

PUSHING THE BOUNDARIES OF EXECUTIVE POWER — *PAPE*, THE PREROGATIVE AND NATIONHOOD POWERS

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[A majority of the High Court in *Pape v Commissioner of Taxation* accepted that the Commonwealth has executive powers beyond those derived from statute, the prerogative and its capacities as a person. This fourth category of executive power, left nameless by the Court but generally described as the ‘nationhood’ power, remains ill-defined and ill-confined. This article explores the limits on the different categories of executive power, why it was perceived necessary to imply a nationhood power, whether this justification is adequate and how such a power might be limited.]

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I INTRODUCTION

The intersection in the *Commonwealth Constitution* between appropriations, executive power and the power to spend has never been very clear. One point of intersection has been the requirement in s 81 of the *Constitution* that appropriations be for the ‘purposes of the Commonwealth’. Prior to the High Court’s judgment in *Pape v Commissioner of Taxation* (*‘Pape’*),¹ the debate about

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¹ (2009) 238 CLR 1.

Commonwealth appropriations had centred upon the question of what falls within the ‘purposes of the Commonwealth’. Some took the view that the ‘purposes of the Commonwealth’ included anything that the Commonwealth Parliament regarded as a Commonwealth purpose,² while others considered that it was a matter for the courts to determine by reference to the distribution of powers within the *Constitution*.³ The answer depended largely on whether one took a federalist⁴ or a nationalist⁵ view of the *Constitution*.

The High Court in *Pape*, by deciding that s 81 itself did not support the expenditure of money appropriated by the Parliament,⁶ pushed the debate from one concerning ‘purposes of the Commonwealth’ to one concerning whether other constitutional powers support the expenditure of appropriated funds.⁷ The question then arose as to whether those aspects of Commonwealth expenditure that could not otherwise be supported by heads of Commonwealth legislative power could still be supported by the executive power and the associated incidental legislative power.

The majority in *Pape*⁸ held that the Commonwealth government could respond to a global financial crisis by employing short-term fiscal measures to stimulate the economy.⁹ In doing so, their Honours accepted that the executive power of the Commonwealth in s 61 of the *Constitution* supported the expenditure of money appropriated for such a purpose and that the incidental power in s 51(xxxix) supported legislation that regulated the expenditure of the appropriation.¹⁰

French CJ concluded that the executive power extends to ‘short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government.’¹¹ His Honour was concerned to stress, however, that this ‘does not equate it to a general power to manage the

² *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 254 (Latham CJ), 273 (McTiernan J) (*Pharmaceutical Benefits Case*); *Victoria v Commonwealth* (1975) 134 CLR 338, 367–9 (McTiernan J), 396 (Mason J), 417 (Murphy J) (*AAP Case*).

³ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 271 (Dixon J), 282 (Williams J); *AAP Case* (1975) 134 CLR 338, 360–3 (Barwick CJ), 373–4 (Gibbs J).

⁴ See, eg, *AAP Case* (1975) 134 CLR 338, 355–8 (Barwick CJ), 374 (Gibbs J).

⁵ See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J) (*Davis*).

⁶ (2009) 238 CLR 1, 55 [111] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon J).

⁷ ‘[I]t is now settled that [ss 81 and 83 of the *Constitution*] ... do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the *Constitution* or the laws of the Commonwealth’: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 (French CJ, Gummow and Crennan JJ) (citations omitted).

⁸ The majority comprised French CJ, Gummow, Crennan and Bell JJ. Although Hayne and Kiefel JJ partially upheld the validity of the impugned law, they did so on a different basis and therefore are not categorised as being in the ‘majority’ for the purposes of this article. Heydon J dissented.

⁹ The legislation in question was the *Tax Bonus for Working Australians Act [No 2] 2009* (Cth) (*Bonus Act*).

¹⁰ *Pape* (2009) 238 CLR 1, 23–4 [8]–[9], 63–4 [133]–[134] (French CJ), 91–2 [241]–[243] (Gummow, Crennan and Bell JJ).

¹¹ *Ibid* 63 [133].

national economy.¹² Nor did it necessarily amount to a power with respect to matters of ‘national concern’ or ‘national emergency’.¹³ He appeared to be sensitive to the need to confine the scope of his finding.

In contrast, Gummow, Crennan and Bell JJ took a broader view and did appear to rely on the notion of ‘national emergency’. They said that

in considering what enterprises and activities are peculiarly adapted to the government of the country and which cannot otherwise be carried on for its benefit, this case may be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.¹⁴

Their Honours drew an analogy between the powers of the executive government to respond to a national crisis, such as war or natural disaster, and the power to deal with a ‘financial crisis on the scale here.’¹⁵ In doing so, they did not appear to attempt to re-interpret the existing prerogative power with regard to self-protection from internal violence or insurrection so that it also applied to self-protection from a financial crisis. Rather, they justified the existence of such a power by reference to Australia’s status as a nation.

This article examines the various sources of Commonwealth executive power and the different limits that attach to them, either arising from the federal distribution of powers or from the position that the source of the power holds in the hierarchy of laws. It queries whether the additional type of executive power identified by the High Court in *Pape* is necessary and it challenges the cogency of the arguments used to justify its existence. Finally, it considers whether such a power is little more than a means of avoiding the existing limits on Commonwealth executive power and what limits might apply to it.

II THE EXTENT OF COMMONWEALTH EXECUTIVE POWER

Section 61 of the *Constitution* vests the executive power of the Commonwealth in the Queen but does not define it. The only clue given is that it ‘extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.’

As the judgments in *Pape* show, the earlier draft of this provision stated that the executive power of the Commonwealth

shall extend to all matters with respect to which the legislative powers of the Parliament may be exercised, excepting only matters, being within the legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers.¹⁶

It was amended on the suggestion of Sir Samuel Griffith to state that the executive powers of the Commonwealth extend to ‘the execution of the provisions of

¹² *Ibid.*

¹³ *Ibid* 24 [10].

¹⁴ *Ibid* 91 [241].

¹⁵ *Ibid* 89 [233].

¹⁶ *Ibid* 56 [116] (French CJ).

this constitution and the laws of the commonwealth.¹⁷ Griffith stated that this change did not alter the intention of the clause. Rather it gave it a positive statement as to those powers, instead of a negative one.¹⁸ It is clear that the intention was for Commonwealth executive powers to follow the distribution of legislative powers.

It was also clear, however, during the Convention Debates of the 1890s that the term ‘executive power’ was used in its common law sense and included some, if not all, of the prerogatives of the Crown.¹⁹ Edmund Barton, in the Adelaide Convention of 1897, described two classes of executive acts — those exercised by the prerogative and those that are ‘the offsprings of Statutes.’²⁰

In *Pape*, French CJ noted that it was unnecessary to consider the full extent of the powers and capacities of the executive, but he nonetheless identified four classes of executive power that fall within s 61 of the *Constitution*.²¹ The first three classes were:

- 1 The powers conferred upon the executive by statutes enacted by the Commonwealth Parliament pursuant to powers conferred by the *Constitution*. This power is clearly incorporated within the express reference in s 61 to the ‘execution ... of the laws of the Commonwealth.’²²
- 2 The prerogative, being the residue of the monarch’s unique²³ powers, privileges and immunities that belong to the Commonwealth.²⁴
- 3 The power derived from the legal capacities of the Commonwealth,²⁵ such as the power to enter into contracts or agreements, employ staff, own and convey property, make ex gratia payments and spend.²⁶

¹⁷ *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 777.

¹⁸ *Ibid* 777–8 (Sir Samuel Griffith).

¹⁹ See *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 908–9. Note George Reid’s recognition that the prerogatives attached to nationhood, such as the power of making war or peace, would not transfer to the Commonwealth at that time: at 908–9. It was anticipated by Joseph Carruthers that prerogatives could instead be ‘assigned’ to the Governor-General by the Queen under s 2 of the *Constitution*: at 914.

²⁰ *Ibid* 910.

²¹ (2009) 238 CLR 1, 60 [126]–[127]. Note that there are also executive powers derived from other sections of the *Constitution*, such as ss 72 and 119.

²² *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 432 (Knox CJ and Gavan Duffy J). On execution, see generally George Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (2004) 25 *Adelaide Law Review* 21, 25.

²³ The word ‘unique’ is here intended to exclude the capacities of the monarch as a person that may be exercised in common with others. See William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1st ed, 1765) vol 1, 232; H W R Wade, ‘Procedure and Prerogative in Public Law’ (1985) 101 *Law Quarterly Review* 180, 191. Cf A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 424–6, where the prerogative was interpreted as including capacities.

²⁴ Note the argument as to whether immunities and/or privileges are legitimately characterised as prerogatives, or whether they are simply a consequence of the existence of prerogative powers: B V Harris, ‘Replacement of the Royal Prerogative in New Zealand’ (2009) 23 *New Zealand Universities Law Review* 285, 293–4; Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, 3rd ed, 2007) 628–30; Margit Cohn, ‘Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive’ (2005) 25 *Oxford Journal of Legal Studies* 97, 105–6.

French CJ, however, concluded that these three types of powers ‘form part of, but do not complete, the executive power.’²⁷ He stated that the executive power ‘has to be capable of serving the proper purposes of a national government’, but gave no name or source to this fourth type of executive power that goes beyond the recognised categories.

Gummow, Crennan and Bell JJ also concluded that the executive power of the Commonwealth goes beyond those preferences, immunities and exceptions that are commonly identified as the prerogative.²⁸ They saw this executive power as having its ‘roots in the executive power exercised in the United Kingdom’²⁹ but did not explain how it could fall outside the three categories of executive power described above, as these are the only sources of executive power in the United Kingdom. It would seem unlikely that s 61 was intended to confer greater executive power on the Commonwealth than was held by the United Kingdom government.³⁰

While both majority judgments drew on the status of the Commonwealth government as a national government to justify the existence of a fourth category of executive power,³¹ they appeared to eschew any reference to this power as a ‘nationhood power’, despite this being its popular description in the academic literature.³² Indeed, they assiduously avoided giving it any name or description. It is the power that dare not be named. This exacerbates, rather than clarifies, the uncertainty as to the nature of this power. It not only raises doubt about the

²⁵ This category has been given various descriptors in the academic literature, including the ‘common law powers of the Crown’: George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 44–5; the ‘spurious prerogatives’: Wade, above n 23, 198; the ‘third source’ of authority for government action: B V Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 109 *Law Quarterly Review* 626, 626; ‘secondary prerogatives’: Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (Pinter, 1998) 15; and ‘non-statutory powers’: Cohn, above n 24.

²⁶ A similar distinction between prerogative powers and the capacities of the Crown was drawn by Brennan J in *Davis* (1988) 166 CLR 79, 108. It is now regarded as orthodox in Australia: Simon Evans, ‘Continuity and Flexibility: Executive Power in Australia’ in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 89, 93.

²⁷ *Pape* (2009) 238 CLR 1, 60 [127].

²⁸ *Ibid* 83 [214].

²⁹ *Ibid* 89 [233]. Cf *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J), where it was stated that ‘with questions arising in federal jurisdiction, one looks not to the content of the prerogative in Britain, but rather to s 61 of the *Constitution*’.

³⁰ Sarah Joseph and Melissa Castan, *Federal Constitutional Law — A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 157.

³¹ *Pape* (2009) 238 CLR 1, 63 [133] (French CJ), 91–2 [242] (Gummow, Crennan and Bell JJ).

³² See, eg, Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 40–4; P H Lane, *Lane’s Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 130–1; Gabriël Moens and John Trone, *Lumb & Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7th ed, 2007) 209; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 534–45; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law* (LexisNexis Butterworths, 8th ed, 2009) 1034–7; Joseph and Castan, above n 30, 158–72. Cf Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 414–15, where it is referred to as the ‘implied national power’.

subject matter of the power, but it also makes it difficult, if not impossible, to discern the limitations that apply to its exercise.

It is the uncertain content and limits of this power that have given rise to both criticism and concern. In *Pape*, members of both the majority and the minority were conscious of the warning of Dixon J in *Australian Communist Party v Commonwealth* ('*Communist Party Case*') that:

History ... shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.³³

More recent history has also shown that Dixon J was prescient in his warning.³⁴ The President of Fiji and the head of the Republic of Fiji Military Forces, in justification of the 2006 coup d'état in Fiji, both argued that the President held a prerogative power to respond to an emergency and that this prerogative could be exercised as a reserve power to dismiss the government, dissolve the Parliament and establish interim rule by decree.³⁵ The High Court of Fiji concluded that if the head of state 'acts in a crisis without mala fides and addresses the grave problems in a way that he believes honestly addresses those problems whether in peace time or war, the courts will uphold his action'.³⁶ This conclusion is potentially a recipe for lawlessness. It has been used to justify the seizure of power, the removal of democratic representation and the making of laws by executive decree.

The Court of Appeal of Fiji overturned the High Court of Fiji's judgment on two main grounds. First, the *Constitution of Fiji* expressly denied the President any reserve powers other than those expressly conferred by that *Constitution*. The conditions for the exercise of the expressly conferred reserve powers had not been met.³⁷ Secondly, the *Constitution of Fiji* expressly dealt with the subject of national security in a manner that abrogated any prerogative with respect to national security in Fiji.³⁸ The *Commonwealth Constitution*, in contrast, does not confine the Governor-General's reserve powers (other than by convention) and does not include express powers to deal with national security or other emergencies. While no-one would seriously argue that the circumstances that have arisen in Fiji might occur in Australia, it is still the case that judicial recognition of an expansive but ill-defined executive power to deal with 'emergencies' may be unwise, as well as unnecessary.

³³ (1951) 83 CLR 1, 187, quoted in *Pape* (2009) 238 CLR 1, 24 [10] (French CJ), 171 [497] (Heydon J).

³⁴ For further examples to that of Fiji, see Joseph and Castan, above n 30, 152 n 19.

³⁵ See *Qarase v Bainimarama* [2008] FJHC 241 (9 October 2008) [1], [4] (Gates ACJ, Byrne and Pathik JJ). See also Anne Twomey, 'The Fijian Coup Cases: The *Constitution*, Reserve Powers and the Doctrine of Necessity' (2009) 83 *Australian Law Journal* 319.

³⁶ *Qarase v Bainimarama* [2008] FJHC 241 (9 October 2008) [149] (Gates ACJ, Byrne and Pathik JJ).

³⁷ *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009) [94] (Powell, Lloyd and Douglas JJA).

³⁸ *Ibid* [123]. Note that the interim Fijian government rejected the Court's decision and later abrogated the *Constitution of Fiji*.

As Heydon J pointed out in his dissenting judgment in *Pape*, it is far from clear what an ‘emergency’ may be. If the courts defer to the opinion of the executive or the legislature, this would give ‘an “unexaminable” power to the Executive’,³⁹ opening up the risk of the executive suppressing democratic institutions. If the courts do not defer to the executive, by what criteria do they assess what is beyond power?⁴⁰ Hayne and Kiefel JJ raised the same concerns.⁴¹ They pointed out that if it were left to the executive to define an emergency, then the executive’s powers would be self-defining. This is especially problematic these days, as Heydon J pointed out, because so many things seem to be described as an emergency, a crisis, or a war on something.⁴²

Academics have also criticised the amorphous nature of an executive power that extends beyond those conferred expressly by the *Constitution*, legislation or the prerogative. Winterton asked how a court is ‘to apply such a vague and politically-charged criterion without reference to standards such as those provided by the prerogative?’⁴³ He noted that the ‘prerogative is inherently more certain and offers greater guidance to both Government and citizen than vague abstract criteria such as what is an “appropriate” activity for a national government.’⁴⁴

We know, for example, that new prerogative powers cannot be created,⁴⁵ although existing prerogatives may be adapted to meet new factual circumstances.⁴⁶ We know that the prerogative may be abrogated by legislation⁴⁷ and that it may be the subject of judicial review, as long as the subject matter of that power is justiciable.⁴⁸ We also know that the prerogative may not be used to create an offence⁴⁹ and that it cannot support the imposition of a tax⁵⁰ or a

³⁹ *Pape* (2009) 238 CLR 1, 193 [552].

⁴⁰ *Ibid.*

⁴¹ *Ibid* 122–3 [352]–[353].

⁴² *Ibid* 193 [551].

⁴³ Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’, above n 22, 33. See also Lane’s description of the nationhood power as ‘dangerous’, ‘shadowy’ and ‘will-o’-the-wisp’: Lane, above n 32, 130–1.

⁴⁴ Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’, above n 22, 35. Similar criticisms have been made of the ‘inherent’ executive power recognised by the Irish Supreme Court in the absence of prerogative powers: Harris, ‘Replacement of the Royal Prerogative in New Zealand’, above n 24, 306.

⁴⁵ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

⁴⁶ See, eg, *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26; Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 120; Joseph, above n 24, 621–2.

⁴⁷ *A-G (UK) v De Keyser’s Royal Hotel Ltd* [1920] AC 508; *Ruddock v Vadarlis* (2001) 110 FCR 491, 501–4 [33]–[40] (Black CJ), 539–40 [181]–[182] (French J); *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27 (25 August 2010) [14] (French CJ), [94] (Gummow, Hayne, Heydon and Crennan JJ).

⁴⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453 (‘*Bancoult*’).

⁴⁹ *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *Davis* (1988) 166 CLR 79, 112 (Brennan J). See also *Pfeiffer v Stevens* (2001) 209 CLR 57, 89–90 [118] (Kirby J).

dispensation from the application of the law.⁵¹ Its source, scope and limits are therefore more certain than an implied nationhood power.

The use of the prerogative, however, has also been the subject of criticism due to its perceived lack of democratic legitimacy when compared with legislation. Simon Evans has noted that

enacting legislation requires greater openness, scrutiny and democratic deliberation than the exercise of prerogative powers, and the exercise of powers under statute is susceptible to more effective channels of judicial review than the exercise of prerogative powers.⁵²

In the United Kingdom, judges,⁵³ academics⁵⁴ and the government⁵⁵ have preferred the greater democratic legitimacy of legislation over the exercise of the prerogative and sought to limit or supplant the prerogative accordingly. This takes place in a context where there is plenary legislative power so that reliance on the much more limited prerogative is only necessary if the government does not have the time or inclination to ask Parliament to pass the relevant legislation. In Australia, because of the distribution of powers in the federal system, the situation is different. In the absence of express conferral of legislative power on the Commonwealth Parliament by the *Constitution*, the prerogative may be needed to support the exercise of incidental legislative power. In other words, while in the United Kingdom the exercise of legislative power is seen as desirable to supplant the less democratic exercise of prerogative power, in Australia the exercise of legislative power is in some cases dependent upon the existence of the prerogative power. Thus, while the United Kingdom's courts have largely approached the prerogative as an executive power that needs to be carefully limited and constrained, the High Court of Australia has sought to escape such limitations by establishing a further category of executive power which is beyond the prerogative — and hence beyond the limits imposed upon the prerogative.

⁵⁰ *Bill of Rights 1688* (Eng) 1 Wm & M sess 2, c2, art 4; *Bowles v Bank of England* [1913] 1 Ch 57, 84–5 (Parker J); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 433–4 (Isaacs J).

⁵¹ *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1195 (Lord Edmund-Davies); *A v Hayden* (1984) 156 CLR 532, 580–2 (Brennan J); *Ridgeway v The Queen* (1995) 184 CLR 19, 54 (Brennan J).

⁵² Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94, 99. See also Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 22, 35–6; Joseph and Castan, above n 30, 157.

⁵³ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ); *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513; *Bancoult* [2009] 1 AC 453, 490–2 [69]–[71] (Lord Bingham).

⁵⁴ See, eg, Rodney Brazier, 'Constitutional Reform and the Crown' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 337, 356–8; Cohn, above n 24, 102–3. See also, regarding New Zealand: Harris, 'Replacement of the Royal Prerogative in New Zealand', above n 24, 287–8, 313.

⁵⁵ United Kingdom, *The Governance of Britain*, Cm 7170 (2007) 17: 'The Government believes that in general the prerogative powers should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control.'

III LIMITATIONS ON COMMONWEALTH EXECUTIVE POWER

The Commonwealth's executive power is limited in two ways. First, it is externally limited by virtue of the distribution of executive power to different governments. Secondly, it is internally limited by reference to the source of the power and its status in the hierarchy of laws.⁵⁶ It would appear that the underlying reason for a nationhood power is to avoid, to some extent, these external and internal limitations on Commonwealth executive power.

A *The Distribution of Executive Powers*

The distribution of executive powers has arisen in two different contexts. Originally, the limitation on Commonwealth non-statutory executive power was perceived in terms of those prerogatives retained by the United Kingdom government (such as the prerogative to declare war and make treaties) and those prerogatives that could be exercised by Australian governments (such as the prerogative of mercy).⁵⁷ With Australia's acquisition of independence came its acquisition of the full prerogative powers of a nation, including those concerning war and peace, treaties and the appointment of diplomatic representatives.⁵⁸

The debate these days is no longer about which prerogatives were retained by the United Kingdom, but rather how the prerogatives are to be distributed between the Commonwealth and the states in a federation. The *Constitution* distributes legislative power between the Commonwealth and the states by giving express but limited powers to the Commonwealth, most of which are concurrent in nature, and plenary residual powers to the states. It has generally been accepted that executive power follows legislative power.⁵⁹ The Commonwealth has the executive power to execute laws that fall within its legislative heads of power and any associated prerogatives. Prerogative powers with respect to external affairs and defence therefore clearly fall within the Commonwealth's

⁵⁶ Cf Winterton's conceptualisation of the 'breadth' and 'depth' of executive power: Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 38–49. Note Saunders' criticism that the High Court in *Pape* did not clearly distinguish between the breadth and depth of executive power: Cheryl Saunders, 'The Sources and Scope of the Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 261–2.

⁵⁷ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 453–4 (Higgins J).

⁵⁸ See H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 415–22; Zines, *The High Court and the Constitution*, above n 32, 342–3. See also *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27 (25 August 2010) [31] (French CJ).

⁵⁹ *Bonanza Creek Gold Mining Co Ltd v The King* [1916] 1 AC 566, 587 (Viscount Haldane for Lord Buckmaster LC, Viscount Haldane, Lords Parker and Sumner) (regarding the distribution of powers in Canada); *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32, 46–7 (Isaacs, Powers and Rich JJ); *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 320–2 (Evatt J); *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 379 (Gibbs J), 396–7 (Mason J). See also *A-G (Vic) ex rel Victorian Chamber of Manufactures v Commonwealth* (1935) 52 CLR 533, 567 (Starke J).

jurisdiction, while those with respect to property largely fall within state jurisdiction and some, such as Crown privileges and immunities, are shared.⁶⁰

The distribution of non-statutory executive powers becomes more difficult when one gets to the third source of power (as identified by French CJ in *Pape*), which may be described as the ‘capacities’ of the Commonwealth government.⁶¹ These capacities include not only the power to make contracts,⁶² enter into agreements⁶³ and lease buildings,⁶⁴ but also to spend money.⁶⁵ Thus, in the United Kingdom, the making of payments to widowers and the victims of crime has been supported by reference to the capacities of the Crown.⁶⁶

There has been a debate, particularly in the United Kingdom, as to whether this third source of power is derived from the status of the Crown as a person⁶⁷ (ie a corporation sole or corporation aggregate)⁶⁸ or whether it is simply derived from the principle that anyone may legally perform an act which has not been prohibited or otherwise regulated by law.⁶⁹ The issue has been addressed recently by the English Court of Appeal in *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government*, where Carnwath LJ found analogies with the powers of natural persons ‘unhelpful’ and argued that:

As a matter of capacity, no doubt, [the Crown] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably ‘governmental’ purposes within limits set by the law.⁷⁰

Richards LJ, in contrast, accepted that ‘third source’ powers are ‘powers that have not been conferred by statute and are not prerogative powers in the narrow sense but are the normal powers (or capacities and freedoms) of a corporation

⁶⁰ *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 320–1 (Evatt J); *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27 (25 August 2010) [30]–[34] (French CJ), [86]–[89] (Gummow, Hayne, Heydon and Crennan JJ); H V Evatt, *The Royal Prerogative* (Law Book, 1987) 220–38; Lane, above n 32, 437–8.

⁶¹ Note the alternative appellations of this source of power: above n 25.

⁶² *New South Wales v Bardolph* (1934) 52 CLR 455, 474–5 (Evatt J), 496 (Rich J), 502 (Starke J), 509 (Dixon J).

⁶³ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 61 (Barwick CJ), 113 (Aickin J).

⁶⁴ *Town Investments Ltd v Department of the Environment* [1978] AC 359.

⁶⁵ Note that the power to spend, while related to the power to contract, is limited to expenditure authorised by the Parliament through a valid appropriation: Zines, *The High Court and the Constitution*, above n 32, 351.

⁶⁶ See *R (Hooper) v Secretary of State for Work and Pensions* [2006] 1 All ER 487; *R v Criminal Injuries Compensation Board; Ex parte P* [1995] 1 All ER 870.

⁶⁷ *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627, 632 (Hale LJ); Harris, ‘The “Third Source” of Authority for Government Action’, above n 25, 635–6; Vincenzi, above n 25, 15; Cohn, above n 24, 99.

⁶⁸ F W Maitland, ‘The Crown as Corporation’ (1901) 17 *Law Quarterly Review* 131, 140; *Town Investments Ltd v Department of the Environment* [1978] AC 359, 400 (Lord Simon).

⁶⁹ *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 366–7 (Megarry V-C). Note, however, the extensive criticism of this case: see, eg, Zines, *The High Court and the Constitution*, above n 32, 356; Joseph, above n 24, 627–8; Anthony Lester and Matthew Weait, ‘The Use of Ministerial Powers without Parliamentary Authority: The Ram Doctrine’ [2003] *Public Law* 415, 421 (see also the analysis of the Ram doctrine at 419–20).

⁷⁰ [2008] 3 All ER 548, 563 [48].

with legal personality.⁷¹ He also accepted that such powers cannot override the rights of others and are ‘subject to judicial review on ordinary public law grounds’.⁷² However, he did not agree with introducing a qualification that such powers only be exercised ‘for the public benefit’ or for ‘governmental purposes’.⁷³

Waller LJ was more cautious, noting that while he instinctively favoured ‘some constraint on the powers by reference to the duty to act only for the public benefit’,⁷⁴ it was unwise to say more until such a factual circumstance was before the Court and could be fully tested.⁷⁵

The same sorts of arguments arise in relation to the federal distribution of executive power in Australia. If the capacities of the Commonwealth are derived from its corporate status and the Commonwealth is a corporation of limited powers, then it is arguable that its capacities are limited to those subject areas that fall within the Commonwealth’s allocated legislative powers. The arguments about ‘governmental purposes’ also come close to the constitutional requirement that appropriations (and thus expenditure, which falls within the capacities of the Crown) must be for ‘Commonwealth purposes’ that relate to the powers allocated to the Commonwealth by the *Constitution*. Similar arguments have been made with respect to the capacity to undertake inquiries, which must only be exercised for a ‘governmental purpose’, rather than to satisfy ‘an idle curiosity’.⁷⁶ On the other hand, if the Commonwealth simply possesses a power to act where action is not forbidden or regulated by law, such a power may well extend beyond those otherwise allocated to the Commonwealth by the *Constitution*.

This issue remains unresolved in Australia. Some, such as Campbell and Winterton, have taken the view that the capacities of the Crown, as they derive from the status of the Crown as a person, are unlimited. Hence, the Commonwealth government can enter into contracts regardless of whether their subject matter falls within the legislative subject matters conferred upon the Commonwealth.⁷⁷ Others, such as Zines and Seddon, have taken the view that the Commonwealth’s capacity to contract is limited by reference to the powers allocated to the Commonwealth by the *Constitution*.⁷⁸ If one takes the latter

⁷¹ Ibid 570 [73].

⁷² Ibid 570 [74].

⁷³ Ibid.

⁷⁴ Ibid 571 [81].

⁷⁵ Ibid.

⁷⁶ *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 156 (Brennan J); *Boath v Wyvill* (1989) 85 ALR 621, 635 (Sheppard, Beaumont and Gummow JJ). Note, however, Zines’ criticism of distinguishing between the ‘governmental’ and ‘non-governmental’ acts of governments: Leslie Zines, ‘The Inherent Executive Power of the Commonwealth’ (2005) 16 *Public Law Review* 279, 283–4.

⁷⁷ Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14; Enid Campbell, ‘Federal Contract Law’ (1970) 44 *Australian Law Journal* 580; Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 45–6. See also Advisory Committee on Executive Government, *Report of the Advisory Committee of the Constitutional Commission on Executive Government* (The Commission, 1987) 54.

⁷⁸ Zines, *The High Court and the Constitution*, above n 32, 349–58; Nicholas Seddon, *Government Contracts — Federal, State and Local* (Federation Press, 3rd ed, 2004) 55–62. See also

view, which is bolstered with regard to spending by the requirement that appropriations be ‘for the purposes of the Commonwealth’, then one reason (albeit unstated) for the establishment of a ‘nationhood’ power may be to avoid the consequences of a constitutional distribution of executive power that is tied to the distribution of legislative power.

B *Limits Derived from the Source of the Executive Power*

The scope and potential application of executive powers are determined by their source. The different sources include:

- 1 a constitutional provision;
- 2 statute;
- 3 the ancient prerogatives of the Crown; and
- 4 the status of the Crown as a person.

1 *Executive Powers Conferred Expressly by the Constitution*

An executive power expressly conferred upon the Governor-General by a provision of the *Constitution* outside of s 61,⁷⁹ such as the power to appoint judges (s 72), prorogue the Parliament (s 5), dissolve the House of Representatives (s 5), give assent to proposed laws (s 58), or exercise the command of the naval and military forces of the Commonwealth (s 68), must be exercised in accordance with the express terms of the *Constitution*, any implications derived from it and any constitutional conventions regarding the exercise of such powers. While the exercise of such a power might be regulated to some extent by legislation, the power can neither be removed from the Governor-General⁸⁰ nor have its exercise substantively restricted, as this would be contrary to the *Constitution*.⁸¹

2 *Executive Powers Conferred by Statute*

An executive power conferred on the Governor-General, Ministers or Commonwealth officers by statute must be exercised in accordance with the express and implied terms of the statute as well as other statutory and common law requirements, such as the laws governing administrative action. The executive power may be validly exercised in a manner that is inconsistent with common law rights if the statute conferring the power so permits.⁸² The conferral of

J E Richardson, ‘The Executive Power of the Commonwealth’ in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 50, 74–5; Moëns and Trone, above n 32, 244–5.

⁷⁹ The exercise of such powers also falls within s 61 to the extent that the Commonwealth is executing the *Constitution*.

⁸⁰ See Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 98–101.

⁸¹ Richardson, above n 78, 72.

⁸² If a statute is to override, or authorise the executive to override, fundamental common law rights, then express words or a clear and unambiguous intention to do so is required: *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J). See also *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Secretary of State for*

executive power by the statute may also abrogate equivalent prerogative powers, but only if this is done expressly or is clearly intended.⁸³ Parliament may also delegate to the executive the power to make subordinate legislation.⁸⁴ To this extent the executive can make laws that override the common law or prior subordinate legislation. In rare cases, Parliament may delegate power to the executive to make laws that override other statutes.⁸⁵ A later statute that is inconsistent with the exercise of a statutory-based executive power will expressly or impliedly amend the earlier statute and by doing so affect the executive power.

3 Executive Powers That Form Part of the Prerogative

Prerogative powers find their source in the royal authority historically exercised, by custom or necessity, by the monarch. That authority is recognised by the common law and hence defined by the courts, even though its original source lies outside the common law.⁸⁶ That power cannot now be expanded. No new prerogative can be established by the courts.⁸⁷ The prerogative is therefore limited to those powers that can be identified by reference to historical use and which have not been subsequently abrogated by legislation. It falls within a limited and diminishing field.

Apart from the rare prerogative power to legislate with respect to ceded or conquered colonies, which is only held by the United Kingdom government,⁸⁸ the prerogative is an executive power. It nonetheless has the force of law⁸⁹ and may, in particular cases, override common law rights and interests.⁹⁰ It is the courts, in determining the limits of the particular prerogative power, which perform the task of accommodating it with potentially conflicting common law rights. For example, a prerogative power to protect the state in time of war or

the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Lord Hoffman); *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, 621 [27] (Lord Steyn); and *R (Jackson) v A-G (UK)* [2006] 1 AC 262, 318 [159] (Baroness Hale).

⁸³ *British Coal Corporation v The King* [1935] AC 500, 519 (Viscount Sankey LC for Viscount Sankey LC, Lords Atkin, Tomlin, Macmillan and Wright); *Barton v Commonwealth* (1974) 131 CLR 477, 501 (Mason J); *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 552 (Lord Browne-Wilkinson).

⁸⁴ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

⁸⁵ This is known as a Henry VIII clause. See generally Joseph, above n 24, 503–5.

⁸⁶ Butterworths, *Halsbury's Laws of England*, vol 8 (at 31 May 1996) 2 Constitutional Law and Human Rights, '5 The Executive' [368]; Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77, 78–9, 106–7.

⁸⁷ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

⁸⁸ See *Bancoult* [2009] 1 AC 453; Anne Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power' (2009) 9 *Oxford University Commonwealth Law Journal* 47, 54–6.

⁸⁹ Note Wade's test for a genuine prerogative — that it is unique to the Crown and produces legal effects at common law: Wade, above n 23, 193. See also the analysis of that test in Harris, 'Replacement of the Royal Prerogative in New Zealand', above n 24, 290–2.

⁹⁰ Zines, *The High Court and the Constitution*, above n 32, 345–6. Cf the statement by Lord Hoffmann that 'since the 17th century the prerogative has not empowered the Crown to change English common or statute law': *Bancoult* [2009] 1 AC 453, 485 [44]. While the Crown may not 'change' the common law, its prerogative acts may still override common law rights in some circumstances: see, eg, *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

emergency, or to keep the peace, may be exercised in a manner that overrides common law rights to freedom of speech and freedom of movement. It may also support incidental legislation that is coercive in nature.⁹¹ However, the prerogative power to enter into a treaty does not make the treaty self-executing as part of domestic law.⁹²

It has been argued that an executive prerogative (as opposed to a legislative prerogative) may not be exercised in a manner that affects fundamental or 'constitutional' common law rights.⁹³ On this basis, prerogative powers could not be used to authorise torture.⁹⁴ However, this would appear to overstate the position. It is clear that some prerogative powers, such as the power of self-protection of the nation in time of war or internal violence, can affect fundamental common law rights. Whether or not they do so is likely to be assessed by reference to the purpose of the prerogative power. Just as courts will not interpret statutes as affecting or abrogating fundamental common law rights unless the statute expressly so provides or clearly so intends, when interpreting the scope of a prerogative power the courts are likely to do so in a manner that does not affect or abrogate fundamental common law rights unless the purpose of the prerogative clearly requires such an effect.

4 *Executive Powers Derived from the Status of the Crown as a Person*

Unlike the prerogative (in its narrow sense), the capacities of the Crown are not limited to historically exercised powers. The capacities of the Crown extend to anything which can be done by a person which is not prohibited or otherwise regulated by law. Hence, it is a category of enormous scope and one that may grow with new developments, especially in technology. In this, it is quite different from the prerogative.

Secondly, as these powers are the same as those of any person to perform an act that is not otherwise illegal or regulated by law, they cannot affect the common law rights of others⁹⁵ and cannot supplant the exercise of prerogative powers. They are permissive only⁹⁶ and are subject to the law.⁹⁷ The government could not therefore rely on its capacity to enter into agreements to support action enforcing that agreement, such as entering onto private property and seizing

⁹¹ See *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121.

⁹² *Meyer v Poynton* (1920) 27 CLR 436, 441 (Starke J); *Davis* (1988) 166 CLR 79, 112 (Brennan J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J).

⁹³ Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic Public Law: *Bancoult* and the Sources, Status and Content of Common Law Limitations on Prerogative Power' [2009] *Public Law* 697, 705.

⁹⁴ *Bancoult* [2009] 1 AC 453, 482–3 [35] (Lord Hoffman).

⁹⁵ *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, 570 [74] (Richards LJ). See also Harris, 'Replacement of the Royal Prerogative in New Zealand', above n 24, 290.

⁹⁶ Vincenzi, above n 25, 34.

⁹⁷ Richardson, above n 78, 66.

things that were the subject of the agreement, as this would amount to a trespass.⁹⁸

If such powers do not themselves support coercive action, it is doubtful whether the incidental legislative power could be employed to support coercive action.⁹⁹ It must be remembered that s 51(xxxix) only extends to ‘matters *incidental* to the *execution* of any power vested by this *Constitution* ... in the Government of the Commonwealth’.¹⁰⁰ The incidental power could not be used to convert a non-coercive executive power into a coercive one. It might, however, be used to support the effectiveness of the non-coercive power (for example, to require that money spent for a particular purpose only be used for that purpose).

IV THE ‘NATIONHOOD’ POWER

If there is a fourth source of executive power that is derived from Australia’s status as a nation, what limits apply to this power, how can they be discerned from its source, and is its existence the consequence of a desire to avoid the inconvenience of the limits on Commonwealth executive power described above?

A Nationhood and the Federal Distribution of Powers

The use of a nationhood power as a means of avoiding the federal distribution of powers is evidenced by the increasingly loose dicta on the subject. The starting point is the statement by Mason J in the *AAP Case* that the Commonwealth executive (and by virtue of the incidental power, Parliament) should have ‘a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation’¹⁰¹ even where they do not fall within any heads of legislative power allocated to the Commonwealth. This expansion of Commonwealth executive power was made subject to the caveat that such enterprises and activities ‘cannot otherwise be carried on for the benefit of the nation.’¹⁰² This suggests that the area in which the nationhood power can be exercised lies outside the scope of state legislative and executive powers as it concerns matters that are truly ‘national’ in nature.¹⁰³ Mason J was conscious of the federal

⁹⁸ Harris, ‘The “Third Source” of Authority for Government Action’, above n 25, 626–7. Note also the United Kingdom government’s acknowledgement that legislation is required for ‘the imposition of legal obligations, the creation of offences, or the raising of taxes’: United Kingdom, *Parliamentary Debates*, House of Lords, 24 March 2003, vol 646, col WA 59–60.

⁹⁹ Cf *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 166 (French CJ, Gummow and Crennan JJ) where it was noted that s 51(xxxix) had been used to create offences to support the making of grants under the non-coercive s 96 of the *Constitution*.

¹⁰⁰ (Emphasis added). See *Le Mesurier v Connor* (1929) 42 CLR 481, 497–8 (Knox CJ, Rich and Dixon JJ); *Burton v Honan* (1952) 86 CLR 169, 177–8 (Dixon CJ); *Davis* (1988) 166 CLR 79, 111–12 (Brennan J); Cheryl Saunders, ‘Intergovernmental Agreements and the Executive Power’ (2005) 16 *Public Law Review* 294, 310.

¹⁰¹ (1975) 134 CLR 338, 397.

¹⁰² *Ibid.*

¹⁰³ See also *New South Wales v Commonwealth* (1975) 135 CLR 337, 373–4 (Barwick CJ), regarding national control of the seabed and the continental shelf.

distribution of powers and stressed that a wide operation could not be given to the executive power 'merely because ... programmes can be conveniently formulated and administered by the national government.'¹⁰⁴ Barwick CJ, Gibbs J and Mason J all stressed that the attainment of nationhood by the Commonwealth did not affect or destroy the constitutional distribution of powers.¹⁰⁵

In *Commonwealth v Tasmania* ('*Tasmanian Dam Case*'), Deane J regarded the nationhood power as being 'confined within areas in which there is no real competition with the States.'¹⁰⁶ He diluted this principle, however, by noting that:

Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours.¹⁰⁷

Thus, not only could the Commonwealth exercise executive powers (and incidental legislative powers) outside of the subject matters of legislative power distributed to the Commonwealth by the *Constitution*, it could now exercise those powers within state areas of jurisdiction as long as this did not involve 'competition' with the states and was confined to 'truly national endeavours'.

This approach became looser still in *Davis v Commonwealth* ('*Davis*'). Mason CJ, Deane and Gaudron JJ simply observed that the commemoration of the bicentenary is 'pre-eminently the business and the concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power.'¹⁰⁸ They considered the interests of the states in the bicentenary to be 'of a more limited character.'¹⁰⁹ This might seem rather surprising, given that the actual event being celebrated was not the centenary of the establishment of the Commonwealth, but rather the bicentenary of the settlement of the colony of New South Wales, now a state.¹¹⁰ The Commonwealth did not come into existence until almost 113 years after the event being celebrated. Nor could it claim to be the successor of New South Wales, as its borders and nature were different from those of the original colony. Nonetheless, the rest of the Court accepted, without demur, that the celebration of the bicentenary was something more appropriately undertaken by the Commonwealth than the states.¹¹¹

¹⁰⁴ *AAP Case* (1975) 134 CLR 338, 398. Note that Mason J also pointed to s 96 of the *Constitution* as confirming 'that the executive power is not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96.'

¹⁰⁵ *Ibid* 364 (Barwick CJ), 379 (Gibbs J), 398 (Mason J).

¹⁰⁶ (1983) 158 CLR 1, 252.

¹⁰⁷ *Ibid* 252-3.

¹⁰⁸ *Davis* (1988) 166 CLR 79, 94.

¹⁰⁹ *Ibid*.

¹¹⁰ Note that all the other states except Western Australia were initially part of New South Wales as first claimed, and therefore trace their beginnings to the settlement of New South Wales in 1788.

¹¹¹ *Davis* (1988) 166 CLR 79, 104 (Wilson and Dawson JJ), 114 (Brennan J), 119 (Toohey J).

In *Davis*, no attempt was even made to give lip-service to the requirement that this activity could not otherwise be carried on for the benefit of the nation. It is not clear why the bicentenary could not have been celebrated by particular states, especially New South Wales, to which the event was the most relevant. Further, Wilson and Dawson JJ appeared to take up Deane J's approach from the *Tasmanian Dam Case* by concluding that the federal distribution of powers was unaffected,¹¹² despite the Commonwealth exercising its powers in an area of state jurisdiction.

As for the *Pape* case, French CJ recognised, as Mason J had done in the *AAP Case*, that 'the exigencies of "national government" cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the three branches of government for which this *Constitution* provides'.¹¹³ However, in deciding the case, he took up the approach of Deane J in the *Tasmanian Dam Case*, arguing that 'it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional distribution of powers'.¹¹⁴ The obvious response is that it is necessarily an interference with the constitutional distribution of powers to confer on the Commonwealth additional executive powers (and incidental legislative powers) which do not fall within the categories of powers distributed to the Commonwealth by the *Constitution*. It is an even greater interference where those executive powers and associated incidental legislative powers fall within an area of state legislative and executive jurisdiction.¹¹⁵

The judgment of Gummow, Crennan and Bell JJ simply asserted that 'only the Commonwealth has the resources available to respond promptly to the present financial crisis on the scale exemplified by the *Bonus Act*'.¹¹⁶ Their Honours then concluded that Australia's status as a federation does not preclude the Commonwealth from giving effect to such measures and that the *Bonus Act* 'is an example of the engagement by the Executive Government in activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit'.¹¹⁷

Two points may be made in response to the arguments of Gummow, Crennan and Bell JJ. First, the fact that the Commonwealth has retained surplus revenue, rather than distributing it to the states as envisaged by the *Constitution*,¹¹⁸ ought not result in the Commonwealth attaining additional executive and legislative

¹¹² *Ibid* 104.

¹¹³ (2009) 238 CLR 1, 60 [127]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 615 (Kirby J) (citations omitted): 'A characterisation of legislative purposes as "national" is not sufficient to attract the support of the nationhood power if those purposes fall within areas of law-making belonging to the States.'

¹¹⁴ *Pape* (2009) 238 CLR 1, 60 [127].

¹¹⁵ See also Heydon J's concerns that Commonwealth laws regulating the expenditure of money, or regulating a 'national economy', might override state laws: *ibid* 182–3 [522].

¹¹⁶ *Ibid* 91 [241].

¹¹⁷ *Ibid* 91–2 [242].

¹¹⁸ *Constitution* ss 94, 96.

powers. Secondly, the activity of stimulating the economy clearly could have been carried on for the public benefit by other means. The Commonwealth could have stimulated the economy by enacting a law under s 51(ii) to reduce the tax payable by taxpayers or provide rebates of tax already paid. For those who do not pay tax, or pay insufficient tax, the Commonwealth could have stimulated the economy by increasing welfare payments under s 51(xxiiiA). It could also have made grants to states under s 96 on the condition that they distribute them to citizens as required, as indeed it did in relation to first homebuyers. The states themselves could also have stimulated the economy through expenditure on capital projects or making grants to individuals.

It is true that the Commonwealth could not otherwise have used this *particular* means of making direct grants to taxpayers to stimulate the economy. But surely Mason J should not be taken to mean by his test in the *AAP Case* that the Commonwealth can use a particular means to achieve objective X under the nationhood power, where that means would otherwise not be within its power, simply because it could not otherwise use that particular means? On such a basis the test would give to the Commonwealth every power that it does not otherwise have and therefore could not exercise for the benefit of the nation. Such an interpretation would result in the conferral of a grant of plenary executive power to the Commonwealth with associated legislative power through s 51(xxxix). This outcome could hardly be regarded as consistent with the distribution of powers set out in, or the maintenance of, the *Constitution*.

Overall, it would appear fair to say that the nationhood power has been used as a means of thwarting the federal distribution of powers apparent in the *Constitution*. The ‘peculiarly adapted’ part of Mason J’s test has been used to arrogate to the Commonwealth executive powers that fall outside the subject area of the legislative powers allocated to the Commonwealth, both where those powers fall outside of state jurisdiction (because the powers are truly national in nature) and where they fall within state jurisdiction (although for the moment this category appears to be confined to cases where the Commonwealth’s activities predominantly involve spending).

B *The Source of the Nationhood Power*

The greatest difficulty with ascertaining the internal limits on the nationhood power is that the source of that power remains unclear. If one follows the chain of reasoning and authority, one discovers that, like the rope in the Indian rope trick, the nationhood power is floating free, because it is no longer tied to, or can no longer be supported by, the originally identified sources of the power.

Most modern authorities on the nationhood power, including the majority judgments in *Pape*, refer back to the authority of statements made by Jacobs J and Mason J in the *AAP Case*. As the reasoning is different, each will here be traced separately.

1 *Jacobs J and ‘the Maintenance of This Constitution’*

Jacobs J in the *AAP Case* sought simultaneously to derive a nationhood power from the prerogative and the reference in s 61 to the ‘maintenance’ of this *Constitution* and the laws of the Commonwealth. He said that:

The *Constitution* envisages the exercise of the prerogative through the Governor-General in those matters appertaining to the Government of the Commonwealth in its provision by s 61 that the executive power of the Commonwealth extends to the execution and maintenance of the *Constitution* ... Primarily its exercise is limited to those areas which are expressly made the subject matters of Commonwealth legislative power. But it cannot be strictly limited to those subject matters. The prerogative is now exercisable by the Queen through the Governor-General acting on the advice of the Executive Council on all matters which are the concern of Australia as a nation. Within the words ‘maintenance of this *Constitution*’ appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.¹¹⁹

It appears from this passage that the ‘nationhood’ powers referred to were prerogative powers, such as the prerogatives in relation to external affairs, defence of the nation and the protection of national functions from domestic violence. These prerogatives appropriately attach to the Commonwealth rather than the states. Jacobs J also attempted to source these prerogative powers in the reference in s 61 to the ‘maintenance of this *Constitution* and of the laws of the Commonwealth.’¹²⁰

The notion of ‘maintaining’ the *Constitution* and Commonwealth law also accommodates the exercise of executive power to protect the *Constitution* from overthrow or subversion¹²¹ and to protect the rule of law. This is consistent with the earlier identification of such powers in cases such as *Burns v Ransley*,¹²² *R v Sharkey*¹²³ and the *Communist Party Case*.¹²⁴ As Winterton has noted, it is doubtful whether there is any difference in scope between the prerogative powers of self-protection and those powers that might be inferred from the reference to the ‘maintenance’ of the *Constitution* in s 61.¹²⁵

¹¹⁹ *AAP Case* (1975) 134 CLR 338, 405–6.

¹²⁰ *Ibid* 406.

¹²¹ *Pape* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ).

¹²² (1949) 79 CLR 101.

¹²³ (1949) 79 CLR 121.

¹²⁴ (1951) 83 CLR 1.

¹²⁵ Winterton, *Parliament, the Executive and the Governor-General*, above n 25, 32. See also at 33, where Winterton concluded that

one must be wary of conceding to the executive a broad power to ‘maintain’ the *Constitution*; it is far safer to limit the government to those prerogative powers which have survived to the present and have, supposedly, been thought compatible with individual liberty in a democratic society.

The above statement by Jacobs J was adopted by Brennan J in *Davis*.¹²⁶ Like Jacobs J, he accepted that there were three sources of executive power under s 61: statute, the prerogative, and the capacities of the Crown as a legal person.¹²⁷ However, Brennan J seized on the reference to the ‘maintenance of this *Constitution*’ and expanded Jacobs J’s interpretation so that it assigned to the executive functions relating to the ‘protection and *advancement* of the Australian nation.’¹²⁸

This is where the analysis becomes problematic, because it is for the first time slipping outside the recognised prerogatives or capacities of the executive into a new field of ‘national advancement’ which has no apparent boundaries and no clear source.¹²⁹ Nor is any recognition given to the fact that it moves beyond those categories that Brennan J earlier identified as constituting the full scope of executive power. The reliance on the ‘maintenance of the *Constitution*’ as supporting executive power for the ‘advancement’ of the nation is barely plausible, and an expansion of the prerogative to incorporate national advancement is too great a strain.

Nonetheless, these passages by Jacobs J and Brennan J have been used to support the notion that there is a nationhood power outside of the prerogatives and capacities of the Crown. French CJ cited them with approval in *Pape*¹³⁰ and earlier in *Ruddock v Vadarlis*,¹³¹ where he drew on them to conclude that the ‘Executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative’.¹³² In *Pape*, his Honour referred to the collection of statutory and prerogative powers and non-prerogative capacities as forming part of, but not completing, the executive power.¹³³ The nature of the additional power was left unexplained, although there were some references to those who had described it as an ‘inherent’ power.¹³⁴

2 *Mason J and the ‘Peculiarly Adapted’ Test*

The other critical and influential passage from the *AAP Case* came from Mason J. He observed that ‘the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity’.¹³⁵ He gave as authority for this proposition a controversial observation by Dixon J in the *Communist Party Case* that ‘the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51(xxxix) with those of other constitu-

¹²⁶ (1988) 166 CLR 79, 110.

¹²⁷ *Ibid* 108.

¹²⁸ *Ibid* 110 (emphasis added).

¹²⁹ See also the criticism by Heydon J that the phrase is not capable of definition: *Pape* (2009) 238 CLR 1, 190 [540].

¹³⁰ *Ibid* 51 [97], 62–3 [131]–[132].

¹³¹ *Ruddock v Vadarlis* (2001) 110 FCR 481, 539 [180].

¹³² *Ibid* 540 [183].

¹³³ (2009) 238 CLR 1, 60 [127].

¹³⁴ *Ibid* 60–1 [128]–[129].

¹³⁵ *AAP Case* (1975) 134 CLR 338, 397.

tional powers.¹³⁶ Dixon J had referred approvingly to the American view that it is ‘within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities’ by providing for the punishment of treason, insurrection or attempts to interfere with the discharge of government business.¹³⁷

This approach is derived from the principle that, where a body is established and functions are conferred upon it, there is impliedly included an ancillary power to protect itself and its functions so that they can be performed.¹³⁸ It is this principle that supports the conferral of a power of self-protection on Houses of Parliament,¹³⁹ as such a power is ‘necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute.’¹⁴⁰

The power to which Dixon J referred was an implied legislative power — not an executive power in combination with s 51(xxxix). It was an implication that was unnecessary, because the power of self-protection falls within the prerogative powers of the Crown in any case, and therefore falls legitimately within the executive power under s 61 and the associated incidental legislative power in s 51(xxxix) without the need for any constitutional implications. However, as the scope of this prerogative was not made clear by the House of Lords until 1965,¹⁴¹ it is understandable that Dixon J did not rely on the prerogative and sought to rely on implication instead.

In the *AAP Case*, after referring to Dixon J’s implication of legislative power, Mason J went on to state with respect to this implied power:

So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.¹⁴²

While the appearance is given that this is simply an extension of an implied power that had already been recognised by the High Court in earlier cases, this is simply not so. The implied power to which Dixon J referred and which was given some, but limited, support in *Burns v Ransley*¹⁴³ and *R v Sharkey*,¹⁴⁴ was a

¹³⁶ *Communist Party Case* (1951) 83 CLR 1, 188 (Dixon J).

¹³⁷ *Ibid.* See Henry Campbell Black, *Handbook of American Constitutional Law* (West Publishing, 2nd ed, 1897) 340.

¹³⁸ See, eg, *R v Kidman* (1915) 20 CLR 425, 440 (Isaacs J).

¹³⁹ See *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225; *Barton v Taylor* [1886] 11 AC 197, 203 (Earl of Selborne for Earl of Selborne, Lords Blackburn, Monkswell, Hobhouse and Sir Richard Couch); *Willis v Perry* (1912) 13 CLR 592.

¹⁴⁰ *Kielley v Carson* (1842) 4 Moo PC 63, 88; 13 ER 225, 234 (Parke B, for Lords Lyndhurst, Brougham, Denman, Abinger, Cottenham, Campbell, Sir Lancelot Shadwell, Sir N C Tindal, Parke B, Erskine J and Dr Lushington).

¹⁴¹ *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

¹⁴² (1975) 134 CLR 338, 397.

¹⁴³ (1949) 79 CLR 101, 110 (Latham CJ), 116 (Dixon J).

¹⁴⁴ (1949) 79 CLR 121, 148 (Dixon J).

power to protect the Commonwealth and its functions as conferred by the *Constitution*. It was also a legislative power. It had nothing at all to do with the conferral on the Commonwealth of additional executive functions, or ‘enterprises and activities peculiarly adapted to the government of a nation.’ It was a principle that in conferring powers and functions on the Commonwealth, the *Constitution* impliedly gave the Commonwealth the legislative power to protect itself and its capacity to exercise those powers and fulfil those functions.

It is not possible to derive from Dixon J’s implication a broader one that notwithstanding the constitutional distribution of powers, the Commonwealth government also has a power to fulfil functions that can be regarded as ‘peculiarly adapted to the government of a nation’.

In *Davis*, three Justices raised their concern about Dixon J’s implication in the *Communist Party Case* and rejected the notion of an implied legislative nationhood power. Wilson and Dawson JJ stated:

we ... think 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 tend to suggest the existence of some new or independent source of power. The Commonwealth cannot be accorded a legislative power to cross the boundaries between State and Commonwealth responsibility laid down by the *Constitution*.¹⁴⁵

Another three Justices were more equivocal on the point, arguing that it might be possible to reach the same conclusion about the validity of laws concerning the Bicentennial Authority without recourse to ss 61 and 51(xxxix) by relying on Dixon J’s implication in the *Communist Party Case*. However, they thought it unnecessary to pursue this question.¹⁴⁶

The doubt cast on Dixon J’s implication, which had never been supported by a majority of the High Court, is problematic because it cuts away at the foundation of Mason J’s extended implication in the *AAP Case*. This implication of executive power is left hanging without authority and, more importantly, without the cogent constitutional reasoning necessary to support it and determine its scope.¹⁴⁷ Nonetheless, Mason J’s implication was adopted by the majority in the *Pape* case.¹⁴⁸ French CJ went so far as to adopt Mason J’s approach while simultaneously rejecting any suggestion that it was based upon implied power¹⁴⁹ and supporting the comments of Wilson and Dawson JJ in *Davis* that criticised Dixon J’s implication.¹⁵⁰ None of the majority judgments in *Pape* analysed the

¹⁴⁵ *Davis* (1988) 166 CLR 79, 103–4. See also Toohey J agreeing: at 119.

¹⁴⁶ *Ibid* 95 (Mason CJ, Deane and Dawson JJ).

¹⁴⁷ Note Winterton’s criticism that Mason J’s implication ‘merely states conclusions, the legal reasoning apparently being assumed’ and that it is ‘not derived by legal reasoning from its premise’: Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’, above n 22, 27–8.

¹⁴⁸ (2009) 238 CLR 1, 50 [95], 61 [129], 63 [133] (French CJ), 87–8 [228] (Gummow, Crennan and Bell JJ). See also 116 [329] (Hayne and Kiefel JJ), 177–81 [511]–[520] (Heydon J).

¹⁴⁹ *Ibid* 63 [133].

¹⁵⁰ See *Davis* (1988) 166 CLR 79, 101–2 (Wilson and Dawson JJ).

source of Mason J's test and the categorisation of this type of executive power within s 61.

3 *Nationhood — A Necessary Implication?*

The best that one can conclude about the nationhood power is that it finds its source in an implication drawn from s 61 of the *Constitution*¹⁵¹ and 'the existence and character of the Commonwealth as a national government'.¹⁵² Its scope extends beyond self-protection and the prerogatives and appears somehow conceptually related to the types of powers that a national government *should* be able to exercise, regardless of the actual powers distributed to that government by the *Constitution*.

This conclusion is, of course, far from satisfactory. Given all the angst suffered by the High Court about a free-floating implied freedom of political communication and the need to tie it down to a source in the text and structure of the *Constitution* that would define its scope and limits,¹⁵³ it is surprising that the High Court did not take a similar approach to an implied executive nationhood power in *Pape*. This is particularly so because in most cases constitutional implications act as limitations on legislative power,¹⁵⁴ whereas an implied nationhood power actually has the effect of expanding both the executive and the legislative power of the Commonwealth, which may undermine the federal distribution of powers.¹⁵⁵ This was a major concern for the minority in *Pape*.¹⁵⁶

The impression given in the *AAP Case*, *Davis* and *Pape* is that the judges have found it necessary to draw such an implication because otherwise there would be a lacuna in power in Australia and the Commonwealth would be unable to perform the functions necessary for a national government. It has been argued that without it the Commonwealth would have no capacity to:

- 1 defend itself from internal subversion or domestic violence,¹⁵⁷ and respond to emergencies such as war or natural disasters;¹⁵⁸
- 2 deal with the symbols of nationhood, such as the national flag and anthem;¹⁵⁹
- 3 enter into intergovernmental agreements;¹⁶⁰

¹⁵¹ Ibid 93–5 (Mason CJ, Deane and Gaudron JJ), 103–4 (Wilson and Dawson JJ) (rejecting an 'implied' nationhood power beyond the construction of s 61), 119 (Toohey J) (also expressing concern about transgressing the *Constitution*); *Pape* (2009) 238 CLR 1, 63 [133] (French CJ), 89 [232] (Gummow, Crennan and Bell JJ), 119 [337] (Hayne and Kiefel JJ). See also 191 [545], 199 [568] where Heydon J appeared sceptical as to the existence of such a power.

¹⁵² *AAP Case* (1975) 134 CLR 338, 397 (Mason J).

¹⁵³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁵⁴ See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Austin v Commonwealth* (2003) 215 CLR 185; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹⁵⁵ *Pape* (2009) 238 CLR 1, 120 [339] (Hayne and Kiefel JJ), 134 [397], 200–1 [576] (Heydon J).

¹⁵⁶ Ibid 124 [357] (Hayne and Kiefel JJ), 190 [541] (Heydon J).

¹⁵⁷ See *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Communist Party Case* (1951) 83 CLR 1.

¹⁵⁸ See *Pape* (2009) 238 CLR 1, 89 [233] (Gummow, Crennan and Bell JJ).

¹⁵⁹ See *Davis* (1988) 166 CLR 79, 110–11 (Brennan J).

- 4 undertake planning and inquiries at the national level;¹⁶¹ or
- 5 establish and fund national institutions, such as art galleries, museums, scientific research institutes and the like.¹⁶²

It is doubtful, however, whether a nationhood power is needed to support these functions. First, the prerogative extends to the protection by the Commonwealth of itself and its functions.¹⁶³ In relation to external threats, such powers find their source in the defence and external affairs powers and the prerogative powers relating to them. In relation to domestic threats, such an executive power also finds support in the reference in s 61 to the maintenance of the *Constitution* and the laws of the Commonwealth.¹⁶⁴ The prerogative power would appear to include the power to maintain the Queen's peace¹⁶⁵ and ensure public safety when war is imminent or when other emergencies occur that may put public safety at risk, such as '[r]iot, pestilence and conflagration'.¹⁶⁶

Secondly, the prerogative also extends to matters concerning symbols, flags and anthems, as well as celebrations of particular events.¹⁶⁷ The British national flag, the Union Flag, is not governed by legislation, but rather was established by a Royal Proclamation. The British national anthem was established, not by legislation or even a formal act of the prerogative, but rather by custom and practice. Other emblems and symbols are routinely declared or proclaimed by way of a prerogative act. There is no reason to fear that we would be flagless or anthemless in the absence of a nationhood power.

Thirdly, intergovernmental agreements would appear to fall within the capacities of the Crown, as any person or body is capable of making agreements, just as the Commonwealth can enter into contracts and other legal relationships.¹⁶⁸ It

¹⁶⁰ See *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J). See also *R v Hughes* (2000) 202 CLR 535, 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁶¹ See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 257 (Latham CJ); *AAP Case* (1975) 134 CLR 338, 397 (Mason J), 412 (Jacobs J).

¹⁶² See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254 (Latham CJ); *AAP Case* (1975) 134 CLR 338, 397 (Mason J), 419 (Murphy J); *Davis* (1988) 166 CLR 79, 110–11 (Brennan J); *Pape* (2009) 238 CLR 1, 50 [95] (French CJ).

¹⁶³ See Zines, 'The Inherent Executive Power of the Commonwealth', above n 76, 289; H P Lee, *Emergency Powers* (1984).

¹⁶⁴ Note the debate as to whether this power extends beyond the prerogative: see Zines, 'The Inherent Executive Power of the Commonwealth', above n 76, 289–90.

¹⁶⁵ *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26. Note Zines' criticism of this case and his hope that it would not be followed in Australia: *ibid* 287.

¹⁶⁶ *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 115 (Viscount Radcliffe). Note, however, the relevance of s 119 of the *Constitution* and the right of the states to deal with domestic violence within a state until the aid of the Commonwealth is called upon.

¹⁶⁷ See, eg, Chitty's discussion of the use of royal proclamations for appointing 'fasts' and 'days of thanksgiving and humiliation': Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 105.

¹⁶⁸ See, eg, *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 410–11 (Dixon J), where his Honour acknowledged that the power to enter into an intergovernmental agreement is one vested in the Commonwealth government by the *Constitution*. See also *South Australia v Commonwealth* (1962) 108 CLR 130, 149 (McTiernan J), 149 (Taylor J) regarding the similarities

would appear that the Commonwealth could validly enter into intergovernmental agreements if the subject matter of the agreement falls within the matters upon which the Commonwealth could legislate,¹⁶⁹ matters with respect to which it could make grants under s 96 of the *Constitution*¹⁷⁰ or matters in which the Commonwealth and the States have ‘joint interest’.¹⁷¹

Fourthly, the power to undertake inquiries either falls within the royal prerogative or the capacities of the Crown, depending upon one’s definition of the prerogative and the nature of the inquiry.¹⁷² While the Commonwealth may inquire into any matter, where the ‘subject matter of the inquiry lies outside the field of Commonwealth power, the Commonwealth cannot constitutionally confer compulsive powers on any body set up to make the inquiry.’¹⁷³ A commission of inquiry can only exercise coercive powers if they are conferred by legislation.¹⁷⁴

The most difficult category is the fifth category, of funding for bodies such as national museums, art galleries, the Commonwealth Scientific and Industrial Research Organisation (‘CSIRO’) and other national institutions. Scientific research, the arts and culture can all be funded and supported at the state level, either directly by the states or through s 96 grants from the Commonwealth, so there is no real necessity for them to operate at the Commonwealth level. Nor is it readily apparent why a national scientific body produces any greater value to the nation than a state scientific body, such as one attached to a state hospital or

and differences between contracts and intergovernmental agreements; Saunders, ‘Intergovernmental Agreements and the Executive Power’, above n 100, 306.

¹⁶⁹ In some cases the Commonwealth may legislate to authorise the making of an agreement: see, eg, *National Health Act 1953* (Cth) s 11; *Quarantine Act 1908* (Cth) s 11. Intergovernmental agreements may also be attached as a schedule to legislation: see, eg, *Financial Agreement Act 1994* (Cth) sch (‘*Financial Agreement (1994)*’).

¹⁷⁰ See *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 166 (French CJ, Gummow and Crennan JJ) and the discussion of the use of ss 96 and 51(xxxix) to support legislation implementing an intergovernmental agreement.

¹⁷¹ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *R v Hughes* (2000) 202 CLR 535, 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 164–5 [29] (French CJ, Gummow and Crennan JJ). Note also the argument that the ‘maintenance’ of the *Constitution* imports intergovernmental cooperation and therefore supports intergovernmental agreements: Saunders, ‘Intergovernmental Agreements and the Executive Power’, above n 100, 306.

¹⁷² In *Clough v Leahy* (1905) 2 CLR 139, 156–7, Griffith CJ concluded that the power to inquire falls within the capacities of the Crown as it is possessed by every person. However, the grant of a royal commission by letters patent involves the exercise of the prerogative: *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 93–4 (Dixon J); *Lockwood v Commonwealth* (1954) 90 CLR 177, 185–6 (Fullagar J); *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 88 (Mason J), 139 (Wilson J), 155–6 (Brennan J).

¹⁷³ *Lockwood v Commonwealth* (1954) 90 CLR 177, 182 (Fullagar J). See also *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 655–6 (Viscount Haldane LC for Viscount Haldane LC, Lords Dunedin, Shaw and Moulton); *Ross v Costigan* (1982) 41 ALR 319, 329–30 (Ellicott J).

¹⁷⁴ *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 655 (Viscount Haldane LC, for Lords Dunedin, Shaw and Moulton); *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 83, 91, 98–9 (Dixon J); *Ross v Costigan* (1982) 41 ALR 319, 330 (Ellicott J); *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 126 (Wilson J); *Herald & Weekly Times Ltd v Woodward* [1995] 1 VR 156, 158 (Brooking J); *Egan v Willis* (1998) 195 CLR 424, 472 (McHugh J).

university.¹⁷⁵ However, it is arguable that such Commonwealth bodies are supported by the prerogative power to establish, fund¹⁷⁶ and regulate the public service and the departments and agencies by which it is organised.¹⁷⁷

Just as the Commonwealth government can establish a Department of Education, even though it has no legislative power with respect to education, it may also be able to establish and run other public sector bodies such as the CSIRO, art galleries, sports institutes and the like.¹⁷⁸ This does not give the Commonwealth Parliament power to make laws with respect to education, scientific research, art or sport.¹⁷⁹ Rather, the Commonwealth could only rely on its executive power to establish such public sector bodies in order to enact laws incidental to the execution of this power — being laws with respect to the management, funding and operation of such bodies.

Further, most national institutions will be supported by the territories power in s 122 and the associated executive powers,¹⁸⁰ as most are to be found in the national capital in the Australian Capital Territory. In addition, to the extent that such bodies are established outside of the Australian Capital Territory, they are likely to be in ‘places acquired by the Commonwealth for public purposes’ and therefore the subject of exclusive Commonwealth legislative and executive power pursuant to s 52 of the *Constitution*. Other Commonwealth powers may also be employed to support such institutions.¹⁸¹

The fear that the Commonwealth will be crippled in the absence of an implied ‘nationhood power’ does not appear to be made out — at least in relation to the facts of the relevant cases and the concerns raised by judges in dicta. This is not to say that in the future there might not be a good argument that by necessity a particular power should be impliedly vested in the Commonwealth. The case has simply not yet been made out. Certainly, the High Court failed to make out such a case in *Pape*. On the facts of that case it was abundantly clear that the desired economic stimulus could have occurred by other means and that there was no necessity to seek to expand the executive power to accommodate an implied nationhood power.

¹⁷⁵ Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’, above n 22, 28.

¹⁷⁶ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ).

¹⁷⁷ See also *Constitution* s 64, which refers to the executive power to ‘appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.’ While in the United Kingdom the civil service has operated for centuries on the basis of prerogative powers, it has recently been given a statutory basis for its management: *Constitutional Reform and Governance Act 2010* (UK) c 25.

¹⁷⁸ The CSIRO, the National Gallery of Australia and the National Museum of Australia are all Commonwealth authorities within the meaning of the *Commonwealth Authorities and Companies Act 1997* (Cth) s 7. See *Science and Industry Research Act 1949* (Cth) s 8; *National Gallery Act 1975* (Cth) s 4; *National Museum of Australia Act 1980* (Cth) s 4.

¹⁷⁹ See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 256–7 (Latham CJ).

¹⁸⁰ ‘There can be no objection in my opinion to the Commonwealth, in the absence of any statutory provisions, establishing parks, gardens, sports grounds, tourist facilities and the like upon land it possesses in Canberra’: *Johnson v Kent* (1975) 132 CLR 164, 170 (Barwick CJ).

¹⁸¹ See, eg, *Pape* (2009) 238 CLR 1, 116 [329], where Hayne and Kiefel JJ raised the question, but did not determine, whether the establishment of the CSIRO could be supported by the patents power.

C *The Limitations on the Nationhood Power*

Assuming, however, that a nationhood power exists and that it finds its source in s 61, based on an implication derived from the Commonwealth's status as a national government, what is its standing in the hierarchy of laws? Does it have the same status as express constitutional powers or implied constitutional freedoms, which cannot be altered or repealed by legislation? Is it more akin to a prerogative power, so that it can be abrogated by legislation but can still prevail over common law rights in some circumstances? Does it have the same status as the capacities of the Crown, which are subject to all other laws, be they found in statute or the common law?

These questions were not addressed by the majority in *Pape*. While some reference was made to limitations on executive power generally, such as the inability of the executive to dispense with obedience to the law or to create a new offence,¹⁸² no distinction was made between the different types of executive power and where the nationhood power fits within them. It seems to have been assumed that the power is largely facultative in nature. Despite the fact that Mason J's implication in the *AAP Case* derived from Dixon J's implication of a power of self-protection, which would appear to be coercive in nature, Mason J's implication referred not to the executive exercising *power*, but rather to it having a 'capacity to engage in *enterprises and activities* peculiarly adapted to the government of a nation'.¹⁸³ Thus, the nationhood power would appear to be one that enables activities to take place, rather than one that supports a law that prevents or prohibits actions or that controls or regulates them. It would therefore seem akin to the capacities of the Commonwealth as a person. In *Pape*, Gummow, Crennan and Bell JJ curiously described the relevant executive act under s 61 as 'determining that there is the need for an immediate fiscal stimulus to the national economy',¹⁸⁴ rather than the act of expending appropriated money by the making of grants to taxpayers. Both, however, could also be categorised as capacities of the Commonwealth in the absence of any nationhood power, except for the fact that they do not appear to fall within the federal distribution of powers to the Commonwealth.

Gummow, Crennan and Bell JJ also raised an additional potential limitation on this power. They suggested that the power to expend may be impliedly limited by the express limitations imposed by the *Constitution* on the power to tax.¹⁸⁵ Such a connection had previously been raised by Latham CJ in the *Pharmaceutical Benefits Case*. He noted that the *United States Constitution* confers upon Congress the power to collect taxes 'and provide for the common defense and general welfare of the United States'.¹⁸⁶ This relationship between the power to

¹⁸² *Ibid* 87 [227], 92 [244] (Gummow, Crennan and Bell JJ). See also at 24 [10] (French CJ), regarding coercive laws.

¹⁸³ *AAP Case* (1975) 134 CLR 338, 397 (Mason J) (emphasis added).

¹⁸⁴ (2009) 238 CLR 1, 89 [232].

¹⁸⁵ *Ibid* 90 [238].

¹⁸⁶ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254–5. See *United States Constitution* art I § 8.1.

tax and the power to spend in the same provision resulted in the conclusion that as the power to tax is unlimited, so is the power to spend.¹⁸⁷ Latham CJ noted, however, that such an argument ‘does not apply to the *Australian Constitution*, because there is not the same collocation and association of words.’¹⁸⁸ In contrast, in *Pape*, Gummow, Crennan and Bell JJ suggested instead that the limitations imposed upon the taxation power with respect to discrimination between states or parts of states (s 51(ii)) and preferences to states or parts of states (s 99) may affect the ‘scope of the executive power to support a law resting on s 51(xxxix).’¹⁸⁹ This could also potentially have ramifications for Commonwealth spending through s 96 grants, particularly where the grant acts as a rebate in part or in full of the application of a Commonwealth tax in a State, with the practical effect that a tax is being applied in a discriminatory or preferential fashion.¹⁹⁰

More commonly, however, the High Court’s concern about limits on the nationhood power has been directed at the question of whether such a facultative executive power could give rise to valid regulatory or coercive laws.¹⁹¹ This requires consideration of the nature and scope of the express incidental power, in addition to any restrictions that may flow from the nature of an executive nationhood power.

In *Davis*, Brennan J addressed the question of the extent to which the power to legislate incidentally to the execution of the nationhood power could be exercised in a coercive manner. He observed:

Punishment may be necessary to protect the Executive Government’s execution or attempted execution of its powers from being frustrated or impaired. But it is one thing to create offences in order to protect the efficacy of execution of executive power; it is another to create offences to supplement what the Executive Government has done or proposes to do. Where the Executive Government engages in activity in order to advance the nation — an essentially facultative function — the execution of executive power is not the occasion for a wide impairment of individual freedom ... In my opinion, the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the

¹⁸⁷ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 255 (Latham CJ), citing *United States v Butler*, 297 US 1 (1936); *Helvering v Davis*, 301 US 619 (1937); and *Charles C Steward Machine Co v Davis*, 301 US 548 (1937).

¹⁸⁸ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 255.

¹⁸⁹ (2009) 238 CLR 1, 90 [237]–[238].

¹⁹⁰ See *W R Moran Pty Ltd v Deputy Commissioner of Taxation (NSW)* [1940] AC 838, 858 (Viscount Maugham for Viscount Maugham, Lords Atkin, Russell of Killoween, Wright and Porter). Note also the High Court’s finding in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 [46] (French CJ, Gummow and Crennan JJ), 206 [174] (Heydon J) that s 96 is subject to s 51(xxxi). Hayne, Kiefel and Bell JJ considered it unnecessary to decide this point: at 199 [141].

¹⁹¹ See, eg, the dicta in *Tasmanian Dam Case* (1983) 158 CLR 1, 203–4 (Wilson J), 252–3 (Deane J). See also Kirby J’s comment that it is highly doubtful that the executive power or an implied nationhood power could support the serious and burdensome consequences of criminal proceedings: *R v Hughes* (2000) 202 CLR 535, 583 [119].

efficacy of the execution by the Executive Government of its powers and capacities.¹⁹²

In *Pape*, the impugned law not only involved the expenditure of money by the Commonwealth; it also regulated that expenditure and gave rights to taxpayers to receive the amounts, and imposed a duty on the Commissioner to expend the amounts.¹⁹³ Nonetheless, if Brennan J's approach to the incidental power were adopted, such a law would be valid under s 51(xxxix) because it supports and protects the efficacy of the executive's acts.¹⁹⁴

In *Davis*, Mason CJ, Deane and Gaudron JJ took a different approach to the incidental power. They bluntly stated that the 'implied legislative power, as well as the incidental power (s 51(xxxix)), enables Parliament to enact coercive laws'.¹⁹⁵ They did not draw any distinction between the different types of executive power that could be supported by the incidental power. However, their Honours narrowed the application of the incidental power by applying a proportionality test, finding that some of the laws in question were 'grossly disproportionate' to the protection of the bicentenary and an 'extraordinary intrusion into freedom of expression [which] is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.'¹⁹⁶

There are two possible explanations for this approach. One is that the nationhood power is to be regarded as a 'purposive' power,¹⁹⁷ in the same way as the defence power¹⁹⁸ or the external affairs power (with regard to the implementation of treaties),¹⁹⁹ leading to the application of a proportionality test as part of the characterisation of the law. This might make sense if the nationhood power were regarded as an implied legislative power that was directed at a particular purpose, but the analysis is more difficult if it is an executive power supported by the express incidental legislative power in s 51(xxxix).

The second possibility is that a proportionality test is being used as a means of assessing the connection between the incidental power and the executive power.²⁰⁰ This approach later reached its high-water mark in *Nationwide News Pty Ltd v Wills*, where Mason CJ stated that 'even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to

¹⁹² *Davis* (1988) 166 CLR 79, 112–13 (citations omitted). See also the application of this principle: at 116.

¹⁹³ (2009) 238 CLR 1, 182–3 [522] (Heydon J).

¹⁹⁴ *Ibid* 120–1 [342] (Hayne and Kiefel JJ).

¹⁹⁵ *Davis* (1988) 166 CLR 79, 99, citing *Burns v Ransley* (1949) 79 CLR 101.

¹⁹⁶ *Ibid* 100.

¹⁹⁷ See, eg, Joseph and Castan, above n 30, 82; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 22.

¹⁹⁸ See, eg, *Communist Party Case* (1951) 83 CLR 1, 273–4 (Kitto J).

¹⁹⁹ See, eg, *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²⁰⁰ See H P Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 126, 136–40; Kirk, above n 197, 21–42.

the pursuit of an end within power'.²⁰¹ In making that assessment, he also took into account whether the law causes 'any infringement of fundamental values traditionally protected by the common law, such as freedom of expression'.²⁰² In *Leask v Commonwealth*, the High Court re-focused the use of a proportionality test as one consideration in determining whether there is a sufficient connection between the incidental law and the substantive head of power.²⁰³

What is interesting about the *Pape* case is that no attempt was made to apply a proportionality test, either because the nationhood power is purposive in nature or to test the connection between the incidental power and the executive power. Nor was there any close analysis of the legislation and whether it fell within the incidental power. French CJ merely concluded that the law was supported by the incidental power,²⁰⁴ while Gummow, Crennan and Bell JJ accepted that s 51(xxxix) did not empower the Parliament to make laws 'creating rights and imposing duties which were not incidental to the execution of another head of legislative power',²⁰⁵ but concluded that the impugned law did not amount to 'a use of s 51(xxxix) of such a character'.²⁰⁶ Perhaps this was because the legislation in *Pape* was not overly coercive in nature (even though it was regulatory),²⁰⁷ or perhaps the Court took a different view about the relationship between the incidental power and the executive power. The silence on the subject is notable.

V CONCLUSION

The major problem with the *Pape* case is that the majority relied on an implied executive nationhood power without giving adequate justification for that reliance and without clearly explaining how that power is to be implied from the text and structure of the *Constitution*, and what limits necessarily apply to it. There is little more in the judgments than bald assertions and references back to prior judgments that themselves fail adequately to ground such an implied power in the *Constitution*. Given the inherent dangers involved in vague, undefined executive powers, the likely use of this power to undermine the federal distribution of powers in the *Constitution* by expanding Commonwealth executive and legislative power, and the High Court's previously expressed concern about free-floating implications that are not grounded adequately in the text and structure of the *Constitution*, more could have been expected. Moreover, there was no necessity for the Court to travel this route, as the Commonwealth could have achieved its fiscal stimulus aims by other constitutionally valid means.

As cases on executive power come rarely to the High Court, the *Pape* case was a lost opportunity for the Court to examine, categorise and limit the executive

²⁰¹ (1992) 177 CLR 1, 30.

²⁰² *Ibid* 31.

²⁰³ (1996) 187 CLR 579, 605 (Dawson J), 616 (Gaudron J), 617–18 (McHugh J), 636 (Kirby J).

²⁰⁴ *Pape* (2009) 238 CLR 1, 64 [134].

²⁰⁵ *Ibid* 92 [244].

²⁰⁶ *Ibid* 92 [245].

²⁰⁷ Note the suggestion that '[i]t is difficult to see how proportionality can be relevant when examining the validity of a facultative law': Joseph and Castan, above n 30, 168 n 64.

power. Instead, it has left an implied executive nationhood power floating untethered above the *Constitution*, to be used in the future as a justification for Commonwealth legislation on anything that the Commonwealth regards as an 'emergency' that it considers can best be addressed by the Commonwealth financial power. It is one more step away from a federation towards Commonwealth hegemony.