The Executive Power of the Commonwealth: its scope and limits

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Major Issues

In recent times there has been considerable discussion as to the extent to which the Executive can or should act independently of Parliament. The debate over the Executive Government's role in the treaty-making process is one such example. Another is the extent to which the Executive may, without parliamentary approval, vary the allowances of Parliamentarians or individual members of the Executive.

More fundamentally, there are concerns that the power of the Executive is actually increasing as Parliament's power declines, and it has been suggested that, should Australia become a Republic, the power of the Executive may be increased even further.  

Section 61, the executive power of the Commonwealth, is located in Chapter II of the Constitution, a Chapter Professor Michael Crommelin has suggested was intended by the Constitutional drafters as a mask rather than prescribe the workings of the executive.

Section 61 tells us who can exercise the executive power. It also tells us that the executive power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' But what does this mean, and why is it necessary?

Sir John Latham, Chief Justice of the High Court from 1935 until 1952, observed in 1961 that there had been little judicial interpretation of section 61. In essence, this remains true today, even though since 1961 the High Court has handed down two important decisions on section 61: *Victoria v The Commonwealth* (1975) and *Davis v The Commonwealth* (1988).

Nevertheless, drawing on High Court authority, the following observations may be made on the scope of the executive power:

- the words, 'execution and maintenance of the Constitution and the laws of the Commonwealth' in section 61 are no longer words of limitation;
- it contains those common law Crown prerogatives (eg, treaty-making; declaring war) that vest in right of the Commonwealth rather than in the States;
- it allows the Commonwealth to engage in activities peculiarly adapted to the government of a nation which cannot otherwise be carried out (including, for example, celebrations...
such as the bicentenary, establishing the CSIRO, and promulgating flags and other national symbols); and

- it includes the power to enter into contracts and commercial arrangements without the sanction of the Parliament.

However, section 61:

- does not extend beyond those responsibilities allocated to the Executive of the Commonwealth by the Constitution although this probably does not limit the Commonwealth to heads of legislative power enumerated in sections 51 and 52;

- is subject to express constitutional limitations; and

- it may be limited by laws enacted by the Commonwealth.

The acknowledged scope of section 61 has been widened by the High Court since Federation. The early view considered that the executive power in section 61 was limited to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Over time it has become accepted that section 61 also incorporates the Crown prerogatives that vest in right of the Commonwealth. These include, for example, the prerogative powers to enter treaties and to declare war.

Whilst recent cases have not fully clarified the scope of the power, it appears that the High Court has extended the scope of section 61 to include consideration of the role and character of the Commonwealth as a national government. In *Davis v The Commonwealth*, for example, the present Chief Justice, Sir Gerard Brennan observed that the Constitution did more than merely join the separate colonies, it 'summoned the Australian nation into existence' and that the executive power was not restricted to the Commonwealth's legislative heads of power.
Introduction

The Australian Constitution is comprised of 128 express provisions and a number of judicially implied terms. Comparatively few of these provisions have been subject to lengthy judicial or academic discussion. Section 61, the executive power, is one of those provisions that had, until quite recently, attracted little attention.

This is surprising particularly given the ongoing debate over the relationship between the Executive government and Parliament. Further, should Australia become a republic, the scope of the executive power of the Commonwealth would need to be carefully considered. Should it remain the same, or should it be confined or expanded? Should the powers of the Executive be enumerated in detail, or should they continue to rely heavily on tradition, usage, and convention? A clear understanding of the scope of the power as it stands is, therefore, necessary.

Section 61 provides Constitutional legitimacy to certain actions taken by the Executive without any need for Parliamentary or legislative sanction. For example, the Executive may enter into treaties without prior parliamentary approval. It is well settled that section 61 includes the prerogative powers of the Crown, including, for example, the power to enter into treaties. This independence of the Executive was observed by H.V. Evatt in his 1924 doctoral thesis. Evatt suggested that one of the reasons why section 61 was so little studied was that:

Responsible government has to an extent blinded us to the importance of the domain of the Prerogative in which the Executive has still an important independence reserved to it.  

Section 61, in conjunction with the power to legislate over incidental matters [section 51(xxxix) of the Constitution], may also be a source of legislative power. In *Davis v The Commonwealth* (1988), Justices Wilson and Dawson said that the Commonwealth must draw on the executive power under section 61 to celebrate its origins, and 'legislation which is incidental to it falls within s. 51(xxxix). Alternatively, as Professor Zines notes:

Some have regarded the legislative power available to control or assist the execution of the executive power that derives from the national status of the Commonwealth as implied in the Constitution.
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Given that the debate over the power of the Executive in relation to Parliament involves both political, as well as legal questions, this paper first provides an overview of the doctrines of responsible government and the separation of powers. The paper briefly discusses the legislative, judicial and executive powers of the Commonwealth as distributed by the Constitution. It traces the High Court's interpretation of section 61, beginning with Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Company, decided in 1922, through to the decision in Davis (1988). Finally, the extent to which Parliament may be able to control the Executive's use of its treaty-making power will be examined.

Responsible Government

It is a commonplace that the Australian polity is a mixture of the British system of parliamentary democracy and that of federalism derived largely from the United States. Key among the doctrines derived from Britain is that of responsible government. Put simply, responsible government means that the executive government, chosen from those elected to Parliament, is accountable to Parliament. Integral to the doctrine of responsible government is that of ministerial responsibility.  

In a speech to the Convention Debates on 4 March 1891, Sir Samuel Griffith (QLD) said that the system of responsible government 'is the best that has yet been invented in the history of the world for carrying out the good government of the people.' However, he continued, the essence of responsible government is often misunderstood:

We are accustomed to think that the essence of responsible government is this: that the ministers of state have seats, most of them, in the lower house of the legislature, and that when they are defeated on an important measure they go out of office.

Rather than being its essence, Griffith described this as merely an accident. The true legal form of responsible government, Griffith suggested, depends on the ministers being appointed 'by the head of the state, the Sovereign, or her representative, and that they may hold seats in Parliament.'

On 6 April 1891, Sir John Bray (SA) argued that that the Constitution should provide that the executive officers of the government 'should all be members of parliament, and not merely that they should be capable of being members of parliament.' Mr Wrixon (VIC) proposed that such officers should be both members of the federal executive council and 'responsible members of the Crown.' Griffith, however, stated that the term 'responsible ministers of the Crown' describes the Government that exists but that there is no need to insert such words in the draft Constitution:
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What we should put into the bill is a definition of the powers and functions of the officers - not call them by names. The draft Constitution Bill adopted by the Convention on 9 April 1891 provided that the Governor-General may appoint Ministers of State to administer the Executive government of the Commonwealth. Such officers hold office during the pleasure of the Governor-General and shall be capable of being chosen and of sitting in Parliament (Chapter II, Clause 4).

The Bill agreed by the Adelaide Convention on 23 April 1897 provided, in addition to the above, that after the first Commonwealth election, no Minister shall hold office for longer than 3 months unless elected to the Parliament. Edmund Barton (NSW) noted in the Debates on 17 September 1897 that this additional clause was inserted 'as a safeguard to responsible government'. Mr Dobson (TAS) warned, however, that the delegates were 'keeping too close to that model of responsible government in the English Constitution which, I venture to think, time will prove is not so well adapted to our federal wants'. The inclusion of the additional limitation was approved on 17 September 1897 by a vote of 21 to 14.

The Draft Constitution adopted by the Melbourne Convention on 16 March 1898 included section 64 (Minister of State) as we now know it. Section 64 provides:

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth. After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

It is substantially the same as that adopted in 1897 with the omission of any reference to such officers being merely capable of sitting in Parliament. Responsible government, then, was clearly intended by the Convention delegates to be a feature of the Australian political system.

Separation of Powers

In Spirit of Laws, Montesquieu suggested that government consists of three types of power: the executive, legislative and judicial, and that liberty may only exist where these powers are separate.

Speaking to the Constitutional Convention on 4 March 1891, Sir Samuel Griffith observed that the United States had adopted the most 'opposite' system of government to responsible
in the United States, Ministers are not permitted to sit in parliament. The reason for this, according to Griffith, was that the 'framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament' and following Montesquieu, 'they thought it extremely desirable to separate the executive and legislative branches of government'.

The delegates to the Constitution Convention favoured responsible government over the separation of legislative and executive powers. Sir Samuel Griffith (QLD), for example, suggested that the US system has shown the 'unwisdom ... of having ministers dissociated, and the executive government entirely dissociated, from the legislature'. Mr Barton (NSW) agreed. In his view, the dissociation of the executive from the representative body means that ministers 'being individually amenable to a president, they are only in the slightest degree animated by a common policy so far as regards their common action'.

More recently, in the context of purporting to explain why the Australian Constitution does not (and need not) contain a Bill of Rights, Sir Robert Menzies observed that although in both the Australian and American Constitutions, the legislative, executive and judicial powers are separately stated, in Australia 'the Executive is not only responsible to the Legislature but, in its political embodiment is part of and directly responsible to the Legislature'. Similarly, Sir Owen Dixon, then a Justice of the High Court, noted that while the frame of Australian Constitution followed American notions of the separation of powers, that notion was quite alien to British practice, and hence it has never been fully applied in Australia. However, his Honour continued, the judicial power is exercised by the Courts alone and ... Parliament cannot empower any other tribunal to perform judicial functions.

The Constitution - Three Arms of Government

The legislative, executive, and judicial powers are separately stated in the Constitution, in Chapters I, II and III respectively.

The Executive Government

In his discussion of the Commonwealth Executive, Professor Michael Crommelin states that 'unlike Chapter I of the Constitution, Chapter II was intended to mask rather than prescribe the workings of the executive'.

One of the reasons for the uncertain scope of the executive power is the desire of the Constitution's framers to retain a deal of flexibility. Another is the 'uncertain scope and status of the prerogative' which forms part of the executive power and includes the
Crown's common law powers such as the right to declare war and to enter into treaty agreements.

The scope of prerogatives has itself varied over time and partly depends on their status in the UK at the time they were received into Australian law. The most commonly referred to treatment of the prerogative power in the Australian context is that formulated by Dr H V Evatt who saw the prerogative as being divided into three classes. His first category, includes the Monarch's capacity to declare war, make peace, coin money, issue Letters Patent for new inventions, confer honours and grant pardons. Secondly, there are special privileges and immunities enjoyed by the Crown. These include (in Evatt's formulation) Crown immunity in court proceedings (except where that immunity has been surrendered by statute) and priority in debt over ordinary citizens. Third, there are the so called priority rights, for example, treasure trove, the ownership of the foreshore and the bed of the ocean within territorial limits and what are referred to as 'escheats'. These prerogative powers expand considerably the executive power conferred on the Commonwealth by Section 61.

Indeed Chapter II of the Constitution, the Executive Government, is relatively short, consisting of only 10 provisions, including section 61. In addition, to the executive power of the Commonwealth, Chapter II provides for the appointment, number and salaries of Ministers (sections 64 to 66). Section 68 vests command of Australia's naval and military forces in the Governor-General and section 69 provides for certain State departments to be transferred to the Commonwealth.

Section 2 of the Constitution also confers upon the Governor-General 'such powers ... as Her Majesty may be pleased to assign to him.' For practical purposes, however, section 61 is the main source of executive power. Although a further significant source of day to day executive power is, of course, that conferred by legislation enacted from time to time by the Parliament.

Legislative powers of the Commonwealth

There was considerable comment during the Convention Debates as to what powers should be vested in the Commonwealth and what powers should remain with the States (an issue still debated to this day). In his speech on 13 March 1891, Sir Henry Parkes (NSW) said that the institutions of government in the separate colonies were as perfect as could be found anywhere in the world but that there were limits on what could be achieved individually:

There are a number of things which no one of the separate governments can by any possibility do, and those things are amongst the highest objects of government.
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Parkes suggested defence as one of those activities that could not efficiently be carried out by the separate colonies independently of one another. Similarly, on 16 March 1891, Mr Deakin (VIC) said:

The states will retain full powers over the greater part of the domain in which they at present enjoy those powers, and will retain them intact for all time. But in national issues, on the subject of defence, as people who desire to have their shores defended, and to see their resources developed by means of a customs tariff and a customs union - on these questions there are no longer state rights and state interests to be guarded in the constitution, but the people’s interests are one, and they call upon us to deal with them as one.27

The legislative powers of the Commonwealth Parliament are, in the main, to be found in Part V, Chapter I of the Constitution. Section 51 of the Constitution lists the majority of those matters on which the Parliament may legislate, often referred to as the Commonwealth’s heads of power. The Parliament may, for example, make laws on:

- trade and commerce with other countries, and among the States [s 51(i)];
- taxation [s 51(ii)];
- defence [s 51(vi)];
- corporations [s 51(xx)];
- immigration [s 51(xxvii)]; and
- external affairs [s 51(xxix)].

Parliament may also make laws on a range of specifically enumerated matters including Commonwealth places and on the Commonwealth public service (section 52), the imposition of customs and excise duties (section 90) as well as on federal territories (section 122). The Commonwealth’s legislative powers are limited by both express and implied Constitutional prohibitions.

The Judicature

Chapter III of the Constitution provides for a system of federal courts and sets up the High Court of Australia.

Section 72 provides for the appointment, tenure and remuneration of the Judges. A Justice of the High Court may be removed only on the ground of proved misbehaviour or incapacity on an address from both Houses of Parliament in the same session. Justices are
currently appointed for a term expiring at age seventy. The remuneration of a Justice may not be reduced during his or her tenure.

The importance of a strong federal court in a federal system was observed during the Convention Debates in 1891. Mr Barton (NSW), for example, on 6 March 1891 noted that disputes over the validity of state or federal statutes were best determined by a federal court:

by that means the interpretation by individual cases is likely to meet with a more harmonious acceptance than would be the result if jealousy were provoked by endeavouring to settle it as between state and state.\(^\text{28}\)

Sir John Downer (SA) agreed, stating that ‘the stronger and more powerful the judicial bench, the stronger and better will the union be.’\(^\text{29}\)

Mr Barton and Sir John Downer also argued that the supreme court in Australia should be the final court in the land. That is, there should not be appeals to the Privy Council. Others, for example, Mr Wrixon (VIC), supported the continuation of appeals to the Privy Council as this would ensure ‘a unity of law over the whole empire’.\(^\text{30}\)

In the event, a compromise was reached. Appeals would be allowed to the Privy Council on inter se matters with leave of the High Court (Constitution, section 74). It was not until 1986, with the enactment of the \textit{Australia Act 1986}, that appeals to the Privy Council were finally abolished.


**Section 61**

Section 61 of the Constitution is now the main source of the Commonwealth’s executive power.

**Scope and Limits**

In the most recent discussion of the nature of section 61, \textit{Davis v The Commonwealth} (1988), Mason CJ, Deane and Gaudron JJ, said that ‘the scope of the executive power of the Commonwealth has often been discussed but never defined’.\(^\text{32}\) Brennan J agreed: ‘The scope of s. 61 has not been charted nor, for the reasons which his Honour [Mason J in the AAP case] stated, is its scope amenable to exhaustive definition’.\(^\text{33}\) This section of the
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paper considers High Court commentary on section 61 and draws some conclusions as to the scope and content of the Commonwealth's executive power.

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 this Constitution, and of the laws of the Commonwealth.

Who exercises the executive power and what is its scope?

The executive power is exercisable by the Governor-General as the Queen's representative. By convention, the Governor-General, when exercising the executive power does so on ministerial advice. Section 126 of the Constitution provides for the Queen to authorise the Governor-General to appoint any person to carry out such powers and functions of the Governor-General as the Governor-General thinks fit.

'Extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.

The interpretation of section 61 is shaped by two important, but conflicting, considerations. On the one hand, there is the practical imperative of leaving with executive government adequate powers and sufficient administrative discretion to conduct the affairs of state as they arise. On the other hand, the executive power must not be so open ended as to allow for arbitrary action. The High Court has shown an abiding concern that resort to the executive power could, if not circumscribed, become a device for the Commonwealth impinging on or eroding the rights and functions of the States.

The Court initially took the view that section 61 went no further than allowing for the execution and maintenance of the Constitution and of legislation passed by Parliament. Knox CJ and Gavan Duffy J in Commonwealth v Colonial Combing, Spinning & Weaving Co (the Wooltops case) said section 61 'delimits the area of the power by declaring that it extends to the maintenance of the Constitution and of the laws of the Commonwealth'. On this view, the term 'laws of the Commonwealth' means Acts of the Commonwealth Parliament.

What this meant in practice was that, initially, the question of the prerogative powers of the Crown did not arise in the context of section 61.
In the *Pharmaceutical Benefits* case (1944), the High Court examined the scope of the appropriations power (section 81) which provides that the Parliament may spend moneys 'for the purposes of the Commonwealth'. The case concerned the validity of the *Pharmaceutical Benefits Act 1944* (the Benefits Act) which established a scheme to provide free medicines from registered chemists under prescription. Whilst focussing on possible limits to the appropriations power, the case also has implications for the use of the executive and incidental powers in supporting regulatory schemes of the kind created by the Benefits Act. The Court also discussed whether areas of responsibility not specifically conferred on the Commonwealth by the clear words of the Constitution can nonetheless be the subject of a legitimate 'Commonwealth purpose'. [Clearly, a wide reading of the phrase 'Commonwealth purpose' would open the way for Commonwealth involvement in many areas hitherto thought to be the sole preserve of the States.] This is of particular import given that the executive and appropriations powers are frequently used in tandem.

The *Pharmaceutical Benefits* case averted to three alternative approaches to defining the scope of the executive and appropriations powers by reference to the 'purposes of the Commonwealth'. Those three alternative approaches involve delineating a 'Commonwealth purpose' as either:

- any matter which the Parliament or the Executive decides is a 'Commonwealth purpose'  

- limiting a legitimate 'Commonwealth purpose' to responsibilities that the Constitution specifies and might reasonably be implied from the distribution of powers and functions between the Commonwealth and the States  

- (most narrowly) limiting 'Commonwealth purposes' to specifically enumerated responsibilities under the Constitution such as those listed in section 51.

The *Pharmaceutical Benefits* case yielded no majority view as to the scope of 'Commonwealth purposes', and gave little detailed guidance on the possible limits of both the appropriations and executive powers. It did, however, lay the ground for later consideration of these issues (see below).

Other cases have examined the scope of the executive power from a different standpoint. They have asked what type of activities the Executive may undertake in order to maintain the Constitution and the laws of the Commonwealth? Two examples are revealing: *Burns v Ransley* and *Brown v West*.

In 1949 a case came before the High Court involving the utterance of what were alleged to be seditious words: *Burns v Ransley*. Gilbert Burns, a member of the Communist Party of Australia (CPA) said that in any war between Soviet Russia and the West, the CPA would fight on the side of the Soviets. Burns was convicted of uttering seditious words under the *Crimes Act 1914*. Burns appealed to the High Court but his appeal was dismissed.
Burns argued that the Commonwealth did not have Constitutional power to make laws with respect to crime, and could not make political criticism a criminal offence.

However, Latham CJ said that section 61 read in conjunction with section 51(xxxix) allows the Commonwealth to make laws to protect itself. His Honour noted that while Parliament does not have the power to enact legislation punishing political criticism, 'excitement to disaffection against a Government goes beyond political criticism'.

A more recent example is Brown v West, decided in March 1990. Brown, a member of the House of Representatives, challenged a decision of the Minister for Administrative Services to increase the postal entitlement available to members of Parliament above that set by the Remuneration Tribunal under the Remuneration Tribunal Act 1973. The High Court decided that the Minister could not increase the postal entitlement. In reaching its decision, the Court considered, amongst other things, whether the executive power could be used to supplement the postal entitlement above that set by the Tribunal.

Chief Justice Mason and Justices Brennan, Deane, Dawson and Toohey stated that the Commonwealth's executive power 'clearly extends to the provision of what is necessary or convenient for the functioning of the Parliament provided that funds for that purpose are appropriated by Parliament'. However, the Court said:

it is not self-evident that the executive power extends to the discretionary provision of benefits having a pecuniary value to individual members of the Parliament who may draw upon the benefit as they will. There may be a difference between the provision of facilities for travel and assembly, which are essential to the functioning of the Parliament, and the discretionary allocation of a benefit having a pecuniary value to alleviate a pecuniary burden which members incur as an incident of office.

Further, their Honours referred to the importance of Parliament in providing pecuniary benefits to its members:

There is much to be said for the view that Parliament alone may make provision for benefits having a pecuniary value which accrue to its members in virtue of their office and which are not mere facilities for the functioning of Parliament.

Whatever the scope of the executive power, the Court said that 'it is susceptible of control by statute'. Here, the operation of certain provisions in the Parliamentary Allowances Act 1952 and the Remuneration Tribunal Act 1973 meant that the executive power alone could not be relied upon to increase the postal entitlement.
Contracts

The High Court's first discussion of section 61 was in 1922 in *Commonwealth v Colonial Combing, Spinning & Weaving Co* (the *Wooltops* case). *Wooltops* considered the capacity of the Executive to enter into contracts without the approval of Parliament. The Court took a narrow view of section 61 (since overruled) deciding that the Executive could not enter contracts without Parliament's prior approval:

apart from any authority conferred by an Act of Parliament of the Commonwealth or by regulations thereunder, the Executive Government of the Commonwealth had no power to make or ratify any of the agreements.

Justice Isaacs stated succinctly:

In my opinion, unless authorised by some Commonwealth legislation the Executive Government would have no power to make any of the agreements.

As Hanks notes in *Australian Constitutional Law*, the Court's attitude to the ability of the Executive to enter contracts is inconsistent with *New South Wales v Bardolph*, decided in 1934. In *Bardolph*, the High Court held that the Executive could validly enter into a binding contract without legislative approval. The contract, however, would be read as containing an implied condition that payments by the Commonwealth should only be made out of moneys appropriated by Parliament.

Justice Dixon (as he then was) said:

It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys.

Further, his Honour said:

The principles of responsible government do not disable the Executive from acting without prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by parliament and doing so before funds to answer the expenditure have actually been made legally available.

Commercial Activities

In *The Commonwealth v Australian Commonwealth Shipping Board*, decided in 1926, the High Court considered the capacity of the Executive to engage in commercial activities. The Court took a narrow view. Knox CJ, Gavan Duffy, Rich and Starke JJ said that Parliament only has such power 'as is expressly or by necessary implication vested in it by
Neither Parliament nor the Executive Government had Constitutional power to set up a manufacturing business for general commercial purposes. The Commonwealth’s executive power did not enable the Government to engage in an activity otherwise ‘unwarranted in express terms by the Constitution’.

In 1975, however, the High Court decided Johnson v Kent, a case involving the Commonwealth Government’s proposal to construct the Black Mountain Tower in Canberra. The tower was to provide communication services as well as a restaurant and public viewing facilities. The plaintiffs argued that the Government did not have the power to construct the tower. In his decision, Chief Justice Barwick stated that there was clear statutory authority for construction of the tower to provide communication services.

In relation to the restaurant and viewing facilities, his Honour held that:

the executive, unless its power is relevantly reduced by statute, may in my opinion do in the Territory upon or with respect to land in the Territory anything which remains within the prerogative of the Crown.

Further, the Executive, in exercising its prerogative, could establish ‘parks, gardens, sports grounds, tourist facilities and the like upon any land it possesses in Canberra’.

Prerogative Powers

As noted above, it was initially thought that section 61 did not incorporate the prerogative powers of the Crown. However, even in early decisions there were some on the High Court who thought otherwise. For example in Wooltops, Starke J stated that section 61 merely indicates the field of the executive power of the Commonwealth, and the ‘validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King’.

It gradually became accepted that the prerogative powers of the Crown were incorporated in section 61 - or at least those vesting in the right of the Commonwealth. This view was finally settled in 1974 in Barton v The Commonwealth.

Barton involved the attempted extradition from Brazil of Alexander and Thomas Barton, Australian citizens living in that country. There was no extradition treaty between Australia and Brazil. The issue before the High Court was, whether in such circumstances, the Commonwealth’s executive power permitted the Government to request Brazil to detain and extradite the Bartons to Australia. The Court held that the executive power did authorise the Government to so act.
Mason J stated that the executive power includes the 'prerogative powers of the Crown', and hence, subject to statute, it is within the executive power to request another state to detain and extradite a person alleged to have committed a crime against Australian law. McTiernan and Menzies JJ, in a joint judgment, endorsed Mason J's views:

we are satisfied that unless statute, either expressly or by necessary implication, has deprived the executive of part of its inherent power, it may make such requests as it considers proper for the assistance of other states in bringing fugitive offenders to justice.62

Character and status of the Commonwealth as a national government

As already noted, the approach supported by the majority in the Pharmaceutical Benefits decision tended to confine the executive and appropriations powers to areas of defined Commonwealth responsibility. The cases detailed below show the Court wrestling with challenges to the validity of activities undertaken by the Commonwealth which do not appear to fall squarely within the enumerated heads of power. In these more recent cases, the fate of the Commonwealth scheme partly turns on whether it may be supported by an inherent (constitutionally implied) power arising out of federal compact rather than because of any express term in the Constitution.

It will be apparent that the law is far from settled, particularly in regard to the constitutionality of various administrative arrangements attending the expenditure of Commonwealth funds (an issue left open by the Pharmaceutical Benefits case). On the other hand, it seems that the scope of the executive power has been given a fairly broad interpretation by a number of judges in recent leading cases: Victoria v The Commonwealth and Hayden (the AAP case) and Davis v The Commonwealth. In particular, these cases examined what weight is to be given to the character and role of the Commonwealth as a national government in determining the scope of the legislative and executive powers of the Commonwealth.63

The AAP Case

Victoria v The Commonwealth and Hayden (the AAP case), was handed down by the High Court in 1975. It is a particularly difficult case with the Court divided in its reasons and the ultimate majority being determined by one judge's view on the issue of standing.

The AAP case examined the nature of the appropriations power (s 81) and the executive power (s 61) and the incidental power [section 51 (xxxix)]. The Appropriation Act (No 1) 1974-1975 provided for certain sums to be appropriated to the Australian Assistance Plan.
(AAP) to enable grants to be made to Regional Councils for Social Development. Victoria argued that the Commonwealth did not have the Constitutional power to appropriate these sums.

Three of the seven judges, Justices McTiernan, Jacobs and Murphy held that the plan was valid. Justice Stephen said that the States did not possess the necessary standing to impugn an appropriation. As a consequence, Victoria's challenge was unsuccessful.

Appropriation and executive powers

Section 81 provides that revenues paid into the Consolidated Revenue Fund are 'to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.' (Section 83 provides that monies may only be withdrawn from the Commonwealth Treasury 'under appropriation made by law.')

In his discussion of what amounted to a purpose of the Commonwealth, Barwick CJ noted that the Commonwealth's legislative and executive powers are limited. Most of its legislative powers may be found in sections 51 and 52 of the Constitution, and its executive powers are limited by the words of section 61.

His Honour, however, said some legislative and executive powers may be derived from the 'very foundation of the Commonwealth as a polity and its emergence as an international state'. Consequently, in considering what is a purpose of the Commonwealth, the focus need not only fall on sections 51 and 52:

The extent of powers which are inherent in the fact of nationhood and of international personality has not been fully explored. Some of them may readily be recognised; and in furtherance of such powers money may be spent. One such power, for example, is the power to explore, whether it be of foreign lands or seas or in areas of scientific knowledge or technology.

But to describe an issue as one of 'national concern' does not automatically bring it within the Commonwealth's legislative power. For example, Barwick CJ said that although the national economy was clearly of 'national concern', that in itself did not make it a matter of Commonwealth power. Whatever act or activity the Commonwealth participates in must be sourced from either a legislative or executive power, derived from the Constitution. Whether the activity is based on legislative or executive power, the Parliament must be able to enact legislation to control the activity for which the money is to be spent. This determines the validity of the appropriation.
With certain exceptions that Barwick CJ considered it unnecessary to state, 'the executive may only do that which has been or could be the subject of valid legislation'. 66

Barwick CJ held that as the Australian Assistance Plan was not for a purpose of the Commonwealth, Parliament did not have the power to enact legislation to authorise the carrying out of the Plan. 67 Hence, his Honour concluded:

No power resides in the Commonwealth to implement and carry out a social welfare plan such as the Australian Assistance Plan. It follows ... that that Plan is not a purpose of the Commonwealth within the meaning of s 82. Accordingly... there is no power in the Parliament to appropriate and authorise the expenditure of money for that Plan and its purposes. 68

On section 61, Gibbs J endorsed the views put forward in both the Wooltops and Australian Shipping Board decisions and went on to say that section 61 limits the power of the Executive: its words 'make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth'. 69 The AAP case did not involve the prerogative powers of the Crown. According to Gibbs J, when it is clear that there is no head of power on which to authorise the Plan, 'it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan.' 70

Without wishing to diminish the views of Barwick CJ and Gibbs J, the key judgment is that of Mason J.

In his judgment, Mason J noted that as no legislation had been enacted to support the Australian Assistance Plan, consideration must be given to the executive power and the incidental power. Thus, the scope of section 61 is limited and does not reach beyond those responsibilities allocated to the Commonwealth by the Constitution. But in doing so, his Honour took a more expansive view of the 'responsibilities' than that of Barwick CJ and Gibbs J, concluding that they may be found in:

• the distribution of powers, especially legislative powers, in the Constitution; and

• the 'character and status of the Commonwealth as a national government'. 71

Further, Mason J continued, in defining the scope of the executive power, the following factors must be considered:

• the impact of the incidental power [section 51(xxxxix)] on section 61;

• the Commonwealth’s implied powers stemming from its existence and nature as a polity.
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His Honour stated that these two factors combined mean that the Commonwealth has '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'.72 The Commonwealth Scientific and Industrial Research Organisation (CSIRO) is an example of the exercise of this capacity. On this reasoning, other activities will be able to be supported in a like fashion under the executive power.

Mason J warned, however, that the executive power to engage in such national activities, arising as it does from a Constitutional implication and the operation of the incidental power, is limited in scope. It would not accord with the division of legislative responsibilities in the Constitution between the Commonwealth and the States to give this aspect of the executive power a wide operation. The Commonwealth, for example, could not establish programs not justified by a head of legislative power merely because such programs ‘can be conveniently formulated and administered by the national government’.73 Thus, although acknowledging the existence of an implied nationhood power, both Barwick CJ and Mason J denied that it extended to support the Australian Assistance Plan.

Mason J also concluded that the Australian Assistance Scheme did not fall within the executive power.74 Accordingly, although the appropriation under section 81 was, in Mason J's view valid, the administrative scheme required to implement the Australian Assistance Plan was beyond power.75

Justices Jacobs and Murphy,76 on the other hand, considered the executive power could be so utilised to support the Australian Assistance Plan. According to Jacobs J, the Australian Assistance Plan was within Commonwealth power for two reasons:

- it fell within the Commonwealth’s executive power to ‘formulate and co-ordinate plans and purposes which require national rather than local planning and of its legislative power to appropriate its funds accordingly’; and

- ‘it is an expenditure of money which is incidental to the execution by the Commonwealth of its wide powers respecting social welfare.’77

Davis v The Commonwealth

The notion of the Commonwealth as a national polity was elaborated in Davis v The Commonwealth, the most recent substantial discussion on the executive power.78 In Davis (1988), the plaintiffs challenged certain sections of the Australian Bicentennial Authority Act 1980 (Cth) as unconstitutional, and argued that section 83 of the Constitution did not authorise the appropriation of money for the purposes of the Bicentennial Authority or for
the celebration of the Bicentenary. Section 22 of the Act prohibited the use of certain terms and symbols (such as ‘1788’, ‘1988’) without the consent of the Authority.

The High Court held that the commemoration of the Bicentenary was within the Commonwealth’s executive power:

the commemoration of the Bicentenary is pre-eminently the business and concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power. 79

In their joint decision, Mason CJ, Deane and Gaudron JJ, referred with approval to Mason J’s comments in Barton that section 61 enabled the Crown to undertake executive action appropriate to its responsibilities under the Constitution. These responsibilities derive from two sources:

• the distribution of legislative powers under the Constitution; and

• from the character of the Commonwealth as a national polity. 80

Consequently, Commonwealth legislative powers extend beyond those specifically stated in the Constitution and ‘include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity.’ 81

Their Honours acknowledged that executive and legislative power is distributed by the Constitution between the Commonwealth and the States. Section 61 ‘confers on the Commonwealth all the prerogative powers of the Crown except those necessarily exercisable by the States’ under the Constitution. 82 It should, therefore, be easier to ascertain the scope of the Commonwealth’s executive power ‘in areas beyond the express grants of legislative power’ where Commonwealth power does not compete with State power. And, the celebration of the Bicentenary, their Honours said, was clearly within the Commonwealth’s province in its ‘capacity as the national and federal government.” 83

Although agreeing with the conclusion reached by Mason CJ, Deane and Gaudron JJ, Wilson and Dawson JJ delivered a separate joint judgment in which they commented on the Commonwealth’s power to make laws on matters not specifically enumerated in the Constitution. Wilson and Dawson JJ did not find it necessary to resort to any implied nationhood power. Such a power, their Honours said, could be ‘accurately described in the terms of s 61 supported by s 51 (xxxix) [the incidental power].’ 84 Further, Wilson and Dawson JJ considered it ‘desirable to deprecate speaking of implied powers as distinct from the proper scope of the executive power conferred by s 61 lest the use of the term tends to suggest the existence of some new or independent source of power.’ 85 Nevertheless, the Commonwealth does have power under section 61 to ‘recognise and celebrate its own origins in history.” 86
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In the opinion of Brennan J (as he then was), the Constitution did more than merely join the separate colonies, it 'summoned the Australian nation into existence'. The purpose of the Constitution 'is to sustain the nation.'

And, if (as earlier decisions found) the Commonwealth executive power could be used to protect the nation, 'it extends to the advancement of the nation whereby its strength is fostered.' Further, his Honour said that the executive power is not restricted to the Commonwealth's legislative heads of power:

So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood - a flag or anthem ... or the benefits of many national initiatives in science, literature and the arts.

This does not imply that the Executive Government can do anything it deems to be in the national interest. But section 61 does allow the Executive to, and here his Honour adopted the test put forward by Mason J in the AAP case, '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 scope of the executive power - a summary

Drawing on the cases discussed above, the following observations may be made on the scope of the executive power:

- the words, 'execution and maintenance of the Constitution and the laws of the Commonwealth' in section 61 are no longer words of limitation;
- it contains those common law Crown prerogatives (eg, treaty-making; declaring war) that vest in the right of the Commonwealth rather than in the States;
- it allows the Commonwealth to engage in activities peculiarly adapted to the government of a nation which cannot otherwise be carried out (including, for example, celebrations of the bicentenary, establishing the CSIRO and promulgating flags and other national symbols); and
- it includes the power to enter into contracts and commercial arrangements without the sanction of the Parliament.

However, section 61:

- does not extend beyond those responsibilities allocated to the Executive of the Commonwealth by the Constitution;
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• is subject to express constitutional limitations; and
• it may be limited by laws enacted by the Commonwealth.

Parliament's supervision of the executive's treaty-making role

The Executive, pursuant to section 61 of the Constitution, clearly has the power to enter into treaties. In recent times there has been considerable discussion concerning whether some limits should be placed on the Executive's power in this regard, and that Parliament should play a greater role in the treaty-making process.

This section considers only one aspect of that debate. Can Parliament enact legislation requiring its approval prior to the Executive entering into a treaty?

In a paper published in 1977, Professor Campbell asked, could Parliament 'legislate to make itself party to the treaty-making power?' In that paper, Professor Campbell suggests that it could not. More recently, in her submission to the Senate Legal and Constitutional References Committee on 13 January 1995, Professor Campbell opined that given the separation of powers, 'it is possible that the High Court would hold that federal parliament cannot enact legislation to invest itself, or either of its Houses, with powers of an executive character.' As a result, Parliament could not 'pursuant to its external affairs power, enact a statute which removes the treaty-making power from the executive branch and transfers it to the Parliament or one (or both) of its Houses.' In other words, it is unlikely that Parliament could validly strip the Executive of its prerogative to enter into treaties on behalf of Australia.

However, Professor Campbell considered that Parliament could validly enact legislation that required the Executive to obtain Parliamentary approval prior to entering into a treaty.

Sir Maurice Byers, QC, in his submission to the Committee, doubted whether Parliament could deprive the Executive of any power given to it by the Constitution. Furthermore, he seems to suggest that Parliament most likely could not limit the Executive's treaty-making power. And a submission by a group of Adelaide legal academics suggested that 'the Commonwealth Parliament's law-making participation in the process may be held to be constitutionally limited to the implementation of treaties in accordance with present practice'.

The reason why Parliament could most likely place limits on the Executive's treaty-making power may be simply stated. The treaty-making power, although found in section 61 of the Constitution, is a prerogative power, and prerogative powers are subject to control by
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statute. As Henry Burmester, Acting Chief General Counsel, Commonwealth Attorney-General's Department stated in his Opinion of 13 June 1995:

In my view Parliament may enact legislation to regulate the exercise of the prerogative powers of the Crown, of which the power to conduct Australia's treaty relations forms part. 98

This view is supported by High Court authority.

In the AAP case, Justice Jacobs stated:

The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s. 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to Australia, may be the subject of legislation of the Australian Parliament. 99

In Koowarta v Bjelke-Petersen, decided in 1982, Justice Murphy discussed the nature of the Commonwealth executive power with respect to external affairs. After noting that the executive power over foreign affairs may be found in section 61 of the Constitution, his Honour said that it is not unlimited, that it is subject to both express and implied constitutional limitations. 100 His Honour continued:

Otherwise the executive ... r in relation to external affairs, unless confined by Parliament, is unconfined. 101

Justices McTiernan and Menzies said in Barton in the context of an extradition request by the Executive that 'unless statute, either expressly or by necessary implication, has deprived the executive of part of its inherent power', it may request other States to assist in returning offenders to Australia. 102 And Mason J stated that 'it is well accepted that a statute will not be held to abrogate a prerogative of the Crown unless it does so by express words or by ... necessary implication.' 103 As Burmester notes, 'the corollary of those statements is that prerogative powers may be affected by statute.' 104 In any event, as J E Richardson has remarked:

The subordination of prerogative power to legislative power was clearly established in the House of Lords case, Attorney-General v De Keyser's Royal Hotel: [1920] AC 508. 105

Thus, it would seem that although Parliament could not assume the power to enter into treaties itself, it could place limitations on the Executive's power to do so. 106 The Government's official response to the Senate's report on treaty-making would seem to suggest provisional support for this view. 107
Conclusion

The acknowledged scope of section 61 has been widened by the High Court since Federation. The early view in the *Wooltops* case considered that the executive power in section 61 was limited to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Over time it has become accepted that section 61 also incorporates the Crown prerogatives that vest in right of the Commonwealth. These include, for example, the prerogative powers to enter treaties and to declare war. Recent cases have extended the scope of section 61 even further to include consideration of the character of the Commonwealth as a national government.

It is arguable that the scope of section 61 remains uncertain - some might say flexible. The debate over whether Parliament could limit the executive power to enter into treaties is an example of this uncertainty. However, both judicial authority and the weight of academic opinion tends to indicate that the Parliament can limit the Executive's power to enter into treaties.

The issue of the Executive's treaty-making power is part of the debate concerning the powers of the Executive and Parliament. Should there be a move to amend the Constitution, it might be argued that attention should also be given to spelling out the scope of the Executive's power.

Endnotes

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1 Much has been written on this issue. For a brief summary, see: Dr J.R. Verrier, *The Future of Parliamentary Research Services: To Lead or to Follow*, Parliamentary Research Service Paper presented at the IFLA Conference, August 1995.
3 Osborn's *Concise Law Dictionary* defines the royal prerogative as 'Those exceptional powers and privileges of the Sovereign in virtue of the Crown, eg. command of the Army, or the treaty-making power.'
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10 p 34
11 ibid. Griffith advocated this procedure, given that the combination of federalism and responsible government was as yet untried, and that it would be appropriate to provide his successors with a degree of flexibility (p 38).
12 ibid, p 765.
13 ibid, p 767.
14 ibid.
15 ibid, Vol II, p 794.
16 ibid, p 797.
17 Convention Debates, Vol I, p 34.
18 ibid, p 35.
20 ibid, p 99.

Australian courts have not strictly adhered to the principle of the separation of powers, although they profess to have found it embodied in the Constitution. It is only in relation to the judicial power that the doctrine has had any practical effect in Australia, and even in that respect there has been a disposition to confine it within fairly narrow bounds.

24 ibid, pp 36-37.
25 (principally reversion of land to the Crown where there are no heirs).
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27 ibid, p 383.
29 ibid, p 103.
30 ibid, p 216.
32 *Davis v The Commonwealth* (1988) 166 CLR 79 at pp 92-93
33 ibid, p 107.
34 For powers the Monarch may exercise whilst personally present in Australia, refer *Royal Powers Act* 1953.
35 This tension is reflected in the lingering echoes of the implied intergovernmental immunities approach rejected by the Court in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the Engineer's Case) (1920) 28 CLR 129 that persist in more recent judgments on the scope of the executive power.

In the early years of federation, it was assumed that a number of powers given to the Queen by common law, that is, prerogative powers, were not included within s 61, such as the power to declare war, to enter into treaties or to acquire territory.

37 *Commonwealth v Colonial, Spinning and Weaving Co* (1921-1922) 31 CLR 421 at p 431.
38 *Attorney-General (Vic) (ex rel Dale) v Commonwealth* (1945) 71 CLR 237.
40 *Burns v Ransley* (1949) 79 CLR 101 at pp 109-110.
41 ibid, p 110.
43 ibid, p 201.
44 ibid.
45 ibid. See also p 202.
46 ibid, p 202.
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47 ibid, p 204.
48 Commonwealth v Colonial, Spinning and Weaving Co (1921-1922) 31 CLR 421.
49 ibid, p 433.
50 Peter Hanks, Australian Constitutional Law, 1994, p 309.
52 ibid, p 509.
53 ibid.
54 The Commonwealth v Australian Commonwealth Shipping Board (1926) 39 CLR 1 at p 9.
55 ibid.
56 ibid, p 10.
58 ibid, p 170.
59 ibid, p 461.
61 ibid, p 498.
62 ibid, p 491.
63 See also New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975) 135 CLR 337 where it was suggested by Barwick CJ (at 374) that the nationhood power might enable the Commonwealth to make laws for the Australian territorial sea.
64 Victoria v The Commonwealth and Hayden (1975) 134 CLR 338 at p 361-362.
65 ibid, p 362.
66 ibid.
67 ibid, p 363.
68 ibid, p 364.
69 ibid, p 379.
70 ibid.
71 ibid, p 396.
72 ibid, p 397.
73 ibid, p 398.
74 ibid, pp 400-401.
75 For a recent example of how this limitation may effect government programs see Senate Rural and Regional Affairs and Transport and Legislation Committee, Report on the Consideration of Bill Referred to the Committee, the Primary Industries and Energy Legislation Amendment Bill (No.3) 1994 and Parliamentary Research Service, Bills Digest No.41 of 1995.
76 ibid, p 419.
77 ibid, p 413.
78 Davis v The Commonwealth (1988) 166 CLR 79.
79 ibid, p 94, per Mason CJ, Deane J and Gaudron J.
80 ibid, p 93.
81 ibid, p 93.
82 ibid.
83 ibid, p 94.
84 ibid, p 102.
85 ibid, p 103.
86 ibid, p 104.
87 ibid, p 110.
88 ibid, p 111.
89 ibid.
92 E. Campbell, Submission to the Senate Legal and Constitutional References Committee, Vol I p 93.
93 ibid.
94 ibid.
95 ibid, Vol 2, p 255.
96 ibid, pp 253-254.
97 ibid, Vol 5, pp 1021-1022.
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100 Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at pp 237-238.

101 ibid, p 238.


103 ibid, p 501.

104 Burmester, op cit, p 3.


106 For a discussion on this point see the report by the Senate Legal and Constitutional References Committee Trick or Treaty? Commonwealth Power to Make and Implement Treaties, (November 1995), pp 45-61.

107 As the Report states: 'The Government considers that it would be sensible to review the experience to be gained from the establishment of a Joint [Parliamentary] Committee and the implementation of other recommendations before moving to consider the need for an approval or disallowance procedure.' Government Response To Senate Legal Constitutional References Committee 2 May 1996. Report, Trick or Treaty? Commonwealth Power to Make and Implement Treaties'.

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