

CRITIQUE AND COMMENT

**EXECUTIVE AND LEGISLATIVE POWER
IN THE IMPLEMENTATION OF
INTERGOVERNMENTAL AGREEMENTS**

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The proliferation of intergovernmental agreements between the Commonwealth and the states raises questions about their characterisation as an exercise of Commonwealth executive power and the legislative power necessary to give effect to them. This lecture, which celebrates Sir Anthony Mason's outstanding contribution to the legal profession and the common law of Australia, reflects on the principal issues and outstanding questions relating to the implementation of such intergovernmental agreements.

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I INTRODUCTION

This is the second occasion on which I have had the honour of delivering the Sir Anthony Mason Lecture at Melbourne University Law School. I have sometimes complained about being asked to deliver lectures in honour of people who are still alive and well and particularly those who are younger than me. Sir Anthony is not younger than me but he is alive. He also appears considerably healthier than might be expected at his advanced age. Moreover,

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he shows all the intellectual energy and interest in the world of a considerably younger person. I make no complaint on that account nor about having been asked to carry out this task for a second time. He is a great Australian jurist and it is a pleasure to honour him again in this way.

My topic concerns intergovernmental agreements and the executive power of the Commonwealth, a subject on which Professor Cheryl Saunders of this university wrote what is probably still the leading paper in the *Public Law Review* in 2005.¹ I wondered to what extent recent developments in relation to executive power might have affected her principal observations. Upon re-reading the paper I am not sure that they have been affected or that recent developments have answered the unanswered questions which the paper raised.

At the heart of any discussion of Commonwealth executive power is s 61 of the *Constitution*, a not-so-limpid pool with highly reflective properties, which provides:

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

Like some out-of-date sermoniser I begin by taking a text from the aging, but not yet old, testament of one of Sir Anthony's many significant judgments. It is a passage from *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd*,² later quoted and approved by six Justices of the High Court in *R v Hughes*,³ in which, speaking of the executive power of the Commonwealth, he said:

Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and [the] State[s] on matters of joint interest, including matters which require for their implementation joint legislative action, so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the *Constitution*.⁴

¹ Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294.

² (1983) 158 CLR 535.

³ (2000) 202 CLR 535, 554–5 [38].

⁴ *Duncan* (n 2) 560.

That passage was preceded by a reference to something that he had said in the *AAP Case*: namely, that the scope of the executive power is to be ascertained from the distribution of the legislative powers effected by the *Constitution* and the character and status of the Commonwealth as a national government.⁵ Sir Anthony's observation may now have to be read subject to the new testament in relation to executive power, which is a work in progress, as indicated by the decisions of the High Court in *Pape v Federal Commissioner of Taxation*,⁶ *Williams v Commonwealth* ('*Williams [No 1]*'),⁷ *Williams v Commonwealth [No 2]*⁸ and *CPCF v Minister for Immigration and Border Protection*.⁹ Nevertheless, what he said frames my topic. It is appropriate to begin by referring to intergovernmental agreements as an incident of federalism.

II FEDERALISM AND THE NEED FOR COOPERATION

Federal constitutions create systems of government in which governmental powers are distributed between a national government and sub-national governments. Each of the sub-national governments is responsible for a part of the national territory. Historically, the designers of federal constitutions have not always given close consideration to the operation of intergovernmental relationships beyond the formal rules set out in the constitutions. Thomas Hueglin and Alan Fenna in their recent book on comparative federalism have observed that '[i]ntergovernmental relations ... as an ongoing and mostly informal practice in federal systems developed as a response to the much greater need for coordination than was originally envisaged'.¹⁰

Relevantly to Australia, they describe intergovernmental relations as driving 'modern federal systems as much as, or even more than, the formal constitutional set-up of divided powers and the bicameral legislative process'.¹¹ That does not mean that cooperative action was absent from the minds of the drafters of the *Australian Constitution*.

The drafting of the *Australian Constitution* and the creation of the Commonwealth were necessarily cooperative undertakings between the delegates

⁵ *Victoria v Commonwealth* (1975) 134 CLR 338, 396–8 ('*AAP Case*').

⁶ (2009) 238 CLR 1.

⁷ (2012) 248 CLR 156.

⁸ (2014) 252 CLR 416.

⁹ (2015) 255 CLR 514.

¹⁰ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press, 2nd ed, 2015) 238.

¹¹ *Ibid.*

to the Constitutional Conventions of the 1890s. The *Constitution's* provisions leave space for extensive intergovernmental cooperation. The existence of that space has been acknowledged repeatedly in the High Court. As Starke J said in 1939 in *Moran's Case*,

[c]o-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the *Constitution*.¹²

Cooperation was characterised by Deane J in *R v Duncan* as 'a positive objective of the *Constitution*'¹³ and as a necessity by Mason J in the passage quoted from his judgment in opening.¹⁴

Sir Harry Gibbs, as Chief Justice, used the term 'co-operative federalism' in *R v Winneke; Ex parte Gallagher*, holding that there was no constitutional impediment to a combined inquiry by the Commonwealth and the states into related subject matters.¹⁵ The Chief Justice observed that it would be 'difficult to imagine why the Parliament would wish to forbid such a sensible exercise of co-operative federalism'.¹⁶ And in *Davis v Commonwealth*, Mason CJ, Deane and Gaudron JJ held that the executive power of the Commonwealth extended to the commemoration of the bicentenary of Australia's colonisation, and acknowledged that the states had a part to play 'whether as part of an exercise in co-operative federalism or otherwise'.¹⁷

The term 'co-operative federalism', then, describes a class of activity which is a natural attribute of the operation of the Federation. It facilitates its functioning. An important mechanism for such cooperation is the intergovernmental agreement. One class of such agreement may lead to the exercise of Commonwealth legislative powers under provisions of the *Constitution* which, of their very nature, require the consent or agreement of the states. On one view, those provisions are textual indicators that the constitutional distribution of legislative powers is not inconsistent with the use of intergovernmental agreements to achieve nationwide administrative and legislative

¹² *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 774 ('*Moran's Case*').

¹³ *Duncan* (n 2) 589.

¹⁴ *Ibid* 560.

¹⁵ (1982) 152 CLR 211, 218.

¹⁶ *Ibid*.

¹⁷ (1988) 166 CLR 79, 94.

objectives beyond the scope of the Commonwealth or the states acting separately. That feature of the *Constitution* arguably informs the content of the executive power in relation to intergovernmental agreements — perhaps that element which has sometimes been called the ‘nationhood power’ or perhaps a subset of it which might be called a ‘collaborative nationhood power’.

To the extent that the recent cases about executive power have arisen out of the unilateral exercise of that power by the Commonwealth, they do not provide complete answers to questions about the scope of the power in relation to multilateral agreements with the states.

III CONSTITUTIONAL PROVISIONS REQUIRING INTERGOVERNMENTAL AGREEMENTS

There are a number of heads of legislative power conditioned, directly or indirectly, upon the consent or agreement of affected states. The Commonwealth Parliament can make laws for the acquisition of the railways of a state on terms arranged with the state.¹⁸ It can also make laws with respect to railway construction and extension in any state with the consent of that state.¹⁹ As a practical matter, some form of intergovernmental agreement is likely to be made anterior to the exercise of such power.

Another head of Commonwealth legislative power which requires state action to enliven it and, in practice, requires anterior agreement, is to be found in s 51(xxxvii) of the *Constitution*. Under that provision the Commonwealth Parliament may make laws with respect to matters referred to it by any state or states, but so that the law shall extend only to the states by whose parliaments the matter is referred, or which afterwards adopt the law.²⁰ Over the years there have been referrals and adoptions supporting a number of Commonwealth laws including laws providing for mutual recognition of occupational qualifications and product standards between states and

¹⁸ *Constitution* s 51(xxxiii).

¹⁹ *Ibid* s 51(xxxiv).

²⁰ See generally *Graham v Paterson* (1950) 81 CLR 1; *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207; Robert S French, ‘The Referral of State Powers’ (2003) 31 *University of Western Australia Law Review* 19; Anne Twomey and Glenn Withers, *Federalist Paper 1: Australia’s Federal Future*, (Report for the Council for the Australian Federation, April 2007) 2; Andrew Lynch, ‘After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)’ (2010) 32 *Sydney Law Review* 363.

territories,²¹ corporations,²² terrorism,²³ de facto relationships,²⁴ water²⁵ and personal property securities.²⁶ Referrals may be expressed broadly by reference to a subject matter on which the Commonwealth would thereby be authorised to legislate. However, states are generally fairly cautious about providing blank legislative cheques. More commonly, referrals are limited to the text of a proposed law so that the power conferred upon the Commonwealth Parliament does not extend beyond the enactment of a law in terms of that text. Where agreement has been reached between the Commonwealth and all of the states on the text of a law to be referred as a matter under s 51(xxxvii), what results will be a single Commonwealth law of uniform application. If only some of the states refer and adopt the law, the result will be a Commonwealth law that does not apply uniformly across Australia. There are no express subject-matter limitations on what may be referred under s 51(xxxvii). However, a referral would not authorise the Commonwealth to make a law in contravention of a constitutional prohibition or guarantee or otherwise inconsistent with constitutional principles emerging from the text and structure of the *Constitution*. In the latter category, a referral of a law which purported to confer federal judicial power upon an entity, other than a court of the kind contemplated by ch III of the *Constitution*, would be one example.

It may be accepted that any intergovernmental agreement entered into by the Commonwealth providing for its implementation by a referral of power would be an exercise of the executive power of the Commonwealth perhaps answering the description of execution of the *Constitution*.

The Commonwealth may also make laws under s 51(xxxviii) with respect to the exercise within the Commonwealth, or at the request or with the concurrence of the parliaments of all the states directly concerned, of any power which could at the establishment of the *Constitution* be exercised only by the Parliament of the United Kingdom or by the Federal Council of

²¹ *Mutual Recognition Act 1992* (Cth), as to which see generally *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255.

²² *Corporations Act 2001* (Cth).

²³ *Criminal Code Act 1995* (Cth) pt 5.3, as amended by *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

²⁴ *Family Law Act 1975* (Cth) pt VIIIAB, as inserted by *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

²⁵ See, eg, *Water Act 2007* (Cth) pts 1A, 2A, 4, 4A, 10A, 11A.

²⁶ *Personal Property Securities Act 2009* (Cth).

Australasia.²⁷ The power so conferred is not limited to the topics enumerated in s 51.²⁸ Three Justices of the High Court held in 1999 that the effect of s 51(xxxviii) is to empower the Commonwealth Parliament to ‘make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies.’²⁹ They described the provision as a potential enhancement of state legislative powers because the parliaments of the states were the potential recipients of legislative power under a law made pursuant to the paragraph.³⁰ Again, it seems uncontroversial that any anterior intergovernmental agreement would fall within the scope of the Commonwealth executive power.

Section 96 confers legislative power on the Commonwealth Parliament to grant financial assistance to any state on such terms and conditions as the Parliament thinks fit. The exercise of the power is not conditioned upon the agreement of the states but the operation of a law made under it is so conditioned. It is typically connected with anterior intergovernmental agreements, although it does not require such agreements for its exercise. The section has provided a long-standing basis for the practical expansion of Commonwealth power through the content of the terms and conditions attached to financial assistance. Those are not confined to the enumerated subject matters of Commonwealth legislative power in s 51.

An argument advanced in the *Federal Aid Roads Act Case* in 1926, that the Commonwealth could not attach conditions to grants amounting in substance to the exercise of a legislative power not within s 51, was rejected.³¹ In an astonishingly short judgment, the Court said:

The Court is of opinion that the *Federal Aid Roads Act* No 46 of 1926 is a valid enactment.

It is plainly warranted by the provisions of sec 96 of the Constitution, and not affected by those of sec 99 or any other provisions of the Constitution, so that exposition is unnecessary.

The action is dismissed.³²

²⁷ See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 815–22.

²⁸ *Port MacDonnell Professional Fisherman’s Association Inc v South Australia* (1989) 168 CLR 340, 376.

²⁹ *Sue v Hill* (1999) 199 CLR 462, 491 [62] (Gleeson CJ, Gummow and Hayne JJ) (citations omitted).

³⁰ *Ibid.*

³¹ *Victoria v Commonwealth* (1926) 38 CLR 399, 405 (*‘Federal Aid Roads Act Case’*).

³² *Ibid* 406.

Section 96 is included in this rollcall of provisions because it is, in its practical operation, consensual. No state is obliged to accept financial assistance if it objects to the terms and conditions imposed on it. Section 96 may obviously be used to give effect to an anterior intergovernmental agreement. An intergovernmental agreement could be imagined between the Commonwealth and states for the provision of financial assistance on condition that it be applied to the delivery of chaplaincy services in public schools in the states. The executive power would be available to support entry into such an agreement by the Commonwealth in contemplation of legislation under s 96.

Section 96 is not limited by the anti-discrimination provisions of the *Constitution*.³³ However, the question whether laws making grants under the section can, in conjunction with intergovernmental agreements, be held invalid because they contemplate acquisition of property by the recipient states other than on just terms has arisen in more than one case. Section 51(xxxi) of the *Constitution* constrains the Commonwealth's power to make laws for the acquisition of the property of any state or person by a requirement that the acquisition be on just terms. In *ICM Agriculture Pty Ltd v Commonwealth*,³⁴ decided in 2009, a majority of the High Court upheld the correctness of *PJ Magennis Pty Ltd v Commonwealth*,³⁵ decided 60 years earlier, in which legislation providing for financial assistance to the states for the acquisition of land other than on just terms was held to be invalid. It was put thus in the joint judgment of Gummow and Crennan JJ and myself:

The result is that the legislative power of the Commonwealth conferred by ss 96 and 51(xxxi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms.³⁶

Spencer v Commonwealth, decided in 2010, concerned the validity of Commonwealth legislation giving effect to agreements made for the enactment of state laws imposing restrictions on the clearing of vegetation on farmland.³⁷ The Court held that proceedings challenging the Commonwealth law should not have been dismissed summarily in the Federal Court. The case as pleaded left open the possibility that the Commonwealth law was invalid because of an

³³ *Constitution* ss 51(ii), 99, 102, 117.

³⁴ (2009) 240 CLR 140, 169–70 [40]–[45] (French CJ, Gummow and Crennan JJ), 206 [174] (Heydon J agreeing).

³⁵ (1949) 80 CLR 382.

³⁶ *ICM Agriculture* (n 34) 170 [46].

³⁷ (2010) 241 CLR 118.

informal arrangement between the Commonwealth and the states for s 96 grants to be made to the states on the basis that the states would enact laws effecting an acquisition of the applicant's property on other than just terms. The answer to that question was left open in the joint judgment of Gummow J and myself. We said:

It is not necessary for present purposes to determine whether a law of the Commonwealth, providing for grants to be made to a State under s 96 of the *Constitution*, or for agreements under which such grants could be made, might be characterised by reference to informal arrangements between the Commonwealth and the State as a law with respect to the acquisition of property.³⁸

The other Justices differed primarily on the question of the criterion for summary dismissal under s 31A of the *Federal Court of Australia Act 1976* (Cth).

As a general proposition the executive power could not be invoked to support an intergovernmental agreement under which the Commonwealth would legislate in contravention of a constitutional guarantee or prohibition or contrary to some principle such as separation of judicial from executive or legislative powers.

In that connection it may be observed that intergovernmental agreements are exchanges of political promises without any contractual operation and not otherwise creating legally enforceable obligations. If such an agreement purported to authorise the enactment of unconstitutional legislation, the consequence of a want of executive power to support the agreement would not necessarily be 'invalidity' in any legally meaningful sense, but simply an inability to give effect to it by legislative or administrative means.

The fact that an intergovernmental agreement is approved or ratified by statute does not give it the force of law. Section 105A of the *Constitution*, which was introduced by amendment in 1928, authorises the Commonwealth Parliament to make agreements with the states in relation to their public debts. It also authorises it to make laws for the carrying out of such agreements. Under a 'Financial Agreement' with the states made in 1927, the Commonwealth took over their public debts as at 1 July 1929, pursuant to s 105, which authorised it to do so. The states agreed to pay interest and to contribute to a sinking fund. The *Financial Agreement Act 1928* (Cth) was made pursuant to the Agreement. The Agreement was also supported by the

³⁸ Ibid 134 [32].

Financial Agreement Validation Act 1929 (Cth). Subsequent amendments to it were approved by statute.³⁹

In *Sankey v Whitlam*, decided in 1978, the High Court held that the inter-governmental Financial Agreement was not a law.⁴⁰ Former Prime Minister Gough Whitlam and members of his ministry had been privately prosecuted for conspiring to effect a purpose unlawful ‘under a law of the Commonwealth’, that is to say borrowing by the Commonwealth of Australia from overseas sources in contravention of the Financial Agreement 1927. Gibbs ACJ in his judgment expressed the common position when he said:

The Financial Agreement purports to be an agreement, not a law. It was not made by any legislature, although it received legislative approval and ratification. It may be varied or rescinded by the parties: s 105A(4). Section 105A itself draws a distinction between the agreements which it authorizes on the one hand and laws made to validate or carry out any such agreement on the other.⁴¹

What was said of the Financial Agreement can be said of any intergovernmental agreement not given statutory effect by an Act of Parliament. Mere ratification or approval does not have that result. In some cases ratification or approval may have a legal consequence. It may be a condition for the enactment of implementing legislation or for the contractual operation and provisions of the agreement, or possibly for the exercise of some ministerial discretion under other legislation.

As the preceding discussion shows, there are significant provisions of the *Constitution* which effectively authorise or contemplate cooperative action and intergovernmental agreements. The focus now shifts to intergovernmental agreements which are not necessarily to be implemented by legislation under one of the provisions which I have mentioned.

IV THE USE OF INTERGOVERNMENTAL AGREEMENTS

The principal political mechanism giving rise to intergovernmental agreements in Australia today is the Council of Australian Governments (‘COAG’),

³⁹ The validity of the *Financial Agreements Enforcement Act 1932* (Cth) authorising the High Court to make a declaration of debt upon default by a state was upheld in *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155 (*‘First Garnishee Case’*). See also Anne Twomey, ‘The Dismissal of the Lang Government’ in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 129.

⁴⁰ (1978) 142 CLR 1.

⁴¹ *Ibid* 29; see also at 74 (Stephen J), 88–9 (Mason J), 106 (Aickin J).

which was established in 1992. Its members are the Prime Minister, state and territory premiers and chief ministers, and the President of the Australian Local Government Association. The website for COAG describes it as ‘the peak intergovernmental forum in Australia.’⁴² It states that where formal agreements are reached, these may be embodied in intergovernmental agreements, including a category called ‘National Agreements’ and ‘National Partnership Agreements.’ The website states that in many instances agreements have been the precursors to the passage of Commonwealth or state and territory legislation. A number of intergovernmental agreements are identified on the current website. Their subjects include water reform in the Murray Darling Basin, competition and productivity, national Indigenous health, public hospital funding, the national exchange of criminal history information for people working with children, environmental biosecurity, commercial vessel safety reform, heavy vehicle regulation, rail safety regulation, national credit law, chemicals and plastics regulatory reform, and many others.

The intergovernmental agreements entered into under the auspices of COAG have been made between members of the executive branches of the governments of the Commonwealth and the states and territories. Some of them require supporting legislation. If such supporting legislation comes within a head of legislative power of the Commonwealth, including a matter referred, pursuant to any agreement, by the states, or if it provides for financial assistance on terms pursuant to s 96, that is sufficient. The agreement, although anterior to the legislation, is not legally necessary to the power of the Commonwealth to enact implementing laws. A more interesting question arises where the Commonwealth seeks to enact legislation pursuant to an intergovernmental agreement on a topic outside any of the subject-matter heads of legislative power, outside the ambulatory referral provision and outside the framework of the conditional financial assistance power. It would have to resort to the incidental power.

As six Justices of the Court said in their joint judgment in *R v Hughes*, ‘[i]t is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power.’⁴³ Their Honours added the important qualification: ‘However, it would be another matter to conclude that this

⁴² ‘About COAG’, *Council of Australian Governments* (Web Page) <<https://www.coag.gov.au/about-coag>>, archived at <<https://perma.cc/Y9YM-KC8G>>.

⁴³ *Hughes* (n 3) 555 [39].

means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern.⁴⁴

No distinction was drawn in that case between unilateral action by the Commonwealth, relying upon the executive power and legislating pursuant to s 51(xxxix) on the one hand, and action taken pursuant to an intergovernmental agreement on the other. The joint judgment did contain the observation, however, that nothing in the reasons denied the general proposition in *Duncan's Case* that cooperation on the part of the Commonwealth and states may well achieve objects that could be achieved by neither acting alone.⁴⁵

It is necessary in this context to be reminded that the Commonwealth when entering into intergovernmental agreements does not have a freedom of the kind enjoyed by natural persons. Its entry into such agreements must be founded on a power.

V THE COMMONWEALTH IS NOT JUST ANOTHER PERSON

In 1995, Sir John Laws, then a Judge of the Queen's Bench Division of the High Court of England and Wales, made an important distinction between the freedom of a private person to do things and the authority required for a public official to do the same things. For private persons he said:

[T]he rule is you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditioned upon some distinct and affirmative justification for which he must burrow in the law books.⁴⁶

For public authorities the rule was different — any action to be taken must be justified by positive law.⁴⁷ Private persons may enter into agreements about anything they like with anyone they want to unless such agreements are prohibited or regulated by law. Executive governments in Australia can only enter into agreements under the authority conferred upon them by their constitutions, the common law informing or attaching to those constitutions and laws made by their respective parliaments under those constitutions.

The *Wooltops Case*, decided by the High Court in 1922, concerned the validity of agreements made between the executive government of the

⁴⁴ Ibid.

⁴⁵ Ibid 555–6 [40].

⁴⁶ *R v Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513, 524.

⁴⁷ Ibid 523.

Commonwealth and The Colonial Combing, Spinning and Weaving Co Ltd.⁴⁸ The Commonwealth agreed to give requisite regulatory consents to the purchase of sheepskins used in the manufacture and sale of woolltops in consideration of a share of the profits. A question was reserved for the Full Court of the High Court as to whether it was within the legal power of the Commonwealth executive government, apart from any Act of the Parliament or regulation thereunder, to make or ratify the challenged agreements. The question was answered in the negative. One of the reasons for reserving the question, referred to by Higgins J,⁴⁹ was an argument foreshadowed by counsel for the Commonwealth in the course of discussion of the reserved question described by Higgins J as

the startling proposition that the Executive Government of the Commonwealth has power to enter into any agreement apart from statute or regulation — any agreement *for any purpose* — unless prohibited by statute.⁵⁰

The Court rejected the apparent attempt to equate the power of the executive government to enter into agreements with the freedom of a private person to do so.⁵¹ Knox CJ and Gavan Duffy J said: ‘In our opinion, an act not authorized by sec 61 is not within the legal power of the Commonwealth Executive Government.’⁵² There has nevertheless been support, subsequently expressed, for the proposition that the Commonwealth can enter into agreements with the same degrees of freedom as a natural person.⁵³ Evatt J, speaking of the executive power of New South Wales, said at first instance in *New South Wales v Bardolph*:

⁴⁸ *Commonwealth v The Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 (‘Wooltops Case’).

⁴⁹ *Ibid* 452.

⁵⁰ *Ibid* (emphasis in original).

⁵¹ *Ibid* 432 (Knox CJ and Gavan Duffy J), 453–5 (Higgins J). Isaacs J proceeded on the premise that legal authority was necessary for the agreements: at 437–41. Starke J agreed that the agreements could not be supported under any provision of the *Constitution*: at 461.

⁵² *Ibid* 432.

⁵³ Leslie Zines, ‘The Inherent Executive Power of the Commonwealth’ (2005) 16 *Public Law Review* 279, 283; Geoffrey Lindell, ‘The Changed Landscape of the Executive Power of the Commonwealth after the *Williams Case*’ (2013) 39 *Monash Law Review* 1, 14; Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 470, citing Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 348–9.

No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects.⁵⁴

The Commonwealth submitted in *Williams [No 1]* that the executive power extends to the capacities of the executive in common with natural persons.⁵⁵ Reference was made to *Bardolph* and a passage from my judgment in *Pape*⁵⁶ in which I cited Brennan J's observation about the content of the executive power in *Davis v Commonwealth*: namely, that

[s]ome of those powers are classified by the common law as prerogative powers — eg, the power to make a treaty; some are mere capacities of a kind which may be possessed by persons other than the Crown.⁵⁷

In *Williams [No 1]*, I observed that the aspect of executive power which has been described as

‘mere capacities of a kind which may be possessed by persons other than the Crown’ is not open-ended. The Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity.⁵⁸

Gummow and Bell JJ identified a basic difficulty with the Commonwealth proposition applied to contracts involving the expenditure of moneys, a difficulty exposed in the joint judgment in *Australian Woollen Mills Pty Ltd v Commonwealth*.⁵⁹ They said that ‘the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved.’⁶⁰

Hayne J noted that the term ‘capacity’ can be used in discussion of the executive power of the Commonwealth in various ways.⁶¹ His Honour put it succinctly: ‘what is at issue in this case is a question of power. And it follows

⁵⁴ (1934) 52 CLR 455, 475.

⁵⁵ *Williams [No 1]* (n 7) 165.

⁵⁶ *Pape* (n 6) 60.

⁵⁷ *Davis* (n 17) 108.

⁵⁸ *Williams [No 1]* (n 7) 193 [38] (citations omitted).

⁵⁹ (1954) 92 CLR 424.

⁶⁰ *Williams [No 1]* (n 7) 236 [151], quoting *ibid* 461 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

⁶¹ *Williams [No 1]* (n 7) 253 [202], referring to its usage in HV Evatt, *Royal Prerogative* (Law Book, 1987) 29–31 and *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ).

that in this case the word “capacity” is best used in the sense of ‘power’. Its use in any other sense is a distraction.⁶²

It had not been shown that the executive government of the Commonwealth has all of the capacities — in the sense of powers — to contract and spend that a natural person has. He described the Commonwealth submission as ‘a particular form of anthropomorphism writ large ... an argument that sought to endow an artificial legal person with human characteristics.’⁶³ ‘The dangers of doing that’, he said, ‘are self-evident.’⁶⁴

This lecture is concerned with intergovernmental agreements. As earlier mentioned, many of them are unlikely to have contractual effect. Rather they involve an exchange of solemn political promises to enact legislation or to make administrative arrangements, or both, in order to give effect to some common purpose. In the light of *Williams [No 1]* it seems reasonable to say that support for the power of the Commonwealth and the states to enter into intergovernmental agreements is not to be derived from a proposition that they can do anything that a natural person can do. Their powers to enter into agreements are sourced in their constitutions and one of those sources is their executive power.

VI A QUESTION FOR REFLECTION

The range of measures that fall under the general rubric of cooperative federalism has already been described. Some such measures are expressly contemplated by the *Constitution*. And as has been repeatedly recognised, the *Constitution* leaves space for other cooperative arrangements between the Commonwealth and the states in relation to national objectives not inconsistent with the *Constitution*.

Apart from referral arrangements and agreements supporting conditional financial assistance under s 96, there are a number of examples of arrangements providing for common-form Commonwealth and state laws forming a single national regime or, in some cases, a regime for a part of the nation. The Australian Energy Market Agreement and laws made pursuant to it constitute a leading example. South Australia enacted lead legislation scheduling a National Electricity Law⁶⁵ and a National Gas Law,⁶⁶ among others, which

⁶² *Williams [No 1]* (n 7) 253 [203].

⁶³ *Ibid* 254 [204].

⁶⁴ *Ibid*; see also at 352 [518] (Crennan J), 373–4 [595] (Kiefel J), the latter referring to *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9–10.

⁶⁵ *National Electricity (South Australia) Act 1996* (SA).

were then adopted by the participating jurisdictions including the Commonwealth.⁶⁷ The Commonwealth established a regulatory entity, the Australian Energy Regulator.⁶⁸ The Australian Energy Market Commission was established by South Australian legislation.⁶⁹ Commonwealth law provided for the conferral of functions on them under the *National Electricity (Commonwealth) Law and Regulations*.⁷⁰

In such cases the Commonwealth enters into intergovernmental agreements in the exercise of its executive powers under s 61 and legislates to give effect to the arrangement to the extent that it falls within its own areas of legislative competence. Such legislation does not require reliance upon the executive power to support it.

A boundary question is whether the Commonwealth can enter into an agreement with a state involving, for example, the expenditure of moneys on the provision of some services or funding, not within any head of power and invoke the incidental power to support legislation to give effect to that agreement. That is to say — is an intergovernmental agreement made in pursuance of a national objective able to be implemented absent any other power, in reliance upon the incidental power? In the case of expenditure, the necessary condition of an appropriation in addition to the relevant legislation would have to be satisfied.

An affirmative answer to that question is supported by *Hughes*. The decisions in *Pape* and *Williams [No 1]* and *Williams [No 2]* do not require a negative answer. *Pape* was a case in which the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was held valid as an exercise of the legislative power in s 51(xxxix) as a law incidental to the exercise of the executive power. That conclusion was not affected by *Williams [No 1]*, which concerned unilateral expenditure found not to be supported by the executive power under s 61. A subsequent attempt to provide legislative support by ambulatory umbrella legislation failed, as found in *Williams [No 2]*, for want of a relevant head of legislative power in relation to the chaplaincy program under challenge.

In *Williams [No 2]*, the Commonwealth argued that the provision of chaplains in schools was within the executive power of the Commonwealth because it is 'reasonably capable of being seen as of national benefit or

⁶⁶ *National Gas (South Australia) Act 2008* (SA).

⁶⁷ *Australian Energy Market Act 2004* (Cth) ss 6, 11A.

⁶⁸ *Competition and Consumer Act 2010* (Cth) s 44AE.

⁶⁹ *Australian Energy Market Commission Establishment Act 2004* (SA).

⁷⁰ *Australian Energy Market Act 2004* (Cth) ss 9–10.

concern.⁷¹ It was of national concern because the states had been consulted about, and had supported the extension of the chaplaincy program considered in *Williams [No 1]*. The Court rejected that submission, saying that '[c]onsultation between the Commonwealth and States coupled with silent, even expressed, acquiescence by the States does not supply otherwise absent constitutional power to the Commonwealth.'⁷²

The judgment then referred specifically to the referral power and to s 96 as to provisions by which the states and the Commonwealth may join in achieving common ends. The entry into an intergovernmental agreement cannot of itself supply otherwise absent constitutional powers of the Commonwealth. However, the fact of the agreement may be an indication that at least the nationhood aspect of the executive power is in play.

The Commonwealth in *Williams [No 2]* invoked the incidental power in support of an argument that the Appropriation Acts themselves provided the authority for the expenditure of the appropriated moneys. Additionally, it relied upon the incidental power as a support for the remedial provision, s 32B of the *Financial Management and Accountability Act* (Cth), which had been enacted to overcome the consequences of *Williams [No 1]*.

The Court rejected the first agreement on the basis that, contrary to *Pape*, it would mean that any and every expenditure of public money in accordance with ss 81 and 83 of the *Constitution* would bring that expenditure within the power of the Commonwealth. The invocation of the incidental power to support the remedial provisions in s 32B was also rejected:

[T]o hold that s 32B of the [*Financial Management and Accountability Act*] is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams [No 1]* deny: that the executive power of the Commonwealth extends to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.⁷³

The scope of Commonwealth executive power in relation to intergovernmental agreements must be viewed in light of its elements as derived from the recent decisions of the High Court. They include:

- 1 Powers necessary or incidental to the execution and maintenance of a law of the Commonwealth.

⁷¹ *Williams [No 2]* (n 8) 466 [70].

⁷² *Ibid* 467 [74].

⁷³ *Ibid* 470 [87].

- 2 Powers conferred by statute.
- 3 Powers defined by such of the prerogatives of the Crown as are properly attributable to the Commonwealth.
- 4 Inherent authority derived from the character and status of the Commonwealth as a national government.
- 5 A class of powers previously described by reference to the capacities of juristic persons but the scope of which, in light of the comments in *Williams [No 1]*, cannot be equated to the freedom of action of a natural person.

The aspect of the executive power apposite to the support of intergovernmental agreements directed to the attainment of national objectives might be thought to be the authority derived from the character and status of the Commonwealth as the national government — the so-called ‘nationhood power’. Whatever the scope of that element of the executive power there is reason to believe that it would support entry into agreements designed to give effect to goals which the Commonwealth and the states agree are desirable, national objectives. While additional subdivisions of the executive power are not to be encouraged, it may be that a power to enter into intergovernmental agreements could be located within a specific sub-class, perhaps a sub-class of the nationhood power. The point of such a classification would be to distinguish it from cases in which the Commonwealth is empowered to act unilaterally in the exercise of the nationhood aspect of the executive power. A specific identification of a collaborative aspect of that power would acknowledge the significance of the common view of all elements of the federation reflected in their willingness to enter into a particular intergovernmental agreement.

It remains the fact of course that the exercise of the power could not support entry into agreements to enact laws under s 51(xxxix) in contravention of guarantees or prohibitions under the *Constitution*, or otherwise inconsistent with constitutional principles or to do things administratively in breach of the law. Further, the incidental power is not a free-standing power which can be invoked when a substantive head of power is wanting. Its relationship in this connection to the implementation of intergovernmental agreements remains to be explored.

Professor Saunders in her 2005 paper described s 61 as a broad-based source of power for most intergovernmental agreements at least where made between Ministers or pursuant to statute. She identified limits to the executive power for that purpose, most obviously the requirement that agreements must

be consistent with the text and structure of the *Constitution* and may also be affected by the federal division of powers to the extent that this is a distinct consideration. In the concluding remarks in her paper, Professor Saunders observed that the scope of constitutional authority for intergovernmental agreements was relatively unexplored. This is still true. As she said, it is an important question in its own right and offers a perspective from which to examine the scope and operation of s 61 and its interface with s 51(xxxix).

Even allowing for more recent developments in the field of executive power I am unable to find anything in Professor Saunders's remarks with which I would disagree. That is a very satisfactory basis upon which to conclude this lecture.