

1. Introduction

I am pleased to have been invited to deliver this Senate Occasional Lecture as the basis for a paper on parliament. I propose to use the opportunity to bring together two topical, broadly related themes. One is the heavy reliance on government through the use of executive power in Australia. The other is the course of High Court decisions over the last decade or so that have placed new emphasis on the need to identify the parameters of federal executive power by reference to the rest of the Constitution. While much executive power is exercised pursuant to statute, the extent to which the executive can act without legislative authority, in the exercise of ‘non-statutory’ executive power, raises some complex constitutional questions. For the moment, the relevant cases culminate in *Williams v. Commonwealth*,¹ although more litigation can be expected.

My purpose in this paper is to explain what has happened so far and to argue that these developments offer an opportunity to craft, through both law and practice, an appropriate sphere for the use of non-statutory executive power for 21st century Australia. I begin by outlining the challenges of understanding the meaning of the key provision of the Constitution, section 61. In this part, I will also briefly canvass the types of cases concerning the executive power that came before the High Court in the first century of federation so as to show how and why the meaning of the section remained unsettled. In the next part I identify some of the patterns of use of executive power and explain the incentives for usage to increase, fuelled by the ambiguity of the power. Part 4 examines recent decisions of the High Court with particular reference to *Williams*, explores their implications for the scope of the power and identifies some of the key questions that remain for decision.

In conclusion, I argue that, while these developments have their challenges, they should be welcomed by the Parliament and the executive branch itself for their potential to enhance the Australian constitutional system. The effectiveness of Australian constitutionalism depends to a greater extent than in any other Western democracy on the vertical and horizontal allocation of power between healthy public institutions. The scope of federal executive power affects all the key constitutional

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 28 September 2012.

¹ [2012] HCA 23.

principles that frame these institutional relationships: federalism, representative and responsible government, separation of powers and the rule of law.

2. The interpretive challenge

The Commonwealth Constitution famously drew on both the British and the United States strands of the common law constitutional tradition. As a generalisation, the institutions that it established are largely British in conception, although they necessarily were overlaid by federalism, as the *sine qua non* of the Constitution. The British Constitution is evolutionary and unwritten, in the sense that there is no codified constitutional document, so that the applicable principles have emerged in response to events over a very long period of time. At the core of the British Constitution is the relationship between the executive and a sovereign parliament, reinforced by the authority of independent courts to resolve disputes over the lawfulness of executive action and the meaning of legislation.

Two distinct lines of development of this relationship are relevant for present purposes. One is the passage of *de facto* executive power from monarch to ministers with the confidence of the elected house. Formal power remained with the monarch, however, giving rise to the distinction between the ‘dignified’ and ‘efficient’ elements of the Constitution to which Walter Bagehot referred² and inhibiting the emergence of a developed concept of the state.³ A second line of development marked the boundaries between power that could be exercised by the executive alone, subject to legislation to the contrary, and that which required authorisation from the parliament. The former included powers that originated in the prerogative of the monarch: the powers to make war and to conclude treaties are examples.⁴ It also included some powers of a kind that can generally be exercised by legal persons as long as they are not prohibited by law, of which a power to contract is an example.⁵ Matters that required parliamentary action, on the other hand, in this sense constituting ‘legislative

² W. Bagehot, *The English Constitution*, Chapman and Hall, London, 1867, p. 13.

³ Martin Loughlin, ‘The State, the Crown and the law’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown*, OUP, Oxford, 1999, p. 33.

⁴ An initial list of the current ‘prerogative executive powers’ in the United Kingdom appears in House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth report, 2003–04, HC 422, 16 March 2004, pp. 9–12. Here and elsewhere they are distinguished from ‘legal prerogatives’ of various kinds, amongst which the committee included the principle that the Crown can do no wrong. For a more comprehensive list see Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report*, 2009, Annex.

⁵ By 2007, Harris records these as having been described in various ways, none of which was fully satisfactory, including ‘common law discretionary powers’, ‘non-statutory powers’ and ‘capacities’: B.V. Harris, ‘The “third source” of authority for government action revisited’, *Law Quarterly Review*, vol. 123, 2007, pp. 225, 226. Harris himself continued to refer to ‘the residuary freedom the government has to act where not legally prohibited’ as ‘the third source’ (p. 226).

power’, included proposals to make or change law, to create offences, to impose taxation or to authorise public expenditure.

This is an oversimplification of the results of a complex history, which left unsettled a range of matters, including the scope and purpose of the prerogative as narrowly understood and whether it included the other non-statutory powers of the Crown or not.⁶ In recent years, in the UK itself, the uncertainty has led to debate on a host of questions, which in some respects parallel issues confronting Australia. These include: the legal character of the Crown and its relevance to the scope of non-statutory executive powers, in an age in which they are used for programmatic purposes;⁷ whether and to what extent the Crown can properly be equated with private persons for the purpose of identifying what the executive might lawfully do;⁸ the efficacy of accountability to parliament for the exercise of non-statutory executive power;⁹ whether and to what extent an exercise of either the prerogative in the narrow sense¹⁰ or of other non-statutory executive powers should require prior authorisation by statute;¹¹ and whether and in what circumstances a parliamentary appropriation constitutes adequate parliamentary approval.¹²

The framers of the Commonwealth Constitution faced the challenge of adapting this historically derived British conception of the executive and its authority to the very different Australian context of an entrenched written Constitution, which was both federal and perceived to be democratically advanced, and in which executive power would formally be exercised by appointed representatives of the Crown in each sphere. To add to the complications, Australia was not yet fully independent and at least some powers affecting Australia would continue to be exercised by the monarch in the United Kingdom, acting on the advice of British ministers.

⁶ These issues are canvassed in Sebastian Payne, ‘The royal prerogative’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown*, OUP, Oxford, 1999, p. 77. A leading protagonist of the view that the prerogative comprises the entire ‘residue of discretionary or arbitrary authority ... legally left in the hands of the Crown’ was A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn, McMillan, London, 1959, p. 424, quoted in Payne, p. 79.

⁷ Janet McLean, ‘The Crown in contract and administrative law’, *Oxford Journal of Legal Studies*, vol. 24, 2004, p. 129.

⁸ Harris, *op. cit.*, pp. 239–40.

⁹ The 2004 House of Commons report quotes Prime Minister Major: ‘It is for individual Ministers to decide on a particular occasion whether and how to report to Parliament on the exercise of prerogative powers’: House of Commons Public Administration Select Committee, *op. cit.*, pp. 7–8.

¹⁰ United Kingdom, *The Governance of Britain*, CM 7170, 2007; but see subsequently Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report*, 2009.

¹¹ Anthony Lester and Matthew Weait, ‘The use of ministerial powers without parliamentary authority: The Ram Doctrine’, *Public Law*, 2003, p. 415; Margit Cohn, ‘Medieval chains, invisible inks: On non-statutory powers of the executive’, *Oxford Journal of Legal Studies*, vol. 25, 2005, p. 97; Margit Cohn, ‘Judicial review of non-statutory executive powers after *Bancoult*: A unified anxious model’, *Public Law*, 2009, p. 260.

¹² Harris, *op. cit.*, p. 229.

The result was a brief section on executive power in a brief chapter of the Constitution dealing with the executive branch. Section 61 provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth.

Relevantly for present purposes, the parliament may make laws with respect to 'matters incidental to the execution' of whatever power section 61 vests in the 'Government of the Commonwealth' (section 51(xxxix)).

There are at least two obvious words of limitation in section 61. One is the requirement for the power to be 'executive' in character rather than 'legislative' or 'judicial' within the meaning of sections 1 and 71 respectively. The other is the need for executive power to pertain to the 'Commonwealth' in contrast, in this case, to the states. The precise scope of neither of these limitations is apparent on the face of the section, however, and it is unclear whether the final clauses are words of limitation or not. Nor is it clear whether and if so how the old British understandings of executive power inform the section. Does section 61 allow for the prerogative in the narrow sense and, if so, to what extent? Does it allow for the so-called 'ordinary' non-statutory powers and again, if so, to what extent? Does it allow for potential new forms of executive action, some of which are driven by federalism, of which intergovernmental agreements are an example?

No section in a constitution can properly be interpreted in isolation from the rest of the instrument. In the case of executive power, the relevant context has several dimensions.

Most obviously relevant are the provisions dealing with federalism. Both legislative and judicial powers are explicitly divided between the Commonwealth and the states (sections 51, 52, 75, 76). Section 109 resolves inconsistencies between Commonwealth and state laws, with implications for conflicts between federal and state jurisdiction.¹³ Section 96 empowers the Commonwealth to make payments of financial assistance to the states, 'on such terms and conditions as the Parliament thinks fit'. An explicit provision to this end is unusual, in comparison with other, older, federal Constitutions.¹⁴ A Senate in which all original states are equally

¹³ *Felton v. Mulligan* (1971) 124 CLR 367.

¹⁴ Cheryl Saunders, 'The hardest nut to crack' in G. Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide*, Legal Books, Sydney, 1987, pp. 149–72.

represented has almost co-equal powers with the House of Representatives (sections 7, 53). The more limited power of the Senate in relation to financial legislation is closely circumscribed (sections 53–55).

A second group of provisions relates to representative government. Legislative power is vested in the parliament (section 1). Both houses of the parliament are directly elected by the people (sections 7, 24). The parliament exercises financial control through a requirement for moneys raised by the government to be credited to the Consolidated Revenue Fund from which it can be ‘appropriated for the purposes of the Commonwealth’ by the parliament in the form of a law (sections 81, 83).

A third group of provisions concerns responsible government. Particularly relevant for present purposes is the requirement in section 64 that the ‘officers’ who administer the departments of state are both advisers to the Governor-General and ministers, who must hold seats in the parliament. It is convenient also to mention two other provisions. Section 56 retains ministerial control over expenditure through a requirement for the Governor-General to recommend ‘by message’ the purpose of an appropriation to the relevant house before an appropriation law is passed. Section 2 enabled the monarch to assign ‘powers and functions’ to the Governor-General that were not encompassed by section 61. Since formal independence, however, this section has been regarded as spent.¹⁵

The meaning of section 61 has arisen before the High Court in particular contexts many times since federation. It is not necessary to canvass this case law in detail here. At risk of overgeneralisation, I assign it to three categories for explanatory purposes. In one category of cases, the principal question has been whether the power is executive in character, in circumstances in which it is relatively obvious that it pertains to the Commonwealth.¹⁶ In a second category of cases the power has readily been accepted as executive in character but it has been contested that it pertains to the Commonwealth rather than to the states.¹⁷ A third category, which I will not elaborate further at this point, deals with a range of other relevant matters including the relationship of an exercise of executive power to constitutional guarantees of, for example, property rights (section 51(xxxi))¹⁸ and the scope of the incidental legislative power in relation to executive power (section 51(xxxix)).¹⁹

¹⁵ Two assignments of power in 1954 and 1973 were revoked by the Queen in 1987 on the advice of the Prime Minister on the ground that they had not been necessary: Constitutional Commission, *Final Report, Summary, 1988*, AGPS, Canberra, 1988, p. 18.

¹⁶ The decision in the Tampa litigation is an example: *Ruddock v. Vadarlis* (2001) 110 FLR 491.

¹⁷ The *Australian Assistance Plan* case is an example: *Victoria v. Commonwealth* (1975) 134 CLR 338.

¹⁸ *ICM Agriculture Pty Ltd v. Commonwealth* (2009) 240 CLR 140.

¹⁹ *Davis v. Commonwealth* (1988) 166 CLR 79; Cheryl Saunders, ‘Intergovernmental agreements and the executive power’, *Public Law Review*, vol. 16, 2005, p. 294.

As far as the first category is concerned, there has been tension from the outset about whether, given the wording of section 61, constitutional or statutory authority is required for the exercise of executive power or whether the various common law understandings of inherent executive power inform a broader reading of the section in some way. Arguments in favour of the latter included that executive power existed ‘antecedently to ... legislation’, as Deakin once suggested;²⁰ that the Commonwealth executive had all the common law powers of a legal person; and that the description of executive power in section 61 as ‘extending’ to certain matters was not intended to restrict its scope. While these claims have never been accepted in their entirety by the court, over time it has been confirmed that, for example, section 61 does indeed incorporate some aspects of the prerogative, including the power to make treaties;²¹ that it authorises the executive to enter into at least some contracts (and to exercise some other non-statutory powers) without legislative authority;²² and that it is the source of power to make intergovernmental agreements.²³ The 1934 decision of the High Court in *New South Wales v. Bardolph*, that legislation was not necessary to authorise a state executive to make a contract ‘in the ordinary course of administering a recognised part of the government of the State’,²⁴ was roundly criticised by leading scholars, as drawing a distinction that would be difficult to sustain.²⁵

The second category of cases concerns the scope of Commonwealth vis-à-vis state executive power. It has some links with the first, insofar as a broad power for the Commonwealth executive to exercise the powers of a legal person to contract potentially denies federal limitations on the power as well. Many, although not all of the most significant cases, however, focused on the related question of the Commonwealth power to spend. Until the latter part of 20th century, it had been assumed that the answer to this question lay in the meaning of the requirement in section 81 for the Consolidated Revenue Fund to be appropriated ‘for the purposes of the Commonwealth’.²⁶ But in 1975, following a challenge to the validity of a regional assistance plan in the *AAP* case (*Victoria v. Commonwealth*), the focus shifted.²⁷ The outcome of the case was frustratingly inconclusive: the challenge was dismissed after

²⁰ Alfred Deakin, ‘Channel of communication with imperial government: Position of consuls: Executive power of the Commonwealth’, in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia: Volume 1: 1901–14*, AGPS, Canberra, 1981, pp. 129, 131.

²¹ *Barton v. Commonwealth* (1974) 131 CLR 477, 498.

²² *Commonwealth v. Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421.

²³ *R v. Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 560.

²⁴ *New South Wales v. Bardolph* (1934) 52 CLR 455, 508, Dixon J.

²⁵ Enid Campbell, ‘Commonwealth contracts’, *Australian Law Journal*, vol. 44, 1970, p. 14; see also Leslie Zines, *The High Court and the Constitution*, 5th edn, Federation Press, Annandale, NSW, 2008, pp. 349–50.

²⁶ See in particular *Attorney-General (Vic) v. Commonwealth (Pharmaceutical Benefits case)* (1945) 71 CLR 237.

²⁷ *Victoria v. Commonwealth (AAP case)* (1975) 134 CLR 338.

Justice Stephen, the seventh member of an otherwise equally divided court, denied the plaintiff state standing.²⁸ The reasoning was potentially instructive, however. While some justices interpreted section 81 broadly to encompass whatever purposes the parliament determined,²⁹ one of these, Justice Mason, pointed to the distinction between appropriation on the one hand and engaging in a spending program on the other. The latter depended on the executive power, as a last resort. And in this case, in his view, the program exceeded the bounds of the power. In what subsequently became an authoritative statement, he observed that section 61:

is not unlimited ... its content does 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 distribution of legislative powers ... and the character and status of the Commonwealth as a national government.³⁰

This understanding of the breadth of section 61 was reconfirmed in 1988 in the very different context of a challenge to the validity of legislation empowering the Australian Bicentennial Authority, where the joint judgment of Mason CJ, Deane and Gaudron JJ also noted that:

the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.³¹

3. The use of executive power

The strengths of non-statutory executive power are that it can be used quickly and strategically in ways that are flexible and informal. In Commonwealth–state relations it may also, at least superficially, reflect consensus rather than ownership by one sphere of government. Executive power performs a valuable role in government for these reasons. The flip side, however, is that it has less desirable properties as well. It lacks the legitimacy, public exposure, quality control and accountability that typically are associated with legislation. In any system, it therefore is necessary to strike an appropriate balance between reliance on executive and legislative power. Constitutions provide the framework, the precise meaning of which is still being

²⁸ Of the remaining justices, Barwick CJ and Gibbs and Mason JJ found for the plaintiff and McTiernan, Jacobs and Murphy JJ for the defendant Commonwealth.

²⁹ Justices McTiernan, Mason and Murphy.

³⁰ (1975) 134 CLR 338, 396–97.

³¹ *Davis v. Commonwealth* (1988) 166 CLR 79, 93–94.

settled in Australia. Within that framework, it is up to governments and parliaments to justify the choices that they make, by reference to the principles at stake.

There are various incentives for governments to resort to use of executive power, generally and in the Commonwealth sphere. Most obviously, it avoids the need for legislative approval including passage by the Senate in which, more often than not, governments lack a majority. A requirement for appropriation, where it exists, has never been much of a hurdle in the budget context and is even less so since the ‘high level of abstraction’ of the description of the purpose of an appropriation was accepted by the High Court in *Combet v. Commonwealth*, without remedial response from the Parliament.³² Reliance on executive power also appears to avoid several of the few guarantees of rights in the Constitution, dealing with property and religion,³³ and does not attract parliamentary scrutiny under the new procedures for human rights protection.³⁴ Recourse to non-statutory executive power minimises and partly eradicates review of the lawfulness of executive action: the Administrative Decisions (Judicial Review) Act, including its right to reasons applies only to decisions pursuant to legislation;³⁵ and while review is procedurally possible under the alternative avenues of the Judiciary Act and the Constitution, for the moment at least there is uncertainty about the standards of lawfulness that apply.³⁶ Administrative Appeals Tribunal review also is available only for decisions under legislation.³⁷ Even review of the constitutionality of executive action is complicated by the nature of the proceedings and the character of the instruments before the court, as the reasons of the various justices in the *AAP* case show.³⁸ These incentives are further fuelled by ambiguity over the constitutional scope of executive power, insofar as it leaves open the possibilities either that the ambit of executive power is significantly wider than that of legislative power or that it offers the potential to broaden legislative power through use of the express incidental power in section 51(xxxix).

Cause and effect is almost impossible to establish in circumstances of this kind. Nevertheless, Australian governments rely very extensively on the use of executive power, unsupported by legislation. Australia is not alone in this; it is a phenomenon elsewhere, particularly in countries that share an underlying tradition of inherent

³² *Combet v. Commonwealth* (2005) 224 CLR 494. The quotation is from the reasons of Hayne J, *Williams v. Commonwealth* [2012] HCA 23 [222].

³³ Both section 51(xxxi) and most of section 116 operate as a constraint on legislation.

³⁴ *Human Rights (Parliamentary Scrutiny) Act 2011*.

³⁵ *Administrative Decisions (Judicial Review) Act 1977*, section 3 (definition of ‘decision to which this Act applies’). This would not change pursuant to the recent report of the Administrative Review Council, which resisted amendment of the ambit of the Act to incorporate executive schemes: Administrative Review Council, *Federal Judicial Review in Australia*, September 2012.

³⁶ *Judiciary Act 1903*, section 39B; Constitution sections 75(iii), 75(v).

³⁷ *Administrative Appeals Tribunal Act 1975*, section 25.

³⁸ *Victoria v. Commonwealth (AAP case)* (1975) 134 CLR 338.

executive power, sourced neither in Constitution nor statute. The debate in the United Kingdom, to which I referred briefly earlier, is a response to concern about the extent to which notions of executive power with their roots in the 17th century are appropriate in the 21st.

In Australia, reliance on executive power is particularly striking in two spheres of domestic activity. One is intergovernmental relations. It would be a diversion to attempt to describe and explore the implications of this complex field here. I note in passing, however, that a very considerable proportion of government in Australia takes place in the exercise of executive power under the rubric of intergovernmental relations, largely bypassing the systemic procedures for political and legal accountability. The abandonment of the former terminology of ministerial councils in favour of reference to the 'COAG Council System', without any public deliberation at all, is merely another recent straw in the wind. I acknowledge some attempts to enhance transparency and accountability in relation to aspects of the intergovernmental arrangements, including the decision of the ACT government to regularly table agreements and a record of negotiations in the ACT legislature.³⁹ Nevertheless, the development of a dense network of arrangements around the purely executive institution of the Council of Australian Governments (COAG) is an issue that Australians should think about comprehensively, sooner rather than later, from the perspective of the democratic structure of government.

The second growth area for executive power within Australia is in relation to what the Commonwealth Ombudsman has described as 'executive schemes'.⁴⁰ In a 2009 report triggered by public complaints about several such schemes, the Ombudsman identified both the strengths and the weaknesses of the implementation of programs through executive action alone, with particular reference to accessibility to the public, consistency of decision-making and accountability. The report explores a series of case studies in depth, providing useful insight into some of the difficulties that arise. It does not seek to quantify the number of such schemes. Thanks to the recent legislative reaction to the decision in *Williams*, however, it is now clear that there were at least 420 extant programs that were considered to have been put at risk by the decision, for which retrospective validation was sought.⁴¹ The list does not make gripping reading, but it is a mine of information about a hitherto opaque aspect of government activity.

³⁹ Correspondence with the Clerk of the Legislative Assembly. Reference is made to the practice on Chief Minister and Cabinet, Intergovernmental Relations, <http://www.cmd.act.gov.au/policystrategic/igr#IGA>.

⁴⁰ Commonwealth Ombudsman, *Executive Schemes*, Report no. 12, 2009.

⁴¹ *Financial Framework Legislation Amendment Act (No. 3) 2012*, inserting schedule 1AA into the Financial Management and Accountability Regulations 1997.

The most famous executive scheme, for the moment, is the National Schools Chaplaincy Program (NSCP).⁴² This is the scheme that was challenged in *Williams* and it is worth focussing on it briefly, not only for that reason but also as an example of its kind. The scheme provided funding to assist schools to establish or extend chaplaincy services. It involved a commitment to expenditure of \$207 million over five years from 2006–07.⁴³ Parallel programs operated in many states and the Commonwealth also provides section 96 grants to states for various aspects of primary and secondary education. The first appropriation to fund the program was made in *Appropriation Act (No. 3) 2006–2007*. The framework of rules for the program took the form of administrative guidelines, including a code of conduct, which were incorporated to the extent relevant into contracts made with service providers in relation to particular schools on the application of each school. The guidelines were revised within government at least three times between 2006 and 2011; further changes were made in 2012. Several of these revisions extended the arrangements to allow funding for secular pastoral care workers, a change which a 2011 departmental report recorded as supported by all the respondent organisations, representing ‘the majority of schools across Australia’.⁴⁴ An Ombudsman report on the program in 2011 noted insufficient guidance in program documentation on, *inter alia*, key terms, including ‘pastoral care’ and ‘proselytise’, and on minimum qualification requirements.⁴⁵

As this description demonstrates, the NSCP is a purely executive program, operating through spending pursuant to contracts in an area primarily of state responsibility. Even the initial appropriation was effected in the bill making provision for ‘ordinary annual services’, despite the compact of 1965.⁴⁶ The multiple changes made to the program guidelines, during its relatively short life, are of a kind that should have been obviated by the greater care that attends policy formulation and drafting through legislation. Most importantly of all, perhaps, this is a significant policy initiative in a country where considerations of both multiculturalism and secularism suggest that the

⁴² Since 2012, the National Schools Chaplaincy and Student Welfare Program.

⁴³ A further \$222 million has been committed until 2014.

⁴⁴ Australian Government, *Consultation Process and Outcomes for the National School Chaplaincy Program*, September 2011, p. 1: <http://www.deewr.gov.au/Schooling/NSCSWP/Documents/ConsultationProcessOutcomesNSCP.pdf>.

⁴⁵ Commonwealth Ombudsman, *Administration of the National School Chaplaincy Program*, July 2011.

⁴⁶ This was justified as a ‘new activity within an existing outcome’ and so ‘not a new policy’: *Williams v. Commonwealth* [2012] HCA 23, [490], Crennan J. Justice Crennan quotes the outcome as ‘improved learning and literacy, numeracy and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice’.

introduction of chaplains into schools requires sensitivity, careful program design and public debate.⁴⁷

In *Williams*, the father of children at the Darling Heights State School in Queensland challenged the validity of the Agreement under the program in relation to this school and the payments made pursuant to it.⁴⁸

4. Recent decisions of the High Court of Australia

The decision in *Williams* did not come out of the blue, but is the latest in a string of cases in which the High Court has stressed the need to understand Commonwealth executive power by reference to the text and structure of the written Constitution. With hindsight, an early seed was planted in the very different circumstances of the *Tampa* litigation (*Ruddock v. Vadarlis*),⁴⁹ when Justice French, then sitting as a member of the Full Court of the Federal Court, observed 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 Chapters I, II and III of the Constitution and, as to legislative powers, between the polities that comprise the federation.⁵⁰

Almost contemporaneous with the *Tampa* case was the High Court decision in *R v. Hughes*⁵¹ in which, while the court avoided decision on whether legislation authorising the conferral of state executive power on Commonwealth officers could be justified as an exercise of the incidental legislative power in support of the executive power, it noted that ‘the scope of the executive power, and of s. 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue

⁴⁷ Cf. Margit Cohn’s suggestion, drawing in Israeli case law, that ‘primary’ arrangements should require legislation: Cohn, op. cit., 2009, pp. 278–80. Characteristics of such arrangements include ‘the extent of effect on the general public; the purpose of the arrangement; the degree of social dispute over its particulars; its budgetary implications; the extent of legislative involvement ...; the urgency of the executive action; and its time-span’.

⁴⁸ The plaintiff initially sought to pursue an argument that the scheme was contrary to section 116, for requiring a religious test as a qualification for office under the Commonwealth. The argument failed on the ground that there was no relevant ‘office under the Commonwealth’.

⁴⁹ *Ruddock v. Vadarlis* (2001) 110 FCR 491.

⁵⁰ At [183]. This observation in turn echoed an earlier remark of Justice Gummow, also at that point a Justice of the Federal Court, ‘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’: *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369.

it’.⁵² Later in the decade, in a different context again, the High Court confirmed that a section 61 agreement could not ‘facilitate’ a payment to states that was not authorised by section 96: in this case, because section 96 was itself subject to the requirement in section 51(xxxi) for the acquisition of property on just terms.⁵³

For present purposes, however, the immediate forerunner of *Williams* was the decision in *Pape v. Federal Commissioner of Taxation*.⁵⁴ *Pape* involved a challenge to the tax bonus legislation that formed part of the Australian fiscal stimulus package at the outset of the global financial crisis in 2008–09. The most likely source of power was the incidental legislative power in support of that aspect of the executive power that was described by Mason J in the *AAP* case as giving the Commonwealth ‘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’.⁵⁵ In the event, the validity of the legislation was narrowly upheld on that basis.⁵⁶ Despite disparities between the reasoning of the justices, *Pape* established at least three propositions. First, the source of the power to spend lies in section 61 and not in the appropriation provisions. Secondly, the Commonwealth’s power to spend is not unlimited, although in this case it was sustained as an exercise of the ‘nationhood’ component of the executive power, on the assumption that this was a short-term, emergency response to a crisis that raised little if any potential conflict with state executive power. Thirdly, section 51(xxxix) is constrained, particularly when used in support of the executive power with implications, still not fully explored, for the enactment of ‘coercive laws’.⁵⁷

In *Williams*, the scope of the executive power was raised in a different context. The principal target of the challenge was the contract, to which Commonwealth spending necessarily was incidental. In the absence of legislation, no question of the scope of section 51(xxxix) arose.⁵⁸ Nor was this a case in which the activity in question was ‘peculiarly adapted to the government of a nation’; on the contrary, the states were engaged in similar programs.

⁵¹ *R v. Hughes* (2000) 202 CLR 535.

⁵² *ibid.*, p. 39.

⁵³ *ICM Agriculture Pty Ltd v. Commonwealth* (2009) 240 CLR 140.

⁵⁴ *Pape v. Federal Commissioner of Taxation* (2009) 238 CLR 1.

⁵⁵ *Victoria v. Commonwealth (AAP case)* (1975) 134 CLR 338, 397.

⁵⁶ By French CJ and Gummow, Crennan and Bell JJ. Hayne and Kiefel JJ partly upheld the legislation by reference to the taxation power. Heydon J dissented.

⁵⁷ *Pape v. Federal Commissioner of Taxation* (2009) 238 CLR 1, [10], French CJ.

⁵⁸ Although see the questions raised by Hayne J about whether substantive provisions of the appropriation legislation went beyond mere appropriation to structure the expenditure: *Williams v. Commonwealth* [2012] HCA 23, [223]–[233].

When the case began, it seemed likely that the outcome would turn principally on the question whether the challenged action could have been the subject of legislation. This perception drew on what came to be described in the case as the ‘common assumption’ that the executive power ‘extends at least to engagement in activities ... which could be authorised by ... a law made by the Parliament, even if there be no such statute’.⁵⁹ Two possible heads of power were claimed by the Commonwealth to this end: the corporations power in section 51(xx), on the ground that the other contracting party, the Scripture Union of Queensland, was a trading corporation and the power in section 51(xxiiiA) to make laws for the ‘provision of ... benefits to students’. In the end, three of the seven justices of the court approached the problem in this way. Two of these held that neither head of power was applicable and would have invalidated the contract on this basis.⁶⁰ The third would have upheld the contract by reference to the benefits to students power.⁶¹

In the event of the failure of the argument based on the ‘common assumption’, the Commonwealth had an alternative, broader position, which drew on the concept of the executive as a legal person, with an unlimited power to contract, subject to legislation to the contrary. This argument was put, but failed. It is now established, if it was not before, that the Commonwealth as a whole constitutes a polity within which authority is allocated between the various branches according to the Constitution including, in relation to the executive, section 61.⁶² The executive power is not unlimited. Quite apart from the obvious relevance of the federal division of power, the presence in the Constitution of section 96 as a mechanism through which the states are offered and have the option to accept grants on condition militated against an understanding of it that would make section 96 redundant and potentially would be coercive in effect if section 51(xxxix) were brought into play. In any event, the court denied that conclusions about the scope of Commonwealth power could satisfactorily be derived by analogy from the capacities of legal persons, given the public character of Commonwealth funds, its accountability obligations and the coercive mechanisms at its disposal.⁶³

These findings alone make *Williams* significant. Much of the interest of the case, however, derives from the treatment of the ‘common assumption’ by a majority of the court.⁶⁴ During the course of the hearing, the tenor of argument changed in a way that persuaded these justices to approach the question of the validity of the contract rather differently. This meant that they were not prepared to assume that the power to

⁵⁹ Gummow and Bell JJ, [125].

⁶⁰ Hayne and Kiefel JJ.

⁶¹ Heydon J.

⁶² French CJ [21], Gummow and Bell JJ [154], Hayne J [204].

⁶³ In particular, Gummow and Bell JJ [151]ff.; Crennan J [519–523].

⁶⁴ French CJ, Gummow and Bell JJ, Crennan J.

contract was always necessarily executive in character, so that the only outstanding issue was whether a contract fell within the Commonwealth sphere. The question thus became whether a contract of this kind required supporting legislation rather than merely the possibility of supporting legislation, determined by reference to a ‘hypothetical law’.⁶⁵ To answer it, they drew on the rest of the constitutional context, ultimately concluding that this contract did not fall within inherent executive power and so required statutory authority.

While the emphases in the three sets of reasons differed, all pointed to constitutional provisions dealing with federalism and representative government. The relationship between the legislature and the executive is relevant to both, given the role of the Senate in the original conception of the Constitution, as the house through which the states have a say in legislation. By contrast, neither house is involved in the exercise of executive power beyond the function of appropriation, in relation to which the powers of the Senate are limited.⁶⁶ In the absence of legislation, moreover, there is no constitutional rule to resolve inconsistency between the exercise of federal and state executive power where, as in the circumstances of *Williams*, there is potential for conflict between the two.

I conclude this part by summarising what I take to be the effects of this complicated case. In considering whether government action that is not authorised by legislation is supported by section 61 it is necessary to consider not only the division of power between the Commonwealth and the states but also the relationship between the executive and parliament. Both are relevant in determining the constitutionality of contract and spending programs. At least some such programs will require authorising legislation which may, of course, expose the lack of an adequate head of legislative power. The touchstone for making these decisions is the text of section 61, understood in the context of the rest of the Constitution. Both the power in the nature of the prerogative ‘properly attributed to the Commonwealth’⁶⁷ and the power derived from nationhood are untouched by *Williams*, at least directly, and remain sources of non-statutory executive power, subject to federal limitations. The potential for conflict with state executive power is an indicator that the limits may have been reached. The judgments also suggest, some more explicitly than others, that there is a range of activities, including contracts, undertaken in the ‘ordinary course of administering a recognised part of the Government of the Commonwealth’⁶⁸ that fall within the scope of inherent executive power on the basis that they involve ‘the execution and

⁶⁵ French CJ [36].

⁶⁶ French CJ [21], [60], Gummow and Bell JJ [136], [145], Crennan J [544].

⁶⁷ French CJ [4].

⁶⁸ This quotation, which in effect is a description of the plaintiff’s argument is taken from the reasons of Gummow and Bell JJ: [138].

maintenance’ of the Constitution, possibly by reference to section 64.⁶⁹ Distinguishing these from contracts of the kind invalidated in *Williams* is one of many challenges for the future.

5. Opportunities

The immediate reaction to *Williams* on the part of the government and Parliament was to enact legislation designed to reverse it. The *Financial Framework Legislation Amendment Act (No. 3) 2012* purports to retrospectively validate more than 400 executive programs, including the National School Chaplaincy and Student Welfare (NSCSW) Program and to authorise additional programs to receive statutory approval through regulation. The substantive validating provision in new section 32B(4) confers power on the ‘Commonwealth’ to administer an arrangement in the regulations, subject to law if, ‘apart from this subsection’ the ‘Commonwealth’ does not otherwise have power to do so. Decisions under this section are excluded from the operation of the Administrative Decisions (Judicial Review) Act. Each program is described in terms of very general outcomes. The only information about the NSCSW Program, for example, is that its objective is: to assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.⁷⁰

The Act itself would be a worthy subject of another lecture. There is a question whether the general validating section is effective for the purpose. Even if this is accepted, so that adequate supporting legislation is in place, there is another question about whether it is valid in relation to each of the programs, in the sense that a head of power can be found. The description of the NSCSW Program, for example, does not encourage reliance on the corporations power and does not necessarily meet the description of the provision of benefits to students.

However problematic the legislation for the purposes for which it was enacted, the mere fact that it provides statutory authority for these programs, however vague, has political and perhaps legal implications. Any new program added by regulation presumably should attract the attention of the Senate Standing Committee on Regulations and Ordinances which, according to its terms of reference, should ask whether it makes rights unduly dependent on administrative decisions that are not subject to independent merits review and whether it contains matter more appropriate for parliamentary enactment. Both the new legislation and any amending regulations also should be subject to a statement of compatibility and examined by the Parliamentary Joint Committee on Human Rights by reference to the seven human

⁶⁹ For example, French CJ [4], [65], [78].

⁷⁰ Financial Management and Accountability Regulations 1997, 407.013.

rights treaties that fall within its remit. It remains to be seen whether the statutory setting affects the processes of judicial review as well.

I suggested at the outset of this lecture that *Williams* provides the opportunity to craft a conception of executive power that is suitable for 21st century Australia. From that standpoint, the Amendment Act is a disappointment. Temporary validating legislation of some kind would have been understandable, not only because of the politics of sudden cessation of these programs but because of the anxiety that the decision may have caused in the short term to recipients of federal funds pursuant to them. Legislation in this form is appropriate only as a stop-gap, while more tailored and longer term solutions are found.

The responsibility for such solutions lies with all branches and spheres of government, including this parliament. In time there will be more litigation and the contours of the constitutional doctrine will be developed further. But it is essential also for the Parliament to have a principled view about the policies and programs that should be dignified by legislation. It is desirable for the states to work out with their Commonwealth counterparts how section 96 might be used more efficiently to administer spending programs that continue to exist. And the executive should welcome these developments as well, although it may not presently think so. At a time of financial constraint there is much to be gained from procedures that ensure that spending programs are not undertaken hastily, that there is a broad-based commitment to them, that they are well designed and implemented and that money is well spent.



Question — You mentioned at the end the challenge to the Parliament to take up the implications of the *Williams* case and the government's response to the *Williams* case which the Parliament agreed to. It should have been a stopgap measure but it has now become a permanent measure. It was passed with great urgency by both houses because there were very compelling reasons to fix up this problem that the High Court had exposed through the *Williams* decision. But now we are left with this huge delegation of power to the executive to make regulations to validate all sorts of programs that may or may not have a connection with Commonwealth legislative power. How might the structures of the parliament be up to that challenge?

Cheryl Saunders — Well there is a question about that, particularly in the wake of *Combet* where the structures of the parliament were not up to the challenge. There are

all sorts of imponderables here. One is whether the legislation will survive challenge; another is if the chaplaincy scheme comes back whether its description will survive challenge. There is a sense in which the Parliament will not be able to avoid this entirely. Again, if you think about the terms of reference of the Senate Regulations and Ordinances Committee, it has a job to review all of these regulations which is remarkably useful. Now of course it can dodge it, but nevertheless the question will have to be considered at some stage.

Question — Going back to Justice French’s decision in *Tampa*, as a non-lawyer it seemed to me on reading it that it almost allowed unlimited power to the executive which effectively equates with the government of the day. I wonder if you could just comment a little bit further on that?

Cheryl Saunders — I was not happy about the *Tampa* decision either. There are several aspects of the *Tampa* decision. One is what the court said about the scope of executive power and the other was what the courts said about the relationship between executive power and legislative power given that there was a Migration Act. The question was the extent to which the executive power survived the enactment of legislation. But I think that what was actually found by the majority in the *Tampa* case in relation to executive power is not as broad as all that. If you look at the way in which Justice French, with whom Justice Beaumont agreed in the *Tampa* litigation, framed the executive power that he found to exist, it was not as broad, for example, as the executive power that Chief Justice Black was playing with. Nevertheless, there was concern at the time that this seemed to be a new sort of executive power and where did it come from? Justice French looked at that and said ‘Oh my God, is this a recipe for continuing to expand executive power?’ Now that questions of executive power are beginning to come up in other contexts, what we are seeing instead is the idea that the executive power is our executive power not just an inherited one that needs to fit within the bounds of the Constitution. It may be expansive in some circumstances but there will be also cause for retraction in others. What we are seeing is the tailoring of executive power by reference to the Constitution as a whole. It is quite an interesting time, really, from that point of view.

Question — Anne Twomey said that the *Pape* decision was a lost opportunity to examine and limit the scope of executive government. How would you respond to that?

Cheryl Saunders — I am not sure that we know the answer to that question yet. *Pape* is interesting because you get an outcome in *Pape*. A majority decision for a particular outcome but a different majority for a set of principles. At least two or three of the potential dissentients in *Pape* really constitute a majority for limiting the executive

power by reference to principle. So insofar as the actual outcome in *Pape* does not reflect that statement of views about the effect of federal limitations on the executive power, I suppose so. On the other hand, as the court said in *Pape* and said again in *Williams* reflecting on *Pape*, *Pape* was a very particular set of circumstances, what was perceived as an economic crisis requiring a quick and speedy reaction by governments. We as a country are still all debating whether that was so or not but at the time, if you think back to the angst, it was easy to understand it. So I do not think you can read too much into *Pape* because I think we are still seeing the playing out of this process of accommodating the very vague terms of section 61 to the rest of the Constitution.

Question — Now that the genie is out of the bottle and given the uncertainties around the effect and validity of the amendment Act, to what extent do you think that the legislative intervention has actually reduced uncertainty?

Cheryl Saunders — In relation to some programs it probably has on the assumption that the general statute itself is valid and that the very general enabling provision works, which I guess is something that we need to think about. A lot of the programs that were added in there dealing with veterans' affairs, for example, clearly survive on federalism-type grounds so perhaps it gave people some comfort in that respect. It certainly postponed the evil day but I think unless both government and parliament turn their minds to really thinking rather more deeply about the various categories of exercise of executive power now and craft appropriate legislative solutions I think that the uncertainty that you refer to will bubble on and continue to haunt all of us including the court.

Question — If there will be a change of government, for example, where there may be cuts to grants programs, do you think that if there is a contract that is ongoing and they are cutting the grant they would then need to change the regulations?

Cheryl Saunders — Not necessarily, I think, but I must say I have not looked at the legislation for that purpose. I do not want to answer off the cuff because I really need to look at it and think about that. My immediate assumption is no but that may not be right. Clearly some of these contracts are going to end anyway even if they are not arbitrarily cut and so it must have been envisaged that the arrangements would naturally come to an end. But whether they contemplated taking them out, perhaps they should or otherwise it would be a mess.

Question — Within the battle between inherent power and the power derived from statutory authority, would it be correct to say that just as the defence heads of power in the Constitution and the power of the executive has as a result waxed and waned

depending on the defence threat, that much of the executive power of the Commonwealth would not be fixed no matter what we do because it will wax and wane depending on the crisis involved, if indeed it is a power for dealing with a crisis?

Cheryl Saunders — The power for dealing with a crisis is only a very small part of the executive power itself, and that is certainly not what we are talking about in relation to *Williams*, and it has got to be a fair old crisis that we are talking about as well. Now if it is a defence crisis it is not going to be such a difficulty in any event because that clearly falls within the Commonwealth realm. The reason why *Pape* was interesting was because it was not so obvious that that fell within the Commonwealth realm. So I do not think that the analogy of waxing and waning really helps terribly much with the executive power.

Question — I am wondering if you could comment on possible comparisons with other countries while noting that there might not be many that have a federation with written constitutions in the common law system. I am wondering if other countries have dealt with this issue of executive power and where they might be at?

Cheryl Saunders — Yes, it is a very interesting comparative project actually, exactly how interesting I had not really fully understood until preparing this paper. In relation to other countries similar to us in the sense that they inherited institutions originally from the UK there is a similar debate going on. There has been a debate in the UK itself. A lot of it there has revolved around the issues that I deliberately dodged here namely defence and external affairs. Much of the debate there was prompted by the government's decision to engage in the second Gulf War without recourse to parliament. So there has been a big debate in the United Kingdom about whether both the prerogative in the narrow sense on the one hand and the so-called ordinary executive powers on the other should in some way be tamed by legislation.

Others have engaged in that debate as well. There is a very interesting series of articles by an Israeli academic called Margit Cohn who has done a lot of comparative work in the area and come up with some solutions of her own, one of which I actually quote in the paper, about where the lines might be drawn between inherent powers to contract and powers to contract that need statutory authority, for example.

If you move outside the British common law tradition to say the continental legal tradition or versions of it, you find an entirely different ball game. There because there is no notion of inherent executive power pre-existing constitutions that has survived, they just assume that you will find your executive power either in legislation or in the constitution. That, of course, is the logic of a written constitution, but it just

takes a while to work around to it. So there are some very interesting comparisons, I think, to be drawn with, for example, Germany in how the concept of executive power has developed and its relationship with both the constitution and legislation.

Question — My question refers to sections 59 and 60 of the Constitution. Section 61 allows for a narrow prerogative of the monarchy. A recent letter to the *Canberra Times* raised the question of a possible referendum law passed by parliament for the establishment of a republic even before the referendum had been put could fail to receive assent from the Crown. Would you care to comment?

Cheryl Saunders — I have not seen that letter so I probably should not comment on that. One of the other things that has happened over the last one hundred years is not only have there been changes in the way that executive power is exercised and changes in the way the court has interpreted executive power but there have been changes in the relationship between the United Kingdom and Australia with Australia becoming independent at some undefined point during that time. Now that also actually has affected the meaning of section 61. I briefly mentioned in passing another section, section 2 of the Constitution, which authorises the Queen to confer certain powers and functions on the Governor-General. Now that is a reference to the period that immediately followed federation when Australia was not fully independent and did not have a full complement of prerogative power anyway. The full power to enter into treaties and declare war on part of Australia was not in section 61 in 1902, it still lay with the United Kingdom and there was a question of whether additional powers might be passed over under section 2. Now, subsequently, Australia became fully independent, the court interpreted section 61 as picking up all those extra powers and section 2 became redundant. But this is part of the backdrop of understanding section 61 and the reason I make those points is the two sections that the questioner just referred to are also parts of the Constitution which have also in effect become redundant over time for precisely the same reasons.