline system and administrative system with respect to Major Gaynor. As to the discipline system, Major Gaynor’s actions were referred to the Director of Military Prosecutions (‘DMP’) for prosecution. As to the administrative system, Major Gaynor was subject to a ‘quick assessment’,\(^{114}\) investigation by an Inquiry Officer\(^{115}\) and, ultimately, adverse administrative action leading to the Termination Decision. The distinction between the actions taken against Major Gaynor under the discipline system and the administrative system is important for the reasons given below.

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\(^{110}\) Ibid [2.38].

\(^{111}\) Ibid [2.40].

\(^{112}\) Ibid [2.55] (citations omitted).

\(^{113}\) Ibid [2.56].

\(^{114}\) See *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [101]-[105] (Buchanan J).

\(^{115}\) Termination Decision, [13g], [14]. Once again, it should be noted that the Inquiry Officer did not find that Major Gaynor had breached the Unacceptable Behaviour Instruction.
(c) The CDF’s Findings in the Termination Decision

The CDF used the word ‘order’ only once in the Termination Decision. This use is in the context of setting out the particulars of the allegations that had been made against Major Gaynor. Specifically, the Termination Decision noted that the Termination Notice alleged that his conduct ‘did not cease after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies’.

Significantly, however, in the Termination Decision, the CDF did not use the word ‘order’ when describing the CO Action or the DCA Action. Instead, the CDF stated as follows in the section ‘Findings of material fact’:

I note the appropriateness of the manner in which you had publicly expressed views was brought to your attention by your Commanding Officer in his conversation with you on 6 February 2013. I also note that the former Deputy Chief of Army brought this standard and the responsibility of Officers to uphold Army values and ethos in their behaviour specifically to your attention on 22 March 2013. I am satisfied that you did not subsequently modify your behaviour to reflect the standard of public behaviour expected of members of the Australian Army and especially of Officers, including by removing the online material as directed by the former Deputy Chief of Army.

Hence, the CDF referred to the appropriateness of Major Gaynor’s conduct ‘being brought to his attention’, and the DCA ‘directing’ and ‘informing’ Major Gaynor. Using such equivocal language is curious, especially when using ‘order’ or ‘command’ would have been clearer and more forceful.

\[116\] Ibid [3b].

\[117\] Termination Decision, [11] (emphasis added). The CDF later noted in the ‘Reasons for decision’ that Major Gaynor ‘failed to modify [his] online behaviour when the inconsistency of your behaviour expressed in online postings with the standard expected of an Officer in the Australian Army was brought specifically to your attention: ibid [16c] (emphasis added). Further, the CDF noted that the persistence of Major Gaynor’s conduct demonstrated that he did not understand or was unable to exercise his responsibilities as an officer notwithstanding the bringing of expected standards of behaviour to your attention by your chain of command on two separate occasions: ibid [16d] (emphasis added). Finally, the CDF noted ‘Once informed that the manner in which you had expressed your personal views did not accord with Army values, in particular by the former Deputy Chief of Army, you did not modify your behaviour.’ ibid [17] (emphasis added).

\[118\] Ibid [17].
However, the context explains why the CDF used the language he did. In the Termination Decision, the CDF noted that the DMP discontinued disciplinary action 119 against Major Gaynor for the material contained in the Termination Notice. 120 This material included an allegation that the Deputy Chief of Army had ordered Major Gaynor. 121

Had disciplinary proceedings continued, whether or not Major Gaynor had received lawful orders would have been an issue. 122 A court martial would have been the appropriate forum to resolve questions of fact and law concerning this issue. It is reasonable to infer that the DMP discontinued prosecution because of the difficulty in proving that the orders were lawful. 123 Consequently, there was no positive finding by the discipline system – a system purposely designed to assess such issues – that a lawful order had been breached.

Certain other statements suggest that the CDF did not base the Termination Decision on Major Gaynor’s disobedience to lawful orders. The CDF noted:

…your duty status is significant for purposes such as consideration of proceedings under the Defence Force Discipline Act 1982… However, for the purposes of this decision pursuant to the Defence (Personnel) Regulations 2002, it is your behaviour generally which is at issue in deciding whether your retention is in the interests of the Australian Army. 124

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119 DFDA s 103(1)(a) provides that the DMP may direct that a charge not be proceeded with. 119
120 Termination Decision, [13f].
121 Termination Notice, [10].
122 It is likely the charge would have been for breaching DFDA s 27(1), which makes it a crime to disobey a lawful command. It is clear from the record that Major Gaynor would have disputed that he had been lawfully ordered.
123 There were a number of issues with proving that the relevant orders were lawful orders. First, under the Political Activities Instruction, ADF members are permitted personal political activity and comment. Second, whether Major Gaynor was ‘on duty and in uniform’ pursuant to DFDA s 3 (definition of ‘defence member’). Third, there may have been difficulty proving that necessary intent to give an order, especially with the CO Action. We further consider this point below at Part VIII.A.3.(d).(iii). Fourth, there may also have been an issue concerning whether these orders impermissibly infringed the implied freedom. We further consider this point below at Part VIII.C.4.
Further:

…the disciplinary proceedings were directed to your alleged contravention of the Defence Force Discipline Act 1982 and the Inquiry Officer inquiry to your formal compliance with [the Unacceptable Behaviour Instruction] as a Defence member in the workplace.\textsuperscript{125}

Finally:

Both of these matters depended on your duty status at the time of your conduct. Neither was directed to the effect of your conduct holistically in terms of your obligations to serve and of the reputation of the Army and ADF. That, however, is the focus of the Termination Notice and the matter to which I directed your attention in my letter of 22 August. Therefore, I do not consider the outcomes of the disciplinary action or administrative inquiry relevant to my decision on your service.\textsuperscript{126}

That is, the CDF’s focus was not on (amongst other things) disobeying lawful orders. Indeed, at the time of the Termination Decision, the CDF treats this as an allegation. Given that the allegation had not been proven in disciplinary proceedings, such language was appropriate. Instead, the CDF’s focus was on a ‘holistic’ assessment of Major Gaynor’s behaviour.\textsuperscript{127}

We noted in the previous section that Major Gaynor was subject to the discipline system and the administrative system. The discipline system discontinued its action against Major Gaynor, while the administrative system continued to the Termination Decision. However, it was not the place of the CDF, in the administrative system, to conclude that Major Gaynor had disobeyed orders. This further explains the CDF’s choice of language in the Termination Decision.

Before going further, we should note that the CO Action and DCA Action could be considered equivalent to employment directions to Major

\textsuperscript{125} Ibid [14] (emphasis added).
\textsuperscript{126} Ibid (emphasis added).
\textsuperscript{127} This conclusion is also supported by the CDF’s Notice to Show Cause for Termination of Appointment dated 22 August 2013: found as Annexure B in Gaynor v CDF [2015] FCA 1370 (4 December 2015). In this document, the CDF stated that he intended to place greater weight, amongst other things, on Major Gaynor’s public statements that are demeaning or intolerant of homosexuals, transgenders and women: ibid [7].
Gaynor.\textsuperscript{128} Based on his statements in the Termination Decision, the CDF appeared to adopt this approach. Not following a direction may well have consequences in the administrative system, as they did for Major Gaynor in the Termination Decision.\textsuperscript{129} Ultimately, however, not following a direction is a different matter to not following a lawful order. The latter has more serious consequences.\textsuperscript{130} And both the Federal Court and the Full Court held that the CO Action and the DCA Action were lawful orders. We now turn to this issue.

\textit{(d) The Federal Court and the Full Court Conclusions}

Given the foregoing, it was inappropriate for the Federal Court and the Full Court to conclude that the CO Action and the DCA Action were lawful orders. There are four reasons which, taken together or separately, explain why this is so. Specifically, the Federal Court and the Full Court:

1. Purported to review a finding of fact when judicially reviewing administrative action;
2. Acted outside their jurisdiction in concluding Major Gaynor had been lawfully ordered;
3. Did not accord procedural fairness to Major Gaynor when concluding he had been lawfully ordered; and
4. Failed to hold that, if the CO Action and DCA Action were orders, they impermissibly infringed the implied freedom and thus could not be lawful orders.

\textsuperscript{128} We say ‘equivalent to employment directions’ because ADF members are not employees and are not engaged under a contract of employment: see \textit{C v Commonwealth of Australia} [2015] FCAFC 113 (21 August 2015) [1] (Tracey, Buchanan and Katzmann JJ); \textit{Commonwealth v Welsh} (1947) 74 CLR 245, 268 (Dixon J). That said, ADF members may be directed like an employee.

\textsuperscript{129} It should be noted, however, that the CO Action and the DCA Action may have impermissibly infringed the implied freedom even if they were directions and not orders. This is because, first, both the CO Action and the DCA Action were executive actions to which the implied freedom applies. Second, we note below why the CO Action and the DCA Action would impermissibly infringe the implied freedom if they were orders: see Part VIII.C.4 below. This reasoning applies analogously to directions. We emphasise that we mean ‘directions’ in the sense that they are executive actions, not ‘directions’ in the employment sense. As mentioned in the footnote immediately above, ADF members are not employees, and do not have contracts of employment. The extent to which the implied freedom applies to contracts of employment, and contracts generally, is an intriguing issue, and one that we hope to address in later work. However, it is an issue that is beyond the scope of this article.

\textsuperscript{130} Namely, a criminal penalty under DFDA s 27(1).
We will examine the fourth reason after we have completed our analysis of the Termination Decision. What follows is our examination of the first three reasons.

(i) Purporting to Review a Finding of Fact in a Judicial Review of Administrative Action

Both the Federal Court and Full Court held that Major Gaynor had disobeyed lawful orders. For the reasons that follow, considering whether or not a defence member has disobeyed lawful orders involves answering questions of fact and law. However, determining whether a defence member has disobeyed a lawful order is, ultimately, a finding of fact.

Distinguishing questions of fact from those of law is notoriously difficult. However, Francis H Bohlen provides a useful starting point:

The primary and popular meaning of the word ‘fact’ is something which has happened or existed, including not only the physical facts of the case but also more abstract matters, such as the state of mind of those individuals, whose state of mind may be of legal importance.

‘Law’ primarily means a body of principles and rules which are capable of being predicated in advance and which are so predicated, awaiting proof of the facts necessary for their application.

As to whether an order has been given, the ADF’s Discipline Law Manual notes:

Words alleged to constitute a command must always be examined in the light of the circumstances in which they were used and this examination may show clearly enough that the words used, although not otherwise supportable as a command, were intended by the speaker to be a command and were so understood by the person to

331 See Part VIII.C.4.
332 That a court martial is a tribunal of fact ultimately determining whether or not someone is guilty of disobeying an order can be seen in Re Manion’s Appeal (1962) 9 FLR 91, 104.
333 In Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389, 394 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), the High Court noted ‘[t]he distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.’
whom they were spoken.\textsuperscript{135}

It appears that whether or not an order has been given is a question of fact. This is because whether or not an order was given depends not only on the words used but their context.\textsuperscript{136} Further, the state of mind of both the speaker and listener are also important.

Of course, whether or not an order was ‘lawful’ is a question of law. However, even here questions of fact are involved. For example, for a reserve ADF member, a lawful order from a superior officer must be given while the member is on duty and in uniform.\textsuperscript{137} However, whether a member was on duty and in uniform at the relevant time is a question of fact.

As noted above, the CDF in his ‘Findings of material fact’ in the Termination Decision did not find that Major Gaynor had been lawfully ordered. One of the concerns with superior courts reviewing findings of fact is that it may not have all the materials available to the original decision-maker.\textsuperscript{138} Further, in fact-finding, the decision-maker may have experience or a perspective a superior court lacks.\textsuperscript{139} As also noted above, a court martial would have been the appropriate forum to resolve issues concerning whether Major Gaynor had been lawfully ordered. However, the DMP discontinued

\textsuperscript{135} Australian Defence Force, Defence Force Discipline Manual (Defence Publishing Service, 2\textsuperscript{nd} ed, 2001) vol 1, 78.

\textsuperscript{136} In \textit{Re Schneider’s Appeal} (1958) 8 FLR 314, 324 the Courts-Martial Appeal Tribunal noted ‘[w]e think that in any particular case words alleged to constitute a command must always be examined in light of the circumstances in which they are used, and that this examination may show clearly enough that a set of words not otherwise supportable as a command was intended by the speaker to be a command, and was so understood by a person to whom they were spoken.’ See also \textit{Re Manion’s Appeal} (1962) 9 FLR 91, 96. The ADF and its governing laws uses the word ‘order’ as it is ordinarily used in the general sense, that is, ‘an authoritative direction, injunction, command, or mandate’: Susan Butler (ed), \textit{Macquarie Concise Dictionary} (Macquarie Dictionary Publishers, 6\textsuperscript{th} ed, 2013) 1035, or, at the very least, how it is ordinarily used in its military sense, that is ‘a command or notice issued by a military commander to subordinate troops’: ibid. And, it must be noted, there is an overlap between how ‘order’ is ordinarily used in the general and military sense, namely, and relevantly, a ‘command’. Members of a court martial are all ADF members: DFDA s 116. They exercise a jury-like function: DFDA ss 133, 134. They will draw upon their military experience to determine whether or not, in the circumstances, the facts fall into the ordinary definition of an order. Hence, the determination of whether or not an order was given falls into that category of case described in \textit{Collector of Customs v Pozzolanic} 43 FCR 280, 288. That is, ‘when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Where it is reasonably open to hold that they do, then the question whether they do or not is one of fact’.

\textsuperscript{137} DFDA s 3 (definition of ‘defence member’).

\textsuperscript{138} Aronson and Groves, above n 45, 388-9 [4.20].

\textsuperscript{139} Ibid.
disciplinary action. In light of the DMP discontinuing disciplinary proceedings, the CDF carefully avoided mentioning that the CO Action and DCA Action were lawful orders. Instead, the CDF appeared to treat them as equivalent to employment directions when 'holistically' assessing Major Gaynor's behaviour.

In the circumstances, it was inappropriate for the Federal Court and the Full Court to disturb this finding of fact.

(ii) Acting Outside Jurisdiction

The military justice system is designed to function independently, although there is some recourse to civilian courts. As to Gaynor, two things should be noted. First, in the discipline system, the Federal Court may only determine questions of law that the Defence Force Discipline Appeals Tribunal refers to it. Second, in the administrative system, the Federal Court system may judicially review administrative actions.

The issue here is that the Federal Court and the Full Court were engaged in a judicial review of administrative action. Given the structure of the military justice system, judicial review cannot determine whether Major Gaynor had been lawfully ordered, or whether he had disobeyed orders. Such determinations fall within the discipline system, not the administrative system. If the Federal Court or the Full Court wanted clarification about whether Major Gaynor was lawfully ordered, the appropriate course was to refer this issue back to the CDF. Of course, this would have resulted in the CDF referring the matter to the DMP – an action whose result was already known.

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140 See Defence Force Discipline Appeals Act 1955 (Cth) ss 51, 52.
141 ADJR Act ss 3 (definition of 'enactment'), 4, 5.
142 The Federal Court and the Full Court appear to have fallen into the type of jurisdictional error described in Craig v South Australia (1995) 184 CLR 163, 177: '[a]n inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.' And further: '[j]urisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside its theoretical limits of its functions and powers.'
143 ADJR Act s 16(1)(b).
Hence, in the circumstances, both the Federal Court and the Full Court should have only reviewed the legality of the CDF’s ‘holistic’ assessment of Major Gaynor’s behaviour.

(iii) Not According Procedural Fairness to Major Gaynor

Even if the Federal Court and the Full Court had jurisdiction to determine whether Major Gaynor had disobeyed lawful orders, neither accorded him procedural fairness. As noted above, determining whether and ADF member disobeyed lawful orders involve questions of fact and law. The questions of fact include determining whether words in their context convey an order, plus the state of mind of both the speaker and the listener. It is no answer to say, as the Federal Court and Full Court did, that ADF members superior in rank have the right to give lawful orders to a member inferior in rank, with the latter being obliged to obey.\footnote{CDF v Gaynor [2015] FCA 1370 (4 December 2015) [113] (Buchanan J); Gaynor [2017] FCAFC 41 (8 March 2017) [150]-[154] (Perram, Mortimer and Gleeson J)]. This is because the factual and legal context is relevant to whether a purported order is a lawful order or, indeed, even an order.\footnote{Australian Defence Force, Defence Force Discipline Manual (Defence Publishing Service, 2nd ed, 2001) vol 1, 78; Re Schneider’s Appeal (1958) 8 FLR 314, 324 and Re Manion’s Appeal (1962) 9 FLR 91, 96.} The factual and legal contexts of the CO Action and the DCA Action were very much in issue in Gaynor.

From the facts of Gaynor, the DCA Action occurred while Major Gaynor was not on duty and not in uniform. Further, the DCA Action purported to extend to matters of public discussion that could not reasonably be considered official information. In these circumstances, both the DCA and Major Gaynor should have provided direct evidence concerning their understanding of the situation. The DCA may have been aware that, in the circumstances, his order may not have had legal force,\footnote{In the sense that Major Gaynor could not be charged for failing to obey it. Further, the DCA was purporting to order a reserve officer who was not on duty to not speak about matters of public discussion outside the workplace. It should be noted that the CDF could have directed Major Gaynor to report for duty. That direction would have had added force given that failing to report for duty is a criminal offence: DFDA s 23(1). However, even then, the DCA Action still would have encountered the difficulties with being a lawful order that we note in Part VIII.C.4.} thus bringing into question his intent to give a lawful order. Major Gaynor may not have understood that he was being lawfully ordered, given that he was commenting about public matters, not on duty or in uniform, and thus not liable to military

\footnote{CDF v Gaynor [2015] FCA 1370 (4 December 2015) [113] (Buchanan J); Gaynor [2017] FCAFC 41 (8 March 2017) [150]-[154] (Perram, Mortimer and Gleeson J)]. This is because the factual and legal context is relevant to whether a purported order is a lawful order or, indeed, even an order.\footnote{Australian Defence Force, Defence Force Discipline Manual (Defence Publishing Service, 2nd ed, 2001) vol 1, 78; Re Schneider’s Appeal (1958) 8 FLR 314, 324 and Re Manion’s Appeal (1962) 9 FLR 91, 96.} The factual and legal contexts of the CO Action and the DCA Action were very much in issue in Gaynor.

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disciplinary action if he did not obey it. Our point is this: whether or not the DCA Action was a lawful order was clearly a controversial issue and, in these circumstances, procedural fairness required that the relevant witnesses be examined and cross-examined.

The CO Action occurred when Major Gaynor’s CO, Lt Colonel Buxton, and Major Gaynor were on duty and in uniform. However, as a question of fact, it does not appear a lawful order was given. In a memorandum, Lt Colonel Buxton noted ‘My intent is to formally counsel [Major Gaynor] concerning the inappropriateness of his actions while serving as an Army officer’. Later, in the record of conversation between Lt Colonel Buxton and Major Gaynor, Lt Colonel Buxton recorded ‘In concluding, LTCOL Buxton advised Major Gaynor that provided he complied with policy and acted professionally, he would consider the issue closed. MAJ Gaynor acknowledged this’. Lt Colonel Buxton does not mention orders, only compliance with policy and acting professionally. Factually, the record of conversation appears to note a caution, not orders. Once again, procedural fairness demanded that Lt Colonel Buxton and Major Gaynor be examined and cross-examined concerning their understanding of the situation.

In addition, the political consequences to Major Gaynor were severe. His livelihood would suffer by being dismissed. Further, his reputation would suffer because he would be seen as an officer who disobeyed orders. In these circumstances, procedural fairness required that Major Gaynor be allowed to examine and cross-examine relevant witnesses.

Put another way, the Federal Court or, failing that, the Full Court needed to address the issue of whether Major Gaynor had disobeyed orders in a manner similar to how a court martial would have. In addressing this issue, a court martial would have allowed the examination and cross-examination of relevant witnesses. That neither the Federal Court nor the Full Court appreciated this is concerning.

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149 Federal Court of Australia Act 1976 (Cth) s 46.
150 Ibid s 27(c).
151 Court Martial and Defence Magistrate Rules (Cth) pt 3.
Given the foregoing, did the CDF also fail to accord procedural fairness to Major Gaynor by not allowing him to examine or cross-examine relevant witnesses? The CDF would have so failed except, once again, the CDF in the Termination Decision did not find that Major Gaynor disobeyed orders. Again, his review was confined to a 'holistic' assessment of Major Gaynor's behaviour.

In summary, there appear to be serious issues concerning how the Federal Court and the Full Court addressed whether or not Major Gaynor had been lawfully ordered. Given this, the High Court should have granted special leave. Such a failure of due process simply cannot happen again in Australia’s legal system.

4 Major Gaynor Did Not Breach Defence Instructions Regarding Social Media

In the Termination Decision, the CDF did not find that Major Gaynor had breached the Social Media Instruction. Further, and as noted in the previous section, the DMP discontinued disciplinary action based on the online material referred to in the Termination Notice. The Social Media Instruction constitutes a general order that, if breached, exposes a defence member to criminal liability. In view of the DMP’s decision to discontinue disciplinary proceedings, the CDF appeared to confine the Termination Decision to a ‘holistic’ assessment of Major Gaynor’s behaviour.

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152 It is worth noting that neither the Federal Court nor the Full Court noted the distinction between the discipline system and the administrative system in Australia’s military justice system. Doing so may have avoided confusion about what they could and could not do with respect to the Termination Decision.

153 The CDF stated ‘I accept you did not contravene extant instructions due to your duty status, but I have considered your submission from the point of view of the standards of behaviour expected of Defence members generally’: Termination Decision, [17] (emphasis added).

154 Ibid [13f].

155 DFDA s 3 (definition of ‘general order’); see also Gaynor v CDF [2015] FCA 1370 (4 December 2015) [68] (Buchanan J).

156 DFDA s 29(1).

157 DFDA s 29(1) did not apply to Major Gaynor because, at the relevant time, he was not on duty or in uniform. In any event, there is a significant issue concerning whether relevant parts of Social Media Instruction [19] impermissibly infringe the implied freedom, given our analysis of s 18C of the Racial Discrimination Act 1975 (Cth) in Forrester, Finlay and Zimmermann, No Offence Intended, above n 17 and s 17(1) of the Anti-Discrimination Act 1998 (Tas) in Forrester, Zimmermann and Finlay, ‘An Opportunity Missed?’, above n 17. Social Media Instruction [19] provides that ‘[d]efence personnel must not post material that is offensive towards any group or person based on any personal traits, attributes, beliefs or practices that exploit, objectify or are derogatory of gender, ethnicity or religion.’
Both the Federal Court and Full Court held that the Social Media Instruction applied to Major Gaynor.\textsuperscript{158} Once again, this was inappropriate for substantially the same reasons we noted in the previous section.\textsuperscript{159}

B What Gaynor Is About

\textit{Gaynor} concerns whether the CDF acted within power when he terminated Major Gaynor’s commission due to his \textit{behaviour}. At the time,\textsuperscript{160} reg 85(1)(d)(ii) provided, relevantly:

(1) The service in the Defence Force of an officer may be terminated, in accordance with this regulation, for any of the following reasons:

\ldots

(d) the Chief of the officer’s Service is satisfied that the retention of the officer is not in the interest of:

\ldots

No defences are provided. This is a sweeping intrusion into the ability of Defence personnel to comment on any government or political matter on social media. ‘Offensive’ and ‘derogatory’ set a threshold for legal liability that is far too low. Further, they are terms that are too broad and too vague. We detail the concepts of overbreadth and vagueness further below.

\textsuperscript{158} \textit{Gaynor v CDF} [2015] FCA 1370 (4 December 2015) [86], [115], [197], [275] (Buchanan J); \textit{Gaynor} [2017] FCAFC 41 (8 March 2017) [7] (Perram, Mortimer and Gleeson JJ).

\textsuperscript{159} Again, the Federal Court and the Full Court appear to be making a finding of fact where the CDF was the appropriate person to make, and who did make, such a finding. The Federal Court and the Full Court also appear to be exercising jurisdiction that should be exercised through the military discipline system concerning questions of fact and law. On the procedural fairness point, if the Federal Court and the Full Court were considering finding that the Social Media Policy \textsuperscript{19} applied to Major Gaynor, he should have been given the opportunity to make written and oral submissions concerning (at least) three matters. First, whether Major Gaynor could \textit{in fact} be identified as an ADF member in certain communications: see Social Media Instruction [9]. It is not clear in some communications that Major Gaynor could be so identified: see \textit{Gaynor v CDF} [2015] FCA 1370 (4 December 2015) [17], [22]-[25]. Even then, the test used to identify someone’s ADF membership with a communication may itself be an issue. If so, Major Gaynor should also have been given the opportunity to make submissions in this regard. Second, whether relevant parts of Social Media Instruction \textsuperscript{19} impermissibly infringed the implied freedom. Third, whether the comments complained about in fact breached Social Media Instruction \textsuperscript{19}. In addition, an ordinary meaning would be given to ‘offensive’ and ‘derogatory’. Hence, as noted above, it would be up to the members of the court martial to determine whether or not, as a matter of fact, the Published Remarks would fall within the ordinary definitions of ‘offensive’ and ‘derogatory’.

\textsuperscript{160} The Defence Personnel Regulations, which applied at the time when the events noted in \textit{Gaynor} occurred, have now been replaced by the \textit{Defence Regulations 2016} (Cth).
(ii) the Chief’s Service;

Regulation 85(1A) of the Defence Personnel Regulations\(^{161}\) was also relevant, and provided:

Without limiting paragraph (1)(d), the Chief of the officer’s Service may be satisfied for that paragraph for reasons relating to the officer’s:

(a) performance; or
(b) behaviour; or
(c) conviction of an offence or a service offence.\(^{162}\)

In the section titled ‘Findings of material fact’, the CDF stated that he informed Major Gaynor that his public comments:

…demonstrate attitudes that are *demeaning of*, and demonstrate *intolerance of*, homosexual, transgender persons and women, and are contrary to the policies and cultural change currently being undertaken in the Australian Army and Australian Defence Force (ADF).\(^{163}\)

The CDF noted that a significant amount of the relevant material from Major Gaynor’s Published Remarks:

…is *critical of* the ADF and government policy and decisions, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles.\(^{164}\)

Further, the CDF noted that Major Gaynor’s publicly expressed disagreement was:

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\(^{161}\) We refer to reg 85(1A) of the *Defence (Personnel) Regulations 2002* (Cth) as ‘reg 85(1A)’ or ‘regulation 85(1A)’ as the case requires.

\(^{162}\) In 2013, DFDA reg 85 was amended. However, reg 85(1)(d)(ii) as amended and reg 85(1A) commenced on 5 March 2013; see DFDA Endnote 1. Hence, these provisions were in effect prior to the Termination Notice being issued.

\(^{163}\) Termination Decision, [4] (emphasis added).

…generally intemperate, disrespectful and does not accord with the standard of behaviour expected of any Defence member, and particularly an Officer of your rank and experience.\textsuperscript{165}

Before going further, we note that the CDF stated that Major Gaynor’s religious convictions had no bearing in on the Termination Decision.\textsuperscript{166} Hence, the CDF considered Major Gaynor’s freedom to speak his religious views.

However, the CDF did not appear to satisfactorily consider Major Gaynor’s freedom to communicate about government and political matters. The closest the CDF came were these statements:

I distinguish between your holding of a personal opinion, the mere fact of which I do not consider necessarily inconsistent with the standards required of Defence members, and your conduct in expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve.\textsuperscript{167}

And later:

Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability.\textsuperscript{168}

As we will show below, as a matter of administrative law, the CDF failed to consider a relevant consideration, specifically Major Gaynor’s freedom to communicate about government and political matters.\textsuperscript{169} However, it is the matter of constitutional law that concerns us – specifically, whether the Termination Decision impermissibly infringed the implied freedom. It is to this matter that we now turn.

\textsuperscript{165} Ibid (emphasis added).
\textsuperscript{166} The CDF accepted Major Gaynor’s statements were informed by his personal beliefs and faith, but did not accept that disciplining Major Gaynor ‘shows intolerance of your opinions and demeans the right of ADF members to practice their faith because such action is directed to your behaviour and the manner in which you have publicly expressed your beliefs, rather than the beliefs themselves.’: ibid [9] The CDF also rejected Major Gaynor’s submission that criticism of his conduct showed intolerance of his Catholic faith, stating: ‘... I do not consider this a question of faith. There is no evidence of direct or indirect discrimination against you on the basis of your religious beliefs’: ibid [18].
\textsuperscript{167} Ibid [9].
\textsuperscript{168} Ibid [10].
\textsuperscript{169} Part VIII.D.
C Applying the Adapted McCloy Test to Gaynor

Applying the adapted McCloy test to the Termination Decision yields the following result.

1 Did the Termination Decision Burden the Implied Freedom?

The Termination Decision terminated Major Gaynor’s commission on the basis of comments that:

- Were critical of ADF and government policy; and
- Demonstrated intolerance of homosexuals, transgender people and women.

ADF and government policy are, of course, government and political matters. Further, the following matters upon which Major Gaynor commented are also government and political matters:

- Women in frontline combat roles;
- Whether or not transgender people should serve in the ADF and, if so, the degree to which accommodation and support should be provided to them;
- The government and the ADF’s approach to Islam; and
- The ADF marching in the Sydney’s annual Gay and Lesbian Mardi Gras.

Applying implied freedom cases concerning legislation by analogy, all that is needed at this stage is that the implied freedom be burdened. The extent to which it is burdened does not matter.170

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170 We note, however, that in McCloy, Gageler J stated that judicial scrutiny of the relevant law should be ‘calibrated to the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis’: McCloy (2015) 257 CLR 178, 238 [150] (Gageler J). Nettle J, at 269-70 [255], observed that ‘a direct or severe burden on the implied freedom requires a strong justification’. Gordon J stated, at 288 [336], that whether a law impermissibly infringes the implied freedom of political communication ‘is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government’. See also Brown [2017] HCA 43 (18 October 2017) [90], [121], [128] (Kiefel CJ, Bell and Keane JJ), [164]-[165] (Gageler J), [237], [291] (Nettle J) and [325], [397] (Gordon J).
As noted above, executive action may concern not only groups but also individuals. Hence, the implied freedom may be burdened even if one individual is affected.

Terminating Major Gaynor’s commission because of comments he made about certain government and political matters is a burden on the implied freedom.\footnote{\text{171}}

Hence, the Termination Decision burdened the implied freedom.

Was the Termination Decision’s Purpose Legitimate?

As shown above, the decision was made pursuant to reg 85(1)(d)(ii). Regulation 85(1A)(b) allows the CDF consider behaviour. It is clear the Termination Decision was principally concerned with Major Gaynor’s behaviour. Maintaining appropriate behaviour in the ADF is legitimate, as it is a purpose compatible with Australia’s constitutionally prescribed system of representative and responsible government.

The real issue with the Termination Decision concerns whether the Termination Decision was a proportional response to Major Gaynor’s comments.

Was the Termination Decision Reasonably Appropriate and Adapted to Advance its Legitimate Object In a Manner Compatible With the Maintenance of the Constitutionally Prescribed System of Representative and Responsible Government?

Here, we apply the steps of the proportionality test, as adapted to executive power.

(a) Was the Termination Decision Suitable?

On its face, there was a rational connection between the Termination Decision and its purpose, which is to discipline behaviour pursuant to regs 85(1)(d)(ii) and 85(1A).

\footnote{\text{171} See also \textit{Gaynor v CDF} [2015] FCA 1370 (4 December 2015) [250] (Buchanan J).}
(b) Was the Termination Decision Necessary?

This step raises an intriguing issue. There was, in fact, an alternative that was (and is) obvious and easily implemented. The alternative was for Major Gaynor to include in any statements where official information was not being disclosed but his ADF involvement may be an issue this disclaimer: ‘The views of Bernard Gaynor are his own and are not those of the ADF.’

The disclaimer ‘The views of [person X] are their own and not those of [organisation Y]’ is widespread in both the public and private sectors. The Commonwealth government, working with the ADF, could easily provide for disclaimers in the ADF’s governing laws. Further, the ADF itself could allow for using disclaimers when issuing orders. Of course, tight restrictions on official information would – and should – remain. However, in matters of public debate where official information is not at risk of being disclosed, then such disclaimers should be used.

Further, and as discussed below, it appears that the governing laws and policies guiding the ADF have not paid due regard to the implied freedom. The use of disclaimers by ADF personnel would accommodate the strength and width of the implied freedom.

Hence, and in light of what this case is and is not about, the Termination Decision fails this step of ‘proportionality testing’.

(c) Was the Termination Decision adequate in its Balance?

In the Termination Decision, the CDF identified a number of bases for terminating Major Gaynor’s commission. These bases were:

1. Major Gaynor’s behaviour was ‘repeatedly inconsistent’ with Defence Instruction (General) PERS 50-1 Equity and Diversity in the Australian Defence Force (‘Equity and Diversity Instruction’) and the Diversity

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972 Provided these orders otherwise meet the requirements for lawful orders. We note that the Australian Defence Force’s Military Personnel Policy Manual, Part 7-1 [1.6]-[1.7] requires that ADF members must take ‘all reasonable steps’ to avoid bringing the ADF or the Department of Defence’s neutrality into question, or giving the impression that the ADF member’s activity is being undertaken in other than a private capacity. The Military Personnel Policy Manual, the Public Comment Instruction and/or the Social Media Instruction could provide guidelines on the use of disclaimers.
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and Inclusion statement dated 13 March 2013 (‘Diversity and Inclusion Statement’); and

2. Certain considerations to which the CDF gave weight.

There are significant issues with these bases, which in turn inform whether the Termination Decision was adequate in its balance. We now examine these bases and, after this, consider other issues relevant to the adequacy of the Termination Decision.

(i) The Equity and Diversity Instruction and the Diversity and Inclusion Statement

Before going further, when assessing the proportionality of executive action, two fundamental principles should be kept in mind:

- In a common law legal system, ‘everybody is free to do anything, subject only to the provisions of the law’; and
- As a corollary to the first principle, in a common law legal system, government cannot do anything unless authorised by law.

Both principles apply to the ADF. Both the Equity and Diversity Instruction and the Diversity and Inclusion Statement were unsound bases for the Termination Decision. As to the Equity and Diversity Instruction, it is clear that this document focuses on conduct in the workplace, not outside of it.

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573 Termination Decision, [10], [16a].
574 Lange (1997) 189 CLR 520, 564 (citations omitted).
575 Charles Sampford, ‘Law, Institutions and the Public/Private Divide’ (1991) 20 Federal Law Review 185, 201: ‘There are different ‘closure rules’ for public and private law. Such closure rules determine what should be done if there is no appropriate rule to cover a case. In public law the rule is ‘what is not authorised is not permitted’ and in private law it is that ‘what is not prohibited is permitted.’ Sir John Laws notes two first order constitutional principles ‘The first is that for the individual citizen, everything which is not forbidden is allowed. The second is that for public bodies, and notably the government, everything that is not allowed is forbidden.’ As to the latter, he notes ‘the ideal of democratic government under the law, where there is no place for arbitrary or capricious conduct, dictates that every decision it takes must be authorised by the terms of the positive legal power conferred upon it, whose limits it must not transgress.’ John Laws, ‘The Rule of Reason – an International Heritage’ in Mads Tønnesson Andenas, Gordon Slynn and Duncan Fairgrieve (eds), Judicial Review in International Perspective (Kluwer, 2000) 247, 256. We would include in the term ‘law’ here both statutory and non-statutory sources of authority, such as prerogative.
576 In the Termination Decision, the CDF asserted that the Equity and Diversity Instruction applied irrespective of duty status: Termination Decision, [10]. Buchanan J made a similar assertion in
the ‘workplace’,¹⁷⁷ ‘workforce’,¹⁷⁸ ‘working conditions’,¹⁷⁹ ‘working environment’¹⁸⁰ and the ADF being an organisation that ‘works together’.¹⁸¹ The document outlines implementation of equity and diversity principles through a Workplace Equity and Diversity Plan.¹⁸² The equity and diversity legislation referred to in the annexure to the Equity and Diversity Instruction refers to legislation that, amongst other things, prohibits discrimination and harassment in the workplace.¹⁸³ Further, the Public Service Act 1999 (Cth) (‘PSA’) provisions referred to in this annexure are directed to conduct in the workplace.¹⁸⁴

As noted above, the CDF found that there was no issue with Major Gaynor’s conduct in the workplace. The CDF certainly found issues with Major Gaynor’s conduct outside the workplace. However, this conduct was simply beyond the scope of the Equity and Diversity Instruction. The CDF could not therefore rely on the Equity and Diversity Instruction to support his termination of Major Gaynor.

As to the Diversity and Inclusion Statement, this document does not carry the force of law in any description. Rather, it is a strategy document. The Diversity and Inclusion Statement may certainly form the basis for future governing laws and orders. However, it is not itself a governing law or an

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¹⁷⁷ Ibid [3], [4], [7e], [9], [18], [18a], [18b], [20a].
¹⁷⁸ Ibid [4].
¹⁷⁹ Ibid [8].
¹⁸⁰ Ibid [11], [13], [17].
¹⁸¹ Ibid [16a].
¹⁸² Ibid [12], [14], [18a], [20a], [21], [23].
¹⁸³ Ibid Annexure A [1]-[5].
¹⁸⁴ Ibid Annexure A [7a], [7c-e], [8].
order.\textsuperscript{185} Even if the Diversity and Inclusion Statement did have legal force, its operation outside the workplace would, in relevant respects, impermissibly infringe the implied freedom.\textsuperscript{186} The CDF could not therefore rely on the Diversity and Inclusion Statement to support his termination of Major Gaynor.\textsuperscript{187}

To conclude, it does not appear that the Equity and Diversity Instruction, the Diversity and Inclusion Statement, or other relevant laws prohibited Major Gaynor’s conduct.\textsuperscript{188} This meant he was, in fact, free to engage in this conduct. We will return to this point in the next section.

\textsuperscript{185} The closest the Diversity and Inclusion Statement comes to an order are remarks the CDF makes jointly with the Defence Secretary in a ‘message’: Diversity and Inclusion Statement 3. However, it is virtually certain the ‘message’ would not be an order, given that it is jointly signed with the Defence Secretary, a civilian.

\textsuperscript{186} For example, the Diversity and Inclusion Statement encourages ADF members to respect diverse backgrounds, experiences, knowledge and skills: ibid 3. If applied as a directive for conduct outside the workplace, this would impermissibly infringe the implied freedom. The reasoning we used above for the Equity and Diversity Instruction’s promotion of respect outside the workplace would apply here. This reasoning would also apply were the Diversity and Inclusion Statement’s expectation that ADF members champion diversity apply as a directive for conduct outside the workplace: ibid 3.

\textsuperscript{187} It is also for these reasons that the Full Court was in error by placing reliance on it in their reasoning; see Gaynor [2017] FCAFC 41 (8 March 2017) [164]-[166] (Perram, Mortimer and Gleeson JJ).

\textsuperscript{188} That said, the relevant considerations of a decision-maker are governed by the construction and purpose of the relevant statute: Peko-Wallsend (1986) 162 CLR 24, 39-40 (Mason J). In this case, the discretion conferred by reg 85(1)(d)(ii) is broad. Here, ‘the general rule is that a discretion expressed without any qualification is unconfined except in so far as it is affected by limitations to be derived from the context and scope and purpose of the statute’: R v Australian Broadcasting Tribunal; Ex Parte 2HD Pty Ltd (1979) 144 CLR 45, 50. The Defence Personnel Regulations reg 7(1) prescribe certain considerations concerning termination as described in reg 7(2). But could it be argued that the Equity and Diversity Instruction and the Diversity and Inclusion Statement be taken into account as a consideration under reg 85(1)(d)(ii) for conduct outside the workplace? In this way, reg 85(1)(d)(ii) would ‘authorise’ using these documents. However, two problems arise. First, reg 85(1)(d)(ii) would then operates as a “catch all” provision for conduct that (in this case) the Chief of Army does not like. This creates the risk of capricious application. Second, and in any event, such a sweeping application of reg 85(1)(d)(ii) would likely impermissibly infringe the implied freedom for the reasons we noted above for the Equity and Diversity Instruction and Diversity and Inclusion Statement were they applied outside the workplace.
(ii) Certain Considerations to Which the CDF Gave Weight

As noted above, regs 85(1)(d)(ii) and 85(1A) provide that the CDF may terminate an officer’s commission on the ground of behaviour. In justifying the Termination Decision, the CDF weighed certain considerations as follows:

1. He gave weight to the standards of behaviour expected of ADF members generally. Further, that Major Gaynor had not modified his behaviour when the manner of his comments critical of Defence, government policy, support for homosexual and transgender ADF personnel and women serving in frontline combat roles had been brought to his attention.

2. The manner and tone of Major Gaynor’s comments had irreparably undermined the CDF’s confidence in Major Gaynor’s ability to uphold Army values and ‘be a leader in an organisation in which everyone is expected to respect diversity and demonstrate tolerance and respect, notwithstanding [Major Gaynor’s] personal beliefs.’

3. The significant weight that the CDF placed on Major Gaynor’s service history, his United States Meritorious Service Medal and his desire to continue service was ‘outweighed by [Major Gaynor’s] conduct in making repeated and intemperate comments critical of Defence and government policies and decisions, and individual Defence members, including after being instructed to of the standard of behaviour expected of [Major Gaynor] if [he] wished to continue as an Officer in the Army Reserve.’

4. He gave considerable weight to the behaviour evidenced in Major Gaynor’s Published Remarks being ‘inconsistent with the standards of behaviour and conduct required for the proper performance of duty.’

5. He gave medium weight to the consideration that Major Gaynor’s online behaviour, which was ‘divisive and disrespectful’ regarding ‘other serving members individually and as groups’, had the capacity to affect

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189 As noted in the previous footnote, the Defence Personnel Regulations obliges those required to make a termination decision to consider certain matters: Defence Personnel Regulations reg 7(1). These matters are described in ibid reg 7(2).
190 Termination Decision, [17].
191 Ibid [18].
192 Ibid [19].
193 Ibid [22].
recruitment and retention, and affect morale and discipline ('Organisation Considerations').

We term the matters contained in points one to four the 'Comment Considerations'.

As to the Comment Considerations, we make four points. First, and generally speaking, restricting expression about government and political matters within the workplace is less likely to impermissibly infringe the implied freedom. But that is not the type of restriction in issue here and, in any event, there was no issue with Major Gaynor’s workplace conduct. Rather, the CDF purported to restrict, and then punish, Major Gaynor’s freedom to communicate about government and political matters outside the workplace.

Our second point is related to the first. As noted above, the implied freedom is not a right. Hence, the Full Court properly corrected the Federal Court in this regard. However, as also noted above, freedom of expression at common law is of constitutional importance. In determining whether that executive action was proportional, its effect on that individual’s common law freedom to express themselves about government and political matters must be considered. The CDF’s actions were a sweeping intrusion into Major Gaynor’s freedom to communicate about government and political matters.

Third, in the Termination Decision, the CDF considered Major Gaynor’s freedom to hold religious beliefs. However, the CDF’s consideration of Major Gaynor’s freedom to communicate about government and political matters was, to put it charitably, cursory. The closest the CDF came to it was to say ‘Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability’.

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194 Ibid [21].
195 Ibid [22].
197 Termination Decision, [10].
Major Gaynor holding a personal opinion and expressing those opinions ‘publicly in an inappropriate and disrespectful manner’.\(^{198}\)

The CDF appeared to fix upon the tone and content of Major Gaynor’s remarks, but does not consider whether Major Gaynor was, in fact, free to make these remarks. For the reasons we noted above, the implied freedom is a strong and wide-ranging freedom. Intemperate and disrespectful language falls well within its ambit. As Kirby J has noted:

> From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas… By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation’s representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse…\(^{199}\)

Hayne J has noted:

> History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental.\(^{200}\)

Fourth, the CDF appears to have insufficiently appreciated both the workplace context and professionalism. As to the workplace context, a person’s political opinion is usually irrelevant to whether they are effective employees.\(^{201}\)

In a workplace, employees can and do set aside personal differences to achieve employment goals. This is, at least in part, the reason why dismissal on the ground of political opinion is a ground for unlawful termination in most Australian jurisdictions.\(^{202}\) Further, employees expressing political opinions

\(^{198}\) Ibid [9].
\(^{200}\) Monis (2013) 249 CLR 92, 136 [85] (Hayne J).
\(^{201}\) Of course, political parties should be free to not employ who are members of other political parties, or do not share that party’s political platform.
\(^{202}\) Anti-Discrimination Act 1991 (Qld) ss 7(j), 15; Anti-Discrimination Act 1998 (Tas) ss 14, 15, 16(m), (n); Equal Opportunity Act 2010 (Vic) ss 6(k), 18; Equal Opportunity Act 1984 (WA) s 53; Fair Work Act 2009 (Cth) 772(f).
outside the workplace should be expected, and indeed accommodated, in a
liberal democracy like Australia’s.

As to professionalism, the ADF is known as the ‘Profession of Arms’.
203 The Equity and Diversity Instruction lists professionalism as the first of the
ADF’s values.204 However, to say that higher standards of conduct are expected
of professionals in expressing political views205 is misconceived. Indeed, much is
expected of professionals in their respective workplaces. However, in a liberal
democracy, professionals can and do publicly participate in fierce and searching
political debates. Our point here is that, outside the workplace, members of the
same profession may bitterly disagree over any number of things, politics
included. However, once in the workplace, their position is similar to
employees, as noted above. That is, professionals should – and do – put aside
such differences to work towards common goals.206

Recognising that political opinion is largely irrelevant to whether
someone can be an effective employee or professional is critical to genuine
workplace inclusivity and diversity. That is, including people not only from
different backgrounds and possessing different attributes, but holding different
views.

While we appear to be labouring the point, it bears repeating: there
were no issues with Major Gaynor’s conduct in the workplace. He clearly
possessed very strong religious and political views. However, there were never
any complaints about how he dealt with other ADF members in the workplace.
Indeed, his conduct in the workplace appears to have been exemplary. Major
Gaynor’s conduct within the workplace appeared consistent with the
professionalism that should be expected of ADF members in a liberal
democracy.

It is true that the ADF regards itself as apolitical, and is cautious about
its members appearing political. However, given the implied freedom’s strength

204 Equity and Diversity Instruction [15a].
205 The Full Court noted that the ADF ‘insists on respect and tolerance, without which diversity
206 For example, lawyers in a litigation team may vehemently disagree on any numbers of matters,
including political matters, outside the workplace. However, once in the workplace, they work with
each other to represent their client.
and width, the ADF should reconsider how it and its members approach political matters. This is a point we further discuss below.

Before turning to other considerations, we note that our comments apply not only to reserve but full time ADF members. Full time ADF personnel remain citizens of the nation they defend. However, there is something to be said for affording reserve members even greater latitude to talk about government and political matters. This is because reserve members are civilians rendering part-time military service. Such reasoning finds support in the Commonwealth Constitution itself, s 44 of which provides for disqualifications for Senators and members of the House of Representatives. Section 44(iv) provides that among those disqualified are those who ‘holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth’. However s 44 also provides, relevantly:

[S]ubsection (iv) does not apply… to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen’s navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

That is, s 44 contemplates that ADF reserve members may be Senators or members of the House of Representatives. This necessarily presupposes that ADF reserve members will be candidates for such positions, and thus be involved in debates about government and political matters. However, it should not be thought that ADF reserve members need stand as candidates to be given latitude to talk about government or political matters. Given the principles of popular sovereignty noted above, the better view is that ADF reserve members have such latitude because they are part of a sovereign people.

As to the Organisation Consideration, it was speculative. There was no indication in the record that ADF members had threatened to leave if Major Gaynor’s commission was not terminated.

Further, the CDF considered the effect on ADF recruitment, retention, morale and discipline if Major Gaynor’s commission was not terminated.

207 See Gaynor v CDF [2015] FCA 1370 (4 December 2015) [253]-[254] (Buchanan J). The Full Court did not appear to disturb this finding on appeal.
However, given this, the CDF should then have considered the effect on such matters if Major Gaynor was terminated.

As we detail in the next section, Major Gaynor’s Published Remarks ranged from mild to coarse. However, the CDF took a ‘broad brush’ approach, describing the language in this material as intemperate, inappropriate, divisive and/or disrespectful. Put another way, the CDF did not indicate which, if any, of Major Gaynor’s comments fell outside this description. However, taking such a broad approach would create a ‘chilling effect’ for current and prospective ADF personnel. What, if anything, can ADF personnel say that won’t get them into trouble on account of their ‘behaviour’? This chilling effect, and its potential to affect recruitment, retention, morale and discipline, is something the CDF did not consider but, in the circumstances, should have.

(iii) Other Considerations

There are certain other considerations relevant to whether the Termination Decision was adequate in its balance.

The first consideration concerns the Termination Decision being too broad and too vague. From the face of the Termination Decision, the entirety of Major Gaynor’s Published Remarks was of concern.209 As such, the Termination Decision’s scope was very broad. Major Gaynor’s comments in his Published Remarks ranged from mild to coarse. The remarks ranged from this:

208 With respect, the approach that certain High Court members in Brown took to the phrase chilling effect’ is somewhat curious: see Brown [2017] HCA 43 (18 October 2017) [262] (Nettle J), [457]-[470] (Gordon J). The phrase ‘chilling effect’ is hardly unknown in High Court jurisprudence. When it is used, it refers to how laws may unduly stifle freedom of expression; it does not refer to the US ‘chilling effect’ doctrine: see, eg, Brown [2017] HCA 43 (18 October 2017) [151] (Kiefel CJ, Bell and Keane JJ); Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, 131, 135 (Mason CJ, Toohey and Gaudron JJ), 155, 156-157 (Brennan J), 174, 185 (Deane J); Roberts v Bass (2002) 212 CLR 1, 40-41 [102] (Gaudron, McHugh and Gummow JJ). See also Australian Law Reform Commission, Unfair Publication: Defamation and Privacy, Report No 11, (1979) 22-3 [37]. Our use of ‘chilling effect’ is intended to refer to the stalling, or deterrent, effect of executive action. We gather that, along with the void-for-vagueness doctrine, the US ‘chilling effect’ doctrine was raised in Brown, thus requiring the High Court to address it.

209 Termination Decision, [22].
It would be useful for Defence hierarchy to publicly support efforts to fairly index military superannuation. It is an issue that not only affects retired soldiers but today’s serving military personnel.\textsuperscript{210}

To this:

No soldier wants to be led by a commander that has voluntarily decided to have his balls cut off. No amount of politically correct propaganda will change that fact.\textsuperscript{211}

Major Gaynor’s remarks also fell at points along this range, the following being some examples:

Defence’s policy directions on sex-change operations, the Mardi Gras and women serving in front-line combat roles are wrong.\textsuperscript{212}

[\textit{The} decision to allow soldiers to march in the Mardi Gras was offensive to many Australians. If Defence is truly equitable, it will now allow members to wear their uniform to any activity that promotes natural marriage.}\textsuperscript{213}

Defence believes Islam is a religion of peace. That is why it has been more concerned about building schools in Afghanistan than trying to change what is taught inside them.\textsuperscript{214}

Defence, struggling to deal with negative publicity surrounding years of alleged sexual assault has now opened the door for males to shower in the ladies bathroom – whether they like it or not.\textsuperscript{215}

The supposedly apolitical Australian Defence Force is now marching to the beat of a very political tune, drummed up by those who demand gay marriage and take pleasure in ridiculing Christianity.\textsuperscript{216}

The truth is that the Islamic religion was blooded in battle and grew strong on the spoils of war.\textsuperscript{217}

\textsuperscript{210} Gaynor v CDF [2015] FCA 1370 (4 December 2015) [32] (Buchanan J).
\textsuperscript{211} Ibid [31].
\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid.
\textsuperscript{215} Ibid [32].
\textsuperscript{216} Ibid.
\textsuperscript{217} Ibid [117].
If Defence will allow one officer protection to comment on Defence policy because he is gay, then I should also be able to speak.\footnote{Ibid [118].}

As an Iraq vet & military officer that originally supported invasion, my views have changed. The war achieved very little.\footnote{Termination Notice, [8e].}

I fail to see how ADF participation in an offensive, sexually explicit parade sends msg that sexual harassment is wrong.\footnote{Ibid [8h].}

He thinks that because he has had a nip here, a tuck there and popped a bunch of pills that he is now a woman. I don’t like to speak on behalf of women, so I’ll let them describe how they feel about his analysis that femininity consists of the sum result of a bunch of cosmetic surgery and hormones stuffed in a bottle.\footnote{Gaynor v CDF [2017] HCA 43 (18 October 2017) [127] (Buchanan J).}

As mentioned above, the Termination Decision did not indicate which of Major Gaynor’s Published Remarks were not intemperate, inappropriate, divisive and/or disrespectful.\footnote{It could be argued that the milder remarks we quotes were made worse by the context in which they were said. However, if context was relevant, \textit{the onus was on the CDF to prove this}. In the absence of such a clarification, the implication is the CDF impugned all the Published Remarks as intemperate, inappropriate, divisive and/or disrespectful both in context and in isolation. Indeed, the fact that we have to speculate about context suggests the Termination Decision was too vague when characterising the Published Remarks.}

The implication is that all the Public Remarks were one or more of these things.

In other work, we have argued that, as regards the implied freedom, laws can be too broad or too vague to be constitutional.\footnote{Forrester, Zimmermann and Finlay, ‘An Opportunity Missed?’, above n 17, 292-6; Forrester, Finlay and Zimmermann, \textit{No Offence Intended}, above n 17, 192-7. In \textit{No Offence Intended}, we concluded as follows (at 196-7): ‘[t]o be clear, we are not suggesting that US or Canadian principles concerning vagueness must be imported into the modified \textit{Lange} test for s 18C and s 18D to be held unconstitutional. \textit{Our view is that, quite apart from any principle of vagueness derived wholly or partly from US or Canadian constitutional law, s 18C and s 18D [of the Racial Discrimination Act 1975 (Cth)] are too complex to be reasonably appropriate and adapted to the end they serve.’ (emphasis added). Our view here is similar to that given in \textit{Brown} [2017] HCA 43 (18 October 2017) [149] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J): ‘[u]nder Australian law a vague law is not invalid on that account alone, but laws which have that quality and which, in their practical operation and effect, burden the freedom must be justified according to the questions in \textit{Lange} if they are to survive challenge.’ That said, in our view, there is little stopping Australia adopting a void for vagueness.} The same principles apply to executive action. This is because, first, certainty is critical to the rule of law:
As a matter of due process, a law is void on its face if it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application’. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork.\textsuperscript{224}

The same principles apply by analogy to executive action. Executive government cannot enforce laws in such a fashion that it is difficult to determine how it will be enforced. As to overbreadth:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate – to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.\textsuperscript{225}

Again, this principle applies by analogy to executive action. The factors that guide executive action cannot themselves be too broad.

Second, we have also noted that the concepts of vagueness and overbreadth create a ‘buffer zone’ around the implied freedom as they have around the First Amendment of the \textit{United States Constitution}.\textsuperscript{226} As we demonstrated above, the implied freedom is strong and wide-ranging.\textsuperscript{227} The implied freedom is a restriction not only on legislative but executive action. Executive action whose scope is too broad or too vague should be restricted.
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Third, like freedom of expression at common law, the common law principle of due process is of constitutional importance. Common law due process includes the principle of certainty in executive action. Given that the common law informs the Commonwealth Constitution, common law due process should inform whether executive action impermissibly infringes the implied freedom.

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229 Due process is one of the fundamental common law principles Australia has inherited. Its sources are not only Magna Carta 1297, 25 Edw 1, c 29 (‘Magna Carta’), but also Liberty of Subject 1354, 28 Edw 3, c 3, and Petition of Right 1627, 3 Car 1, c 1. As with the Magna Carta, the latter statutes are either received law in certain Australian jurisdictions, or applied by Imperial Acts legislation in other Australian jurisdictions. In Brown, members of the High Court noted that Australia had no counterpart of the Fifth and Fourteenth Amendments of the United States Constitution and hence lacked the constitutional basis for a void for vagueness doctrines: Brown [2017] HCA 43 (18 October 2017) [148] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J), see also [446]-[456], [467] (Gordon J), [505]-[509] (Edelman J). With respect, due process remains a fundamental common law principle in Australia. The Fifth Amendment enshrines this fundamental common law principle as a right with respect to the US Federal government. The Fourteenth Amendment does the same but with respect to the States of the US. In Canada, s 7 of the Canadian Charter of Rights and Freedoms (‘s 7’) also enshrines this fundamental common law principle as a right. Hence, Australia does have a counterpart to the Fifth and Fourteenth Amendments and, for that matter, s 7. However, it is found in the common law as a fundamental (indeed, constitutional) principle, and not in a Bill or Charter of Rights. In Brown, members of the High Court also noted that resolving issues concerning vagueness ‘does not involve the importation of foreign constitutional doctrine’: Brown [2017] HCA 43 (18 October 2017) [149] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J). With respect, the irony in this statement is hard to ignore. In McClory, the plurality appeared to have little difficulty adapting an approach to assessing proportionality clearly based on that of the civil law legal tradition (namely Germany’s): see Brown [2017] HCA 43 (18 October 2017) [160] (Gageler J). Yet, adapting a doctrine used by the US and Canada – two countries that, like Australia, are constitutional federations with common law legal traditions – is, somehow, beyond the pale. The irony is compounded because the Lange (and hence McClory) test itself appears to be based on US jurisprudence: see Coleman [2004] HCA 25; (2004) 220 CLR 1, 91 [234] (Kirby J) quoting McCulloch v Maryland 17 US 159, 206 (Marshall CJ) (1819): ‘[i]f the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.’ See also Leask v Commonwealth [1996] HCA 29; (1996) 187 CLR 579, 599 (Dawson J). To repeat, due process is a fundamental common law principle, and one of constitutional importance. That the US and Canada both enshrined this principle as a right is not, in the scheme of things, so giant a leap that Australia cannot adapt the void for vagueness doctrine to its own constitutional framework. After all, the principle of legality (that the law will not violate fundamental common law rights and freedoms without clear and unambiguous statutory language) has been fashioned from similar fundamental common law principles: see James Spigelman, ‘Principle of legality and the clear statement principle’ (2005) 79 ALJ 769, 774-6.

230 Lange (1997) 189 CLR 520, 564.

231 This appears to be another situation that Brennan J described in Re Bolton: ‘[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very
Under regs 85(1)(d)(ii) and 85(1A), the CDF is given broad authority to terminate commissions based on behaviour. Whether these regulations are too broad and too vague may itself be an issue. However, that is not our focus.

Rather, our focus is the application of these regulations on the basis that Major Gaynor’s remarks are intemperate, inappropriate, divisive and/or disrespectful. As to vagueness, reasonable minds may differ whether certain remarks of Major Gaynor’s are intemperate, inappropriate, divisive and/or disrespectful. This is so even if an objective, ‘reasonable person’ test is used. For example, take the remark ‘I fail to see how ADF participation in an offensive, sexually explicit parade sends msg that sexual harassment is wrong’. Two reasonable minds, applying the same ‘reasonable person’ test, may reach very different conclusions concerning whether Major Gaynor’s remarks were intemperate, inappropriate, divisive and/or disrespectful. This result is unacceptable from a rule of law standpoint. Reasonable minds should, as far as possible, be reaching the same conclusions when applying the same objective tests to the same facts.

As to overbreadth, the CDF’s approach in the Termination Decision suggests that a very wide range of comments may be capable being considered intemperate, inappropriate, divisive and/or disrespectful, thereby risking an officer’s commission being terminated on grounds of ‘behaviour’. As noted above, Major Gaynor’s comments ranged from mild to coarse. However, even comments on the milder end of the spectrum, like ‘Defence’s policy directions on sex-change operations, the Mardi Gras and women serving in front-line combat roles are wrong’, were caught. Were this approach to such language enacted in a governing law, it would likely be found to impermissibly infringe

existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.’: see *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-1.

233 For example, one person may conclude that the remark was inappropriate, while another may conclude the remark was only expressing a concern in a rhetorical way.

234 It is true that, in cases like this one where the relevant statute has conferred broad discretion to dismiss a commissioned officer, the fact that another conclusion might reasonably be reached is not itself a ground for judicial review: see *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [54]-[60] (Buchanan J); *Gaynor* [2017] FCAFC 41 (8 March 2017) [103] (Perram, Mortimer and Gleeson JJ). However, and as we noted earlier, where the implied freedom is concerned a more systematic approach is required. Such an approach must aim to discourage and, where necessary, remedy, overbreadth and vagueness in executive decision-making affecting communication about government and political matters. This means that reasonable minds should, as far as possible, not be differing when they apply the same objective tests to the same facts.
the implied freedom. Hence, the CDF could not circumvent the implied freedom because he purported to enforce a regulation concerning behaviour.

A further consideration is that it appears that Major Gaynor spoke out at least partly because the ADF had itself engaged in political activity. Traditionally, the ADF is an apolitical organisation. This is a tradition that stems from the English Civil War and its aftermath. The military should not concern itself in matters of politics. However, in 2013 the ADF participated formally in Sydney’s Gay and Lesbian Mardi Gras.

At this point, it is once again useful to distinguish between what goes on inside and outside the workplace. The ADF can and should make every effort to promote diversity and inclusiveness, and eliminate harassment and discrimination, within the workplace. However, given that the ADF is an apolitical organisation, it must be careful with its public associations, including with organisations promoting diversity and inclusion as part of a political agenda.

The Gay and Lesbian Mardi Gras in Sydney has become a significant annual cultural event. However, it is also, unquestionably, a political event. At about the time Major Gaynor wrote, the organising body for the Gay and Lesbian Mardi Gras stated that it provides ‘resources and opportunities to our community for creative and political expression’. And later:

Sydney Gay and Lesbian Mardi Gras organisation will continue to advance gay and lesbian rights here and abroad and to showcase our pride to be whoever we are or want to be.

But we also – because its the right thing to do and its in our constitution – will advance the rights of bisexual, transgender, queer and intersex communities.

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235 The ADF has also participated formally in the annual Sydney Gay and Lesbian Mardi Gras since 2013. We also note that ADF has changed its policy to allow the CDF to permit uniformed participation at political events: see the ADF’s Military Personnel Policy Manual, Part 7 [1.9].

We believe that Mardi Gras contains a powerful message for everyone in our community, Sydney and the rest of the world. It is not just freedom from discrimination but that all people should be free to celebrate the loving relationships they have formed. *Mardi Gras is strongest when it talks about both our rights and the world we want to live in.*

There is more work to be done.\(^{237}\)

There is no doubt that the Gay and Lesbian Mardi Gras has been, and still is, very effective in promoting causes important to the LGBTQI community. However, it is for this very reason that the ADF, as an apolitical organisation, cannot participate in it.

Hence, the ADF, a formally apolitical organisation, was engaged in political activity. Importantly, this political activity did not involve creating official information, as would be case if the ADF was engaged in military operations prosecuting a war.\(^{238}\) Rather, the activity involved matters not directly relevant to the defence of Australia. The ADF thereby played a role in prompting comments from Major Gaynor about government and political matters. The ADF then purported to discipline Major Gaynor for these comments while not accounting for its own actions. In our view, this is a factor in favour of finding that the Termination Decision impermissibly infringed the implied freedom.

*Gaynor* raises intriguing lines of inquiry with respect to the implied freedom. To what extent may government agencies restrict their employees’ communications about government and political matters?\(^{239}\) What happens

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\(^{237}\) Ibid 3 (emphasis added).

\(^{238}\) As Carl von Clausewitz observed ‘...War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means’: Carl von Clausewitz, *On War* (Kegan Paul, Trench, Trubner & Co, 1918) vol 1, 23. The statement commonly attributed to Clausewitz is ‘war is politics by other means’.

\(^{239}\) For example, PSA 13(11) provides that ‘An APS employee must at all times behave in a way that upholds: (a) the APS Values and APS Employment Principles; and (b) the integrity and good reputation of the employee’s Agency and the APS’ (emphasis added). APS values include respecting all people, including their rights and their heritage: ibid 10(3); and being apolitical, providing the government with advice that is frank, honest, timely and based on the best available evidence: ibid 10(5). Can an APS employee be liable for statements they say outside of work? This issue has been of recent interest: Australian Broadcasting Corporation, ‘Facebook liking anti-government posts banned under new public service policy’, *ABC News* (online), 7 August 2017 <http://www.abc.net.au/news/2017-08-07/facebook-liking-anti-government-posts-could-cost-public-service/8786660>; Melissa Castan, ‘Is liking something on Facebook ‘protected political speech’? It depends’ *The Conversation*
when a government agency restricts its employees’ communications about government and political matters outside that agency’s purpose, but then prompts these communications by acting outside its purpose? Does disciplinary action against government whistleblowers impermissibly infringe the implied freedom? While Gaynor did not concern whistleblowing, its implications extend beyond the ADF to other formally apolitical organisations, such as the Australian Public Service and the public services of the States and Territories.

To conclude, was the Termination Decision adequate in its balance? Ultimately, it was not. Once again, this case was not about Major Gaynor disclosing official information, engaging in workplace harassment or disobeying lawful orders. It would be a different matter if this case involved any of these matters, but it didn’t. The Equity and Diversity Instruction and the Diversity and Inclusion Statement did not support holding Major Gaynor accountable for comments he made outside the workplace. Further, the CDF considered certain comments made by Major Gaynor intemperate, inappropriate, divisive and/or disrespectful when they could not reasonably be considered as such. In any event, the CDF failed to consider that the implied freedom extends to ADF personnel, especially when outside the workplace, and also extends to intemperate, inappropriate, divisive and/or disrespectful language. The Termination Decision was also a sweeping intrusion into Major Gaynor’s common law freedom of expression outside the workplace. This common law freedom is of constitutional importance, and is relevant to proportionality testing. Finally, the CDF failed to consider the ADF’s own role in prompting Major Gaynor’s comments which, in the circumstances, he should have.

240 For example, while one of the ADF’s purposes is to promote inclusivity and diversity in its workplaces, this does not extend to promoting them outside its workplaces.

241 A government agency may ‘cross a line’, thus prompting a whistleblower to speak out and inform the Australian people. Disciplinary action may impermissibly infringe the implied freedom by purporting to punish someone who transmitted information that Australian electors needed to know to better discharge their role in Australia’s constitutionally prescribed system of representative and responsible government.
What if Major Gaynor Had Been Ordered?

As noted above, the CDF found that the CO Action and the DCA Action were not in fact orders. However, even if Major Gaynor had been ordered on these occasions, the question remains whether they would have been lawful orders. Putting aside the issue of whether Major Gaynor was on duty and in uniform on both occasions, each order arguably impermissibly infringed the implied freedom. Our reasoning concerning whether the Termination Decision impermissibly infringed the implied freedom is applicable here. In particular:

- The CO Action and DCA Action purported to restrict Major Gaynor’s communications about government and political matters outside the workplace.
- The CO Action and DCA Action purported to apply to communication that did not involve official information or national security matters.
- By reason of the first two points, the CO Action and DCA Action were a sweeping intrusion into Major Gaynor’s common law freedom of expression.
- The scope of the CO Action and DCA Action was too broad and too vague. It was unclear what kind of comments would not subject Major Gaynor to disciplinary action.

D Failure to Consider a Relevant Consideration

Our analysis has focused on applying our proposed approach to executive action affecting the implied freedom. However, we will make a passing comment about the current approach as it would have applied to the facts of Gaynor. As we noted above, the CDF’s consideration of the implied freedom was cursory. Under the current approach, the implied freedom should be regarded as an important ‘standing consideration’ when enforcing laws affecting the freedom to communicate about government or political matters. While the CDF noted that differences of opinion existed, he appeared not to give the implied freedom adequate consideration. Hence, the current

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242 In Gaynor, the Full Court did not consider how the current approach applied to the Termination Decision. This is because Major Gaynor did not raise this specific point as a ground for judicial review: see Gaynor [2017] FCAFC 41 (8 March 2017) [81] (Perram, Mortimer and Gleeson JJ).

243 For a discussion on the whether considering a relevant consideration is adequate, see Aronson and Groves, Judicial Review of Administrative Action, above n 45, 283-5 [5.140]-[5.150]. See also at 284-5 [5.150]: ‘[t]he precise extent to which an implied freedom is infringed remains a matter of judgment as to the degree of intrusiveness involved. This is the

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approach could have supported setting aside the Termination Decision. That said, given the latitude courts typically allow executive decision-makers under the current approach, we cannot say this with certainty. Once again, our proposed approach properly accounts for the implied freedom’s importance in a systematic way.

E  
Policy Considerations Regarding the ADF and the Commonwealth Constitution

Herein consists our distinguishing excellence, that in the hour of action we show the greatest courage, and yet debate beforehand the expediency of our measures. The courage of others is the result of ignorance; deliberation makes them cowards. And those undoubtedly must be owned to have the greatest souls, who, most acutely sensible to the miseries of war and the sweets of peace, are not hence in the least deterred from facing danger.244

Pericles’s funeral oration to the Athenians is one of the earliest known recorded defences of democracy.245 In it, he explains how the democratic spirit makes the martial spirit more powerful. Victor Davis Hanson has argued that democratic Thebes prevailed against oligarchic Sparta in 369-370BC in part because of its ability to mobilise and motivate its citizens. These citizens no longer needed a property qualification to vote, and thus felt they had a stake in Thebes.246

The strength of democracies is not confined to the ancients. The past century has shown that liberal democracies have prevailed in all global wars, be they hot or cold. Tyrannies, ancient and modern, have charged that democracies are decadent and soft. However, as we have noted elsewhere, citizens in any democracy must have a fair measure of maturity and resilience. By ‘fair’ we mean ‘not insignificant’, but also ‘not unreasonable’.247 In a democracy, a citizen must tolerate views that they vehemently disagree with, to a mandatory factor, but that is not because the factor might have been undervalued, but because such recitals sometimes fail to repel an inference that there was in fact no consideration of the mandatory factor’ (citations omitted) (emphasis in original).

244 Pericles, ‘Funeral Oration to the Athenians’ in Great Speeches: Words That Made History (Viking, 2005) 7.
245 The funeral oration is found in the History of the Peloponnesian War by Thucydides: see Book II of Thucydides, History of the Peloponnesian War (William Heinemann, 1956).
247 For further discussion see Forrester, Finlay and Zimmermann, No Offence Intended, above n 17, 139-41.
often stated in terms they find repugnant. Yet, even so, these citizens will work together to overcome common problems, and achieve common goals. Indeed, in our view and generally speaking, the maturity and resilience achieved by citizens of liberal democracies far exceed those in tyrannies.

The maturity and resilience of the citizenry of liberal democracies of course carry over into their militaries, which are comprised of citizen soldiers. As to the ADF, it must recognise that its soldiers remain citizens of the nation they defend. Further, it must accommodate as far as possible those freedoms ‘hard-wired’ into the Commonwealth Constitution that it defends.

However, in our view, the ADF has not sufficiently accommodated the implied freedom in its governing laws and policies. It has no choice but to do so. In making this observation, we are not saying that bastardisation, harassment and abuse in the ADF aren’t problems that must be addressed. They clearly are. But the ADF must not impermissibly infringe the implied freedom in its quest for reform.

How is this to be done? We suggest that the ADF would be aided in its quest by making two distinctions. The first distinction is that between what happens in the workplace and what happens outside it. Conduct occurring outside the workplace should not be a disciplinary concern unless it breaches the law, be that law civil or criminal. However, the standards of conduct expected within the workplace must be high. ADF personnel should be expected to act professionally in the workplace by putting aside whatever differences they may have outside it and working towards common goals.

That said, it would be naïve to think that discussing government or political matters never arises in an ADF workplace. If such discussion does arise, then the professional expectation of ADF members should be to continue to work together towards common goals despite any differences. It is only when such differences lead to harassment or abuse should it become actionable under relevant ADF policies. Here, the standards for harassment or abuse must allow for the expression of even vehement political disagreement. Put another way,

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248 For example, there are issues with parts of Social Media Instruction [19], as noted above in the footnotes.
249 For example, someone with staunch left-wing views, while in the workplace, must put aside whatever differences they have with someone who publicly expresses staunchly right-wing views, and vice versa.
ADF members acting professionally must recognise that expressing even vehement political disagreement, without more, does not constitute harassment or abuse. Ultimately, it is one thing to generally criticise a view, belief, idea or practice, but singling out an ADF member for harassment or abuse is quite another.

The second distinction is that between the views of ADF members and the ADF as an organisation. ADF members should be able to express views about government and political matters provided the following is done:

1. They do not disclose official information, or information otherwise important to national security;
2. In doing so, they do not engage in harassment in the workplace or otherwise breach criminal or civil law; and
3. Where there may be confusion about the matter, they disclaim that the expressed views are their own and not those of the ADF.

As to the ADF as an organisation, it should promote workplace reform. However, it should take care to ensure that it is seen to be apolitical in its public pronouncements and involvement.250

We suggest that, in observing these distinctions, the ADF will better accommodate the implied freedom, and recognise the freedoms of its citizen soldiers, while undertaking necessary workplace reforms.

IX CONCLUSION

In this article, we have explored the implied freedom’s effect on executive power. As we have argued, the implied freedom affects executive power at the Commonwealth, State and Territory levels. Further, we have proposed that adapting the plurality’s test in *McCloy* to executive power more systematically accounts for the implied freedom. We have applied our proposed approach to the topical case of *Gaynor*. It is hoped that, by applying the adapted *McCloy* test, the freedom of Australians to communicate about government and

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250 On this point, the CDF may permit political activity in uniform: Military Personnel Policy Manual, Part 7-1 [1.9a]. This is a troubling provision, as it allows the CDF to, in effect, pick and choose which political activities are allowed. Given the seniority of the CDF, this provisions risks the ADF being perceived by the public as endorsing certain views. This provision should be reformed.
political matters may be better protected. This protection extends beyond laws infringing the implied freedom to any executive action that may do so.
A COMMENT ON HOW THE IMPLIED FREEDOM
OF POLITICAL COMMUNICATION RESTRICTS
NON-STATUTORY EXECUTIVE POWER

Gerard Carney*

This comment argues that the decisions of the Executive at all levels of Australian government need to be consistent with the implied freedom of political communication. Hence the test so far propounded for an infringement of the implied freedom needs to be adjusted to refer not just to a 'law' but also to any exercise of non-statutory executive power whether an exercise of royal prerogative power or other non-statutory capacity of the executive. Although there are limited circumstances when such an exercise of executive power affects the legal rights and duties of citizens, when this occurs, the implied freedom offers protection.

I INTRODUCTION

One intriguing aspect of the implied freedom of political communication derived from the Commonwealth Constitution remains unresolved: how, if at all, does this constitutional implication apply to the exercise of executive power? The High Court has often described the implied freedom as a restriction on both legislative and executive power. Yet its decisions have only concerned an exercise of legislative power. This may account for the fact that the Court’s various tests for an infringement of the implied freedom only assess the validity of ‘a law’.

This comment explores how the implied freedom might apply as a restriction on the executive power of the Commonwealth and of the States, in particular, its non-statutory scope. A complicating factor in this analysis is the High Court’s insistence that the implied freedom operates only as a negative right and not as an individual or positive right. Nonetheless, the inclusion of executive power in the scope of the implied freedom is not mere rhetoric – it ensures that an actual exercise of executive power must be consistent with the

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1 Some recognition also given to its application to judicial power: see, eg, Deane J in Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104 at 164.
constitutional freedom to criticise and comment on the institutions of both federal and state governments.

II IMPLIED FREEDOM AS A RESTRICTION ON EXECUTIVE POWER

The first judicial recognition of the implied freedom as a restriction on both legislative and executive power seems to have been given by Brennan J in *Nationwide News Pty Ltd v Wills*:

I would state the governing implication in these terms: the Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matter

His Honour may have included executive power because of his earlier comment that the ‘principles of [representative government] and the principle of responsible government are constitutional imperatives which are intended … to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people.’

The inclusion of executive power in this context is consistent with its inclusion in the scope of other constitutional restrictions which are referred to in *Nationwide News*. Brennan J referred to the freedom of interstate trade, commerce and intercourse under s 92, as redefined in *Cole v Whitfield*, as preventing both ‘legislative and executive interference’. Deane and Toohey JJ also referred to this restriction as well as those under the *Melbourne Corporation* principle and Chapter III as restrictions on both legislative and executive power. No express reference is made in *Australian Capital Television Pty Ltd v Commonwealth* to the implied freedom of political communication as a restriction on executive power as such. Mason CJ merely refers to the

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(1992) 177 CLR 1, 50-1 (emphasis added).
3 Ibid 47.
5 (1992) 177 CLR 1, 54.
7 (1992) 177 CLR 106.
Melbourne Corporation principle as a restriction on Commonwealth legislative and executive powers.\(^8\)

The first time a High Court majority described the implied freedom as a restriction on executive power occurred in *Theophanous v Herald and Weekly Times Ltd.* Mason CJ, Toohey and Gaudron JJ recognised that ‘[t]he decisions in *Nationwide News* and *Australian Capital Television* establish that the implied freedom is a restriction on legislative and executive power.’\(^9\) Brennan J observed: ‘[l]ike s 92, the implication limits legislative and executive power.’\(^10\) Deane J\(^1\) suggested the scope of the restriction as ‘arguably’ wider by including judicial as well as executive power, and as a ‘tentative view’ that it restricts all the ‘organs of government’ of the two Territories.

Most significantly in *Lange v Australian Broadcasting Corporation*\(^13\) a unanimous joint judgment of the High Court included Commonwealth executive power in this pivotal statement:

> [Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.\(^14\)

Consistently, in *Levy v Victoria*\(^15\) Brennan CJ stated:

> The implication denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of communication, unless the

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\(^8\) Ibid 147. However, the Chief Justice did advert to the unrestricted Commonwealth Executive discretion under s 95J of the impugned legislation to make regulations to apply the pt IIID regime to a particular election. This executive discretion prevented the statutory regime from being a justified restriction on the implied freedom. This is of course a statutory delegation to the Executive, not an exercise of executive power as such.
\(^9\) (1994) 182 CLR 104.
\(^10\) Ibid 125.
\(^11\) Ibid 149.
\(^12\) Ibid 164.
\(^13\) (1997) 189 CLR 520.
\(^14\) Ibid 560 (emphasis added).
\(^15\) (1997) 189 CLR 579.
restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. In principle, therefore, non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes.\(^{16}\)

In *McClye v Australian Electoral Commission*,\(^{17}\) Hayne J referred to the implied freedom as ‘a freedom from government action’.

The inclusion of executive power along with legislative power continued in *McCloy v New South Wales*,\(^{18}\) where the joint judgment of French CJ, Kiefel, Bell and Keane JJ\(^{19}\) and that of Gordon J\(^{20}\) restated the standard description that the implied freedom operates as a limitation on executive power. Gageler J, moreover, repeated it seven times as a limitation on ‘executive power’ or ‘executive action’.\(^{21}\)

No distinction is made in any of those judgments between federal and State executive power since the implied freedom operates as a restriction equally on both.\(^{22}\) The same test applies whether it is an exercise of Commonwealth or State power. Yet throughout these decisions the evolving test to determine whether the implied freedom is infringed, by the Commonwealth or a State, has only ever referred to testing the validity of a ‘law’. The test always begins with the question: ‘[d]oes the law effectively burden the freedom in its terms, operation or effect?’\(^{23}\)

Given that there is nothing in the test that precludes its requirements from being applied to an exercise of executive power, as distinct from legislative power, one cannot infer from the focus of the test on a ‘law’, that the High

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\(^{16}\) Ibid 594 (emphases added).  
\(^{17}\) (1999) 163 ALR 734, 741.  
\(^{19}\) Ibid 206 [42].  
\(^{20}\) Ibid 280 [303].  
\(^{21}\) Ibid 227 [114]-[115], 228 [117].  
\(^{22}\) *Unions of NSW v New South Wales* (2013) 252 CLR 530, 550 [25].  
Court intended to preclude an exercise of non-statutory executive power from the scope of the implied freedom. Accordingly, the central issue this comment explores is whether the description of the implied freedom as a restriction on 'executive power' or 'executive action', or as protecting against 'executive interference', has potential operative effect? Or was the Executive merely included out of an abundance of caution to prevent the Commonwealth or State Executives from thinking that they can interfere with the implied freedom with impunity? That is, to obviate the fear that executive power might be exercised to undermine the principle of representative democracy. To resolve this issue, the nature of executive power needs to be explored to assess if, and how, its exercise might burden the implied freedom.

### III  EXECUTIVE POWER

Despite the complex nature of federal and State executive power, it is useful to distinguish at the outset between powers recognised by the common law as still vested in the Executive branch, and the vast grant of statutory power to the Executive. The latter category of power easily attracts the implied freedom as a restriction on the exercise of delegated legislative power. But, the position in relation to non-statutory executive power is more complicated. Within that category, only some powers can be coercive, that is, capable of affecting legal rights and duties, while others require legislative backing to do so. Obviously, those in the former category are capable of imposing a burden on the implied freedom.

#### A  Non-Statutory Executive Power

The Commonwealth Executive possesses a general grant of ‘executive power’ in s 61 of the Constitution:

> 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.

Section 61 not only adopts the common law content of executive power as at 1 January 1901, but also ‘extends’ that content to include ‘the execution and maintenance of this Constitution, and of the laws of the Commonwealth’.
Further, the High Court has derived from this extension and the position of the Commonwealth Executive as the national government, the ‘implied nationhood power’, which enables the Commonwealth Executive ‘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.’

The common law content of Commonwealth and State ‘executive power’ comprises two distinct forms of powers: prerogative powers, privileges and immunities; and those powers referred to as the capacities of the Crown. Despite debate as to whether the latter capacities should be included in the prerogative powers, the distinction is maintained in this context because of its significance in determining how far executive power may be coercive. Also relevant is the redefinition of Commonwealth executive power in Williams v Commonwealth, in particular that the Commonwealth as a juristic entity comprises all three branches of government, not merely the Executive. This reinforces the need to include the executive powers in the scope of the implied freedom.

Central to the issue being explored is to identify to what extent might an exercise of any of these components of non-statutory executive power restrict the freedom of political communication. A starting point is to identify how far an exercise of non-statutory executive power can be coercive in the sense of affecting legal rights and duties.

1 Executive Power Cannot Change Statute Law or the Common Law

The most fundamental proposition is clear: no non-statutory exercise of executive power can change the law - whether legislation or common law. As Isaacs J in R v Kidman stated: ‘[t]he Executive cannot change or add to the law; it can only execute it.’

Hence, the Executive cannot create a new offence or modify an existing offence. For example, Brennan J observed in Davis v Commonwealth:

26 Ibid 184 (French CJ).
At least since the *Case of Proclamations*, the exercise of prerogative power has not been capable of creating a new offence. Nor can the exercise by the Executive Government of a non-statutory capacity create an offence.

Similarly, the Supreme Court of the United Kingdom in *R v Secretary of State for Exiting the European Union (Miller’s Case)* affirmed the incapacity of the Royal prerogative power in the United Kingdom to alter United Kingdom statute law or the common law. This was established in the *Case of Proclamations* by Coke CJ: ‘the King by his proclamation or other ways cannot change any part of the common law, statute law, or the customs of the realm.’

It follows from this principle that no new prerogative powers are capable of being created by the courts, for this would effect a change in the common law. As Lord Diplock warned in *British Broadcasting Corporation v Johns*: ‘It is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.’

2 Executive Power Cannot Interfere With Legal Rights or Duties Unless Authorised By a Specific Prerogative or Statute

Absent specific prerogative authority, the Executive needs statutory authority to act coercively. This fundamental principle was established in 1765 in *Entick v Carrington* where the Court of Common Pleas held the King’s Messengers liable in trespass for entering the plaintiff’s property to seize his papers. Their actions were not authorised by any prerogative or statute. So their warrant, issued by the Secretary of State, was of no legal force. This principle was again articulated and applied by Lord Atkin in *Eshugbayi Eleko v Government of Nigeria*:

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28 (1611) 12 Co Rep 74; 77 ER 1352.
31 Ibid [50].
32 Ibid [44].
34 (1765) 19 St Tr 1030 especially at 1064-6; *Joseph v Colonial Treasurer of NSW* (1918) 25 CLR 32, 52.
In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.\(^{35}\)

This means that the Crown cannot use its capacities in a coercive way or otherwise interfere with the legal rights or duties of others. Its executive power can only be used coercively where a specific prerogative authorises such a legal effect. Reliance on the Crown’s juristic capacity will be insufficient. Professor Zines explained this distinction:

An important difference between prerogatives and capacities is that the former, such as the declaration of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders and the various Crown immunities and privileges, are capable of interfering with what would otherwise be the legal rights of others. In the case of capacities, their exercise cannot override legal rights and duties.\(^{36}\)

Professor Lane\(^{37}\) illustrated this lack of power, in the absence of prerogative or statutory authority, whenever the Federal Executive affects ‘the subject coercively, in his life, liberty or property’ with these examples\(^{38}\):

Thus, lacking statutory authority, the Executive was not able to deport,\(^{39}\) detain or extradite a fugitive,\(^{40}\) arrest a person believed to have committed a felony abroad,\(^{41}\) arbitrarily deny mail and telephone services,\(^{42}\) compel attendance to give evidence or compel the production of documents in an inquiry,\(^{43}\) prosecute the subject simply because he belonged to an association and not because he engaged in specific conduct made illegal by the law of the land.\(^{44}\)


\(^{37}\) P H Lane, Lane’s Commentary on the Australian Constitution (Law Book Company, 1986) 318-9.

\(^{38}\) Ibid 319.

\(^{39}\) Ex parte Walsh and Johnson: Re Yates (1925) 37 CLR 36, 53, 79, 132.

\(^{40}\) Barton v Commonwealth (1974) 131 CLR 477, 483, 494.

\(^{41}\) Brown v Lizars (1905) 2 CLR 13, 85, 860.

\(^{42}\) Bradley v Commonwealth (1973) 128 CLR 257, 575, 580-1, 583.

\(^{43}\) McGuiness v Attorney-General (Vic) (1940) 63 CLR 73, 83, 102.

\(^{44}\) Australian Communist Party v Commonwealth (1951) 83 CLR 1, 193.
Most recently, Gageler J in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* emphasised the lack of any non-statutory executive power to detain an individual without statutory authority since the *Habeas Corpus Act 1640*:

The inability of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is not simply the consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. It is the consequence of an inherent constitutional incapacity which is commensurate with the availability, long settled at the time of the establishment of the Commonwealth, of habeas corpus to compel release from any executive detention not affirmatively authorised by statute.

On the other hand, certain prerogatives are potentially coercive and so capable of affecting legal rights and duties. The majority of the Supreme Court of the United Kingdom in *Miller’s Case* acknowledged that an exercise of the Royal prerogative could ‘affect the legal rights and duties of others’, for example, in the exercise of the Crown’s power to decide on the terms of service of its servants and to alter those rights, and the Crown’s power to destroy property during wartime.

In addition to the potential for particular prerogative powers to affect the legal rights and duties of others, there is, in the case of the Commonwealth Executive only, the possibility that legal rights might also be affected by the implied nationhood power and the express power in s 61 to maintain the *Commonwealth Constitution*.

A clear example is the exercise of coercive Commonwealth executive power in *Ruddock v Vadarlis* to prevent entry of aliens into Australia. According to a majority of the Full Court of the Federal Court, this power authorised the boarding of a Norwegian ship, *MV Tampa*, by 45 Special Armed
Services (SAS) troops while the ship was within Australian waters four nautical miles from the coast of the Australian territory of Christmas Island. French J (with whom Beaumont J agreed) seemed to derive this power, not from the prerogative, but from s 61:

In my opinion, the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion ... The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia [sic] community, from entering.53

French J left open whether this Commonwealth executive power extended to the expulsion of non-citizens present in Australia.54 In dissent, Black CJ found the 'preponderance of opinion by the text writers' was against any prerogative power to exclude aliens from entering Australia during peacetime.54

The express extension of s 61 executive power to ‘the execution and maintenance of this Constitution, and of the laws of the Commonwealth’ is another potential source of coercive Commonwealth executive power. As French CJ identified in Williams v Commonwealth (No 1): ‘the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect’, without any further Commonwealth statutory authorisation.55

3 The Executive Can Act in a Non-Coercive Way Subject to Statute and the Common Law

This Executive ability to act non-coercively derives from the juristic capacity of the Crown as the Executive branch. It has been described as ‘the freedom which

53 Ibid 543 [193].
54 Ibid.
54 Ibid 500 [26].
55 (2012) 248 CLR 156, 191 [34].
the government has to do anything that is not prohibited by law. Examples include the entering into contracts, the establishment of a business and other entities, and the distribution of information.

Commentators have argued that the Crown should not necessarily be accorded the same capacities as an individual, given the much greater impact the Crown can have on individuals. For instance, Professor Zines opined:

[C]ertain consequences of government action affecting the liberty of the individual should be recognized as primarily governmental and not comparable with private action. Unless such actions were authorised by the prerogative they should require statutory authority. They include official inquiries relating to private persons, surveillance of private persons and the preparation and supply of information regarding individuals which could, for example, affect where they work or reside.

This view was effectively adopted in Williams v Commonwealth (No 1) when it required statutory authority for Commonwealth contracts other than those entered into in the ordinary course of government administration (see further below). Hayne J emphasised that it is ‘public money’ which is being spent, not merely Commonwealth money.

IV  POTENTIAL EXECUTIVE NON-STATUTORY INFRINGEMENT OF THE IMPLIED FREEDOM

Given the possibility that an exercise of Commonwealth executive power through one of its prerogative powers or the express self-maintenance power might affect the legal rights and duties of individuals and entities, a critical issue arises: in what circumstances might such an exercise of executive power potentially burden the freedom of political communication? In this context, the Crown’s capacities also need to be considered despite their lack of coercive force. It is important to keep in mind though that in those areas of executive power where the implied freedom might potentially be burdened, it is most

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56 Harris, above n 35.
57 Ibid 627.
59 (2012) 248 CLR 156.
60 Ibid 241 [173].
likely they have been abrogated completely or substantially by statute. The survey below assumes, however, the absence of any such statutory encroachment.

The *external prerogatives*, exclusive to the Commonwealth, that may affect legal rights and duties include the disposition of the armed forces, the declaration and prosecution of war, and the security of the Commonwealth. The prosecution of a war or similar emergency is obviously an inherently coercive power, although its scope remains uncertain as Professor Zines suggested:

> War and other emergencies provide clear exceptions to the principle that prerogatives are non-coercive. The general scope of the power in these circumstances is, however, uncertain. In wartime there seems to be a power to intern enemy aliens. Other powers are to requisition national ships required in time of war, to destroy property to avoid it falling into the control of an enemy, and to go on land to erect fortifications to repel an invasion (a right shared with citizens). In the case of the requisition, damaging or destruction of property compensation is payable.

Internal security to keep the peace (absent war or similar emergency) has not been authoritatively established as a prerogative power due to the fact that legislation usually confers, on the Executive, statutory powers needed to respond. But if it were included in the prerogative, this would be a fertile area for the implied freedom to be affected.

The *domestic prerogatives* that may affect legal rights and duties include the initiation and termination of criminal proceedings, granting pardons, creation of corporations by charter, *bona vacantia*, *waifs*, treasure trove, and copyright in public documents. But the most obvious area in which the implied freedom might be affected is in the area of the Executive's relationship with its ministers, officers and employees. As recognised by the

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62 Ibid 287.
63 Zines argues against this being included in the prerogative: ibid 287.
Supreme Court of the United Kingdom in *Miller’s Case*, a specific direction or instruction falls within executive power.

An extreme example of a likely breach of the implied freedom is a gag order on ministers from talking to the media. Such a gag order has been imposed at the local government level. For instance, a resolution of the Council of the City of Perth prevented its councillors from speaking with the media on Council business for a decade until revoked in 2017. Recent statutory restrictions on federal and State public servants as to their use of social media need to be tested for validity against the implied freedom. The same test would have applied had they been imposed by a non-statutory exercise of exercise power.

Another potential area is that of Freedom of Information (‘FOI’) where an executive decision to refuse access to government information might interfere with the implied freedom, even in circumstances where FOI legislation exempts disclosure. This, like ‘official secrecy’ restrictions, involves an exercise of statutory executive power.

The regulation of the use of, or access to, government property could potentially burden the implied freedom. For instance, refusal to permit a meeting or a protest on government premises. Whether such refusal is an exercise of prerogative power or of a mere capacity of proprietorship is unclear.

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65 [2017] UKSC 5 (24 January 2017) [52].
69 Finn J in *Bennett v President, Human Rights and Equal Opportunity* (2003) 134 FCR 334 held invalid reg 7(13) of the Public Service Regulations (Cth) for infringing the implied freedom of political communication.
As for the Crown’s capacities, while not coercive in terms of unilaterally imposing legal rights and duties, their exercise may affect the implied freedom, and thereby be subject to it. This is particularly so when the Executive enters into government contracts. The imposition of restrictions on communication in commercial agreements between the Executive and other parties might burden the implied freedom.\(^72\) Hence, undertakings of confidentiality need to be tested as to their compatibility with the implied freedom.\(^73\)

The need for statutory authorisation of Commonwealth contracts established in *Williams v Commonwealth (No 1)*\(^74\) makes it more likely that the implied freedom can be invoked in respect of government contracts. It remains unclear to what extent the contractual details need to be authorised by the Commonwealth Parliament. However, in relation to Commonwealth contracts exempted from statutory authorisation by *Williams v Commonwealth (No 1)*, namely, contracts which relate to, or are incidental to, the ordinary, well-recognised functions of government, or, possibly\(^75\) those authorised by the implied nationhood power, the application of the implied freedom as a restriction on executive power remains a distinct issue.

*Williams v Commonwealth (No 1)* raises the prospect that statutory authorisation might be required for other Crown capacities, such as the conduct of inquiries and the incorporation of a company. This possibility flows from the concerns of the judgments in *Williams v Commonwealth (No 1)* with the need for adequate Executive accountability, the federal balance, and the consequent refusal to equate the freedoms of individuals with those of the juristic Commonwealth.

The impact of *Williams v Commonwealth (No 1)* on the State Executives is not readily apparent from the judgments. However, the High Court’s adoption of the ratio from *New South Wales v Bardolph*\(^76\) that the NSW Executive had the executive power to enter into an advertising contract


\(^{73}\) Cf Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151.

\(^{74}\) (2012) 248 CLR 156.

\(^{75}\) Acknowledged by French CJ in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 191 [34].

\(^{76}\) (1934) 52 CLR 455.
because it was incidental to the ordinary, well-recognised functions of government, suggests that State Executives might be required to have statutory authorisation for any contracts outside that field.\textsuperscript{77}

French CJ acknowledged in \textit{Williams v Commonwealth (No 1)} that ‘[t]here are undoubtedly significant fields of executive action which do not require express statutory authority’.\textsuperscript{78} One significant field conferred by s 61 which requires no further statutory authorisation is, as French CJ identified in \textit{Williams v Commonwealth (No 1)}, that ‘the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect’.\textsuperscript{79}

The Chief Justice also identified two further fields of non-statutory executive action: ‘the administration of departments of State under s 64 of the Constitution and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government.’\textsuperscript{80}

\section*{V \hspace{1em} \textbf{EXECUTIVE POWER FROM STATUTORY GRANT}}

How the implied freedom might restrict an exercise of discretionary administrative power conferred by statute or regulation was explored in \textit{Wotton v Queensland}\textsuperscript{81} where the plurality observed:

\begin{quote}
[W]hile the exercise of [State] legislative power may involve the conferral of authority upon an administrative body such as the Parole Board, the conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act ultra vires.\textsuperscript{82}
\end{quote}

\begin{flushright}
\textsuperscript{78} \textit{Williams v Commonwealth (No 1)} (2012) 248 CLR 156, 191 [34].
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} (2012) 246 CLR 1.
\textsuperscript{82} Ibid 13-4, [21].
\end{flushright}
That is, the validity of an exercise of a discretionary statutory power does not entail any constitutional issue of compliance with the implied freedom as such. Rather, compliance is effectively subsumed in deciding whether the decision is ultra vires the statutory grant.\(^3\)

An instance of this approach is found in the decision of the Full Court of the Federal Court in *Chief of the Defence Force v Gaynor*\(^4\) which overturned the decision of Buchanan J that the Chief of the Defence Force had infringed the implied freedom of political communication in terminating the plaintiff’s commission with the Australian Defence Force Reserve. This was not an exercise of non-statutory executive power because the termination was made pursuant to Commonwealth regulations. However, *Gaynor* explores the nature of the implied freedom as a negative right with the Full Court finding that the primary judge had erred in using it as a positive right.

**A Chief of the Defence Force v Gaynor**

Gaynor, who had transferred from the Regular Army to the Army Reserve in 2011, and was promoted to Major in January 2013, had his commission terminated in 2014 by the Chief of the Defence Force pursuant to reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth). That regulation authorised termination if the Chief of the Defence Force was satisfied that the officer’s retention in the service was ‘not in the interest’ of the Army. That view was formed in this case essentially on two grounds: first, Gaynor had violated on many occasions an official instruction, entitled ‘Use of social media by Defence Personnel’ issued on 16 January 2013, by criticising Defence Force policies which promoted equality and diversity, particularly in relation to homosexuality and transgender behaviour; and secondly, he had refused to comply with a specific instruction, issued to him by the Deputy Chief of Army on 22 March 2013, to cease immediately from posting any further such criticisms in the public domain.

Gaynor challenged his termination by judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Buchanan J rejected all the grounds of review relied upon except for the implied freedom of political communication.

\(^3\) Ibid 14, [22].

\(^4\) (2017) 246 FCR 298.
communication. His Honour considered that Gaynor’s right to make political
commendents in his personal capacity while in the Army Reserve was infringed
and could not be justified within the *Lange* test. His Honour found that the
termination of Gaynor’s commission failed the third element of the test of
proportionality enunciated in *McCloy* because termination was not “adequate
in its balance” having regard to the fact that the applicant’s conduct involved
the expression of political opinion, effectively as a private citizen.85

On appeal the Full Court of the Federal Court86 overturned this decision
on the basis that the primary judge had erred in his application of the implied
freedom by using it as a positive right to overturn the decision to terminate
Gaynor’s commission. The only legitimate issue in relation to the implied
freedom was whether reg 85(1)(d) of the *Defence (Personnel) Regulations 2002*
(Cth), which conferred the discretionary power to terminate, complied with the
freedom. Deciding that this was so, the primary judge was not entitled to also
review the actual decision made pursuant to that power. In doing so, the Full
Court held the primary judge had gone too far – in effect, he had applied the
implied freedom as ‘an individual right’.

The Full Court87 followed the High Court’s consistent warning88 that
the implied freedom does not confer a personal right, as such, since the focus
must be on how the exercise of power affects that freedom not the rights of the
plaintiff. The Court found that the primary judge had repeatedly referred in his
reasons to the burden on Gaynor’s right to communicate on political matters.89
He had looked ‘through an incorrect prism’:

We have concluded the primary judge did err in the level at which he
applied the *Lange* test, and this led his Honour to look at the
constitutional argument through an incorrect prism – namely,
whether the respondent’s ‘right’ to freedom of political
communication was impermissibly impaired by the termination
decision. … In our opinion, the better view of his Honour’s reasons is
that the approach of seeing the freedom as an individual right is what

87 Ibid 310-2 [48]-[52].
89 Chief of the Defence Force v Gaynor (2017) 246 FCR 298, 312-4 [55]-[63]
then led to the application of the Lange test at what the appellant describes as 'the wrong level'.

Following Wotten, the Full Court only reviewed the validity of reg 85 in terms of the implied freedom. The Court accepted the appellant’s concession that reg 85(1)(d), in its operation and effect, burdened the implied freedom, but concluded that this burden was justified in accordance with the various requirements of the McCloy test. The Full Court then refused to go one step further to review Gaynor’s actual termination since no constitutional issue was involved: if that termination violated the implied freedom, that was an issue of ultra vires for judicial review – which was not part of the appeal to the Full Court in that case.

The Full Court briefly referred to prior judicial comment that the implied freedom restricted executive power, as well as legislative power. But correctly noted that such comments ‘tend to be general propositions, which have not yet been squarely confronted and teased out in a case where there was no statutory source for the impugned power.’ The Court seemed to acknowledge the difficulty with the Lange test, drafted in terms of testing only a law, yet noted ‘the tantalising reference to executive power remains.’ Consequently, the Court left open the issue whether the implied freedom restricted an exercise of Commonwealth executive power sourced entirely in s 61 of the Constitution in the absence of any statutory authority.

Gaynor raises a perplexing issue: how does the implied freedom apply only as a negative right in the exercise of executive power, particularly in the exercise of a non-statutory executive power?

In referring often to the impact of the termination on the ‘rights’ of Gaynor, the primary judge left himself exposed to being overturned for according a personal or individual right in that case. What difference would it have made if he had referred instead to the impact of the termination on the
implied freedom to criticise the policies of the Defence Force? At such a level does the distinction between a negative or positive right make sense? Could it be that this distinction between positive and negative rights does not work in relation to executive power? If so, this adds to the criticism of the original derivation of that distinction in relation to the exercise of legislative power.96

A clear benefit of the extension of the implied freedom as a constitutional restriction on non-statutory executive power is that it overrides any potential non-justiciability of the exercise of prerogative power.97 It fits neatly within the approach suggested by Professor Winterton:

When the exercise of a prerogative power directly affects individual liberties, and raises questions with which the courts are familiar and which are capable of resolution by the application of ‘judicially discoverable and manageable standards’, there is no apparent reason why the courts should not review the manner of exercise of the power, and strong arguments in favour of their doing so, because ‘unfettered executive discretion is a constitutional monstrosity’. Courts might, for example, review requests for extradition of fugitive offenders, decisions to construct public buildings capable of constituting a public nuisance, military action which damages or destroys property, and decisions relating to the award of government contracts, among others, to ascertain whether the prerogative power involved was exercised honestly, fairly, and without recourse to considerations, or for purposes, which appear to be irrelevant or improper having regard to the nature and function of the power.98

VI CONCLUSION

The extension of the implied freedom of political communication as a restriction on Commonwealth and State executive power should not be viewed as mere constitutional rhetoric. It is a necessary part of the protection which the implied freedom affords to Australia’s representative and responsible government at both the federal and State level. While the implied freedom is

98 George Winterton, Parliament, the Executive and the Governor-General (Melbourne University Press, 1983) 137 (citations omitted).
particularly important in relation to the exercise of executive power from statutory grant, it is also an important constitutional safeguard in relation to the exercise of non-statutory executive power — whether this involves prerogative power or an Executive capacity. Although the implied freedom is more likely to be invoked where there is a coercive exercise of power in the former case, a non-coercive use of the Executive’s capacities to implement government policy, especially in a commercial context, may equally affect the implied freedom. It is necessary, however, to apply the implied freedom in such cases as a negative right, rather than as a positive right. Essentially, this means that any complainant needs to assert an immunity from the exercise of executive power, rather than any right as such.
This article explores the difficulties of bringing a Chapter III constitutional challenge to parole legislation. The province of the executive domain and becoming increasingly politicised, parole arises for consideration after the judicial sentencing process is complete. This means that parole lacks the same constitutional limits of the Kable-guarded judicature, even in cases where parole legislation is ad hominem and has the practical effect of removing parole eligibility.

...because we should not delude ourselves and imagine that this is the last time there will be a clamour from somewhere for a person who becomes eligible for parole to have that eligibility legislated away.²

I INTRODUCTION

Section 74AA of the Corrections Act 1986 (Vic) is an extraordinary provision. Ad hominem in nature, the Victorian section is directed to the ‘[c]onditions for making a parole order for Julian Knight’. Its level of particularity is set down in s 74AA(6) which clarifies that ‘Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder’. Extraordinariness alone does not, however, determine a provision’s legal validity. State parole legislation such as this affecting Julian Knight presents a range of difficulties for a constitutional challenge. This article explores these challenges. In particular, it focuses on the central obstacle of recent High Court endorsement of the considerable discretion that States have to regulate parole within the State executive domain.
II KNIGHT’S WATCH

Knight was 19 years old when sentenced by the Victorian Supreme Court in 1988 for the Hoddle Street massacre committed in Clifton Hill on 9 August 1987. He was given a life sentence for seven separate counts of murder and a sentence of imprisonment for 10 years for each of the 46 counts of attempted murder (each sentence to be served concurrently). Hampel J imposed a non-parole period of 27 years explaining that:

an unduly high minimum term would defeat the main purpose for which it is fixed, namely your rehabilitation and possible release at a time when you would still be able to adjust to life in the community.¹

In the Second Reading Speech introducing s 74AA, the Victorian Minister for Police and Emergency Services declared that ‘the Victorian community can be certain that they are protected forever from the possibility that Julian Knight will one day be free to commit another atrocity.’² The Opposition, although cognisant of such legislative responses needing to be ‘rare’, was similarly supportive of Knight’s long-term imprisonment:

... for the term of his natural life. We believe that the vast majority of Victorians also support this. Julian Knight is an individual who took seven lives and destroyed many more lives than that. He is an individual who has shown no sign of remorse for his actions and who has continued to seek to contact the families of victims...The offences that he is responsible for were heinous. They destroyed and affected many more lives than those of the seven direct victims who were killed during his rampage in Hoddle Street all those years ago.³

Enacted one month before Knight’s minimum term expired, s 74AA limits the Victorian Adult Parole Board’s ability to make a parole order for Knight to circumstances where the Board:

(3) (a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner—

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³ Victoria, Parliamentary Debates, Legislative Assembly, 13 March 2014, 747 (Kim Wells, Minister for Police and Emergency Services).
(i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that he does not pose a risk to the community; and

(b) is further satisfied that, because of those circumstances, the making of the order is justified.

It goes on to exclude the application of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Charter’),\(^7\) including s 31(7),\(^8\) which provides a sunset period for Charter override declarations. While the Minister for Police and Emergency Services concluded that the Bill was compatible with the Charter, including the right to liberty, the right to freedom of movement, equality before the law and the freedom from cruel, inhuman or degrading treatment, he recognised that there was a possibility of a court finding otherwise and therefore sought to exclude the Charter’s operations on the grounds:

of the need to ensure that the life sentences imposed by the Supreme Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing and real risk of serious harm presented by Julian Knight.\(^9\)

### III THE CONTENTIONS IN KNIGHT

Knight brought a Chapter III constitutional challenge to s 74AA in the High Court of Australia’s original jurisdiction.\(^10\) This was based on its exceptional *ad hominem* drafting which particularised ‘the prisoner Julian Knight’ and his sentence made ‘by the Supreme Court in November 1988’ of ‘life imprisonment for each of 7 counts of murder’. He argued that s 74AA compromised the institutional integrity of a ‘court of a State’ in two ways. First, as a matter of substance, it interfered with Hampel J’s original sentence, compromising the institutional integrity of the Supreme Court, in eradicating the benefits of the minimum term or non-parole period of 27 years set by Hampel J because of the

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\(^7\) *Corrections Act 1986* (Vic) s 74AA(4).
\(^8\) Ibid s 74AA(5).
\(^9\) Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 746 (Kim Wells, Minister for Police and Emergency Services).
\(^10\) *Knight v Victoria* (2017) 91 ALJR 824.
Plaintiff’s youth and prospects of rehabilitation. Second, the Plaintiff contended that the parole Board’s function was contrary to Chapter III of the Commonwealth Constitution in that it contemplated vesting an incompatible function in a State judicial officer. This argument was based on the legislation’s contemplation, but not stipulation, that a sitting judge could be appointed to the parole board. There was, however, no sitting judge appointed to the parole board at the time it considered Knight’s case.

Knight’s argument relied on an application of the Kable principle. In Kable v Director of Public Prosecutions (NSW)\textsuperscript{11} the High Court found, by majority, that the Community Protection Act 1994 (NSW) which, empowered the Supreme Court of New South Wales to make an ad hominem preventative detention order in relation to Gregory Wayne Kable, was unconstitutional. This was because the State parliament was vesting a function in the New South Wales Supreme Court that would compromise public confidence in the Court’s impartiality\textsuperscript{12} and would frustrate the Court’s ongoing ability to be vested with Commonwealth judicial power under Chapter III of the Commonwealth Constitution. While a strict separation of powers does not exist at the State level,\textsuperscript{13} McHugh J referred to State courts as being ‘part of an integrated [court] system’ such that no parliament within the federation can enact legislation which ‘might alter or undermine the constitutional scheme set up by Ch III’ or the capacity of State courts to be ‘repositories of federal judicial power.’\textsuperscript{14}

Since Kable the principle has been refined in a series of High Court decisions, to replace the ‘public confidence’ inquiry with a focus on whether a function is substantially incompatible with a State court’s ‘institutional integrity’.\textsuperscript{15} As Hayne, Crennan, Kiefel and Bell JJ explained in Assistant Commissioner Condon v Pompano Pty Ltd ‘the continued institutional integrity of the State courts directs attention to questions of independence, impartiality and fairness.’\textsuperscript{16} Its focus is on the essential characteristics of State

\textsuperscript{11} (1996) 189 CLR 51.
\textsuperscript{12} Ibid 107 (Gaudron J), 124 (McHugh J), 133 (Gummow J).
\textsuperscript{13} Ibid 67 (Brennan CJ), 77-8 (Dawson J), 93 (Toohey J), 109, 118 (McHugh J), 132 (Gummow J).
\textsuperscript{14} Ibid 114-6.
\textsuperscript{16} (2013) 252 CLR 38, 103 [169].
courts being retained so that they can continue to serve their functions within the Australian court hierarchy contemplated by Chapter III.¹⁷

Relying on Kable presented a range of difficulties for Knight. Quite apart from the fact that ‘the severity… of laws’¹⁸ does not determine constitutionality under the Kable⁹ principle, the restriction in Kable is centred on protecting the ‘institutional integrity’ of State courts. This meant that the factual context of Kable was markedly different to that parole setting in Knight.²⁰ The problem for Knight was that the Victorian legislation was an almost exact replica of New South Wales legislation that had been considered by the High Court in Crump²¹ (§ 154A Crimes (Administration of Sentences) Act 1999 (NSW)), albeit the Victorian provision was ad hominem in its application. In Crump, parole was confirmed to be an executive function, determining whether a sentence could be continued to be served in the community but quite separate from the judicial sentencing role, and subject to the applicable parole guidelines of the day.²² As parole eligibility is determined after the judicial process is complete, it is a purely executive determination and does not entail an enlistment of the court (but may, as is possible with the Victorian Parole Board, include State judges sitting on the Board).

A Interference with Sentence

The Victorian Government at the time of introducing the Knight Bill, the Corrections Amendment (Parole) Bill 2014 (Vic), were conspicuously aware that it could be construed as a constitutional overreach or usurpation of the judicial sentencing role. The Minister for Police and Emergency Services in the

Bill’s Statement of Compatibility stated that the amendment was not enlarging the deprivation of liberty bestowed by Knight’s original sentence. Instead, s 74AA affected the ‘conditions’ in which the Board was entitled to grant parole while leaving the ‘head sentence of imprisonment’ untouched.

In the Court’s first unanimous constitutional law joint judgment since Day, their Honours rejected the contention that the provision ‘in its legal form’ or ‘substantial practical operation’ interfered with Hampel J’s sentence. Aligning the Victorian legislation with that considered in Crump, the Court held that it did not interfere with the Supreme Court’s sentence because the minimum term was not pinpointing Knight’s release date and the determination of his release ‘was simply outside the scope of the exercise of judicial power constituted by the imposition of the sentences’. The fact that it was likely that Knight would remain in prison did not alter the minimum term itself or the severity of the sentence which had been judicially determined by Hampel J.

Distinguishing Crump proved quite intractable for Knight. Not only was the relevance of s 154A’s more general application disputed but French CJ had referred in Crump to the legislative objects of the Crimes (Administration of Sentences) Act 1999 (NSW) as having ‘[a]n ad hominem component’. To the extent that Crump was indistinguishable and the legislation ‘identical in substance to the legal and practical operation of s 74AA’, the Court was not willing to reconsider or overrule Crump’s findings.

The Court in Knight dismissed the ‘more specific’ ad hominem character of s 74AA as ‘a distinction without a difference’. Nonetheless, the

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23 Victoria, Parliamentary Debates, Legislative Assembly, 13 March 2014, 745 (Kim Wells, Minister for Police and Emergency Services).
24 Ibid.
26 Knight v Victoria (2017) 91 ALJR 824, 826 [6].
27 Ibid 830 [28].
28 Ibid 830 [29].
29 Ibid 829-30 [25].
30 Ibid 829 [22].
31 Ibid 829-30 [25].
32 Ibid.
rule of law, contested as it is, favours general laws over those aimed at individuals. In *Momcilovic v R*, Crennan and Kiefel JJ put hope into the notion that the rule of law could ‘imply a limitation’ on State legislation. While the principle was unspoken in *Knight*, the Court was quick to dismiss the constitutional relevance of the legislative targeting of Julian Knight. In *Nicholas*, Gaudron J commented that ‘[i]f legislation which is specific rather than general is such that, nevertheless, it neither infringes the requirements of equal justice nor prevents the independent determination of the matter in issue, it is not, in my view, invalid.’ However, the Court in *Knight* was careful to not rule out the significance of *ad hominem* legislation full stop. They noted, citing *Nicholas* and *Liyanage* that, ‘the party-specific nature of legislation can be indicative of the tendency of that legislation to interfere with an exercise of judicial power.’ This suggests that *ad hominem* legislation may put a court on notice of the risk of legislative usurpation, a risk that did not materialise for Knight.

The Plaintiff repeatedly stressed that s 74AA(6)’s reference to a particular sentence made ‘by the Supreme Court in November 1988’ played more than an identifying role and that within the ‘political charged context…undermines the institutional integrity of the court that is being targeted by the legislation.’ The question was what impact the provision had on the sentencing determination. As the Victorian Scrutiny of Acts and Regulations Committee noted, ‘[t]he practical effect of …the Bill may be equivalent to replacing that order with an order that his sentence not include any parole eligibility date.’ Keane J suggested, in argument, that the legislation ‘is not disapproving of the sentence’ but ‘disapproving or expressing a lack of confidence in the executive organs of government that are charged with ameliorating it…’ Similarly, in *Crump*, French CJ had made clear that while

34 (2011) 245 CLR 1, 215-6 [562]-[563].
35 *Nicholas v The Queen* (1998) 193 CLR 173, 211-2 [83].
36 Ibid.
37 *Liyanage v The Queen* [1967] 1 AC 259.
38 *Knight v Victoria* (2017) 91 ALJR 824, 830 [26].
the legislative intervention in parole ‘altered a statutory consequence of the sentence. It did not alter its legal effect.’

Attorney-General (Qld) v Lawrence provides an interesting contrast to Knight. In this 2013 decision, the Queensland Court of Appeal invalidated amendments to the Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld) which empowered the executive to make a ‘public interest declaration’ so as to ‘deprive a “relevant person” of supervised liberty granted to that person by an order of the Supreme Court’. This was construed by the Court of Appeal as ‘undermin[ing] the authority of the Supreme Court by impugning every order made’ such that each Supreme Court determination made ‘must be regarded as provisional’ and effectively subject to executive override. The amendments meant that ‘substantial effect’ of the executive order ‘was equivalent to a reversal of the Court’s order’ and they were therefore unconstitutional as a violation of Chapter III of the Commonwealth Constitution. While Lawrence did not go on appeal to the High Court, the key to distinguishing the decisions seems to rest in the relationship between the judicial and executive order and whether the latter interferes with the former. For Knight, the recognised assignment of parole as an executive function, independent of the judicial sentence, made establishing this interference problematic.

B Incompatibility and the Role of a State Judicial Officer

The Court held that that it did not need to determine the second argument, that judicial officers sitting on the Parole Board would be vested with functions incompatible with their Chapter III role. This was avoided because sitting judicial officers had not been assigned parole board functions in considering Knight’s application under s 74AA. While s 64(2) provided that a ‘division of the Board’ required ‘at least 3 members’ it only required one sitting Judge or Magistrate or a retired Judge or Magistrate.

43 [2014] 2 Qd R 504.
44 Ibid 527-8 [34] (Holmes, Muir and Fraser JJA).
45 Ibid 530 [41].
46 Ibid.
Knight contended that constitutional invalidity could turn on the ‘potential involvement’ of sitting judges in a s 74AA determination, exercised *persona designata*. In *Wainohu v New South Wales* a majority of the High Court extended the incompatibility principle in *Kable* to functions conferred on State judges in a personal capacity. Applied by Knight here, the contention was that the s 74AA function’s conferral on a judicial officer was incompatible when holistically assessed as it conferred an executive function, to be applied on an *ad hominem* basis, and without the restrictions of natural justice.

Their Honours concluded that it was not necessary to decide this point when it would involve conclusions as to whether ‘a legislative provision would have an invalid operation in circumstance which have not arisen’, regardless, following the path taken in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, the Court concluded that s74AA would be able to be read down in accordance with s 6 of the *Interpretation of Legislation Act 1984* (Vic) so as to exclude a judicial officer from sitting should it be a function that would be invalid for a judge to exercise.

IV CONCLUDING THOUGHTS – KNIGHT AND THE POLITICOISATION OF PAROLE

The recent high profile parole breaches, and the public and private responses to them, ensure that the future mirroring by Australian States of provisions such as s 74AA is a likelihood. Section 74AA was itself a more personalised blueprint of the New South Wales legislation upheld in *Crump*. South Australia, Western Australia, Queensland and New South Wales (along with

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47 Knight (Plaintiff), 'Plaintiff’s Submissions’, Submission in *Knight v Victoria*, No M251/2015, 16 December 2016, [50].
50 *Knight v Victoria* (2017) 91 ALJR 824, 830-1 [33].
52 (1996) 189 CLR 1, 831 [34].
53 Ibid 831 [37].
the Commonwealth) also intervened in the action in *Knight* which suggests an interest if not also an intimation as to the policy’s likely future relevance. It has long been recognised that justice policies are highly changeable, and these changes can have a significant impact on the length of imprisonment actually served by prisoners, especially for those detained for longer terms.\(^5\) In *Crump*, French CJ highlighted that the very nature of parole meant that such changes could even see parliament eliminating parole entitlements.\(^6\)

What *Crump* and now *Knight* highlight is the potential for even greater politicisation of parole. This is most evident in the comment by the Premier of Victoria that even without the introduction of s 74AA it was ‘extremely unlikely that Mr Knight would have been given parole’.\(^7\) In June 2017, the Prime Minister announced that the risk of terrorism required greater control by State Attorneys-General of parole board decisions.\(^8\) As Keane J indicated in *Knight* such moves begin to shed doubt on the faith placed in the executive to make appropriate parole determinations.\(^9\) There is a clear risk that the role of the parole board is weakened as a result.\(^10\) Such politicised moves also render it more likely that sitting judges will be found to be exercising incompatible functions should they form part of a parole board.

In the shadow of *Kable*, such options are all the more attractive to State parliaments when, as *Knight* confirms, the executive sphere of parole lacks the same constitutional limits of the *Kable*-guarded judicature. It is far from certain,\(^11\) however, that the broader State executive domain is not subject to

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\(^7\) *Victoria, Parliamentary Debates*, Legislative Assembly, 18 February 2014, 269 (Denis Napthine, Premier).


\(^11\) For an excellent discussion of the uncertainty and policy implications caused by *Kable* see: Appleby, above n 20.
some limits and it remains to be seen whether such limits will begin to crystallise in the future.

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The Commonwealth Parliament is conferred legislative competence to implement treaty obligations by the external affairs power. What is the status of implementing legislation if the executive subsequently exercises its power to vary Australia’s treaty obligations, and where that legislation cannot otherwise be constitutionally supported? This comment argues that the external affairs power should be understood as waxing and waning analogously to the defence power. The result is that the executive may undermine the validity of implementing legislation by varying treaty obligations. However, the sense of unease engendered by this conclusion may, to some extent, be mitigated by implying a legislative intention that implementing legislation should not endure beyond the facts that support its validity.

I INTRODUCTION

Few propositions are as well entrenched as the claim that the executive, in the exercise of its prerogative powers, cannot displace statute law or common law. This proposition is supported by an abundance of authority stretching back to the Glorious Revolution of 1688. As the Supreme Court of the United Kingdom recently observed in *R (on the application of Miller) v Secretary of State for Exiting the European Union*, ‘it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative

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The authors wish to acknowledge that the question explored in this comment was inspired by the 2017 Sir Harry Gibbs Constitutional Law Moot problem. Zaccary Molloy Mencshelyi and Stephen Puttick were members of the UWA Law School team and Murray Wesson was the team coach. In accordance with competition rules, the authors commenced collaborative work on the comment only after the conclusion of the moot competition. The authors also thank Isabel Inkster for her insights.
does not enable ministers to change statute or common law.\textsuperscript{1} Similarly, in the Australian context, Isaacs J held in \textit{R v Kidman} that the ‘executive cannot change or add to the law; it can only execute it.’\textsuperscript{2} The proposition is sourced in both the legislative supremacy of Parliament and the separation of powers.\textsuperscript{3} It is, Thomas Poole argues, an axiomatic rule about the institutional allocation of public power that does not admit of balancing or deference.\textsuperscript{4}

Yet, under the \textit{Commonwealth Constitution}, this proposition may be subject to an intriguing qualification in the context of treaty amendment or withdrawal — an issue that has recently been the subject of considerable discussion in other jurisdictions.\textsuperscript{5} In terms of the \textit{Commonwealth Constitution}, treaties are implemented pursuant to the external affairs power.\textsuperscript{6} The ratification of a treaty generates legislative competence on the part of the Commonwealth Parliament, with the validity of domestic legislation that implements a treaty depending upon its conformity with that treaty.\textsuperscript{7} But, what is the status of such legislation if the executive subsequently exercises the


\textsuperscript{3} In \textit{New South Wales v Commonwealth} (1915) 20 CLR 54, Isaacs J (at 90) referred to the proposition that the ‘legislature makes, the executive executes, and the judiciary construes the law’ as the ‘dominant principle of demarcation’ of the Constitution.


\textsuperscript{5} In \textit{R (on the application of Miller) v Secretary of State for Exiting the European Union} [2017] UKSC 5 (24 January 2017), a majority of the Supreme Court of the United Kingdom held that legislation was required prior to ministers issuing a notification pursuant to Article 50 of the \textit{Treaty on European Union for the United Kingdom} to withdraw from the European Union. Similarly, in South Africa in \textit{Democratic Alliance v Minister of International Relations and Cooperation} 2017 (3) SA 212 (GP), a Full Bench of the High Court found that a notice of withdraw from the \textit{Rome Statute of the International Criminal Court} was invalid given that it had not been preceded by parliamentary approval and repeal of the implementation Act. This led the South African government to abandon its attempt to withdraw from the \textit{Rome Statute}. See, eg, Max du Plessis and Guenael Mettraux, ‘South Africa’s Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability’ (2017) 15 \textit{Journal of International Criminal Justice} 361.

\textsuperscript{6} Section 51(xxix) of the \textit{Commonwealth of Australia Constitution Act}: ‘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 external affairs.’

prerogative power\textsuperscript{8} to vary Australia’s treaty obligations, and the legislation cannot be supported by another aspect of the external affairs power,\textsuperscript{9} or an alternative head of power? Does the legislation endure notwithstanding variations to the treaty obligations that supported the validity of the legislation in the first place, or is the executive competent to effectively invalidate or amend legislation—contrary to the weighty authority cited above?

To the authors’ knowledge, there is no express authority on this point in Australian constitutional law. To explore this unresolved issue, this comment firstly discusses treaty ratification and treaty implementation under the Commonwealth Constitution in broad terms. The comment then identifies the following possibilities. First, domestic legislation that implements a treaty should be presumptively understood as abrogating the executive’s power to withdraw from or amend those treaty obligations. In other words, legislative assent is presumptively required whenever the Commonwealth Parliament has implemented a treaty and the executive subsequently seeks to vary those treaty obligations such that the legislation would then be outside of legislative competence. Second, the validity of legislation that implements a treaty should be determined by Australia’s treaty obligations at the date of assent of the relevant Act. This would allow the executive to subsequently withdraw from or amend Australia’s treaty obligations without affecting the validity of the domestic legislation implementing those obligations. Third, the validity of legislation that implements a treaty should be determined by Australia’s treaty obligations at the date of challenge of the Act. On this view, the external affairs power is analogous to the defence power,\textsuperscript{10} which ‘waxes and wanes’ in accordance with the exigencies facing the Commonwealth.\textsuperscript{11} Treaty withdrawal

\textsuperscript{8} It may be, and has been, suggested that the power is sourced in s 61 of the Commonwealth Constitution and is independent of the prerogative. This question is beyond the scope of this comment and our analysis proceeds on the conventional understanding that the power is properly understood as an incident of prerogative.

\textsuperscript{9} The external affairs power may also be enlivened by customary international law, extraterritorial power, relations with other countries, and possibly matters of international concern. See generally Sarah Joseph and Melissa Castan, Federal Constitutional Law: A Contemporary View (Thomson Reuters, 4\textsuperscript{th} ed, 2014) 123-50.

\textsuperscript{10} Section 51(vi) of the Commonwealth of Australia Constitution Act: ‘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 the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.’

\textsuperscript{11} Australian Communist Party v Commonwealth (Communist Party Case) (1951) 83 CLR 1, 256 (Fullagar J).
or amendment may therefore affect the validity of legislation that has implemented the treaty.

Notwithstanding the extensive authority that the executive cannot displace legislation through the exercise of its prerogative powers, the comment concludes that the third possibility is the most persuasive understanding of the relationship between Australia’s treaty obligations and legislation implementing such obligations. Although arising in the specific, and possibly hypothetical, context of treaty withdrawal or amendment in respect of legislation that cannot otherwise be constitutionally supported, the executive may nevertheless possess a power generally thought to be precluded by the constitutional law of many modern democratic states. This is a surprising, and somewhat unsettling, conclusion. One response is to imply a legislative intention that an implementing statute should not endure beyond the facts that support its validity. The advantage of this approach is that legislative provision and executive action are apparently rendered consistent. Put more specifically, if such an intention is implied, withdrawal from the treaty does not displace the particular law. Rather, the operation of the law was always intended to cease with the executive’s decision to withdraw. Nevertheless, while ingenious, the implied intention argument cannot obscure that Australia’s federal constitutional arrangements make the validity of implementing legislation contingent upon facts that fall within the prerogative powers, thereby concentrating a potentially far-reaching power in the hands of the executive. The implied intention argument mitigates, but does not entirely dispel, the sense of disquiet generated by our conclusions.

II TREATY RATIFICATION AND IMPLEMENTATION

A Constitutions Compared

In Australian law, the signing and ratification of treaties are matters for the executive under s 61 of the Constitution. The wording of s 61 is notoriously sparse: ‘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.’ Notwithstanding, s 61 is widely understood to
incorporate the prerogative powers of the Crown including the power to sign and ratify,\textsuperscript{12} as well as withdraw from and amend,\textsuperscript{13} treaties.

The Australian legal system is also a dualist system. It is well-established that ‘treaties do not have the force of law unless they are given that effect by statute.’\textsuperscript{14} However, treaty ratification generates legislative competence under the external affairs power. That is, once a treaty is ratified, the Commonwealth Parliament may pass legislation that gives effect to, or incorporates, that treaty on the domestic plane. Like the defence power, the external affairs power is therefore purposive: it exists for the purpose of implementing Australia’s international obligations.\textsuperscript{15} The High Court of Australia has stipulated various criteria that must be met for a treaty to be implemented. The treaty must have been ratified in good faith;\textsuperscript{16} the treaty must be sufficiently specific to allow for implementation;\textsuperscript{17} and the legislation must conform to the demands of the treaty.\textsuperscript{18} There are also suggestions in the case law, although the point has not been settled, that the treaty provision that the Commonwealth Parliament wishes to implement must impose an obligation upon the Commonwealth.\textsuperscript{19} It is not necessary for present purposes to scrutinise more closely these various aspects of the power.

The distinctive nature of these arrangements can be appreciated by contrasting them with the British and American constitutions — two key

\textsuperscript{12} Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J).

\textsuperscript{13} The power to withdraw from treaties is regarded as the corollary of the executive’s power to enter into treaties, albeit subject to the terms of the treaty and general international law. See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) pt V. See also, eg, Turp v Canada [2012] FC 893 (17 July 2012) [18] (Noel J). On amendment, G P J McGinley notes that treaty obligations may be amended directly or indirectly. Direct amendment occurs by entry into an amending treaty expressly altering the terms of the first treaty. Indirect amendment can occur in various ways, including entry into another treaty dealing with the same subject matter as the first treaty but without direct reference to changing obligations under the first treaty, and through the practice of the parties or the practice of one party and the acquiescence of the other. See ‘The Status of Treaties in Australian Municipal Law: The Principle of Walker v Baird Reconsidered’ (1990) 12 Adelaide Law Review 367, 382-3.

\textsuperscript{14} See, eg, Koo v West (1985) 159 CLR 550, 570 (Gibbs CJ).

\textsuperscript{15} See, eg, Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 545 (Deane J).

\textsuperscript{16} See, eg, Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 260 (Brennan J).

\textsuperscript{17} See, eg, Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

\textsuperscript{18} Ibid.

\textsuperscript{19} See, eg, Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 108 (Gibbs CJ). For contrary views, see the judgment of Mason J in the Tasmanian Dam Case at 129 and the judgment of Deane J at 546.
influences on Australian constitutional law. On the one hand, the dualist nature of the Australian legal system originates from British constitutional law. In Brown v Lizars,\textsuperscript{20} the High Court of Australia adopted the rule from Walker v Baird\textsuperscript{21} that treaties do not form part of municipal law unless an Act of Parliament has incorporated them on the domestic plane. Dualism reflects a fundamental principle of British and Australian constitutional law that we have already encountered: 'it is for Parliament, and not for the Executive to make or alter municipal law.'\textsuperscript{22} However, there is no equivalent to the external affairs power under Britain’s unwritten constitution. Instead, the British Parliament is sovereign — treaty ratification is not necessary to generate legislative competence. Likewise, treaty amendment or withdrawal does not affect the powers of the British Parliament and hence the validity of implementing legislation.\textsuperscript{23} Following, the question of whether the executive can effectively invalidate or amend legislation by exercising its prerogative power to vary treaty obligations does not arise under the British constitution as it does in Australia.

This can be contrasted to the system in the United States of America. The status of treaties in United States law is expressly addressed in the Supremacy Clause of the United States Constitution: ‘...all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land...’\textsuperscript{24} The effect of the Supremacy Clause is that a treaty negotiated and, with the consent of two-thirds of the Senators present ratified by the President, must 'be regarded in courts of justice as equivalent to an act of

\textsuperscript{20} (1905) 2 CLR 837, 851 (Griffith CJ).
\textsuperscript{21} [1892] AC 491.
\textsuperscript{22} Simsek v MacPhee (Minister for Immigration and Ethnic Affairs) (1982) 148 CLR 636, 642 (Stephen J). A qualification to this rule was established in Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 where a majority of the High Court held that treaty ratification may create a legitimate expectation that government decisions will conform with the treaty. However, doubt has subsequently been cast upon this doctrine. See, eg, Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1, 33-34 (McHugh and Gummow JJ).
\textsuperscript{23} This may seem contrary to the decision in R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 (24 January 2017). However, in that case the European Communities Act 1972 gave direct effect to, or acted as a 'conduit pipe' for, European Union law. Departure from the European Union through the exercise of the prerogative would not have invalidated the Act; it would simply have terminated the application of European Union law via the Act. It was for this reason that Lord Reed found in his dissenting judgment that legislation was not required for the Article 50 notification of withdrawal from the European Union to be issued. In contrast, the view of the majority was that the prerogative power of withdrawal was inconsistent with the Act, and that a constitutional change of this magnitude required legislation.
\textsuperscript{24} Article VI, Clause 2.
the legislature...

Under the *United States Constitution* then, treaties are self-executing unless they are drafted in such a way that they require congressional action before they have domestic legal consequences. Whether the advice and consent of the Senators is required for the President to withdraw from a treaty is unresolved. However, the key point for present purposes is that the question of whether the executive can effectively invalidate legislation by withdrawing from or amending a treaty does not arise, given that it is the treaty itself that forms part of United States law.

**B Treaty Variation and the Validity of Implementing Legislation: s 61 and s 51(xxix)**

In contrast then, we return to the problem in the Australian context that executive variation of treaty obligations could, at least hypothetically, affect the validity of domestic legislation. We first summarise the problem identified. First, the executive enters a treaty. Next, the Parliament passes legislation giving effect to that treaty on the domestic plane. For present purposes, let us assume that only the ‘treaty implementation aspect’ of the external affairs power supports the legislation. The executive subsequently withdraws from the relevant treaty. A conventional understanding of the relationship between s 61 and s 51(xxix) is that the scope of the external affairs power wanes with treaty withdrawal. Following, the relevant legislation would now fall outside the scope of the head of power and, at least on one view, would become invalid. This section explores the possible conceptions of the relationship between Australia’s treaty obligations and legislation implementing those obligations in an attempt to resolve this problem. We have identified three potential alternatives. First, implied abrogation of the power to withdraw. Second, validity is determined at the date of assent such that subsequent withdrawal does not affect validity of implementing legislation. Third, validity is determined at the date of challenge such that withdrawal could affect the operation of the legislation.

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Does Implementing Legislation Presumptively Abrogate the Executive’s Prerogative Power to Vary Treaty Obligations?

It must be recalled that the prerogative power to withdraw from or amend a treaty is sourced in the common law. Following, it is well established that this power may be abrogated, modified, or regulated by the legislature. In other words, and subject to the points that follow, it is possible for the legislature to provide that parliamentary assent is necessary where a treaty has been implemented by the legislature and the executive subsequently seeks to vary Australia’s treaty obligations. There are occasional dicta in the case law that might appear to support the existence of a presumption that legislative assent is required in such circumstances.

In *Ruddock v Vadarlis*, for example, Black CJ held that an intention to abrogate a prerogative power might be established ‘where the Parliament has entered a field in which Australia has assumed treaty obligations and has acted to give effect to those obligations in that field and where the asserted prerogative or executive power might be capable of exercise in a manner not conformable with the Parliament’s provision for the satisfaction of those obligations.’ Black CJ did not have in mind the specific issue of treaty withdrawal or amendment in respect of implementing legislation. However, given that under the *Commonwealth Constitution*, executive variation of treaty obligations is seemingly capable of impacting the validity of domestic legislation — and in that sense is not ‘conformable’ with such legislation — it is at least arguable that the executive’s prerogative power to make and unmake treaties is presumptively abrogated by the implementing legislation.

The existence of such a presumption would address the problem considered in this comment. The general rule would be that legislation implementing treaty obligations would preclude the executive from unilaterally varying those obligations. Legislative assent would only be unnecessary where the legislature had expressly provided that it was not required. In these circumstances, the legislature would have intended that the legislation should cease to operate, in whole or in part, in the event of variation of Australia’s

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28 See note at above n 8.
30 Ibid 504.
treaty obligations. Accordingly, there would be no qualification of the fundamental rule that the executive cannot change the law without statutory authorisation.

This approach is attractive in its clarity. However, there are several conceptual and practical difficulties with it. First, it runs contrary to the weight of authority on this point. For instance, it is well accepted that statutory abrogation of a prerogative power must occur through express words or by necessary implication.31 In other words, legislation is presumed not to abrogate prerogative powers. Abrogation instead arises in specific, relatively well-defined circumstances that are not typically regarded as extending to implied abrogation of the treaty-making power merely by implementing legislation.32 There is, for example, authority that where legislation wholly regulates the area of a particular prerogative power, the exercise of that power is governed by the provisions of the statute.33 However, legislation implementing a treaty does not necessarily regulate the power to make or unmake the treaty; indeed, that is normally left unregulated by the implementing statute. There is also authority that ministers cannot frustrate the purpose of a statute by undermining its effective operation34 or rendering it redundant.35 These formulations might appear to be more promising but on closer inspection they likewise refer to circumstances where legislation expressly regulates the purported exercise of the prerogative power; they do not establish that legislation implementing a treaty impliedly abrogates the power to withdraw from or amend the treaty.

This raises a second issue with this approach. Recalling Black CJ’s dicta quoted above, the prerogative would only be impliedly abrogated where treaty withdrawal would necessarily be ‘not conformable’ with the continued validity of the implementing legislation. Let us first change the hypothetical slightly. And, suppose that the implementing legislation is supportable by another aspect of s 51(xxix) or another head of power. This would mean that treaty

33 Attorney-General v De Keyser’s Royal Hotel Ltd 1920 AC 508, 526 (Lord Dunedin); Ruddock v Vadarlis (2001) 110 FCR 491, 501 (Black CJ).
34 Laker Airways Ltd v Department of Trade [1977] QB 643.
35 R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513.
withdrawal is in fact entirely conformable with the continued validity of the legislation — the treaty could be withdrawn from and the legislation merely ‘rely’ on an alternative head of power. This raises serious practical difficulties. First, it would not be possible to identify whether the prerogative power would have been abrogated without first ascertaining potential alternative heads of power. Additionally, and perhaps more significantly, let us assume that at one time the legislation is supportable only by the treaty-implementing aspect of s 51(xxiv). That would mean, on this approach, that the prerogative to withdraw from the relevant treaty had been impliedly abrogated. Let us now assume that, at some later time, the legislation becomes supportable by an alternative head of power — perhaps, the ‘relations with other countries aspect’ of s 51(xxiv). This would, necessarily, mean that treaty withdrawal would no longer affect validity of the legislation — that is, it would no longer be unconformable. Does this mean that the prerogative power to withdraw would be ‘revived’? Conceptually, at least applying this approach, it would seem so. This result is irreconcilable with another fundamental principle of Australia’s constitutional system: the prerogative falls within a limited and ever diminishing field. That is, the prerogative is limited to powers that can be identified from historical use and which have not been subsequently abrogated. 

It is also to be noted at this point the diversity of academic opinion regarding the Commonwealth Parliament’s capacity to abrogate executive power to enter treaties in the first place. For example, Sir Maurice Byers submitted to the Senate Legal and Constitutional References Committee’s 1995 inquiry, ‘Trick or Treaty? Commonwealth Power to Make and Implement Treaties’, that the Parliament could not ‘take away any power [which] the Constitution give[s] to the Executive’, and that no executive function may be discharged by the Parliament. Consequently, while the Parliament may regulate the executive’s exercise of the treaty-making power, ‘[n]o law could take [it] away directly or indirectly.’ Critically, Sir Maurice considered that any law giving the Parliament power to veto treaty ratification would be

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38 Ibid.
constitutionally invalid. This may be contrasted to submissions of Professor Enid Campbell and Henry Burmester who both considered that Parliament could, as a matter of constitutional law, pass a law of this latter kind; however, Parliament could not itself assume the power to conclude treaties. The Committee ultimately concluded that a law regulating the executive’s prerogative to enter treaties would be unlikely to impermissibly usurp the separation of powers, provided the Parliament was not itself exercising the power. Further, Professor Sawer has suggested that the Commonwealth Parliament has competence to ‘restrict the powers which the executive obtains from s 61, and the prerogative, for example by requiring legislative ratification of treaties.’ Professor Richardson has gone further suggesting, contra Professor Campbell and Burmester, that ‘Parliament could … provide that, instead of ratification of treaties remaining an act of executive government, ratification should be a function of the Parliament.’ Finally, Professor Winterton has suggested that, given the executive’s treaty-making power is derived from the prerogative, it is inherently subject to legislation, including making the exercise of the power entirely legislative. The same considerations that speak to treaty making must, a fortiori, speak to the power to withdraw. As such, necessarily implied abrogation of the power to withdraw from a treaty is inconsistent with, for example, the view articulated by Sir Maurice Byers.

Finally, it is well-established that the ‘greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power.’ The prerogative power to conduct foreign relations through the making and unmaking of treaties is clearly central to

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39 Ibid.
40 Ibid.
national sovereignty.\textsuperscript{46} This likewise militates against any presumption, or implication, that implementing legislation abrogates executive power.

On reflection, this conclusion should not be especially surprising. As the majority emphasise in \textit{Miller}, the premise of dualism is that ‘international law and domestic law operate in independent spheres.’\textsuperscript{47} This means, on the one hand, that treaties do not form part of domestic law unless they are given effect by statute. However, dualism also entails the converse proposition: ‘treaties between sovereign states have effect in international law and are not governed by the domestic law of any state.’\textsuperscript{48} A presumption that legislation implementing a treaty has abrogated the executive’s power to withdraw from or amend the treaty would undermine the dualist distinction. In short, to resolve the question posed by this comment, the relationship between executive variation of treaty obligations and the validity of implementing legislation needs to be more squarely confronted.

\textbf{2 Should the Constitutionality of Implementing Legislation Be Determined By the Circumstances Existing at the Date of Assent?}

An alternative possibility is that the validity of implementing legislation should be determined by Australia’s treaty obligations at the date of assent of the Act. In other words, once a treaty is implemented the executive can subsequently withdraw from or amend the treaty without affecting the validity of domestic legislation. The advantage of this approach is that it is consistent with the proposition that the executive should not be able to change the law through the exercise of its prerogative powers, as well as the proposition that the executive can nevertheless exercise its prerogative powers to the extent that these have not been impliedly or expressly abrogated by the legislature. Put differently, it

\textsuperscript{46} For example, Murphy J, when considering the operation of ss 51(xxix) and 61 as enabling Australia to carry out its functions as an ‘international person’, suggested that applying a narrow approach to the interpretation of Acts passed under the power would result in Australia being an ‘international cripple unable to participate fully in the emerging world’: \textit{New South Wales v Commonwealth} (1975) 135 CLR 337, 505 (the ‘Offshore Sovereignty case’). See also \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168, 241 (Murphy J). Although considering a different issue, this dictum speaks to the significance of the power.


\textsuperscript{48} Ibid.
holds the promise of maintaining both the legislative supremacy of Parliament and the prerogative powers of the executive.

However, this conception of the relationship between Australia’s treaty obligations and implementing legislation runs counter to much of the authority on the external affairs power. In case law and academic literature, an analogy is frequently drawn between the defence power and the external affairs power.\(^{49}\) Both powers, it is argued, are purposive.\(^ {50}\) The defence power exists for the purpose of defending the Commonwealth,\(^ {51}\) while the external affairs power exists for the purpose of giving effect to Australia’s international obligations.\(^ {52}\) As indicated above, both powers are also capable of waxing and waning in accordance with changing circumstances. The defence power expands and contracts depending upon the exigencies facing the Commonwealth; it is a ‘fixed concept with a changing content.’\(^ {53}\) The defence power is therefore ambulatory; legislation that is valid on the basis of a particular set of facts may cease to be valid if the relevant facts change. As Dixon J held in \textit{Hume v Higgins}, when the conditions to which a law was directed have passed, ‘the statutory provision will then be spent.’\(^ {54}\) In \textit{Koowarta v Bjelke-Petersen}, Stephen J found that an analogous approach should be taken to the external affairs power, whereby its content is determined by what is generally regarded at any particular time as a part of the external affairs of the nation and the validity of challenged laws is tested on this basis.\(^ {55}\) To insist that the validity of legislation implementing treaty obligations should be determined by the facts existing at the date of assent would undermine this commonly understood operation of purposive heads of power and introduce a qualification not previously countenanced in the case law.


\(^{50}\) See, eg, George Williams, Sean Brennan and Andrew Lynch, \textit{Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials} (The Federation Press, 6th edn, 2014) 778.

\(^{51}\) \textit{Stenhouse v Coleman} (1944) 69 CLR 475, 471 (Dixon J).

\(^{52}\) \textit{R v Burgess; Ex parte Henry} (1936) 55 CLR 608, 674 (Dixon J); \textit{Polyukhovich v Commonwealth} at (1991) 172 CLR 501, 551 (Brennan J).

\(^{53}\) \textit{Australian Textiles Pty Ltd v The Commonwealth} (1945) 71 CLR 161, 178 (Dixon J).

\(^{54}\) (1949) 78 CLR 116, 134 (Dixon J). See also \textit{Australian Textiles Pty Ltd v The Commonwealth} (1945) 71 CLR 161, 181 (Dixon J); \textit{R v Foster} (1949) 79 CLR 43.

This approach would also seem to be a quintessential example of the legislative stream rising higher than the constitutional source.\textsuperscript{56} If treaty ratification generates legislative competence on the part of the Commonwealth Parliament, and the implementing legislation cannot otherwise be constitutionally supported, it is difficult to identify the basis upon which legislative validity could be maintained once the treaty obligations have been amended or terminated. The problem is, fundamentally, trying to maintain the legislative supremacy of Parliament while at the same time preserving well established, and perhaps even essential, executive powers. Again, this accommodation is readily achievable in the British system where the sovereignty of the British Parliament means that treaty ratification is not necessary to generate legislative competence and, likewise, treaty withdrawal or amendment does not have repercussions for the validity of legislation that has already been enacted. However, under the \textit{Commonwealth Constitution} treaty ratification generates legislative competence and conversely, it would seem, variation of treaty obligations may have implications for the validity of implementing legislation.

\textbf{3  Should the Constitutionality of Implementing Legislation be Determined by the Circumstances Existing at the Date of Challenge?}

The remaining possibility is that the validity of implementing legislation should be determined by the circumstances existing at the date of challenge of the Act. This approach maintains the analogy that regards both the defence power and the external affairs power as waxing and waning in accordance with changing circumstances. This approach also recognises that, unlike the British Parliament, the Commonwealth Parliament is not sovereign but instead derives legislative power to implement treaties from the external affairs power enumerated in s 51. It ensures, in other words, that the legislative stream remains true to the constitutional source.

Nevertheless, as the Honourable Robert French AC notes in his contribution to this special issue, executive power, especially non-statutory

\textsuperscript{56} \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1, 258 (Fullagar J).
executive power, is associated with societal anxiety. It is difficult not to feel disquieted by the conclusion that the executive may be capable of effectively invalidating or amending legislation through the exercise of its prerogative power to withdraw from or amend treaties, not least because of extensive authority dating from 1688 that the executive of a democratic state should not possess this power. This anxiety is only likely to be heightened by the observation that the executive of a foreign nation may also be capable of effectively invalidating Australian domestic legislation, by, for example, withdrawing from or amending a bilateral treaty that has been implemented by the Commonwealth Parliament. That is, withdrawal from a bilateral treaty by the foreign power would necessarily terminate the treaty obligation, and thus, legislative competence would wane. Following, at least in the abovementioned hypothetical, the implementing legislation would no longer be valid.

However, on closer inspection these consequences are not as absurd or unprecedented as they might at first appear. In the context of the defence power, the executive is capable of generating facts that expand and contract the scope of the power, and which may have consequences for the validity of domestic legislation. The executive can, for example, make declarations of war and peace, and deploy and withdraw the armed forces, thereby escalating or deescalating hostilities. Indeed, the executives of foreign nations may also take actions relevant to the scope of the defence power. The surrender of a foreign nation, for instance, may lead to a waning of the defence power and an eventual finding that Commonwealth legislation is no longer valid. It is true, as McTiernan J held in the Communist Party Case, that the Commonwealth Constitution does not permit the legislature — and by extension the executive — to ‘recite itself’ into power. But this proposition entails that the branches of government cannot assert facts that do not exist; it does not mean that they cannot generate facts relevant to the scope of Commonwealth legislative power.

57 ‘Executive Power in Australia – Nurtured and Bound in Anxiety.’ As Dixon J notes in Australian Communist Party v Commonwealth (1951) 83 CLR 1 (at 187): ‘History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power.’
58 See McGinley, above n 13, 381.
59 In Australian Textiles Pty Ltd v The Commonwealth (1945) 71 CLR 161, Dixon J (at 176) took judicial notice of the surrender of Japan, noting that the ‘whole aspect of things had, of course changed.’
60 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 206.
One response to the sense of unease generated by these observations might be to imply a legislative intention that an Act should not endure beyond the facts that support its validity. In *Hume v Higgins*, for example, in the context of the defence power, Dixon J held that the principles of statutory interpretation ‘enable the Court to imply in a statutory provision obviously addressed to a particular set of facts a restriction upon its operation confining it to those facts.’

Similarly, it may be possible to imply a legislative intention that legislation implementing treaty obligations should not endure beyond the existence of those obligations, assuming that the Act cannot otherwise be constitutionally supported. This accords with the rule of statutory interpretation articulated by Isaacs J in *Federal Commissioner of Taxation v Munro* that ‘there is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds.’ The advantage of this approach is that it is apparently consistent with the proposition that the executive cannot change, or dispense with, the law without statutory authorisation. This is because, by implying the legislative intention, Parliament would have in effect provided for the cessation of the particular provision. Similarly, unilateral withdrawal from a bilateral treaty by a foreign power would not invalidate the legislation — rather, the legislation would cease to operate in accordance with Parliament’s (implied) intention. The approach is supported by s 15A of the *Acts Interpretation Act 1901 (Cth)* which provides:

> ‘[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.’

By operation of s 15A, an Act that cannot be constitutionally supported beyond the existence of treaty obligations is to be construed as not ‘intended’ to endure beyond those obligations, so as not to exceed the legislative competence of the Commonwealth Parliament. Therefore, executive withdrawal (or, again, withdrawal by the foreign power) is not inconsistent with the relevant legislation. Put another way, applying this approach, treaty withdrawal merely ‘concludes’ legislation that must be read subject to the *Commonwealth*

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61 *Hume v Higgins* (1949) 78 CLR 116, 133.
62 (1926) 38 CLR 153, 180.
Constitution and in accordance with the implied legislative intention. This recognises that the validity of an implementing Act is contingent upon facts that change from time to time — here the existence of the treaty obligation.

Nevertheless, the implied intention argument, while consistent with principle and authority, cannot obscure that the external affairs power makes the validity of implementing legislation contingent upon facts that fall within the executive's prerogative powers to withdraw from or amend treaty obligations — unless these have been expressly abrogated by the legislature. The external affairs power therefore concentrates a potentially far-reaching power in the hands of the executive. This aspect of the Commonwealth Constitution sits uneasily with the separation of powers and the legislative supremacy of Parliament as these principles are understood in the constitutional law of most modern democratic states, even if the implied intention argument has the effect of apparently rendering it consistent. The sense of anxiety generated by our conclusions is therefore assuaged, but not entirely dispelled, by implying an intention that implementing legislation that cannot otherwise be constitutionally supported should not endure beyond the existence of the relevant treaty obligations.

III Conclusion

It is possible that the scenario considered in this comment — the executive withdrawing from or amending a treaty, thereby raising the question of the validity of implementing legislation that cannot otherwise be constitutionally supported — will remain entirely hypothetical. It has been noted that 'very few treaties to which Australia is a party have been implemented through legislation based solely on the external affairs power.' Given the breadth of Commonwealth legislative powers, it is likely that implementing legislation will often find support in another aspect of the external affairs power or an alternative head of power. Still, it is possible to find counter-examples. In Koowarta v Bjelke-Petersen, for example, the validity of the relevant parts of the Racial Discrimination Act 1975 (Cth) was found to turn entirely upon the valid implementation of the Convention on the Elimination of All Forms of

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Racial Discrimination. In other words, if the executive were to withdraw from the Convention, the Act would, in the words of Dixon J, be ‘spent.’

Of course, it is possible to imply a legislative intention that the Racial Discrimination Act 1975 (Cth) should not endure beyond the facts that support its validity, here the continuing treaty obligations. This approach has the apparent advantage of addressing important concerns relating to the separation of powers and the legislative supremacy of Parliament. Nevertheless, given that the relevant facts fall within the prerogative powers of the executive, the sobering conclusion remains that the executive could exercise these powers to undermine the validity of a cornerstone of Australia’s human rights protections. Notwithstanding that result, it is difficult to see what other conclusion is available under Australia’s distinctive constitutional arrangements. Indeed, it would appear — as argued in this comment — that this conclusion is, indeed, the most coherent understanding of the relationship between s 51(xxix) and s 61, parliamentary supremacy and the separation of powers.

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65 By a majority of six to one, the High Court found that the relevant parts of the Act were not valid under the ‘race’ power in s 51(xxvi) of the Constitution.
66 Hume v Higgins (1949) 78 CLR 116, 134.