THE RELATIONSHIP BETWEEN THE ROYAL PREROGATIVE AND STATUTE IN AUSTRALIA

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It is a longstanding principle that a prerogative of the Crown may be abrogated, curtailed or displaced by a statute that directly regulates the same subject matter. This article examines the application of this 'displacement principle' in Australian case law and its interaction with principles of statutory interpretation. It offers an analysis of the interpretive approach that has been adopted by Australian courts in ascertaining whether the prerogative has been displaced by statute. It interrogates a core feature of this approach, namely, the adoption of a strong presumption against displacement of prerogative powers that are important to national sovereignty and the functioning of the executive government. It is argued that the application of this presumption has prevented the full expression of the displacement principle in Australia and should be reconsidered.

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I Introduction

The royal prerogative remains an important source of authority for government action in Australia. The power to declare war and peace,[1] enter into treaties with foreign governments,[2] request the surrender and extradition of fugitives from foreign states,[3] call out the military to maintain the peace,[4] and exclude non-citizens from Australia[5] are all executive acts that are understood as falling within the prerogative. In his Honour's tripartite classification of prerogative powers in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* ('*Farley's Case*'), Evatt J referred to these powers as the 'executive prerogatives' that were generally vested exclusively in the Crown in right of the Commonwealth of Australia.[6] Today, these prerogative powers are exercised by Commonwealth ministers or the Governor-General, who almost always acts on ministerial advice.[7]

The term 'prerogative' refers collectively to the bundle of discretionary rights, powers, privileges and immunities that were enjoyed exclusively by the Monarch in the United Kingdom ('UK'). The prerogative has been described as 'a relic of a past age',[8] left over from a time when the Monarch was directly

[1] *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J) ('*Farey*').

[2] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 635–6 (Latham CJ), 681 (Evatt and McTiernan JJ) ('*Burgess*'); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193 (Gibbs CJ).

[3] *Barton v Commonwealth* (1974) 131 CLR 477, 485 (Barwick CJ), 498–9 (Mason J), 505–6 (Jacobs J) ('*Barton*'); *Oates v A-G (Cth)* (2003) 214 CLR 496, 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ) ('*Oates*').

[4] See *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 44 (Croom-Johnson LJ), 45–6 (Purchas LJ), 58–9 (Nourse LJ) ('*Northumbria*'). In Australia, the exercise of this power would be subject to s 119 of the *Australian Constitution*. It is unclear whether, and to what extent, this prerogative has survived the enactment of pt IIIAAA of the *Defence Act 1903* (Cth) ('*Commonwealth Defence Act*'), which sets out a comprehensive regime for the deployment of the Australian Defence Force when it is called out to protect the states against domestic violence or to protect Commonwealth interests. This question has not yet received judicial consideration.

[5] See *Ruddock v Vadarlis* (2001) 110 FCR 491, 495–501 [9]–[29] (Black CJ) ('*Tampa Case*').

[6] (1940) 63 CLR 278, 320–1 ('*Farley's Case*'). The prerogative powers of the Crown also include legal preferences, immunities and exceptions which were denied to its subjects and certain proprietary rights: at 321.

[7] The Governor-General is generally not required to act on advice in the exercise of 'reserve powers', which resemble the personal prerogatives of the Monarch. The exercise of reserve powers is guided by the conventions of responsible government: see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 6–7. There are some prerogative powers that are expressly contemplated by the *Australian Constitution*. These powers are not the subject of this article.

[8] *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101 (Lord Reid) ('*Burmah Oil*').

involved in the administration of government.[9] A defining characteristic of the prerogative is that it can be exercised independently of legislation, but its precise content and scope otherwise remain uncertain.

While the prerogative can be exercised without statutory authorisation, it is subject to limitations derived from the common law. These limits have been cited by some constitutional scholars in support of confining the scope of Commonwealth executive power to the prerogative.[10] Prerogative powers can lapse due to disuse.[11] The prerogative is also limited to historically exercised powers.[12] While the prerogative can evolve and adapt to changing circumstances, new prerogatives cannot be created.[13] The executive government cannot exercise the prerogative to deprive a person of liberty or interfere with their private property,[14] create an offence,[15] raise taxes,[16] or compel persons to give evidence or produce documents in relation to a government inquiry.[17] Nor can the prerogative be exercised to change statutes or the common law.[18]

[9] Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8(1) *International Journal of Constitutional Law* 146, 147 ('Royal Prerogative').

[10] See especially George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 31–4, 115–16, 137–9 ('*Parliament*'); George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25(1) *Adelaide Law Review* 21, 35–6 ('The Relationship'); Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, "Nationhood" and the Future of the Prerogative' (2012) 12(1) *Oxford University Commonwealth Law Journal* 97, 122–3.

[11] *Tampa Case* (n 5) 498 [19]–[20], 500–1 [29]–[30]. See also Winterton, *Parliament* (n 10) 119–20.

[12] *British Broadcasting Corporation v Johns* [1965] 1 Ch 32, 79 (Diplock LJ).

[13] See, eg, *Northumbria* (n 4) 44 (Croom-Johnson LJ), 55 (Purchas LJ), 56, 58–9 (Nourse LJ); Winterton, *Parliament* (n 10) 120–1; George Winterton, 'The Prerogative in Novel Situations' (1983) 99 (July) *Law Quarterly Review* 407, 407–8; Gerangelos (n 10) 122; Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 319 ('Pushing the Boundaries').

[14] *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 79 (Isaacs J); *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807, 817 (Lord Camden CJ).

[15] *Davis v Commonwealth* (1988) 166 CLR 79, 112 (Brennan J) ('*Davis*').

[16] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 433–4 (Isaacs J) ('*Wooltops Case*').

[17] *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 83 (Latham CJ), 91 (Starke J), 98–9 (Dixon J), cited in *Tampa Case* (n 5) 501 [31] (Black CJ).

[18] *Case of Proclamations* (1610) 12 Co Rep 74; 77 ER 1352, 1353 (Coke CJ). See *Bill of Rights 1688*, 1 Wm & M sess 2, c 2. See also *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 75 [25]–[28] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ), 159 [122] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC) ('*Miller*'). Professor Anne Twomey has suggested that this

As the prerogative originated from the UK under a system of parliamentary sovereignty, it is susceptible to control by the Parliament.[19] The relationship between the prerogative and statute was clarified in the important and influential decision of the House of Lords in *Attorney-General v De Keyser's Royal Hotel Ltd* ('*De Keyser*').[20] That case laid down the principle that 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament'.[21] In these circumstances, the prerogative is to be regarded as abrogated, abridged or 'displaced'[22] by the statute. The statutory displacement of the prerogative may occur by express words or by necessary implication.[23]

proposition may not be entirely accurate because the exercise of the prerogative may affect the *application* of the common law: see Anne Twomey, '*Miller* and the Prerogative' in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing, 2018) 69, 73–6.

19 *Miller* (n 18) 75 [25] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ), 139 [48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

20 [1920] AC 508 ('*De Keyser*').

21 This is the statement of principle that has been approved by a plurality of the High Court of Australia in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 69–70 [85] (McHugh, Gummow and Hayne JJ) ('*Jarratt*'), quoting *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J) ('*Henderson's Case*'), and a majority of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Arnhem Land Trust*'). See also *De Keyser* (n 20) 526 (Lord Dunedin), 539–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner), 575 (Lord Parmoor).

22 This article refers to 'displacement' of the prerogative by statute. 'Displacement' has been used interchangeably with terms such as 'abrogation', 'abridgement' or 'ouster' of the prerogative: see, eg, John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in Attorney-General v De Keyser's Royal Hotel Ltd' (1974) 48 (September) *Australian Law Journal* 434, 438; Winterton, 'The Relationship' (n 10) 43 n 150; Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41(2) *Federal Law Review* 363 ('Democracy, Liberty and the Prerogative'). In *Oates v A-G (Cth)* (2001) 181 ALR 559, 569 [40], Lindgren J interpreted 'displaced' as 'including the notion of partial displacement, that is, confinement, restriction or limitation' of the prerogative. This wider conception of displacement will be adopted in this article.

23 *De Keyser* (n 20) 576 (Lord Parmoor). See also *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643, 719–21 (Roskill LJ) ('*Laker Airways*'); *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 552 (Lord Browne-Wilkinson) ('*Fire Brigades Union*'); *Miller* (n 18) 139–40 [48].

This principle, which will be referred to in this article as the 'displacement principle',[24] has been incorporated in Australian case law,[25] but has received relatively little judicial consideration or attention from scholars.[26] However, we are now living in an 'age of statutes'.[27] The vast majority of executive powers are conferred and regulated by legislation.[28] The question of whether non-statutory executive powers, including prerogative powers, have been altered or displaced by legislation is an important one that courts will be required to grapple with as a result of this proliferation of statutes. Australian courts have also insisted on increased parliamentary oversight of executive action that was historically undertaken in the absence of statutory authorisation, such as the capacity to

[24] This principle has been referred to as the 'abeyance principle' in the United Kingdom ('UK'), which has been distinguished from the 'frustration principle': Robert Craig, 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79(6) *Modern Law Review* 1041, 1046 ('Medieval Chains'); Robert Craig, 'A Simple Application of the Frustration Principle: Prerogative, Statute and *Miller*' [2017] (November Supplement) *Public Law* 25, 28–9, 33 ('A Simple Application'). There are obiter dicta to suggest that the prerogative is not extinguished by the statute but is held in abeyance until the statute is repealed: *De Keyser* (n 20) 539–40 (Lord Atkinson), 554 (Lord Moulton), 562 (Lord Sumner). However, as this question has not been authoritatively determined, it is preferable to adopt the terminology of 'displacement' rather than 'abeyance': see also Winterton, 'The Relationship' (n 10) 43 n 150.

[25] *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 514 (Latham CJ) ('*Uther's Case*'); *Barton* (n 3) 488 (Barwick CJ), 501 (Mason J); *Brown v West* (1990) 169 CLR 195, 202, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) ('*Brown*'); *Ling v Commonwealth* (1994) 51 FCR 88, 92 (Gummow, Lee and Hill JJ) ('*Ling*'); *Henderson's Case* (n 21) 459 (McHugh J); *Tampa Case* (n 5) 501 [33] (Black CJ), 539–40 [181]–[182] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Jarratt* (n 21) 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–5 [129] (Callinan J); *Arnhem Land Trust* (n 21) 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–1 [279] (Kiefel J) ('*CPCF*'); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ) ('*Cadia*').

[26] But see Saunders, Democracy, Liberty and the Prerogative (n 22); Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13(2) *Public Law Review* 94, 98–9; Winterton, 'The Relationship' (n 10) 42–9; Goldring (n 22).

[27] See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 1. See also Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015); Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 13; Justice Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108; Janina Boughey and Lisa Burton Crawford, 'Executive Power in an Age of Statutes' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 1, 1.

[28] See Finn, 'Statutes and the Common Law' (n 27) 11.

contract and spend.[29] There is, seemingly, a shrinking field of non-statutory executive power in Australia.[30]

The aim of this article is to examine the application of the displacement principle in Australian case law and its interaction with principles of statutory interpretation, in order to gain a better understanding of the contemporary relationship between the prerogative and statute in Australia.[31] As will be shown, the central question in these cases is whether a legislative intention to displace or otherwise deprive the executive of the prerogative can be discerned from the statute. That is not a question of searching for the actual intention of the Parliament or its members, which a majority of the High Court has dismissed as a 'fiction'.[32] The prevailing understanding of legislative intention is that it is the product, rather than the ultimate goal, of the judicial interpretation of statutes.[33] The relevant 'intention' of a statute is one which is revealed to the court by applying the rules and principles of statutory construction. The meaning that is produced from undertaking the objective exercise of construing the statutory text in its context and with reference to its purpose and the 'canons of construction' is the meaning that the Parliament can be taken to have intended.[34]

Statutory interpretation is, therefore, the principal task undertaken by courts in these cases. The question of whether a statute can be taken to have

[29] See, eg, *Williams v Commonwealth* (2012) 248 CLR 156, 216–17 [83] (French CJ), 233 [138] (Gummow and Bell JJ), 270–1 [249]–[253] (Hayne J), 355 [534] (Crennan J) ('*Williams [No 1]*'); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 465 [66]–[68] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Williams [No 2]*').

[30] A similar observation has been made by Twomey, 'Pushing the Boundaries' (n 13) 325; Saunders, Democracy, Liberty and the Prerogative (n 22) 365. See also Thomas Poole, 'The Strange Death of Prerogative in England' (2018) 43(2) *University of Western Australia Law Review* 42, 58 ('The Strange Death of Prerogative').

[31] See also Peta Stephenson, 'Statutory Displacement of the Prerogative in Australia' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 203 ('Statutory Displacement').

[32] See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'). It is beyond the scope of this article to engage in the debate in the literature about legislative intention: see, eg, Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010); Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012); Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

[33] See, eg, *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ), quoted in *Lacey* (n 32) 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[34] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

displaced the prerogative requires a careful analysis of the meaning, operation and scope of the statute. The outcomes of these cases will, to a large extent, turn on the provisions of the particular statute and the circumstances of the individual case.[35] Nevertheless, it is possible to extract broader statements of principle from the case law that have guided the courts' approach to displacement in Australia.

This article offers an analysis of the interpretive approach that has been adopted by Australian courts in ascertaining whether the prerogative has been displaced by statute. It interrogates a core feature of this approach, namely, the adoption of a strong presumption against displacement of prerogative powers that are important to national sovereignty and the functioning of the executive government. It is argued that the application of this presumption has prevented the full expression of the displacement principle in Australia and should be reconsidered. This article proceeds as follows. Part II provides an overview of the royal prerogative and its incorporation as an aspect of the executive power of the Commonwealth in s 61 of the *Australian Constitution*. Part III examines the emergence of the displacement principle in *De Keyser* before examining its application in Australian case law. Part IV of the article critically examines the interpretive approach that has been adopted by Australian courts in ascertaining whether the prerogative has been displaced by statute.

II The Royal Prerogative

As the subject of this article is statutory displacement of the prerogative, it is helpful to begin by providing a brief overview of the royal prerogative and its relationship with the executive power of the Commonwealth in s 61 of the *Australian Constitution*. It is necessary to have an understanding of the prerogative because, in evaluating whether it has been displaced by statute, courts must identify the prerogative that is engaged in any particular case. As will be shown, this is not always a straightforward task because the precise content and scope of the prerogative are uncertain.

Section 61 is the principal provision dealing with the executive power of the Commonwealth in the *Australian Constitution*. Section 61 is situated in ch II of the *Australian Constitution*, which is entitled 'The Executive Government'. Section 61 vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the Governor-General and 'extends to the execution and maintenance of this Constitution, and of the laws of the

[35] See also Saunders, Democracy, Liberty and the Prerogative (n 22) 390; BS Markesinis, 'The Royal Prerogative Re-Visited' (1973) 32(2) *Cambridge Law Journal* 287, 305.

Commonwealth'. Section 61 'marks the external boundaries'[36] of Commonwealth executive power but does not define it.[37] The High Court has accepted that British constitutional history and practice inform the meaning of s 61 and are important to 'a proper understanding of the executive power of the Commonwealth'.[38] However, the High Court has also emphasised that the executive power conferred by s 61 is not identical to the power of the British executive.[39] The *Australian Constitution* created a different legal system from that which exists in the UK and, as such, it cannot be assumed that the powers enjoyed by the Commonwealth executive in Australia are identical to the prerogative powers that were enjoyed by the Monarch in the UK.[40]

It is now generally accepted that, in addition to executive powers sourced directly in the *Australian Constitution* and conferred by statute, s 61 incorporates all of the common law powers of the Crown that are 'appropriate' to the Commonwealth, subject to the federal distribution of powers effected by the *Australian Constitution*.[41] Australian courts have divided the common law powers into two categories, namely, the 'prerogatives' and 'capacities' of the Crown.[42]

The High Court has also held that the executive power of the Commonwealth extends beyond the prerogative and includes an 'inherent' or 'implied' executive power derived, in part, from Australia's national status.[43] Australian courts have applied the displacement principle in cases concerning the

[36] *Wooltops Case* (n 16) 437–40 (Isaacs J).

[37] *Davis* (n 15) 92–3 (Mason CJ, Deane and Gaudron JJ), quoted in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 62 [131] (French CJ) ('*Pape*') and *Williams [No 1]* (n 29) 372 [588] (Kiefel J).

[38] *Williams [No 2]* (n 29) 468–9 [80]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[39] Ibid 469 [81]–[82].

[40] Ibid 469 [81]–[83]. See also Cheryl Saunders, 'Separation of Legislative and Executive Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 617, 632.

[41] *Barton* (n 3) 498 (Mason J). See also Leslie Zines, 'Commentary' in HV Evatt, *The Royal Prerogative* (Law Book, 1987) C1, C4–C5; Winterton, *Parliament* (n 10) 24, 50–1.

[42] *Davis* (n 15) 107–9 (Brennan J); *Williams [No 1]* (n 29) 185–6 [25] (French CJ), 343–4 [488] (Crennan J).

[43] See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ), 375 (Gibbs J), 397 (Mason J), 412 (Jacobs J); *Davis* (n 15) 94 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J); *Pape* (n 37) 60–3 [128]–[132] (French CJ), 87–8 [228], 91–2 [242] (Gummow, Crennan and Bell JJ); *Williams [No 1]* (n 29) 191 [34], 216–17 [83] (French CJ), 250–1 [196] (Hayne J), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J); *Williams [No 2]* (n 29) 454 [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *CPCF* (n 25) 596 [260] (Kiefel J).

nationhood power.[44] Laureate Professor Emeritus Cheryl Saunders has suggested that this is an example of the High Court adapting common law principles to the Australian constitutional context.[45] Accordingly, in this article, the observations that I will make about the interpretive approach taken by the Court in relation to the displacement of the prerogative by statute apply to cases concerning the nationhood power.[46]

The precise nature of the prerogative remains contested.[47] In *Introduction to the Study of the Law of the Constitution*, AV Dicey defined the prerogative as 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.[48] According to Dicey, the prerogative is exercisable by the Queen herself or by her Ministers and accordingly, '[e]very act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative'.[49] Dicey's definition emphasises the *residual* nature of the prerogative, which coheres with contemporary understandings of the prerogative as being limited to historically exercised powers.[50] However, Dicey favoured a broad definition of the prerogative in the sense that he understood the term as including all of the common law, or non-statutory, powers of the Crown. This necessarily includes all of the capacities that the Crown has as a legal person that it shares with its citizens, such as the power to enter into contracts and spend money.[51] Dicey's broader conception of the prerogative has received endorsement in the UK's jurisprudence, which appears to favour this definition over the competing account of the prerogative put forward by Sir William Blackstone.[52] However, as will be shown,

[44] *Tampa Case* (n 5) 544–6 [199]–[204] (French J, Beaumont J agreeing at 514 [95]). See also Saunders, Democracy, Liberty and the Prerogative (n 22) 367–8.

[45] Saunders, 'Separation of Legislative and Executive Power' (n 40) 632.

[46] For discussion about the nationhood power, see generally Peta Stephenson, 'Nationhood and Section 61 of the *Constitution*' (2018) 43(2) *University of Western Australia Law Review* 149; Twomey, 'Pushing the Boundaries' (n 13).

[47] Poole, 'Royal Prerogative' (n 9) 146–7.

[48] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 424.

[49] Ibid 425.

[50] Saunders, Democracy, Liberty and the Prerogative (n 22) 366; Poole, 'The Strange Death of Prerogative' (n 30) 47.

[51] Dicey (n 48) 425–6; *Williams [No 1]* (n 29) 185–6 [25] (French CJ).

[52] See, eg, *De Keyser* (n 20) 526 (Lord Dunedin); *Burmah Oil* (n 8) 99 (Lord Reid); *Laker Airways* (n 23) 719 (Roskill LJ); *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 398 (Lord Fraser) ('*GCHQ*'); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453, 490 [69] (Lord Bingham); *Miller* (n 18) 139–40 [47]–[48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

Australian judges have tended to prefer Blackstone's definition of the prerogative in recent decisions.

In the *Commentaries on the Laws of England*, Blackstone used the term 'prerogative' to describe those powers that were unique to the Crown.[53] Blackstone divided the common law powers of the Crown into two categories, namely, prerogatives and other capacities.[54] Unlike Dicey, Blackstone's definition recognises the different nature of these common law powers of the Crown. Blackstone defined the prerogative as 'that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity' and added that it is in its nature

> singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.[55]

Blackstone placed emphasis on the fact that the prerogative was *unique* to the Monarch, in the sense that it was derived from the Monarch's royal authority.[56] Blackstone observed that there was a fundamental difference in the nature of prerogative powers and other capacities. According to Blackstone, prerogative powers were capable of being exercised by the Crown in a way that could interfere with, or override, the legal rights and duties of individuals.[57] While both definitions of the prerogative have received judicial endorsement, in its more recent decisions, several members of the High Court have expressly adopted Blackstone's distinction between the two categories of non-statutory executive power.[58] Accordingly, in this article I use the term 'prerogative' as Blackstone used it — to describe those rights, powers, immunities and privileges that belonged exclusively to the Monarch, that have since been inherited by the Crown in right of the Commonwealth of Australia.

[53] William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid Prest (Oxford University Press, 2016) bk 1, 155 [232].

[54] Ibid.

[55] Ibid.

[56] See also Saunders, Democracy, Liberty and the Prerogative (n 22) 365.

[57] Blackstone (n 53) bk 1, 155 [232], quoted in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98 [135] (Gageler J) ('*Plaintiff M68*'). See also *Miller* (n 18) 140–1 [52]–[53] citing, as examples, the prerogative to decide on, and alter, terms of service of servants of the Crown: *GCHQ* (n 52), and the prerogative power to destroy property in wartime: *Burmah Oil* (n 8).

[58] See especially *Davis* (n 15) 107–9 (Brennan J); *Williams [No 1]* (n 29) 185–6 [25] (French CJ), 344 [488] (Crennan J); *Plaintiff M68* (n 57) 97–9 [132]–[136].

In his judgment in *Farley's Case*, Evatt J suggested that the prerogative can be classified as falling within three categories.[59] Pursuant to its 'executive prerogatives', the Commonwealth could perform certain acts, such as declare war and peace, negotiate and enter into treaties, appoint ambassadors, confer honours, coin money, acquire territory and grant pardons.[60] By virtue of its 'common law prerogatives', the Crown was entitled to the benefit of legal preferences, immunities and exceptions which were denied to its subjects. This included priority in payment of debts and immunity from court processes.[61] The third category of prerogative enjoyed by the Crown included proprietary rights in relation to royal metals, 'treasure trove', and the foreshore, seabed and subsoil within territorial limits.[62]

While it was accepted that s 61 incorporated the prerogative, it was left unclear how the prerogative powers, rights, privileges and immunities would be distributed between the Commonwealth and state executives.[63] The prerogative needed to be adapted to the Australian federal constitutional context, which differed from that of the UK as a unitary state. Justice Evatt argued that the division of the executive prerogatives broadly followed the federal distribution of legislative powers in ss 51–2 and 122 of the *Australian Constitution*.[64] Accordingly, most of the executive prerogatives were transferred to, and exercised exclusively by, the Commonwealth. As Australia acquired independence, these included the prerogative powers of the Imperial government,[65] relating to foreign affairs and treaties,[66] extradition[67] and war.[68] The preferences and immunities of the Crown, on the other hand, were shared by both the

[59] *Farley's Case* (n 6) 320–1. This classification was first presented in HV Evatt's doctoral thesis, which was subsequently published in HV Evatt, *The Royal Prerogative* (Law Book, 1987) 30–1.

[60] See *Farley's Case* (n 6) 320–1; Evatt (n 59) 30–1.

[61] *Farley's Case* (n 6) 321.

[62] Ibid.

[63] Ibid. See also *Cadia* (n 25) 226 [87] (Gummow, Hayne, Heydon and Crennan JJ).

[64] *Farley's Case* (n 6) 321–2.

[65] Leslie Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 1, 6–10; Zines, 'Commentary' (n 41) C10–C17.

[66] *Burgess* (n 2) 643–4 (Latham CJ), affd *Barton* (n 3) 498 (Mason J). See also *New South Wales v Commonwealth* (1975) 135 CLR 337, 379, 381 (McTiernan J), 503 (Murphy J) ('*Seas and Submerged Lands Case*').

[67] *Barton* (n 3) 485, 488 (Barwick CJ), 490–1 (McTiernan and Menzies JJ), 498–9 (Mason J), 505 (Jacobs J).

[68] *Farey* (n 1) 452 (Isaacs J).

Commonwealth and the states.[69] It was also understood by Evatt J that the states retained the proprietary rights of the Crown,[70] with the exception of rights in respect of the territorial sea, which were vested in the Crown in right of the Commonwealth.[71]

As Evatt J's classification demonstrates, the prerogative is not confined to executive powers, but includes common law privileges and immunities, as well as property rights. This classification also has interpretive significance because 'important' prerogative powers attract the application of the strong presumption against displacement, which is discussed in more detail below. Courts have declared that the power to request extradition of a fugitive from a foreign state[72] and the power to prevent the entry of non-citizens into Australia,[73] both of which fall within the category of 'executive prerogatives', are 'important' prerogative powers.

III The Principle Governing the Relationship between the Prerogative and Statute

De Keyser is the leading 20th century case on displacement.[74] Although *De Keyser* was decided in 1920, the principle that it established continues to govern the relationship between the prerogative and statute in both the UK and Australia.[75] The contemporary relevance of the displacement principle was

69 *Farley's Case* (n 6) 322–3 (Evatt J). See also Winterton, *Parliament* (n 10) 49; Zines, 'Commentary' (n 41) C14.

70 *Farley's Case* (n 6) 322. Some doubt has been cast on this assumption following *Cadia* (n 25) 210–11 [30]–[34] (French CJ), 226–7 [87]–[89] (Gummow, Hayne, Heydon and Crennan JJ).

71 See *Seas and Submerged Lands Case* (n 66) 371, 373 (Barwick CJ), 379 (McTiernan J).

72 *Barton* (n 3) 501 (Mason J), 505, 507–8 (Jacobs J); *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

73 *Tampa Case* (n 5) 542–3 [192]–[193] (French J, Beaumont J agreeing at 514 [95]).

74 *Miller* (n 18) 139 [48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC). The majority also cites *Fire Brigades Union* (n 23), but it has been suggested that this case is authority for the 'frustration principle': Craig, 'Medieval Chains' (n 24) 1045–6; Craig, 'A Simple Application' (n 24) 33–5.

75 In the UK, see, eg, *Laker Airways* (n 23) 719–21 (Roskill LJ); *Fire Brigades Union* (n 23) 552 (Lord Browne-Wilkinson); *Northumbria* (n 4) 44 (Croom-Johnson LJ), 52–3 (Purchas LJ); *Miller* (n 18) 139–40 [48]. In Australia see, eg, *Uther's Case* (n 25) 514 (Latham CJ); *Barton* (n 3) 488 (Barwick CJ), 501 (Mason J); *Brown* (n 25) 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ling* (n 25) 92 (Gummow, Lee and Hill JJ); *Henderson's Case* (n 21) 459 (McHugh J); *Tampa Case* (n 5) 501 [33] (Black CJ), 539 [181]–[182] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Jarratt* (n 21) 69–70 [85] (McHugh, Gummow and Hayne JJ); *Arnhem Land Trust* (n 21) 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cadia* (n 25) 204 [14]

highlighted in the 2017 decision of the Supreme Court of the United Kingdom in *R (Miller) v Secretary of State for Exiting the European Union* ('*Miller*'), where the majority confirmed that 'a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute'.[76]

There were, however, differences in the ways that the displacement principle was applied in *De Keyser*.[77] While the displacement principle was reflected in all of the judgments, each of the five judges adopted different approaches in ascertaining whether the statutory regime had, in fact, displaced the prerogative. The next Part of the article examines the emergence and application of the displacement principle in *De Keyser*, before considering its adoption in Australian case law.

A Attorney-General v De Keyser's Royal Hotel Ltd

De Keyser concerned the compulsory acquisition of De Keyser's Royal Hotel for use as headquarters for the Royal Flying Corps during the First World War. At the time, there was a statutory scheme set out in two Acts ('*Defence Acts*') which regulated acquisitions of property and imposed an obligation on the Crown to provide compensation to individuals whose property was acquired.[78] The Crown argued that it was not obliged to pay compensation, as assessed under the statutory scheme, because the property had been acquired under the royal prerogative to defend the realm.[79] The House of Lords did not accept this argument. All five judges found that the prerogative to acquire property in aid of defence of the realm had been displaced by the *Defence Acts*.[80] The Crown was, therefore, liable to pay compensation for the use and possession of property it had acquired during wartime in accordance with the statutory regime.[81] It could not rely on the prerogative as a means of avoiding this obligation.

(French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ); *CPCF* (n 25) 600–1 [279] (Kiefel J).

[76] *Miller* (n 18) 139 [48].

[77] See also Saunders, Democracy, Liberty and the Prerogative (n 22) 372–6.

[78] The *Defence of the Realm Consolidation Act 1914*, 5 Geo 5, c 8, s 1(2) gave the executive the power to make regulations nullifying the effect of the *Defence Act 1842*, 5 & 6 Vict, c 94, ss 19–24, relating to the assessment of compensation.

[79] *De Keyser* (n 20) 514 (Sir Gordon Hewart A-G and Sir Ernest Pollock S-G) (during argument), 567 (Lord Parmoor).

[80] Ibid 528 (Lord Dunedin), 539–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner), 575 (Lord Parmoor).

[81] Ibid 531 (Lord Dunedin), 546 (Lord Atkinson), 555 (Lord Moulton), 562 (Lord Sumner), 567, 581 (Lord Parmoor).

While all of the judges reached the same conclusion, they adopted different approaches in ascertaining whether the *Defence Acts* could be taken to have displaced the prerogative. Lord Dunedin considered that 'if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules'.[82] As the *Defence Acts* occupied the same field as the prerogative, there was 'no room for asserting an unrestricted prerogative right as existing alongside with the statutory powers'.[83] This test, which is analogous to the 'covering the field' test that the High Court of Australia has used to resolve inconsistencies between Commonwealth and state laws under s 109 of the *Australian Constitution*,[84] sets a fairly low threshold for displacement of the prerogative. For Lord Dunedin, the enactment of legislation on the same subject matter as the prerogative was sufficient evidence of the Parliament's intention to displace it. The prerogative to requisition property in aid of defence of the realm was not available to the Crown, because the statute occupied the same field and displaced it.

In their respective judgments, Lords Atkinson, Moulton and Sumner attributed significance to the fact that the statutory regime conferred powers on the Crown that were as wide as the prerogative but subject to restrictions on their exercise.[85] Indeed, by making provision for the assessment and payment of compensation in the legislation, the Parliament had indicated its intention 'that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute'.[86] These statutes could not, therefore, be construed as evincing an intention to preserve the prerogative, which was capable of authorising the Crown to carry out the same acts as the statutes empowered it to undertake without being subject to the conditions and limitations imposed on it by the statutory regime.[87]

Of the five different judgments that were delivered in *De Keyser*, the clearest statement of principle comes from the judgment of Lord Parmoor, which has proven to be particularly influential in Australia.[88] Lord Parmoor stated that

[82] Ibid 526.

[83] Ibid 528.

[84] See, eg, *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 591–2 (Fullagar J).

[85] *De Keyser* (n 20) 538–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner).

[86] Ibid 554.

[87] Ibid 539.

[88] See *Barton* (n 3) 501 (Mason J); *Henderson's Case* (n 21) 459 (McHugh J); *Tampa Case* (n 5) 501 [33] (Black CJ); *Jarratt* (n 21) 69–70 [85] (McHugh, Gummow and Hayne JJ); *Arnhem Land Trust* (n 21) 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *CPCF* (n 25) 600–1 [279] (Kiefel J). See also *Miller* (n 18) 139–40 [48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

> [t]he constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.[89]

As the Parliament had enacted statutory provisions which directly regulated requisitions of private property by the Crown, including the creation of a statutory right of compensation, Lord Parmoor was satisfied that the case was brought within this principle.[90]

Lord Parmoor's judgment also demonstrates the centrality of statutory construction to the application of the displacement principle. Historically, the general approach adopted by courts in construing statutes was that the prerogative could only be taken away by express words or necessary implication.[91] This approach was confirmed in Lord Parmoor's judgment in *De Keyser*, where he explained that

> [t]he principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or … where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury or wrong.[92]

As the *Defence Acts* in *De Keyser* made provision for the payment of compensation for a compulsory acquisition of property by the Crown during wartime, Lord Parmoor classified them as 'statutes made for the advancement of justice and to prevent injury and wrong'[93] and concluded that they had displaced the prerogative. Relevantly, however, Lord Parmoor also observed that 'where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced'.[94]

[89] *De Keyser* (n 20) 575.

[90] Ibid 576–9.

[91] See, eg, *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66b; 77 ER 1235, 1247. For an extensive list of the historical cases, see Saunders, Democracy, Liberty and the Prerogative (n 22) 371 n 57.

[92] *De Keyser* (n 20) 576.

[93] Ibid.

[94] Ibid.

An important feature of Lord Parmoor's approach was the requirement of an inconsistency, or conflict, between the statute and the prerogative before the prerogative would be taken to have been displaced.[95] In this respect, it was significant that the *Defence Acts* made provision for the payment of compensation upon an acquisition of property by the Crown.[96] The conflict arose because the *Defence Acts* directly regulated the same subject matter as the prerogative, but also conferred a right to compensation that could have been taken away or avoided by the Crown if the prerogative was found to have survived.[97] The existence of this inconsistency between the provisions of the statute and the continued exercise of the prerogative was evidence of the Parliament's intention to displace the prerogative by enacting the statutory regime.[98] By necessary implication, the prerogative had been displaced by the *Defence Acts*.

The judges in *De Keyser* adopted different approaches in determining whether the *Defence Acts* had displaced the prerogative. However, it was a feature of all of the judgments that the executive government should be prevented from relying on the prerogative in order to circumvent conditions, limitations or restrictions imposed on the exercise of its power by the Parliament.[99] The decision in *De Keyser* established the displacement principle as an important limitation on the prerogative powers of the executive branch of government. This principle reflects fundamental constitutional values of parliamentary sovereignty and responsible government that are common to both the UK and Australia, and confirms that the prerogative is subject to the control of the Parliament.[100] The displacement principle also gives expression to an aspect of the rule of law, namely certainty.[101] It is important that, in those areas where a prerogative power exists alongside equivalent executive powers conferred by statute, individuals know what the law is. It is equally important to understand whether executive officers are acting in accordance with the powers and obligations conferred on them by statute, or whether they are exercising the

[95] Ibid.

[96] Ibid 575–6, 579.

[97] Ibid 575–6.

[98] Ibid 576. Similar observations were made at 539 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner).

[99] Ibid 526, 528 (Lord Dunedin), 538–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner), 575 (Lord Parmoor).

[100] See, eg, *Laker Airways* (n 23) 719–21 (Roskill LJ); *Fire Brigades Union* (n 23) 552 (Lord Browne-Wilkinson); *Miller* (n 18) 139–40 [48].

[101] See Evans (n 26) 99; Goldring (n 22) 442; Saunders, Democracy, Liberty and the Prerogative (n 22) 370. See also Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 69–70.

prerogative or non-statutory executive power, independent of limits imposed by the statutory regime.[102]

B *Application of* De Keyser *in Australian Case Law*

De Keyser has been approved in Australian case law.[103] However, because of the interpretive approach adopted by Australian courts, the displacement principle has not always been honoured in its application. Lord Parmoor's formulation of the displacement principle in *De Keyser* has proven to be particularly influential in Australia. It received judicial endorsement in the 1997 decision of *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* ('*Henderson's Case*'), where McHugh J described 'the basic constitutional principle laid down' in *De Keyser* as follows:

> That principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.[104]

This statement has been quoted with approval by the High Court in subsequent decisions.[105]

While the displacement principle has been incorporated in Australian case law, courts have generally been reluctant to find that the executive prerogatives have been displaced by statute, opting instead to preserve the prerogative, even where the Parliament has enacted detailed statutory regimes on the same subject matter.[106] While straightforward in theory, the displacement principle has

[102] See also Evans (n 26) 99.

[103] *Uther's Case* (n 25) 514 (Latham CJ); *Barton* (n 3) 488 (Barwick CJ), 501 (Mason J); *Brown* (n 25) 202, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ling* (n 25) 92 (Gummow, Lee and Hill JJ); *Henderson's Case* (n 21) 459 (McHugh J); *Tampa Case* (n 5) 501 [33] (Black CJ), 539 [181]–[182] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Jarratt* (n 21) 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–5 [129] (Callinan J); *Arnhem Land Trust* (n 21) 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cadia* (n 25) 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ); *CPCF* (n 25) 600–1 [279] (Kiefel J).

[104] *Henderson's Case* (n 21) 459.

[105] *Jarratt* (n 21) 70 [85] (McHugh, Gummow and Hayne JJ); *Arnhem Land Trust* (n 21) 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ). A similar statement of principle was made in *CPCF* (n 25) 600–1 [279] (Kiefel J).

[106] See especially *Barton* (n 3) 488 (Barwick CJ), 491 (McTiernan and Menzies JJ), 501 (Mason J), 506–8 (Jacobs J); *Ling* (n 25) 94, 97 (Gummow, Lee and Hill JJ); *Tampa Case* (n 5) 544–6 [199]–[204] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [37]–[40], 512–13 [45]–[46] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

proven to be difficult to apply in practice. That is because the full expression of the principle ultimately depends on the construction of the statute, which is the central task of the court in these cases.

Australian courts routinely apply a presumption against displacement of the prerogative. The presumption was applied as early as 1909 in the decision of *Booth v Williams*, where Street J stated that '[i]t is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible'.[107] It is generally accepted that a prerogative of the Crown will not be displaced except by express words or necessary implication drawn from the statute.[108] As statutes rarely contain express words displacing the prerogative, courts have had to consider whether, by implication, the statute had that effect.

The presumption against displacement has only been rebutted in a handful of cases. Australian courts have generally been more willing to infer an intention to deprive the executive government of the prerogative where its exercise would interfere with the rights and benefits conferred on individuals by the statute.[109] This was evident in a series of decisions where the Crown's prerogative to dismiss public servants 'at pleasure' was held to have been displaced by statute.[110] The High Court has also been willing to find that the prerogative has been displaced in cases concerning private property rights.[111] In these cases, even though the legislation did not expressly state that it displaced the prerogative, the courts found that the statute otherwise exhibited a sufficiently clear intent, having interpreted the relevant provisions in their statutory context and in light of the purpose of the legislation and surrounding circumstances.[112]

In *Ling v Commonwealth* ('*Ling*'), however, the Full Court of the Federal Court found that the Crown's 'prerogative' right to take assignments of choses

[107] (1909) 9 SR (NSW) 421, 440 ('*Booth*'), quoting Peter Benson Maxwell, *On the Interpretation of Statutes*, ed J Anwyl Theobald (Sweet & Maxwell, 4th ed, 1905) 202. See also *Ling* (n 25) 92 (Gummow, Lee and Hill JJ), citing *Booth* (n 107) 440 .

[108] See *Barton* (n 3) 488 (Barwick CJ), 491 (McTiernan and Menzies JJ), 501 (Mason J); *Tampa Case* (n 5) 501 [33] (Black CJ), 540–1 [184]–[185] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Cadia* (n 25) 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ).

[109] See Saunders, Democracy, Liberty and the Prerogative (n 22) 379–82.

[110] See, eg, *Bennett v Commonwealth* [1980] 1 NSWLR 581, 587 [20]–[22] (Rogers J); *Barratt v Howard* (2000) 96 FCR 428, 447–8 [68]–[72] (Beaumont, French and Merkel JJ); *Kelly v Commissioner, Department of Corrective Services* (2001) 52 NSWLR 533, 535–6 [3]–[4] (Giles JA), 551–3 [39]–[42], 558 [57]–[58] (Heydon JA), 570–1 [103]–[106] (Rolfe AJA).

[111] See *Cadia* (n 25) 218 [57] (French CJ), 230 [102]–[103] (Gummow, Hayne, Heydon and Crennan JJ).

[112] See also Saunders, Democracy, Liberty and the Prerogative (n 22) 379–82.

in action survived the enactment of the *Overseas Students (Refunds) Act 1990* (Cth) and regulations.[113] The Act had been passed in order 'to facilitate the refunding of payments made by overseas students unable to undertake or complete courses of study in Australia' as a result of a change to Commonwealth policy after the Tiananmen Square incident in 1989.[114] The Commonwealth had paid the students the outstanding refunds owed to them by providers of English language courses, including Mr Ling, and the students assigned their contractual rights with those providers to the Commonwealth.[115] The Commonwealth pursued recovery action against Ling and those institutions which had not repaid the outstanding amounts.[116]

In *Ling*, the Court applied the presumption against displacement, noting that 'the legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible'.[117] The Court was not satisfied that such an intention could be discerned from the Act as construed, and held that its provisions did not have the effect of curtailing or otherwise displacing the prerogative right of the Commonwealth to take and enforce assignments of choses in action.[118] In reaching this conclusion, the Court ascribed significance to the 'facultative' nature of the Act.[119] The Act did not create a new statutory right to take assignments of choses in action.[120] The operative provisions of the Act assumed that the Commonwealth had already exercised its prerogative right and that the assignments had already been taken.[121] According to the Court, there was 'nothing in the statute which substitutes a new statutory right for a prerogative right to take assignments'.[122]

Ling demonstrates that a statute may directly regulate the same area as the prerogative, but may not impose conditions or create rights so as to be inconsistent with it. An inconsistency will not arise where the statute assumes the

[113] *Ling* (n 25) 95, 97 (Gummow, Lee and Hill JJ). As the right to take assignments of choses in action can also be exercised by individuals, the Court appears to have employed Dicey's broader conception of the prerogative in this case, which includes the common law capacities of the Crown, in preference to Blackstone's narrower account.

[114] Ibid 91, quoting the long title to the *Overseas Students (Refunds) Act 1990* (Cth).

[115] *Ling* (n 25) 91.

[116] Ibid.

[117] Ibid 92, citing *Booth* (n 107) 440 (Street J).

[118] *Ling* (n 25) 97.

[119] Ibid 92, 97.

[120] Ibid 94.

[121] Ibid.

[122] Ibid.

continued existence of the prerogative or executive power.[123] In *Ling*, the Act did not confer powers on the Commonwealth government to take the assignments. The statute assumed that the prerogative right to take assignments had already been exercised and the assignments taken. The Act merely set out how proceedings for the recovery of debt would take place. Therefore, the prerogative survived in *Ling*, and that was appropriate in the circumstances. It was not necessary for the Court to apply a presumption against displacement. In *Ling*, the provisions in the Act were not inconsistent with the continued existence of the prerogative. An intention to displace the prerogative could not, therefore, be inferred from the provisions of the statute.

The strength of the presumption against displacement varies depending on the nature of the prerogative power that is engaged in a particular case. The presumption is strongest in its application to prerogative powers that are 'important' to national sovereignty or the functioning of the executive government.[124] The power to request the surrender and extradition of a fugitive offender and the power to prevent the entry of non-citizens into Australia have been classified as 'important' prerogative powers that attract the application of the strong presumption against displacement.

This was evident in the 1974 decision of *Barton v Commonwealth* ('*Barton*').[125] The High Court was required to consider whether the *Extradition (Foreign States) Act 1966–1973* (Cth) had displaced the prerogative power to request the surrender and extradition of a fugitive from Brazil, a country with which Australia did not have an extradition treaty at the time.[126] The Court unanimously held that the Act only regulated extradition requests from foreign states with which Australia had an extradition treaty. The Act did not have the effect of displacing the prerogative to request the surrender of a fugitive from a non-treaty state, such as Brazil.[127] Accordingly, the prerogative to request extradition from non-treaty states survived and the request for extradition was valid.[128]

The presumption against displacement was applied by the majority in *Barton*. It was accepted that a statute will not be held to have abrogated or displaced a prerogative of the Crown unless it does so by 'express words or necessary

[123] For example, the *Royal Commissions Act 1923* (NSW) s 5 applies after the royal prerogative to establish a royal commission has been exercised by the making of letters patent.

[124] *Barton* (n 3) 501 (Mason J), 505, 508 (Jacobs J); *Tampa Case* (n 5) 540–1 [185], 545 [201]–[202] (French J, Beaumont J agreeing at 514 [95]).

[125] *Barton* (n 3).

[126] Ibid 491–3 (Mason J).

[127] Ibid 488 (Barwick CJ), 501 (Mason J), 505–8 (Jacobs J).

[128] Ibid 488 (Barwick CJ), 491 (McTiernan and Menzies JJ), 501 (Mason J), 507–8 (Jacobs J).

implication'.[129] Three judges, however, considered that the power to request extradition was important to the Australian government, and applied a stronger presumption against its displacement in their construction of the Act. Chief Justice Barwick described the presumption as 'extremely strong' and declared that a statute will not displace a prerogative power of the Crown unless it does so by 'a clear and unambiguous provision'.[130] Justice Mason stated that 'the decisive consideration' in his analysis was that the prerogative power to seek and accept extradition of a fugitive was 'an important power essential to a proper vindication and an effective enforcement of Australian municipal law'.[131] It was not, therefore 'to be supposed that Parliament intended to abrogate the power in the absence of a clearly expressed intention to that effect'.[132] In that regard, not only was there a 'conspicuous absence of express words', but because the Act did not extend to cover extradition of fugitive offenders from non-treaty states, Mason J concluded that there was nothing in the Act which evinced a sufficiently clear intention on the part of the Parliament to displace the prerogative.[133] Justice Jacobs similarly reasoned that 'the free right of the Australian Government to communicate at will with a foreign government is an essential attribute of this country as a sovereign nation'.[134] It followed that 'an intention to withdraw or curtail a prerogative power must be clearly shown'.[135] According to Jacobs J, there was 'nothing in the legislation which would suggest … that the executive power stemming from the prerogative is intended wholly to be replaced by the statutory power'.[136]

The High Court subsequently affirmed the approach to displacement adopted by the majority in *Barton* in the decision of *Oates v Attorney-General (Cth)* ('*Oates*'), where it was held that the prerogative to request extradition survived the enactment of the *Extradition Act 1988* (Cth).[137] In its construction of the Act, the Court applied the presumption against displacement, noting that 'the statute will not be held to have abrogated the power unless it does so by express words or necessary implication'.[138] The Court also attributed

[129] Ibid 491, 501.

[130] Ibid 488.

[131] Ibid 501.

[132] Ibid.

[133] Ibid.

[134] Ibid 505.

[135] Ibid 508.

[136] Ibid.

[137] *Oates* (n 3) 511 [37], 512–13 [45]–[46] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

[138] Ibid 511 [37].

significance to the importance of the power, quoting with approval Mason J's observation in *Barton* that it is 'essential to a proper vindication and an effective enforcement of Australian municipal law'.[139] The Court reasoned that the Act operated to facilitate the making of requests from foreign countries for extradition to Australia.[140] It did not confer power on the Attorney-General to make a request for extradition, but rather it was predicated on the existence of the prerogative power to make such a request.[141] The Act supplemented, rather than displaced, the prerogative and the Court could not discern from the Act an intention to deprive the executive of the prerogative in this case.

The majority of the Full Court of the Federal Court applied the strong presumption against displacement in the 2001 decision of *Ruddock v Vadarlis* ('*Tampa Case*').[142] In that case, the Court was required to consider the effect of the *Migration Act 1958* (Cth) ('*Migration Act*') on the inherent executive power to exclude non-citizens from Australia.[143] Justice French, with whom Beaumont J agreed, held that actions taken by the Commonwealth government to effect the exclusion and expulsion of non-citizens from Australia, including the deployment of troops on board a vessel carrying hundreds of rescued persons to prevent it from entering Australian territorial waters, were within the scope of the Commonwealth's non-statutory executive power, and this power had not been displaced by the *Migration Act*.[144]

Central to the majority judgment in the *Tampa Case* was the finding that the executive power of the Commonwealth extended beyond the prerogative and included an inherent power derived from Australia's status as an independent, sovereign nation.[145] This power was understood by French J as being important to the expression of Australia's sovereignty and it provided the constitutional basis for the action taken by the Commonwealth to prevent the entry of non-citizens into Australia, including the deployment of troops for this purpose.[146] It is important to note that in his consideration of the relationship between the *Migration Act* and the inherent executive power, the central question for French J was whether an intention to abrogate or displace the executive power could be discerned from the statute.[147] Even though French J thought

[139] Ibid, quoting *Barton* (n 3) 501.

[140] *Oates* (n 3) 511 [38].

[141] Ibid 511 [39].

[142] *Tampa Case* (n 5) 540–1 [184]–[185] (French J, Beaumont J agreeing at 514 [95]).

[143] See ibid 532 [159].

[144] Ibid 522 [128], 545–6 [202]–[204].

[145] Ibid 540–1 [185], 543 [193].

[146] Ibid 543 [193].

[147] Ibid 545 [201]–[202].

that the executive power extended beyond the prerogative, he nevertheless applied the same interpretive approach that he would have done if he was ascertaining whether a prerogative power had been displaced by statute.

The importance of the power was relevant to French J's consideration of whether it had been displaced by the *Migration Act*.[148] Indeed, French J's approach closely resembled that of Mason J and Jacobs J in *Barton*. As the power to exclude non-citizens from Australia was an 'essential' power, French J applied the strong presumption against displacement.[149] Justice French observed, in this respect, that '[t]he greater the significance of a particular Executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power'.[150] In the absence of express words, the relevant question was whether the *Migration Act* evidenced a 'clear and unambiguous intention' to deprive the executive of its power to prevent non-citizens from entering Australia.[151] According to French J's construction of the statute, the provisions of the *Migration Act* were 'facultative' in nature and could not be taken as intending to deprive the executive of its power in this case.[152] Accordingly, the inherent executive power survived, notwithstanding the enactment of detailed provisions in the *Migration Act* that conferred and regulated equivalent executive powers.[153]

Chief Justice Black did not apply a strong presumption against displacement in his dissenting judgment in the *Tampa Case*. Chief Justice Black also adopted a different test for displacement and reached a different outcome.[154] According to Black CJ, the *Migration Act* had displaced the prerogative to exclude and expel non-citizens from Australia, because its provisions covered the same area as the prerogative.[155] Chief Justice Black then went on to find that the *Migration Act* did not authorise the executive action taken to prevent the rescued persons on board the *Tampa* from entering Australia, including detention for that purpose.[156]

148 Ibid 540–1 [184]–[185].

149 Ibid 540–1 [184]–[185], 543 [193].

150 Ibid 540 [185].

151 Ibid 545 [201].

152 Ibid 545 [202].

153 Ibid 545–6 [204].

154 Ibid 501 [34]. See also Robert French, 'Executive Power in Australia: Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 33.

155 *Tampa Case* (n 5) 508 [64].

156 Ibid 514 [90].

The relationship between the prerogative and statute was subsequently considered in *CPCF v Minister for Immigration and Border Protection* ('*CPCF*').[157] At issue in *CPCF* was the constitutional validity of the Commonwealth's detention of asylum seekers on board an Australian vessel, but outside Australia's territorial waters. The majority of the High Court concluded that the action was authorised under the *Maritime Powers Act 2013* (Cth) ('*MPA*').[158] Justices Hayne and Bell and Kiefel J dissented.[159]

Justice Kiefel engaged in a detailed analysis of the relationship between the *MPA* and the non-statutory executive power of the Commonwealth in her dissenting judgment in *CPCF*.[160] Justice Kiefel's approach to the question of displacement resembled that which was adopted by Black CJ in the *Tampa Case*. In Kiefel J's opinion, the detailed provisions of the *MPA* that conferred and conditioned the exercise of coercive powers of expulsion and detention had displaced any prerogative powers on the same topic.[161] As such, those powers could only be exercised in accordance with the *MPA*.[162] However, Kiefel J concluded that the executive action that was taken in this case was not authorised by the *MPA*.[163]

IV The Interpretive Approach

The displacement principle is an important limitation on the prerogative powers of the executive branch of government. While it has been incorporated into Australian case law, the preceding analysis demonstrates that courts have generally been reluctant to find that the executive prerogatives have been displaced by statute. This Part of the article offers an analysis of the interpretive approach that has been adopted by Australian courts in ascertaining whether the prerogative has been impliedly displaced by statute. It interrogates the adoption of a strong presumption against displacement of prerogative powers that are important to national sovereignty and the functioning of the executive government. It is argued that this interpretive approach has prevented the full expression of the displacement principle in Australia and should be

157 *CPCF* (n 25) 538–9 [40]–[42] (French CJ), 564–5 [141] (Hayne and Bell JJ), 600–2 [279]–[285] (Kiefel J).

158 Ibid 529 [14] (French CJ), 583 [211], 587 [229] (Crennan J), 630 [392] (Gageler J), 656–7 [513] (Keane J).

159 Ibid 563 [133] (Hayne and Bell JJ); 610 [323], 611 [326] (Kiefel J).

160 Ibid 595–602 [258]–[286].

161 Ibid 601–2 [283].

162 Ibid 602 [285].

163 Ibid 610 [323], 611 [326].

reconsidered. In this respect, the more flexible approach to the presumption that was adopted by the minority judges in the decisions of the *Tampa Case* and *CPCF* is to be preferred.

It is demonstrated that the application of the strong presumption has set a high threshold for statutory displacement of the prerogative in Australia. Courts need to be able to ascertain from the statute a sufficiently clear intention to displace or deprive the executive of its power in order to rebut the presumption. As the presumption varies in strength depending on the nature of the prerogative power that is engaged, courts require a higher degree of certainty as to the Parliament's intention to displace important prerogative powers, as evidenced by the courts' insistence on 'clear words' or a 'clear and unambiguous' intention in *Barton* and the *Tampa Case*.[164] Whether such an intention can be discerned from the statute and attributed to the Parliament will necessarily depend on the court's construction of the individual statute.

As is shown below, courts have been more willing to infer an intention to displace the prerogative where the statute, as construed, operates in a way that is inconsistent with the continued exercise of the prerogative.[165] Courts have developed principles to determine whether there is an inconsistency and there are, in this respect, similarities between the approach of the courts in displacement cases and the approach adopted by the High Court for resolving inconsistencies between Commonwealth and state laws under s 109 of the *Australian Constitution*.[166]

A *Strong Presumption against Displacement of 'Important' Prerogative Powers*

In the cases considered above, the majority applied a presumption against displacement. Courts assume that prerogative powers have not been displaced unless the statute reveals, either expressly or by necessary implication, an

[164] *Barton* (n 3) 488 (Barwick CJ); *Tampa Case* (n 5) 545 [201], 546 [204].

[165] See also Evans (n 26) 98.

[166] For a discussion of s 109 inconsistency see, eg, Gary A Rumble, 'The Nature of Inconsistency under Section 109 of the Constitution' (1980) 11(1) *Federal Law Review* 40 ('The Nature of Inconsistency'); Gary A Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38(3) *Federal Law Review* 445; Geoffrey Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8(2) *Constitutional Law and Policy Review* 25 ('Grappling with Inconsistency'); Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) ch 5. There are insights that could potentially be gleaned from examining how courts have resolved other types of inconsistencies between laws, such as implied repeal of an earlier statute by a later statute, the colonial doctrine of repugnancy, or inconsistency between a statute and the *Australian Constitution*, but this is beyond the scope of this article: see, eg, Leeming (n 166) ch 1.

intention to displace the prerogative. Some of the judges in the majority in *Barton*, and the majority in the *Tampa Case*, applied a strong presumption against displacement of prerogative powers that are important to national sovereignty or the functioning of the executive government.[167] The application of this strong presumption against displacement has had the effect of preserving certain prerogative powers. This is particularly evident in the *Tampa Case*, where the majority found that the inherent executive power to exclude non-citizens survived, even where the Parliament had enacted a detailed statutory framework conferring and regulating the exercise of similar executive powers in the *Migration Act*.[168]

The language of the courts in formulating the presumption suggests that its rationale, like that of other rules of construction, 'lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear'.[169] This then leads to the problem of identifying what prerogative powers are to be regarded as sufficiently 'important' to national sovereignty or to the functioning of the executive government so as to attract the application of the strong presumption.[170] Courts have, as mentioned above, declared that the power to request and obtain the extradition of a fugitive offender and the power to prevent non-citizens from entering Australia are 'important' executive powers.[171] In *Barton*, Mason J held that the power to seek and obtain the surrender by a foreign state of a fugitive offender is an important power 'essential to a proper vindication and an effective enforcement of Australian municipal law'.[172] However, his Honour did not provide further reasons supporting this conclusion. Justice Jacobs was also of the view that 'the free right of the Australian Government to communicate at will with a foreign government is an essential attribute of this country as a

[167] *Barton* (n 3) 501 (Mason J), 505, 508 (Jacobs J); *Tampa Case* (n 5) 540–1 [185] (French J, Beaumont J agreeing at 514 [95]).

[168] *Tampa Case* (n 5) 545–6 [202]–[205].

[169] *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Bropho*').

[170] Similar problems arise with the principle of legality and identification of 'fundamental' rights: see Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 456–9. Cf Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 395–8.

[171] *Barton* (n 3) 501 (Mason J), 505, 508 (Jacobs J); *Tampa Case* (n 5) 543 [193] (French J, Beaumont J agreeing at 514 [95]).

[172] *Barton* (n 3) 501, quoted in *Oates* (n 3) 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

sovereign nation'[173] and an 'important prerogative power'[174] but did not elaborate on this point.

In the *Tampa Case*, French J found that '[t]he greater the significance of a particular Executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power'.[175] Justice French also noted that '[t]he power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack … the ability to prevent people not part of the Australia [sic] community, from entering'.[176] In his dissent, Black CJ conceded that 'if a power is well used, well-established and important to the functioning of the Executive government, a very clear manifestation of an intention to abrogate will be required'.[177] However, his Honour went on to observe that:

> [W]here an asserted power is at best doubtful, and where, if it exists at all, it does so in a field that has been the concern of the Parliament for a very long time, a less stringent view of the intention necessary to abrogate such a power is appropriate.[178]

Beyond these statements, the Court did not explain the process or criteria by which it came to classify a prerogative power as 'important'. Judges may reasonably disagree on whether a prerogative power is sufficiently important to Australian sovereignty or the continued functioning of the executive government to attract the application of this strong presumption against displacement, as illustrated by the different opinions on this matter set out by Black CJ and French J in their judgments in the *Tampa Case*.[179] Indeed, there may be judicial disagreement on whether the prerogative has survived. Cases concerning the prerogative often require 'extensive historical and archival research'.[180] Chief Justice Black concluded that it was, at best, 'doubtful' as to whether the

[173] *Barton* (n 3) 505.

[174] Ibid 508.

[175] *Tampa Case* (n 5) 540 [185].

[176] Ibid 543 [193].

[177] Ibid 504 [40].

[178] Ibid.

[179] See also Ernst Willheim, 'MV *Tampa*: The Australian Response' (2003) 15(2) *International Journal of Refugee Law* 159, 186–8; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279, 291–3 ('The Inherent Executive Power'); Evans (n 26) 97–9; Saunders, Democracy, Liberty and the Prerogative (n 22) 382.

[180] Winterton, 'The Relationship' (n 10) 33–4.

prerogative relating to the entry of non-citizens into Australia had survived, especially given that it had been regulated by legislation for such a long time.[181]

There are important areas of activity in Australia which are essential to the functioning of the national government and which, traditionally, have not been regulated by statute. The conduct of Australia's foreign relations and diplomacy, including the entry into treaties and other international agreements, and the power to declare war and peace are examples of prerogative powers that remain exercisable in the absence of parliamentary approval.[182] These are, perhaps, the 'important' prerogative powers that the judges had in mind when formulating the presumption.

However, unresolved questions remain about the status of prerogatives and other non-statutory executive powers which are less certain, such as the prerogative to keep the peace. The existence of this prerogative was only recently confirmed in the 1989 decision of *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority*[183] and it has not been immune from criticism.[184] In Australia, Part IIIAAA of the *Defence Act 1903* (Cth) sets out a comprehensive and detailed framework that governs when the Australian Defence Force can be called out to provide aid to the civil power.[185] As the High Court has not set out criteria or characteristics of important prerogative powers, it is unclear whether this power would be sufficiently important to attract the strong presumption against displacement.

[181] *Tampa Case* (n 5) 504 [40]. See also *CPCF* (n 25) 600 [277], 601 [280] (Kiefel J). Justice Callinan did not consider it necessary to explore the extent of the 'current vitality' of the Crown's right to dismiss 'at pleasure' in *Jarratt* (n 21) 87–8 [135]–[137].

[182] See *Miller* (n 18) 140 [49] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC). Twomey describes these prerogative powers as being 'inherently political in nature' and has suggested that it would not be appropriate to place them on statutory footing, because they often need to be exercised 'in a decisive and unreviewable manner': Twomey, '*Miller* and the Prerogative' (n 18) 88. Cf Geoffrey Lindell, 'The Constitutional Authority to Deploy Australian Military Forces in the Coalition War against Iraq' (2002) 5(3) *Constitutional Law and Policy Review* 46, 48–9 ('The Constitutional Authority').

[183] *Northumbria* (n 4) 44 (Croom-Johnson LJ), 51, 55 (Purchas LJ), 58 (Nourse LJ).

[184] See, eg, HJ Beynon, 'Prerogative to Supply Plastic Baton Rounds and CS to the Police' [1987] (2) *Public Law* 146, criticising the decision of the Divisional Court. See also AW Bradley, 'Police Powers and the Prerogative' [1988] (3) *Public Law* 298 and Robert Ward, 'Baton Rounds and Circulars' (1988) 47(2) *Cambridge Law Journal* 155, both criticising the decision of the Court of Appeal.

[185] Section 51ZD of the *Commonwealth Defence Act* (n 4) is entitled 'Effect on other Defence Force utilisation and powers' and stipulates that pt IIIAAA 'does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded'. The interpretive significance of provisions such as these is considered below: see below n 193.

In its analysis of the royal prerogative in *Miller*, the majority explained that 'a prerogative power however well established may be curtailed or abrogated by statute'.[186] It remains unclear why it should be presumed that, because a power is important to national sovereignty, the Parliament did not intend to regulate it.[187] Australian courts have not provided a convincing justification or rationale for the adoption of the strong presumption against displacement of important prerogative powers. In circumstances where the Parliament has passed legislation setting out a detailed statutory regime that confers and regulates the exercise of executive powers, and especially coercive powers, the more appropriate inference to draw is that the Parliament intended to displace the equivalent prerogative powers irrespective of whether they are 'important' to national sovereignty.[188] The inference is all the more appropriate where the exercise of the prerogative would directly impact or interfere with the rights of individuals. In these circumstances, it is preferable for the prerogative to be displaced by equivalent statutory powers that have been subject to parliamentary scrutiny.[189] This is because, as Professor Simon Evans has explained:

> Notwithstanding the dominance of the executive in Parliament, 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.[190]

The identification of a power as an important prerogative has interpretive significance.[191] In the absence of 'clear and unambiguous' language to the contrary in the statute, it will be assumed that the Parliament did not intend to displace the prerogative. The application of this presumption may limit the otherwise clear meaning and scope of a statute, as evidenced by the majority decision in the *Tampa Case*. Even though the *Migration Act* provided a comprehensive regime for the exclusion and expulsion of non-citizens from Australia, and conferred extensive powers on executive officers, the majority was not able to find that that this was evidence of a sufficiently clear intention to displace

[186] *Miller* (n 18) 139 [48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

[187] See Saunders, Democracy, Liberty and the Prerogative (n 22) 382.

[188] Ibid 382; Willheim (n 179) 187. See also Zines, 'The Inherent Executive Power' (n 179) 292–3.

[189] See, eg, Lindell, 'The Constitutional Authority' (n 182) 48–9; Evans (n 26) 99; Winterton, 'The Relationship' (n 10) 35–6; Twomey, '*Miller* and the Prerogative' (n 18) 88.

[190] Evans (n 26) 99.

[191] The same observation has been made in relation to the identification of fundamental rights in applying the principle of legality: Meagher (n 170) 459.

the prerogative, or non-statutory executive power, to prevent non-citizens from entering Australia.[192]

The application of the strong presumption against displacement of important prerogative powers has, in recent years, caught the attention of the Parliament and parliamentary drafters. There is a growing trend in Australia where provisions that purport to preserve the prerogative and non-statutory executive powers of the Commonwealth are being included in Commonwealth statutes that confer and regulate equivalent executive powers.[193] The issue of whether these express statutory provisions could operate to preserve the prerogative was considered most recently in *CPCF*. In their respective judgments, French CJ, Hayne and Bell JJ, and Kiefel J considered the effect of s 5 of the *MPA*. Section 5 is entitled 'Effect on executive power' and expressly states that '[t]his Act does not limit the executive power of the Commonwealth'. The Commonwealth argued that these express words made it clear that it was the Parliament's intention that the *MPA* operate in addition to non-statutory executive power.[194]

It is significant that all of the judges who considered the issue rejected this argument.[195] In particular, Kiefel J cited with approval an observation in *John Holland Pty Ltd v Victorian Workcover Authority*[196] that 'such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting'.[197] Justice Kiefel reaffirmed that the 'relevant "intention" of a statute is that which is revealed to the court by ordinary processes of statutory construction'.[198] In this respect, it was significant that the *MPA* 'authorise[d] a decision that the relevant powers be exercised in a particular way and detail[ed] the manner and conditions of their exercise'.[199] Justice Kiefel concluded that the *MPA* did not support an intention that the Commonwealth executive is to retain a complete discretion as to how powers of detention and

[192] *Tampa Case* (n 5) 545 [202] (French J, Beaumont J agreeing at 514 [95]).

[193] See, eg, *Migration Act 1958* (Cth) s 7A ('*Migration Act*'); *Commonwealth Defence Act* (n 4) s 51ZD; *Maritime Powers Act 2013* (Cth) s 5. For a more detailed discussion of express statements of intention, see Stephenson, 'Statutory Displacement' (n 31) 219–20.

[194] *CPCF* (n 25) 538 [40] (French CJ).

[195] Ibid 538 [41] (French CJ), 564–5 [141] (Hayne and Bell JJ), 601–2 [283] (Kiefel J).

[196] (2009) 239 CLR 518 ('*John Holland*').

[197] *CPCF* (n 25) 601 [282], quoting *John Holland* (n 196) 527 [20] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[198] *CPCF* (n 25) 601 [282], citing *Momcilovic v The Queen* (2011) 245 CLR 1, 74 [111]–[112] (Gummow J), 133–4 [315], 141 [341] (Hayne J), 235 [638] (Crennan and Kiefel JJ).

[199] *CPCF* (n 25) 601 [283].

removal of non-citizens from Australia are to be exercised.[200] Section 5 was 'better understood as preserving such other … executive powers as may be exercised conformably' with the *MPA* provisions.[201]

The decision in *CPCF* could be seen as signalling a more flexible approach to the application of the presumption against displacement and, if that is the case, it is to be welcomed. As mentioned above, Kiefel J adopted a similar approach in ascertaining the relationship between the prerogative and statute as that of Black CJ in the *Tampa Case*.[202] In considering whether the *MPA* displaced any non-statutory executive power, Kiefel J did not apply any presumption against displacement in her judgment. Justice Kiefel reasoned that the statutory regime in the *MPA*, which placed conditions on the exercise of powers of detention and removal, was inconsistent with an intention to preserve the prerogative power on the same topic.[203] The *MPA* was therefore found to have displaced the prerogative power, and the executive government could only exercise its power to detain and remove non-citizens in accordance with the provisions in the statute.[204]

While the judgments of Kiefel J in *CPCF* and Black CJ in the *Tampa Case* are minority opinions, the interpretive approach that their Honours adopted gave full expression to the displacement principle and ought to be preferred. Where the Parliament has enacted a comprehensive statutory regime that imposes conditions, limitations and restrictions on the exercise of executive powers that are equivalent to the prerogative, that should be sufficient evidence of the Parliament's intention to deprive the executive government of the prerogative. Courts should be willing to find that the prerogative has been displaced in these circumstances and replaced by statutory provisions that have received oversight and scrutiny from the Parliament.[205] As Evans has observed:

> If it is assumed that the Parliament intended the law … to be clear, certain and general, it is hardly likely that it intended the parallel operation of two inconsistent regimes, the existence and scope of one of which was uncertain. Equally, it is hardly likely that the Parliament intended to leave operating an uncertain

[200] Ibid 601–2 [283].

[201] Ibid.

[202] Ibid 600–2 [277]–[283].

[203] Ibid 600 [277], 601–2 [283].

[204] Ibid 602 [284]–[285].

[205] See Twomey, '*Miller* and the Prerogative' (n 18) 88.

> non-statutory regime, affecting the liberties of individuals with limited channels of parliamentary accountability.[206]

Professor George Winterton has similarly remarked that the conferral and regulation of executive powers by statute is preferable because 'this promotes accountability to Parliament, giving Parliament authority to examine executive action; it strengthens the rule of law by subjecting executive action to judicial review'.[207] The displacement principle is an important limit on the prerogative powers of the executive government. It gives effect to the values of parliamentary sovereignty and the rule of law, which underpin the Australian constitutional system. As such, Australian courts should reconsider the application of a strong presumption against displacement of important prerogative powers in favour of a weaker presumption.[208] The adoption of a more flexible approach to the presumption against displacement would, as illustrated by the minority judgments in the *Tampa Case* and *CPCF*, enable the full expression of the displacement principle in Australia.

B *Requirement of an Inconsistency between Statute and the Prerogative and Its Relationship with Legislative Intention*

In the cases discussed above, courts have held that the Parliament can be taken to have intended to have displaced the prerogative where the statute, as construed, operates in a way that is inconsistent with its continued exercise. In his judgment in the *Tampa Case*, French J summarised the relationship between legislative intention and inconsistency as follows: 'The term "intention" of course is a fiction. What must be asked is whether the *Migration Act* operates in a way that is necessarily inconsistent with the subsistence of the Executive power described.'[209]

Equally, the absence of an inconsistency has been treated by courts as evidence that the Parliament did not intend to displace the prerogative. The prevailing view in Australia appears to be that where the statute purports to directly regulate the same area as the prerogative, such that it 'covers the field' of the prerogative, this will not generally be sufficient to show that the Parliament had intended to displace it, although there are dissenting voices to the

[206] Evans (n 26) 99.

[207] Winterton, 'The Relationship' (n 10) 35. See also Goldring (n 22) 442.

[208] The High Court weakened the presumption that statutes do not bind the Crown in *Bropho* (n 169) 21–4 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Courts could adopt a similar approach in relation to displacement: see Winterton, 'The Relationship' (n 10) 47–9.

[209] *Tampa Case* (n 5) 545 [202].

contrary.[210] The cases suggest that courts will be more willing to find that the prerogative has been displaced by statute in circumstances where there is a direct inconsistency, such as where the statute confers a right or benefit on an individual that would have been taken away by the exercise of the prerogative.[211]

This was evident in *Jarratt v Commissioner of Police (NSW)*, where the prerogative to dismiss public servants 'at pleasure' was held to have been displaced by the *Police Service Act 1990* (NSW).[212] The majority of the High Court emphasised, as Lord Parmoor had done in *De Keyser*, that the Crown could not rely on its prerogative to dismiss its servants at pleasure as a means of circumventing the requirements of procedural fairness in relation to the appointment and dismissal of public servants in the statute that had been imposed by the Parliament in order to protect the rights of individuals.[213] The inference drawn by the majority from the imposition of statutory conditions and limits on the exercise of the power was that the Parliament intended to displace the prerogative to dismiss servants at pleasure by enacting the statute.[214] Otherwise, as Callinan J observed in his judgment, '[w]hy make statutory provision for any of this if all that is involved, or is to be left unimpaired, is naked Crown privilege or prerogative?'[215] The inconsistency between the continued exercise of the prerogative to dismiss 'at pleasure' and the provisions of the statute was evidence of the Parliament's intention to displace the prerogative and this was the crucial factor for the majority in finding that it had been displaced by statute.[216]

The absence of a direct inconsistency between the statute and prerogative was an important factor for the majority in *Barton*, *Ling* and the *Tampa Case* in finding that the Parliament did *not* intend to displace the prerogative by enacting the statutory regime in those cases. In particular, in *Ling* and the *Tampa Case*, and later in *Oates*, it was significant that the statute assumed, and was

[210] See, eg, ibid 501 [34] (Black CJ); *CPCF* (n 25) 600–1 [279] (Kiefel J).

[211] Scholars have queried whether there is continuing utility in referring to the different categories of inconsistency in the context of s 109 inconsistency: see especially Rumble, 'The Nature of Inconsistency' (n 166) 72; Lindell, 'Grappling with Inconsistency' (n 166) 30; Leeming, *Resolving Conflicts of Laws* (n 166) 155–7.

[212] *Jarratt* (n 21) 69–70 [85] (McHugh, Gummow and Hayne JJ), 87–8 [137] (Callinan J).

[213] Ibid 68 [78] (McHugh, Gummow and Hayne JJ), 89 [140]–[142] (Callinan J).

[214] Ibid 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–5 [129], 87–8 [137], 89 [141] (Callinan J).

[215] Ibid 84 [129].

[216] Ibid 69 [81], 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–5 [129] (Callinan J).

predicated on, the continued existence of the prerogative.[217] In *Ling* and the *Tampa Case*, the majority described the statutes as being 'facultative' in nature, in the sense that they facilitated the exercise of executive power.[218] There was, therefore, no inconsistency, because the statutes supplemented or enabled the exercise of executive power rather than displacing it.

In the *Tampa Case*, French J found that the *Migration Act* did not operate in a way that was 'necessarily inconsistent' with the executive power.[219] Justice French reasoned, as the majority had in *Ling*, that the provisions of the *Migration Act* were 'facultative' in nature and did not purport to diminish the executive power.[220] Justice French also observed that the object of the Act was control of entry. It did not confer rights on non-citizens seeking to enter Australia that would have been taken away by the exercise of the executive power.[221] Justice French therefore concluded that there was no inconsistency between the provisions of the statute and the exercise of executive power, so far as it related to the control of entry of non-citizens.[222]

I have made the point elsewhere that French J's conclusion that the *Migration Act* did not confer rights on non-citizens is arguable.[223] While the *Migration Act* did not confer a right of entry on non-citizens, French J acknowledged that there were 'process rights at various stages of the visa granting system', including rights relating to judicial review, but concluded that they 'do not operate in the circumstances to which the Executive power posited for the purposes of this case applies'.[224] These process rights did not operate because, as noted by Black CJ in his judgment, the Commonwealth government wanted to avoid the operation and application of the *Migration Act*, and this is why it exercised its executive power to prevent the *MV Tampa* from entering the port at Christmas Island.[225] The *Migration Act* only applied where 'unlawful non-citizens'[226] had

[217] *Ling* (n 25) 94, 97 (Gummow, Lee and Hill JJ); *Tampa Case* (n 5) 545 [202] (French J, Beaumont J agreeing at 514 [95]); *Oates* (n 3) 511 [38]–[39] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

[218] *Ling* (n 25) 97; *Tampa Case* (n 5) 545 [202].

[219] *Tampa Case* (n 5) 545 [202].

[220] Ibid.

[221] Ibid.

[222] Ibid.

[223] See Stephenson, 'Statutory Displacement' (n 31) 215–16. See also Saunders, Democracy, Liberty and the Prerogative (n 22) 381–2; Zines, 'The Inherent Executive Power' (n 179) 292–3.

[224] *Tampa Case* (n 5) 545 [202].

[225] Ibid 507 [60].

[226] An 'unlawful non-citizen' for the purposes of the *Migration Act* (n 193) is a person that does not hold a visa entitling them to enter Australia: at ss 13–14.

entered the 'migration zone'[227] and the port at Christmas Island was within Australia's migration zone for the purposes of the *Migration Act*.[228] The majority effectively sanctioned the exercise of the inherent executive power by the Commonwealth as a means of avoiding its obligations to process the rescued persons in accordance with the provisions of the *Migration Act*.[229]

While the interpretive approach adopted by French J in the *Tampa Case* was broadly consistent with the approach adopted by the majority in earlier decisions, there were some significant differences between the *Migration Act* and the statutes that were considered in the other cases that were largely overlooked. The *Migration Act* differed in operation and scope from the statutes that were considered in *Barton* and *Oates*. It was significant that the statutory scheme in those cases did not cover extradition in all circumstances and, accordingly, did not extend to the whole of the area covered by the exercise of the prerogative.[230] It followed from this conclusion that there was no inconsistency or conflict between the provisions of the statute and the exercise of the prerogative power to request extradition in the circumstances of each case. The *Migration Act*, on the other hand, provided a comprehensive regime relating to the control of Australia's borders. The provisions of the *Migration Act* directly regulated the same area as that covered by the exercise of the inherent executive power.

Furthermore, while French J described the provisions of the *Migration Act* as 'facultative',[231] they were different in nature to the provisions in *Ling*. The purpose of the Act and Regulations in *Ling* was to facilitate the enforcement of the assignments and to assist the Commonwealth in proving its case in recovery proceedings.[232] The Act did not create a new statutory right to take assignments of choses in action.[233] The operative provisions of the Act assumed that the prerogative to take the assignment had already been exercised by the Commonwealth.[234] By contrast, the *Migration Act* conferred extensive, coercive powers on executive officers, which included powers to detain persons; chase,

227 Ibid s 189. See also at s 5(1) (definition of 'migration zone').

228 *Tampa Case* (n 5) 505 [45]–[47] (Black CJ), 536 [167] (French J, Beaumont J agreeing at 514 [95]).

229 Stephenson, 'Statutory Displacement' (n 31) 215–16.

230 *Barton* (n 3) 501 (Mason J), 507–8 (Jacobs J); *Oates* (n 3) 511 [38]–[39] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

231 *Tampa Case* (n 5) 545 [202].

232 *Ling* (n 25) 97 (Gummow, Lee and Hill JJ).

233 Ibid 94.

234 Ibid.

board and stop vessels; and in certain circumstances, fire at and into a vessel.[235] It also created offences and regulated, more generally, the exclusion, expulsion and detention of non-citizens and interdiction at sea.[236] The *Migration Act* conferred powers on the executive that were at least as wide as the prerogative, but subject to conditions on their exercise. Nevertheless, French J relied on similar reasoning as the majority in *Ling* to find that the provisions of the *Migration Act* 'may yield a like result to the exercise of Executive power, [but] in this particular application of it cannot be taken as intending to deprive the Executive of the power necessary to do what it has done in this case'.[237]

Chief Justice Black disagreed. His Honour cited the express conferral of coercive powers as evidence of 'the powerful scope and content of the Act'.[238] The *Migration Act* provided 'a comprehensive regime for the control of Australia's borders'[239] and, in these circumstances, Black CJ thought that the appropriate inference to draw was that the Parliament intended that the executive would exercise those powers in accordance with the procedure set out in the statutory regime.[240] The comprehensive and detailed nature of the *Migration Act*, when coupled with the coercive nature of the powers that it conferred on the executive, suggested that the Parliament intended to displace the prerogative by enacting the statutory regime.[241] Indeed, Black CJ did not think that the preservation of non-statutory executive powers, that would exist as a 'parallel Executive right' alongside the extensive statutory powers conferred by the *Migration Act*, was the correct intention to impute to the Parliament.[242]

Justice French and Black CJ adopted different approaches in ascertaining whether the prerogative had been impliedly displaced by the provisions of the *Migration Act*. Chief Justice Black endorsed Lord Dunedin's 'covering the field' approach to displacement from *De Keyser* and stated:

> It is uncontentious that the relationship between a statute and the prerogative is that where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, the exercise of the power or right is governed by the provisions of the statute, which are to prevail

235 *Tampa Case* (n 5) 505–6 [50], 506 [55] (Black CJ).
236 Ibid 507 [60].
237 Ibid 545 [202].
238 Ibid 506 [55].
239 Ibid 507 [60].
240 Ibid 507 [60]–[61].
241 Ibid 508 [64].
242 Ibid 507 [61].

> in that respect … The accepted test is whether the legislation has the same area of operation as the prerogative.[243]

In his construction of the statute, the Chief Justice ascribed particular significance to the express statement of the object in the *Migration Act*, being to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'[244] and the detailed mechanisms governing visas, self-identification, removal and deportation that were designed to advance the object of the Act.[245] The Act conferred wide ranging, coercive powers on executive officers, created offences and imposed penalties.[246] The fact that the *Migration Act* comprehensively regulated the field of border protection and conferred extensive powers on executive officers to act, that were equivalent to the prerogative but subject to conditions and limitations on their exercise, was sufficient evidence of the Parliament's intention to displace the prerogative.[247] Chief Justice Black was of the view that the conclusion to be drawn from the comprehensive regime in the *Migration Act* was 'that the Parliament intended that in the field of exclusion, entry and expulsion of aliens the Act should operate to the exclusion of any Executive power derived otherwise than from powers conferred by the Parliament'.[248] This conclusion was, in Black CJ's view, 'all the more readily drawn' given that there was uncertainty about whether the prerogative continued to exist at all.[249]

Even in the absence of express words in the statute, Black CJ was satisfied that, after having interpreted the relevant provisions in their statutory context and in light of the purpose of the legislation and surrounding circumstances, the *Migration Act* exhibited a sufficiently clear intention to displace the prerogative power to exclude non-citizens from Australia.[250] In contrast, French J thought that the relevant question in the *Tampa Case* was 'whether the *Migration Act* evince[d] a *clear and unambiguous intention*'[251] to deprive the executive of the power to prevent non-citizens from entering Australian territory. That is because, as shown above, French J applied a strong presumption against displacement.

[243] Ibid 501 [33]–[34].

[244] Ibid 504 [42], quoting *Migration Act* (n 193) s 4(1).

[245] *Tampa Case* (n 5) 504 [42]–[43].

[246] Ibid 505–6 [49]–[50].

[247] Ibid 508 [64].

[248] Ibid.

[249] Ibid.

[250] Ibid 504–8 [42]–[64].

[251] Ibid 545 [201] (emphasis added).

One explanation for the difference in the approaches and conclusions drawn by the different members of the Court in the *Tampa Case* is that Black CJ did not apply the strong presumption against displacement. Therefore, the requisite intention did not need to be expressed as clearly. In Black CJ's consideration of the clarity with which an intention to displace the prerogative needed to be expressed, he observed that

> if a power is well used, well-established and important to the functioning of the Executive government, a very clear manifestation of an intention to abrogate will be required. But, similarly, where an asserted power is at best doubtful, and where, if it exists at all, it does so in a field that has been the concern of the Parliament for a very long time, a less stringent view of the intention necessary to abrogate such a power is appropriate.[252]

Chief Justice Black was not convinced that the prerogative to exclude non-citizens continued to exist.[253] However, if it did, the provision of a comprehensive and detailed statutory regime in the *Migration Act* was sufficient evidence of the Parliament's intention to displace the prerogative.[254]

While there may be some disagreement about whether French J was correct in his conclusion in the *Tampa Case*, the interpretive methodology employed by French J reflects the prevailing approach adopted by courts in ascertaining whether an intention to displace the prerogative can be discerned from the statute. Australian courts have generally been reluctant to find, in the absence of clear statutory words, that the prerogative has been displaced by a statute that 'covered the field' of the prerogative. The fact that the statute regulates the same subject matter of the prerogative does not appear to be sufficient evidence of the Parliament's intention to displace the prerogative. It would seem that there needs to be a direct inconsistency between the provisions of the statute and the continued exercise of the prerogative, or non-statutory executive power.

The 'covering the field' approach was, however, applied by Black CJ in his dissenting judgment in the *Tampa Case*.[255] Justice Kiefel adopted a similar approach to that of Black CJ in her dissenting judgment in *CPCF*, where her Honour reiterated that it was a constitutional principle that

> any prerogative power is to be regarded as displaced, or abrogated, where the Parliament has legislated on the same topic. When a matter is directly regulated by statute, the Executive Government derives its authority from the Parliament

[252] Ibid 504 [40].

[253] Ibid 500–1 [29].

[254] Ibid 507 [61].

[255] Ibid 504–8 [42]–[64].

> and can no longer rely on a prerogative power. Where the Executive Government exercises such authority, it is bound to observe the restrictions which the Parliament has imposed.[256]

In this respect, Kiefel J reasoned that the enactment of detailed legislation such as the *MPA*, which imposed conditions on the exercise of coercive powers of expulsion and detention, was not consistent with 'an intention that the Commonwealth Executive is to retain a complete discretion as to how such powers are to be exercised'.[257] Justice Kiefel was not prepared to find that the prerogative survived in circumstances where the Commonwealth Parliament had legislated extensively on topics relating to immigration and border protection since Federation, and had made provision for the manner and conditions of the exercise of coercive powers of expulsion and detention in the *MPA*.[258]

An inconsistency between a statute and the prerogative can arise in different ways. However, as a result of the rigid application of the strong presumption against displacement of 'important' prerogative powers, the requisite intention needs to be expressed with unmistakable clarity. The prevailing approach in Australian case law seems to suggest that, in the absence of clear words, only a direct inconsistency will be sufficient to demonstrate that the Parliament intended to deprive the executive of the prerogative by enacting the statutory regime.[259] As French J noted in the *Tampa Case*, 'close scrutiny will be required of any contention that a statute, without express words to that effect, has displaced the operation of the Executive power by virtue of "covering the field" of the subject matter'.[260]

It is plausible that the majority's insistence on a direct inconsistency as evidence of the Parliament's intention to displace the prerogative is designed to lessen the possibility of an unintentional displacement of the prerogative by statute. In the context of s 109 jurisprudence concerning inconsistency between Commonwealth and state laws, the application of the 'covering the field' test has given rise to inconsistency over a range of subject matters.[261] This concern may be heightened because of the effect of displacement. While it is beyond the scope of this article to examine the effect of displacement in detail, it has been suggested that displacement does not extinguish the prerogative, but holds it in

256 *CPCF* (n 25) 600–1 [279] (citations omitted).

257 Ibid 601 [283].

258 Ibid 600 [277], 601 [280].

259 See also Evans (n 26) 98.

260 *Tampa Case* (n 5) 540–1 [185].

261 See Lindell, 'Grappling with Inconsistency' (n 166) 29.

abeyance until the legislation is repealed.[262] Given that the practical effect of a finding that the prerogative has been displaced by statute is that the executive will be deprived of its prerogative power, courts need to be satisfied that this is the correct intention to be imputed to the Parliament.

The requirement of a 'clear and unambiguous' intention to rebut the presumption has set a high threshold for statutory displacement of the prerogative in Australia. As the *Tampa Case* demonstrates, the majority effectively sanctioned the exercise of the inherent executive power by the Commonwealth as a means of avoiding the operation of the *Migration Act* and its conditions. As a result of this decision, the rescued persons were deprived of their right to be processed in accordance with the provisions of the *Migration Act*. It is difficult to reconcile the approach adopted by the majority in ascertaining whether the executive power to exclude non-citizens from Australia had been displaced by the statute with the decision in *De Keyser*. The House of Lords was clear in that case that where the Parliament has intervened by imposing conditions, restrictions and limitations on the exercise of powers that also fall within the scope of the prerogative, the executive derives its power from the statute and must exercise it in accordance with the statute.[263] Accordingly, the interpretive approach adopted by Black CJ and Kiefel J in their respective dissents, which gives full expression to the displacement principle as articulated in *De Keyser*, is to be preferred.

V Conclusion

In an 'age of statutes', it is becoming increasingly important to understand the relationship between statute and the prerogative. This article has sought to contribute to our understanding of this relationship by examining the incorporation and application of the constitutional principle in *De Keyser* in Australian case law and its interaction with principles of statutory interpretation. It offered an analysis of the interpretive approach that has been adopted by Australian courts in ascertaining whether the prerogative has been displaced by statute. It argued that the application of the strong presumption against displacement of important prerogative powers has effectively prevented the full expression of the displacement principle in Australia and should therefore be reconsidered.

While it is the duty of the court 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have',[264] it is

[262] *De Keyser* (n 20) 539–40 (Lord Atkinson), 554 (Lord Moulton).

[263] Ibid 526 (Lord Dunedin), 539–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner), 576 (Lord Parmoor).

[264] *Project Blue Sky* (n 34) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

also the role of the court to apply and enforce constitutional limits on executive power. The courts are not interpreting statutes in the abstract, but against a background of constitutional principles. The displacement principle set out in *De Keyser*, and incorporated in Australia, operates to ensure that the prerogative powers of the executive government remain subject to the control of the Parliament. Courts should, where possible, adopt an interpretive approach that honours this principle.