VARIATION ON A THEME: CPCF V MINISTER FOR IMMIGRATION AND BORDER PROTECTION [2015] HCA 1

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Textually, *CPCF v Minister for Immigration and Border Protection* [2015] HCA 2015 (***CPCF***) appears to simply be another decision about statutory construction. A 4-3 majority held that the *Maritime Powers Act 2013* (Cth) (***MPA***) authorised the detention and removal of Tamil asylum seekers in Australia's contiguous zone.

Below the surface, however, there lurks an enticing question as to the nature, scope and content of Commonwealth executive power in s 61 of the *Constitution*. In an edition of the *University of Western Australia Law Review* dedicated to the memory of Professor Peter Johnston it is appropriate to consider *CPCF*'s constitutional law impacts on Commonwealth executive power.[1] Given that this case was ultimately resolved on a statutory basis, *CPCF* is more interesting for what it leaves unsaid about executive power than for its textual adumbrations.

After scrutinising *CPCF*, its most fascinating aspect is critically analysed. Ultimately, it is demonstrated that executive power must now receive the attention that judicial and legislative power have enjoyed for decades in the canon of Australian constitutional law.

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[1] Though Professor Johnston's academic contribution across most areas of law was significant, he made a special contribution in this field: e.g. 'State Courts and Chapter III of the Commonwealth Constitution: Is *Kable's Case* Still Relevant?' (2005) 32 *University of Western Australia Law Review* 211; 'Method or Madness: Constitutional Perturbations and *Marquet's Case*' (2004) 7(2) *Constitutional Law and Policy Review* 25; 'The Constitution as Physics: A Commentary on Papers by Professor Saunders and Dr Mantziaris' (2004) 25 *Adelaide Law Review* 257; 'The Bank Nationalisation Cases' in George Winterton and HP Lee (eds) *Great Australian Constitutional Landmarks* (Cambridge University Press, 2003) 85; 'A Taxing Time: The High Court and the Tax Provisions of the Constitution' (1993) 23 *University of Western Australia Law Review* 362;

I Facts and Procedural History[2]

On 29 June 2014, an Indian vessel carrying 157 asylum seekers was intercepted by the Australian Navy approximately 16 miles from the Australian offshore territory of Christmas Island. Their vessel having become unseaworthy due to a fire, the passengers were taken on board the Australian ship, purportedly pursuant to s 72(4) of the *MPA*. The Commonwealth government directed the Navy ship set off for India, in furtherance of a decision made on 1 July 2014 by the National Security Committee of the Commonwealth Cabinet.

The Australian ship reached India on or about 10 July 2014. It remained until 22 July, when it became clear the Indian government would not permit discharge of the passengers. Pursuant to the Minister for Immigration and Border Protection's directive, for 'operational and other reasons', the ship sailed for Cocos (Keeling) Islands and discharged all of its passengers, who were taken into immigration detention pursuant to the *Migration Act 1971* (Cth).

Urgent injunctive relief was sought in the High Court of Australia on 7 July 2014. Essentially, the applicants' argument was that there were serious legal questions concerning the validity of the Commonwealth's actions in light of Australia's international obligations. Justice Crennan restrained the Commonwealth from delivering any plaintiff into the custody of Sri Lanka until 4:00pm the following day. Once it became clear that the putative refugees would not be transferred to India, the urgency dissipated and this matter was set down for a directions hearing by Hayne J.

In the High Court proceedings, the plaintiffs sought damages for unlawful imprisonment. The central question was obvious: did either the *MPA* or the non-statutory Commonwealth executive power authorise the plaintiffs' detention and removal. By a 4-3 majority, the conduct of the Australian Navy officers was held to be authorised by the *MPA*.

II Executive Power in *CPCF*

For the majority, there were two key questions. First, did the *MPA* authorise the conduct of the Navy? Secondly, did this Commonwealth statute's legal

[2] See *CPCF* [2015] HCA 1, [1]-[5] (French CJ); *JARK (representing a class as defined in Paragraph 1 of "Nature of the Claim" in the Writ of Summons) v Minister for Immigration and Border Protection; SAS v Minister for Immigration and Border Protection* [2014] HCATrans 148 (***JARK***); *JARK* [2014] HCATrans 149; *JARK* [2014] HCATrans 150; *CPCF* [2014] HCATrans 152; *CPCF* [2014] HCATrans 153; *CPCF* [2014] HCATrans 156; *CPCF* [2014] HCTrans 164; *CPCF* [2015] HCATrans 184.

operation extend into Australia's offshore contiguous zone?[3] Essentially, s 72 of the *MPA* provided for a scheme whereby persons detained outside Australia's territorial waters could be removed to a 'place'. The Court's careful construction of the provision is now perhaps otiose because, before *CPCF* was decided, the Commonwealth Parliament amended the *MPA* to cover a similar situation.[4]

Chief Justice French indicated that there was no doubt about the geographic operation of the *MPA* extending to the contiguous zone.[5] His Honour noted that the Australian Navy vessel could have, consistently with s 72(4) of the *MPA*,[6]

> remain[ed] at sea for as long as was reasonably necessary to determine whether negotiations were likely to yield an agreement to receive the plaintiff and other persons… [T]he exercise of power under s 72(4)… could not be said to be invalid.

Consequently, it was unnecessary to decide the:

> important constitutional question whether there was a power under s 61 [of the Commonwealth *Constitution*] which, absent the lawful exercise of power under the MPA, would have authorised the actions taken by the Commonwealth in this case.

This succinct comment by French CJ is particularly significant given his judgment *Ruddock v Vadarlis*[7] where he found that s 61 is the exclusive legal source of Commonwealth executive power. He emphasised that the description of a particular power as a 'prerogative' acknowledges its historical antecedents, but fails to recognise its exclusive source as s 61.[8] If in *CPCF* French CJ had elaborated on this further, it would have indicated the direction in which his position on Commonwealth executive power may have developed in the intervening 13 years.

For Hayne and Bell JJ, the detention and removal of the 'unauthorised

[3] In the course of their consideration, a number of issues were averted to by the majority: international law, including non-refoulement; the maritime chain of command; the obligation to accord procedural fairness; and the relevance of permission (or absence thereof) to land India. This note does not consider those issues in any detail.
[4] See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ss 13-18.
[5] *CPCF* [2015] HCA 1, [29] (French CJ).
[6] *CPCF* [2015] HCA 1, [50] (French CJ).
[7] (2001) 110 FCR 491 (***Vadarlis***).
[8] *Vadarlis* (2001) 110 FCR 491, [179].

maritime arrivals'[9] was beyond the Navy's legal power. On the MPA's proper construction, the taking of persons to a place outside Australia was authorised when the 'taking' could be completed.[10] Absent prior agreement with India, that was not possible. Their Honours considered that this construction would not defeat the purpose of the statutory scheme, because Nauru and Papua New Guinea are designated under s 198AB of the *Migration Act 1958* (Cth) as regional processing countries.[11]

Concerning executive power, Hayne and Bell JJ said any discussion must begin with:[12]

> clear identification of the content of the question that is asked… It is whether the exercise of a power… justified what otherwise would be a false imprisonment and any associated trespass to the person.

Their Honours highlighted a statement in *Chu Kheng Lim v Minister for Immigration*:[13]

> [A]ny officer of the Commonwealth executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision

Pursuing that premise to its logical conclusion, their Honours noted that:[14]

> [t]o hold that the [Commonwealth] Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.

Crennan J and Gageler J decided *CPCF* by reference to the *MPA*, and therefore the non-statutory Commonwealth executive power question was unnecessary to answer. As a result, the most intriguing judgments are those of Kiefel J and Keane J.

Justice Kiefel highlighted, like so many eminent constitutional law scholars,[15] that 'the terms of s 61 do not offer much assistance in resolving

[9] To adopt the language of the *Migration Act 1958* (Cth) s 5AA.
[10] *CPCF* [2015] HCA 1, [86] (Hayne and Bell JJ).
[11] *CPCF* [2015] HCA 1, [86]-[87] (Hayne and Bell JJ).
[12] *CPCF* [2015] HCA 1, [142] (Hayne and Bell JJ).
[13] *CPCF* [2015] HCA 1, [148] (Hayne and Bell JJ) quoting *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 19 (Brennan CJ, Deane and Dawson JJ).
[14] *CPCF* [2015] HCA 1, [150] (Hayne and Bell JJ).
[15] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 27; Harold Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Book

questions as to the scope of executive power'.[16] Her Honour went on to assert that the primary authority relied on by the Commonwealth, *Attorney-General for Canada v Cain*,[17] was of little relevance to the circumstances of *CPCF*. The crucial question was the way powers are distributed between the arms of the Commonwealth government, and *Cain* was not concerned with that question.[18] Citing *Barton v the Commonwealth*,[19] Kiefel J held that the surrender of a person to another country will always require statutory authorisation.[20] In any event, any power the Commonwealth executive may have had to detain and remove the plaintiffs had been lost or displaced through abrogation by statute.[21] A careful examination of Kiefel J's judgment reveals a deep scepticism about the Commonwealth's argument.

Though satisfied that the *MPA* authorised the detention and removal, Keane J also considered the executive power arguments. Relying on *Cain*, his Honour held that the Commonwealth executive had sufficient power to bar the entry of a vessel to Australia and to do all things necessary to achieve that result.[22] With respect however, it should be emphasised that *Cain* stands only for the proposition that every nation has power to prevent aliens from entering its territory.[23] This is to say nothing of the nature, scope, or manner of exercise of the power. To assert simply that Australia as a sovereign nation has the power to prevent aliens from entering its territory does not adequately confront the that the executive government cannot do so of its own volition. This difficulty is explored further below.

III Recasting the Debate: A Framework for Commonwealth Executive Power?

To date, the High Court has not engaged in a doctrinal analysis of executive power[24]or s 61 of the *Constitution*'s nebulous and uncertain terms. For example,

Pty Ltd, 1984) 415; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th edition 2008) 342.

[16] *CPCF* [2015] HCA 1, [259] (Kiefel J).

[17] [1906] AC 542 (***Cain***).

[18] *CPCF* [2015] HCA 1, [262]-[265] (Kiefel J).

[19] (1974) 131 CLR 477.

[20] *CPCF* [2015] HCA 1, [270]-[271] (Kiefel J).

[21] *CPCF* [2015] HCA 1, [277], [283] (Kiefel J).

[22] *CPCF* [2015] HCA 1, [479]-[483] (Keane J).

[23] *Cain* [1906] AC 542, 546 (Lord Atkinson).

[24] Arguably *Williams v the Commonwealth* [2014] HCA 23 (***Williams (No 2)***), *Williams v the Commonwealth (No 1)* (2012) 248 CLR 156 (***Williams (No 1)***) *Pape v Commissioner of Taxation*

Professor Winterton has described s 61 as 'remarkably cryptic' when compared to other constitutional provisions.[25] Indeed, he acknowledges 'it has been suggested [that s 61] was deliberately left vague'.[26] The better view, however, is that the framers did not foresee the difficulty that s 61 would cause. In stark contrast, *The Annotated Constitution of the Australian Commonwealth* suggests that '[t]he Executive functions of the Federal Government are clearly and expressly defined'.[27] Of course, this has certainly not been the experience of scholars on constitutional law.[28]

As a result of CPCF's vagaries, no Justice fully engaged in a discussion of the nature, scope and content of Commonwealth executive power. That is regrettable, if understandable. As Winterton has noted, from 1901 to 2003 only 10 High Court cases had considered the exercise of Commonwealth executive power.[29] In the intervening decade or so, only three cases have been added to that short list: *Pape*, *Williams (No 1)* and *Williams (No 2)*.

In part due to s 61's nature, and in part due to the absence of appropriate litigation to consider the issue, the Court has not developed tests and doctrines applicable in the area. Contrasted with the approach to, for example, intergovernmental immunities[30] it is clear that executive power jurisprudence is underdeveloped.

A legal framework for resolving these questions has two benefits. First, it allows the executive to act knowing their acts will be valid on the application of a certain test. Secondly, it enables judges and lawyers[31] to express the limits on Commonwealth executive power by reference to objective standards. On the

(2009) 238 CLR 1 (***Pape***) are the beginning of this process. However, it is clear there is a lot more to be said. By way of comparison, there were 40 years between the decisions in *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermakers'***) and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – both significant decisions concerning judicial power.

[25] Winterton, above n 11, 27.

[26] F Gurry 'The Implementation of Policy Through Executive Action' (1977) 11 *Melbourne University Law Review* 189, 221.

[27] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 699; see also Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Maxwell. 1901) 64-6; William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell 1910) 292-302: in the early years of Federation, the Executive power of the Commonwealth did not evoke particular controversy.

[28] See above n 16.

[29] George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 421.

[30] *Austin v the Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

[31] Not to mention legal academics and law students.

facts in *CPCF*, a framework would have allowed the executive government to make decisions with confidence that they were lawful, assuming they relied solely on non-statutory executive power. Of course, formulating say a legal test would be a formidable task. However, a doctrinal analysis of Commonwealth executive power should result in more certainty.

What is the way forward? One idea worth revisiting is the notion of 'breadth and depth' preferred by Professor Winterton.[32] It has been described as 'neat and illuminating',[33] and yet was cited only by Heydon J dissenting in *Williams (No 1)*,[34] arguably the most significant case on Commonwealth executive power handed down by the High Court.

In Winterton's conception of executive power, breadth refers to the subject matters which Commonwealth executive power covers. In his analysis, it includes all topics in ss 51 and 122 of the *Constitution*, as well as the implied nationhood power and power to contract. Since *Williams (No 1)* it is clear that Commonwealth executive power does not include a bare power to contract and spend. This is not to suggest, however, that the usefulness of breadth is eroded. A unifying theory, based on the *Constitution*'s text and structure, could conceivably be proposed to give Commonwealth executive power content.[35]

Similarly, Winterton refers to 'depth' as the 'separation of powers' aspect of Commonwealth executive power.[36] This concept limits the activities the Commonwealth executive may engage in within the breadth of its powers. This is the most useful point at which to place limits on Commonwealth executive power. That the Commonwealth executive cannot enter contracts or spend money are properly described as limits on the depth of the power, rather than its breadth.

In the offshore context alone, many conundrums exist. Migration is the obvious example. What is the Commonwealth executive's power in relation to vessels intercepted beyond Australia's territorial waters? However, other questions arise. Is legislation required to maintain foreign or international legal

[32] Winterton, above n 16, ch 2.

[33] *Williams (No 1)* (2012) 248 CLR 156, [382] n 525 (Heydon J); see also Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: 2 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 1.

[34] *Williams (No 1)* (2012) 248 CLR 156, [368], [379], [385], [405]-[406] (Heydon J) (French CJ also makes reference at [26], but only to outline to content of the 'common assumption').

[35] See for instance Winterton, above n 16, 29: Winterton describes breadth as the 'federalism' component of executive power. Federalism, properly defined, could provide a constitutional basis for limiting the breadth of Commonwealth executive power.

[36] Winterton, above n 16, 29.

proceedings? Who advises the Queen in London on the appointment of State Governors, when they may have Commonwealth functions conferred on them?[37] To what extent is the Commonwealth executive able to act without statutory authorisation in respect of offshore oil and gas installations? A framework for Commonwealth executive power would greatly assist in the resolution of these questions.

IV Conclusion

Through the divergent approaches taken to Commonwealth executive power by the Justices in *CPCF*, it is clear that an extended and nuanced structural and doctrinal analysis is necessary. Without it, the diasporic approach to the development of the law in the area will continue. A survey of the cases concerning Commonwealth executive power reveals no common thread or unifying concept.[38] When compared to the adherence to orthodoxy in the realm of judicial power,[39] the contrast is stark. That the High Court was not required to confront Commonwealth executive power in *CPCF* is regretted. Hopefully, an appropriate vehicle for consideration of the conceptual framework of Commonwealth executive power will emerge in the near future. If so, Professor Johnston would no doubt have relished engaging in the ensuing legal debates.

[37] *Australia Act 1986* (Cth) s 7: the Premier of each State tenders advice to the Queen in relation to the exercise of powers and function related to that State. Arguably, the function is a Commonwealth one, as it is contained within Commonwealth legislation. Who is entitled to advise the Queen on the appointment of the Governor, whose power to appoint the Premier may have Commonwealth implications? See also *Constitution* s 126: if the Governor of a State is appointed as a deputy to the Governor-General, it is again arguable they have a Commonwealth function.

[38] See for instance *Barton v the Commonwealth* (1975) 131 CLR 477; *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338; *Johnson v Kent* (1975) 132 CLR 164; *Davis v the Commonwealth* (1988) 166 CLR 79; *Pape* (2012) 248 CLR 156; *Williams (No 1)* (2012) 248 CLR 156.

[39] That orthodoxy being captured in *Boilermakers'*.