

NATIONHOOD AND SECTION 61 OF THE CONSTITUTION

Dr Peta Stephenson*

*This article explores the relationship between the nationhood power and s 61 of the Constitution. It argues that, in the majority of decided cases, the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law. The key issue that has arisen in the case law has been whether an executive act fell within a subject matter of Commonwealth executive power. In this regard, the Court has found that Australia's attainment of nationhood expanded the areas of Commonwealth responsibility over which the executive power could be exercised. It is further shown that the nationhood power has not undermined the federal distribution of powers. The Court has, in ascertaining whether an executive act is supported by the nationhood power, consistently applied Mason J's 'peculiarly adapted' test, which was set out in *Victoria v Commonwealth and Hayden* ('AAP Case'). This test incorporates federalism to condition and limit the nationhood power.*

I INTRODUCTION

Section 61 is the principal repository of Commonwealth executive power in the *Constitution*. It 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 Commonwealth'. Section 61 'marks the external boundaries'¹ of

* Lecturer, School of Law, Faculty of Law, Queensland University of Technology. Special thanks are due to Anne Twomey, Jonathan Crowe, Benjamin Saunders and the anonymous reviewer for their helpful comments on an earlier version of this article. This article was presented as a paper at the Institute for Advanced Studies Executive Power Workshop at The University of Western Australia on 7 April 2017. I am grateful to all who participated in the discussion. All errors and opinions expressed are my own.

¹ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437-40, 447-8 (Isaacs J) ('*Wooltops Case*').

Commonwealth executive power but does not define it.² The meaning of s 61 can only be properly understood if it is considered in the light of British constitutional history, conventions and the common law.³

Consistent with our British heritage, it is now generally accepted that, in addition to executive powers sourced directly in the *Constitution* and conferred by statute, s 61 incorporates all of the common law or ‘non-statutory’ powers of the Crown that are appropriate to the Commonwealth, subject to the federal distribution of powers effected by the *Constitution*.⁴ In a classification that has since received judicial endorsement, Sir William Blackstone divided the common law powers into two categories, namely, the prerogative powers and capacities of the Crown.⁵ The ‘prerogative’ was understood as referring 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’, such as the power to declare war and peace, enter into treaties and confer honours.⁶ ‘Capacities’, on the other hand, were those powers that the Crown shared in common with its subjects. Of the Crown’s common law capacities, the power to contract and spend has received the most judicial consideration in

² *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ) (*‘Davis’*) quoted in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 62 [131] (French CJ) (*‘Pape’*) and *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 372 [588] (Kiefel J) (*‘Williams (No 1)’*).

³ See, eg, *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 304 (Dixon J) (*‘Farley’s Case’*); George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1-13, 29, 71-85; Sir Victor Windeyer, ‘Responsible Government – Highlights, Sidelights and Reflections’ (1957) 41 *Royal Australian Historical Society Journal and Proceedings* 257, 259; W M C Gummow, ‘The *Constitution*: Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167, 172, 178-9; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 339-41; Bradley Selway, ‘All at Sea – Constitutional Assumptions and “the Executive Power of the Commonwealth”’ (2003) 31 *Federal Law Review* 495, 501-4.

⁴ *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See also Enid Campbell, ‘Parliament and the Executive’ in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 88, 88-90; Leslie Zines, ‘Commentary’ in H V Evatt, *The Royal Prerogative* (Law Book Co, 1987) C1, C4-5; Winterton, *Parliament*, above n 3, 24-5, 50-1; Gummow, above n 3, 172-3, 178-80.

⁵ Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765-69) Book I, 232 endorsed in *Davis* (1988) 166 CLR 79, 108 (Brennan J); *Williams (No 1)* (2012) 248 CLR 156, 186 [25] (French CJ), 343-4 [488] (Crennan J); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 97 [133], 98 [135] (Gageler J) (*‘Plaintiff M68’*).

⁶ Blackstone, above n 5, 232 endorsed in *Davis* (1988) 166 CLR 79, 108 (Brennan J); *Williams (No 1)* (2012) 248 CLR 156, 186 [25] (French CJ), 343-4 [488] (Crennan J). See also Leslie Zines, ‘The Inherent Executive Power of the Commonwealth’ (2005) 16 *Public Law Review* 279, 280; Anne Twomey, ‘Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313, 316.

recent years, following a spate of High Court challenges to controversial Commonwealth spending programs.⁷

In *Victoria v Commonwealth and Hayden* ('AAP Case'),⁸ four Justices of the High Court confirmed that the executive power in s 61 also incorporated an implied executive power derived, in part, from Australia's national status.⁹ Mason J gave the most precise formulation of it, describing it as 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.¹⁰ This aspect of the executive power has been described as the 'inherent power',¹¹ or 'implied national power'.¹² More commonly, scholars have referred to it as the 'nationhood power',¹³ notwithstanding that, until fairly recently, this description was not adopted by a majority of the High Court of Australia.¹⁴

⁷ See, especially *Pape* (2009) 238 CLR 1; *Williams (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 ('*Williams (No 2)*'). On the distinction between prerogatives and capacities see Blackstone, above n 5, 232 endorsed in *Davis* (1988) 166 CLR 79, 108-9 (Brennan J); *Williams (No 1)* (2012) 248 CLR 156, 186 [25] (French CJ), 343-4 [488] (Crennan J); *Plaintiff M68* (2016) 257 CLR 42, 97 [133], 98 [135] (Gageler J). See also Zines, 'Inherent', above n 6, 280; B V Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 *Law Quarterly Review* 225, 635-6; Twomey, above n 6, 322-3, 326-7.

⁸ (1975) 134 CLR 338.

⁹ *Ibid* 362 (Barwick CJ), 375 (Gibbs J), 397 (Mason J), 412 (Jacobs J).

¹⁰ *Ibid* 397.

¹¹ Zines, 'Inherent', above n 6; H P Lee, *Emergency Powers* (The Law Book Company Ltd, 1984) 125-6, 206-7; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks' Australian Constitutional Law* (LexisNexis Butterworths, 9th ed, 2013) 934-5.

¹² Zines, *High Court*, above n 3, 414-5; Cheryl Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267.

¹³ See, eg, Winterton, *Parliament*, above n 3, 40-4; P H Lane, *Lane's Commentary on the Australian Constitution* (Law Book, 2nd ed, 1997) 438-9; Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 669-71; Gabrielle Appleby, 'There Must be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93, 111-2, 128-130; Twomey, '*Pape*', above n 6; 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 *Oxford University Commonwealth Law Journal* 97, 104, 128, 130; Peter Gerangelos, H P Lee, Nicholas Aroney, Sarah Murray, Simon Evans and Patrick Emerton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 3rd ed, 2013) 325-6 [3.390]; Gabrielle Appleby and Stephen McDonald, 'Looking at Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 258, 262, 274, 276; Anne Twomey, 'Post-*Williams* Expenditure – When can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation' (2014) 33 *University of Queensland Law Journal* 9, 23-5; Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2014) 39 *Monash Law Review* 348, 353, 384; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 379-397; Peter Gerangelos, 'Executive Power' in Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios (eds), *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press,

In his important and influential monograph, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, Professor George Winterton articulated a framework of analysis for determining whether executive action falls within the execution and maintenance limb of s 61.¹⁵ Winterton suggested that the content and scope of s 61 could be ascertained having regard to its ‘breadth’ and ‘depth’.¹⁶ ‘Breadth’ describes the subject matters over which the executive power can be exercised. It reflects the federal distribution of powers between the Commonwealth and the states effected by ss 51, 52 and 122 of the *Constitution*.¹⁷ ‘Depth’ describes the types of action that can be undertaken by the Executive in relation to those subject matters. Winterton’s core thesis was that executive action undertaken to ‘maintain’ the *Constitution* and Commonwealth laws needed to be supported by the prerogative.¹⁸

Winterton was of the view that the virtue of the prerogative is that it is subject to limits on its exercise, well established in the common law, and can be abrogated, displaced or regulated by statute.¹⁹ He argued that confining the executive power to the common law powers of the Crown promoted greater

2015) 427, 451-9; Nicholas Condylis, ‘Debating the Nature and Ambit of the Commonwealth’s Non-Statutory Executive Power’ (2015) 39 *Melbourne University Law Review* 385, 389, 399, 426-8; Andrew Hanna, ‘Nationhood Power and Judicial Review: A Bridge Too Far’ (2015) 39 *University of Western Australia Law Review* 327; Peta Stephenson, ‘Justice Mason in the *Australian Assistance Plan Case* (1975): Nationhood, Federalism and Commonwealth Executive Power’ in Andrew Lynch (ed) *Great Australian Dissents* (Cambridge University Press, 2016) 169, 170, 174-188.

¹⁴ Similar observations have been made by Twomey, ‘*Pape*’, above n 6, 317; Gerangelos, ‘Section 61’, above n 13, 104, 112; Gerangelos, ‘Executive Power’, above n 13, 451. In the context of executive power, the following members of the High Court referred expressly to the ‘nationhood power’ or powers ‘grouped under notion of “nationhood”’ in: *Williams (No 1)* (2012) 248 CLR 156, 267 [240] (Hayne J); *Williams (No 2)* (2014) 252 CLR 416, 454 [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 568 [150] (Hayne and Bell JJ), 596 [260] (Kiefel J) (*‘CPCF’*).

¹⁵ Winterton, *Parliament*, above n 3, 27-52.

¹⁶ *Ibid* 29-34, 40-4 endorsed in *Plaintiff M68* (2016) 257 CLR 42, 96-7 [130]-[131] (Gageler J).

¹⁷ *Ibid* 29-31, 38-47.

¹⁸ *Ibid* 29, 48-52, 111, 115-7. Note that Winterton used ‘prerogative’ in a wide sense to cover both prerogatives and capacities in Winterton, *Parliament*, above n 3, 111-3. See also A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 424-5 contra Blackstone, above n 5, 232.

¹⁹ George Winterton, ‘The Limits and Use of Executive Power by Government’ (2003) 31 *Federal Law Review* 421, 432-3; George Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (2004) 25 *Adelaide Law Review* 21, 35-6; Peter Gerangelos, ‘Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 189, 193-4, 197-8.

parliamentary oversight of executive action and greater scope for judicial review, which was consistent with the principles of responsible government and the separation of powers.²⁰ Winterton's breadth and depth analysis has not always been strictly applied by Australian courts.²¹ Nevertheless, it remains a helpful conceptual framework for explaining and understanding the relationship between nationhood and s 61 of the *Constitution*.

Scholars have expressed concern that the nationhood power has added 'depth' to the executive power and can support executive action that would otherwise be denied to it by the common law.²² Furthermore, as these activities appear to fall outside the areas of responsibility allocated to the Commonwealth by ss 51, 52 and 122 of the *Constitution*, it has been suggested that the nationhood power could potentially undermine the federal distribution of powers. This article aims to address these concerns by providing an account of the nature and scope of the nationhood power. In particular, it argues that the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. It develops and expands on similar arguments made by Professors Leslie Zines and Anne Twomey and demonstrates that the weight of authority suggests that the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law.²³ The constitutional significance of Australia's acquisition of nationhood is that it expanded the subject matters or 'breadth' of Commonwealth executive power.²⁴ It is further shown that the nationhood power has not undermined the federal distribution of powers. The Court has consistently applied Mason J's 'peculiarly adapted' test, which was set out in the *AAP Case*, in ascertaining whether an executive act is supported by the nationhood power. This test incorporates federalism as a limit on the nationhood power.

²⁰ Winterton, 'Limits', above n 19, 432-3; Winterton, 'Relationship', above n 19, 35-6; Gerangelos, 'Winterton Thesis', above n 19, 197-8.

²¹ See especially *Ruddock v Vadarlis* 110 FCR 491, 540 [183], 542 [191] (French J) ('*Tampa Case*'); *Williams (No 1)* (2012) 248 CLR 156 but cf *Plaintiff M68* (2016) 257 CLR 42, 96 [130] (Gageler J).

²² See especially Winterton, 'Limits', above n 19; Winterton, 'Relationship', above n 19; Gerangelos, 'Winterton Thesis', above n 19; Gerangelos, 'Section 61', above n 17; Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94 but cf Zines, 'Inherent', above n 6.

²³ Zines, 'Inherent', above n 6; Twomey, '*Pape*', above n 6, 339.

²⁴ Zines, 'Inherent', above n 6, 281; Twomey, '*Pape*', above n 6, 339.

II NATIONHOOD AND 'BREADTH'

In contrast to s 51, which clearly enumerates the subject matters of Commonwealth legislative power, the text of s 61 does little to clarify the areas of responsibility that are allocated to the Commonwealth Executive by the *Constitution* and the nature of the action that can be undertaken in relation to those areas. In this part, it is demonstrated that the High Court has had regard to Australia's attainment of nationhood in interpreting s 61 of the *Constitution*, and it has expanded the subject matters or 'breadth' of the executive power of the Commonwealth.²⁵

A *The Constitutional Significance of Australia's Attainment of Nationhood*

When the *Constitution* was enacted in 1901, the Commonwealth of Australia was ushered into existence as a self-governing colony within the British Empire.²⁶ The *Constitution* did not have the effect of making Australia a nation 'internationally or independent', although it was 'a major step towards each'.²⁷ It vested the Commonwealth with all of the powers that were necessary for an independent nation-State. These included powers relating to defence and external affairs. Consistent with its colonial status, however, not all of these powers were immediately exercisable by the Commonwealth. The Commonwealth could not, for example, negotiate or enter into agreements

²⁵ See also Sir Anthony Mason, 'The Australian Constitution 1901-1988' (1988) 62 *Australian Law Journal* 752, 753-4.

²⁶ W J Hudson and M P Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne University Press, 1988), 35-6; Winterton, *Parliament*, above n 3, 18; 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, 15. See also *Bonser v La Macchia* (1969) 122 CLR 177, 189 (Barwick CJ), 223-4 (Windeyer J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *New South Wales v Commonwealth* (1975) 135 CLR 337, 373 (Barwick CJ) ('*Seas and Submerged Lands Case*'); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 183 (Barwick CJ), 194-5 (Gibbs J), 208-14 (Stephen J) ('*China Ocean Shipping Co*'); *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 257 (Gibbs J); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 179, 183-4 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Sue v Hill* (1999) 199 CLR 462, 527 [170] (Gaudron J) contra *Bisticic v Rokov* (1976) 135 CLR 552, 656-8 (Murphy J); *Robinson v Western Australia Museum* (1977) 138 CLR 283, 343 (Murphy J); *China Ocean Shipping Co* (1979) 145 CLR 172, 236-9 (Murphy J); *Commonwealth v Queensland* (1975) 134 CLR 298 (Murphy J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 238 (Murphy J) ('*Koowarta*').

²⁷ *Bonser v La Macchia* (1969) 122 CLR 177, 189 (Barwick CJ).

with foreign countries.²⁸ Nor could it declare war or peace²⁹ or acquire territory.³⁰ These powers were exercisable only by the King on the advice of the British Government.³¹

As Australia grew in political status, the prerogative powers relating to Imperial matters that had traditionally only been exercised by the British Government gradually came to be exercisable by the Commonwealth Government.³² The 1926 Imperial Conference was, in this regard, a particularly important step taken in Australia's 'evolution'³³ into nationhood.³⁴ The Conference issued the Balfour Declaration of 1926 which had the effect of securing the autonomy of the Dominion Executives in the conduct of their internal and external affairs. At the 1926 Imperial Conference it was resolved, among other things, that there would be a change to the constitutional conventions regarding the role of the Governors-General of the Dominions. Instead of being representatives or agents of the British Government, it was resolved that they would act on behalf of the Crown and could exercise powers, including powers relating to external affairs, on the advice of Dominion ministers.³⁵ As a result of the resolutions adopted at the 1926 Imperial Conference, the Commonwealth Government could exercise its executive power in relation to matters that had previously fallen within the scope of the external prerogatives of the Crown in its Imperial capacity.³⁶

²⁸ Zines, 'Nationhood', above n 26, 25-7; George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31, 41-2; Hudson and Sharp, above n 26, 39.

²⁹ *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J). See also Zines, 'Commentary', above n 4, C3-5; Zines, 'Nationhood', above n 26, 25-7; Winterton, 'Independence', above n 28, 33.

³⁰ Zines, 'Nationhood', above n 26, 25; Winterton, *Parliament*, above n 3, 24.

³¹ Zines, 'Nationhood', above n 26, 25-7; Winterton, 'Independence', above n 28, 41-2. See also *Bonser v La Macchia* (1969) 122 CLR 177, 224 (Windeyer J).

³² Zines, 'Nationhood', above n 26, 43; Zines, 'Commentary', above n 4, C3; Anne Twomey, 'Sue v Hill – The Evolution of Australian Independence' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 77, 102-3.

³³ Geoffrey Lindell, 'Introduction: The Vision in Hindsight Explained' in Geoffrey Lindell and Robert Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) xix, xix, xxiv.

³⁴ Zines, 'Nationhood', above n 26, 16; Winterton, 'Independence', above n 28, 41-6; Mason, above n 25, 753. See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 682-4 (Evatt and McTiernan JJ) ('Burgess').

³⁵ Zines, 'Nationhood', above n 26, 28; Winterton, 'Independence', above n 28, 35-6; Twomey, 'Sue v Hill', above n 32, 83-4, 102-3.

³⁶ Zines, 'Nationhood', above n 26, 32.

Full Dominion independence in the exercise of executive power was attained at the Imperial Conference of 1930.³⁷ The passage of the *Statute of Westminster 1931* (Imp) on 11 December 1931 and its subsequent adoption by the Commonwealth in the *Statute of Westminster (Adoption) Act 1942* (Cth)³⁸ secured the legislative independence of the Commonwealth Parliament. Scholars have, therefore, suggested that Australia was effectively independent, in the sense of being ‘free from external restraint,’ on the date of the enactment of the *Statute of Westminster* on 11 December 1931.³⁹ The High Court, on the other hand, has been more conservative, preferring to date Australia’s independence at some time ‘subsequent to the passage and adoption of the Statute of Westminster’ and has noted the difficulty in pinpointing ‘precisely’ when this occurred.⁴⁰

At the latest, the Commonwealth of Australia secured substantive independence upon the passage of the *Australia Acts 1986* (UK and Cth) (*‘Australia Acts’*) on 3 March 1986.⁴¹ By this legislation, the United Kingdom relinquished its power to legislate for Australia,⁴² and appeals to the Privy Council from state courts were terminated.⁴³ The states were authorised to enact legislation repugnant to the laws of the United Kingdom.⁴⁴

As Zines has explained, Australia’s attainment of independence did not result in any change to the text of the *Constitution*. Instead, it altered the constitutional convention as to who would give advice to the Crown.⁴⁵

³⁷ *Bonser v La Macchia* (1969) 122 CLR 177, 224 (Windeyer J); Winterton, ‘Independence’, above n 28, 41-2; Twomey, ‘*Sue v Hill*’, above n 32, 102-3.

³⁸ The Statute of Westminster was retrospectively adopted on 3 September 1939, following the enactment of the *Statute of Westminster Adoption Act 1942* (Cth).

³⁹ Winterton, ‘Independence’, above n 28, 41-3; Twomey, ‘*Sue v Hill*’, above n 32, 102, 108; Geoffrey Lindell, ‘Further Reflections on the Date of the Acquisition of Australia’s Independence’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 51, 53-5. See also Hudson and Sharp, above n 26, 7.

⁴⁰ See, eg, *Bonser v La Macchia* (1969) 122 CLR 177, 189 (Barwick CJ), 223-4 (Windeyer J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Seas and Submerged Lands Case* (1975) 135 CLR 337, 373 (Barwick CJ); *China Ocean Shipping Co* (1979) 145 CLR 172, 183 (Barwick CJ), 194-5 (Gibbs J) 208-14 (Stephen J); *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 257 (Gibbs J); *Sue v Hill* (1999) 199 CLR 462, 527 [170] (Gaudron J).

⁴¹ *Sue v Hill* (1999) 199 CLR 462, 528 [173] (Gaudron J) cf Winterton, ‘Independence’, above n 28, 42-3; Twomey, ‘*Sue v Hill*’, above n 32, 96-102, 108; Lindell, above n 39, 53-5.

⁴² *Australia Act 1986* (Cth), s 1; *Australia Act 1986* (UK), s 1.

⁴³ *Australia Act 1986* (Cth), s 11; *Australia Act 1986* (UK), s 11.

⁴⁴ *Australia Act 1986* (Cth), s 3; *Australia Act 1986* (UK), s 3.

⁴⁵ Zines, ‘Commentary’, above n 4, C3.

Accordingly, in order to ascertain the content and scope of the executive power of the Commonwealth in s 61, the Court had to consider Australia's evolving national status, as evidenced by 'political action, conference declarations, intra-imperial agreements and recognition of the international personality' by other nations.⁴⁶ Windeyer J summarised the relevance of nationhood to the Court's interpretation of the *Constitution* in the following terms:

Australia has grown into nationhood. With the march of history the Australian colonies are now the Australian nation. The words of the Constitution must be read with that in mind and to meet, as they arise, the national needs of the "one indissoluble Federal Commonwealth" under the Crown ... The law has followed the facts. The Statute of Westminster has, by removing restrictions, real or supposed, affirmed the legal competence of the Commonwealth Parliament. The Commonwealth has become, by international recognition, a sovereign nation, competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty.⁴⁷

An important consequence of Australia's attainment of national status was the ability to exercise control over its external affairs. This was evident in the decision of *R v Burgess; Ex parte Henry* ('*Burgess*').⁴⁸ It was held in that case that the Commonwealth could exercise its executive power to 'deal administratively with the external affairs of the Commonwealth'.⁴⁹ This included 'the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane'.⁵⁰ Several members of the Court were of the view that the prerogative power to negotiate and enter into treaties became exercisable by Commonwealth Executive when Australia attained international personality, as early as 1919, when it had signed the *Treaty of Versailles*.⁵¹

The prerogative of extradition also became exercisable by the Commonwealth Government when Australia attained national and sovereign

⁴⁶ Ibid C2.

⁴⁷ *Bonser v La Macchia* (1969) 122 CLR 177, 223-4 (Windeyer J). See similar remarks made in *R v Foster; Ex parte Eastern and Australian Steamship Company* (1959) 103 CLR 256, 305 (Windeyer J); *Spratt v Hermes* (1965) 114 CLR 226, 247 (Barwick CJ).

⁴⁸ *Burgess* (1936) 55 CLR 608, 643-4 (Latham CJ).

⁴⁹ Ibid 635, 643-4 (Latham CJ), 682-4 (Evatt and McTiernan JJ).

⁵⁰ Ibid 643-4 (Latham CJ).

⁵¹ Ibid 682-4 (Evatt and McTiernan JJ); *Jolley v Mainka* (1938) 49 CLR 242, 282-3 (Evatt J).

status. In *Barton v Commonwealth*,⁵² the Court accepted that the Commonwealth Government could make a request for extradition from a country with which it did not have an extradition treaty. Mason J remarked that that the executive power of the Commonwealth:

[E]nables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.⁵³

The immediate significance of Australia's attainment of nationhood for the High Court's interpretation of s 61 was that the 'Imperial' prerogatives, including those relating to external affairs,⁵⁴ extradition⁵⁵ and war,⁵⁶ became exercisable by the Commonwealth Government.⁵⁷

B *Nationhood and the Expansion of the 'Breadth' of the Executive Power*

In its more contemporary constitutional jurisprudence, the High Court has had regard to Australia's acquisition of national status to expand the subject matters, or 'breadth', of Commonwealth executive power.⁵⁸ In ascertaining the scope of the executive power of the Commonwealth in the *AAP Case*, Mason J began with the text of s 61, and in particular, the phrase 'extends to the execution and maintenance of this *Constitution* and of the laws of the Commonwealth'. In Mason J's view, the Commonwealth's executive power was 'not unlimited'⁵⁹ and that its content:

[D]oes not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the

⁵² (1974) 131 CLR 477.

⁵³ *Ibid* 498.

⁵⁴ *Burgess* (1936) 55 CLR 608, 643-4 (Latham CJ) endorsed in *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See also *Seas and Submerged Lands Case* (1975) 135 CLR 337, 379, 381 (McTiernan J), 503 (Murphy J).

⁵⁵ *Barton v Commonwealth* (1974) 131 CLR 477.

⁵⁶ *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J). See also Zines, 'Nationhood', above n 26, 31-2.

⁵⁷ See also Zines, 'Nationhood', above n 26, 30-1; Twomey, '*Sue v Hill*', above n 32, 80-7.

⁵⁸ This point has also been made by Zines, 'Inherent', above n 6, 281; Twomey, '*Pape*', above n 6, 339-40.

⁵⁹ *AAP Case* (1975) 134 CLR 338, 396.

distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government.⁶⁰

In this passage, Mason J does not appear to be suggesting that nationhood is a source of executive power. He is simply demonstrating that the scope of Commonwealth executive power should not be regarded as being confined to the subject matters of Commonwealth legislative power, which are expressly enumerated in ss 51, 52 and 122 of the *Constitution*.⁶¹ It extended to an area of responsibility derived from the ‘character and status of the Commonwealth as a national government’.⁶²

In that same case, Jacobs J also suggested that s 61 of the *Constitution* needed to be interpreted having regard to the ‘the idea of Australia as a nation’.⁶³ His Honour was referring to the ‘breadth’ of Commonwealth executive power where he stated that:

The growth of national identity results in a corresponding growth in the *area of activities which have an Australian rather than a local flavour*. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values.⁶⁴

In this passage, Jacobs J is employing the concept of nationhood to expand the areas of responsibility over which the executive power of the Commonwealth could be exercised, to include ‘national coordination’.⁶⁵ A consequence of Australia’s acquisition of nationhood was that the Commonwealth, as the

⁶⁰ Ibid endorsed in *Duncan* (1983) 158 CLR 535, 560 (Mason J); *Davis* (1988) 166 CLR 79, 93-4 (Mason CJ, Deane and Gaudron JJ); *R v Hughes* (2000) 202 CLR 535, 554-5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Pape* (2009) 238 CLR 1, 114 [323], 115-6 [327], 124 [357] (Hayne and Kiefel JJ), *Williams (No 1)* (2012) 248 CLR 156, 188 [29] (French CJ), 156 [133] (Gummow and Bell JJ), 251 [197] (Hayne J), 356-7 [539] (Crennan J), 364 [564], 371 [586] (Kiefel J).

⁶¹ See also *Williams (No 1)* (2012) 248 CLR 156, 357 [540] (Crennan J); *Plaintiff M68* (2016) 257 CLR 42, 96 [131] (Gageler J).

⁶² *AAP Case* (1975) 134 CLR 338, 396.

⁶³ Ibid 412-3.

⁶⁴ Ibid 412 (emphasis added).

⁶⁵ Ibid. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 109 (Gibbs CJ) (‘*Tasmanian Dam Case*’).

national government, could undertake activities that required national coordination rather than local planning.

Subsequent decisions of the High Court have also employed the concept of nationhood to add 'breadth' to the executive power of the Commonwealth. In *Davis v Commonwealth* ('*Davis*'),⁶⁶ the majority found that the Commonwealth could exercise its executive power to engage in activities associated with the organisation and commemoration of the 1988 Bicentenary of European settlement in Australia ('Bicentenary').⁶⁷ In his judgment, Brennan J was quite explicit that Australia's attainment of nationhood had expanded the areas of responsibility over which the executive power extended. This was evident where he stated that:

The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite "in one indissoluble Federal Commonwealth", melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood – a flag or anthem, e.g. – or the benefit of many national initiatives in science, literature and the arts.⁶⁸

According to Brennan J, Australia's acquisition of national status meant that the subject matters of 'national protection' and 'national advancement' were considered appropriate to the position of the Commonwealth as the national government.⁶⁹ While the remainder of the Court in *Davis* fell short of recognising that the executive power extended to 'national advancement', they

⁶⁶ (1988) 166 CLR 79.

⁶⁷ *Ibid* 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).

⁶⁸ *Ibid* 111.

⁶⁹ *Ibid* 110.

accepted that the Commonwealth could exercise its executive power for the purpose of commemorating an event of national significance.⁷⁰

The influence of Australia's attainment of nationhood on the 'breadth' of the executive power is also evident in *Pape v Commissioner of Taxation* ('*Pape*').⁷¹ *Pape* concerned the validity of an aspect of the Commonwealth Government's financial stimulus package that was implemented in 2009 to mitigate the effects of the Global Financial Crisis ('GFC') on the national economy. The High Court held that the executive power of the Commonwealth in s 61 supported the Commonwealth distributing one-off tax bonus payments to individual taxpayers, and the incidental power in s 51(xxxix) supported the associated legislation, the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).

In his judgment, French CJ had regard to the 'character and status of the Commonwealth as the national government' in finding that the executive power of the Commonwealth needed to be 'capable of serving the proper purposes of a national government'.⁷² The Commonwealth could exercise its executive power to spend appropriated funds, provided that it was for a purpose that fell within an area of Commonwealth responsibility. Decades earlier, the High Court had decided in the *AAP Case* that the 'national economy' was not a subject matter within Commonwealth power.⁷³ However, the executive power was being exercised in *Pape* for the purpose of responding to a national economic emergency. The Chief Justice concluded that the Commonwealth could exercise its executive power to spend in order to meet an 'urgent national economic problem',⁷⁴ but cautioned that this finding did not mean that the Commonwealth was conferred with a general power to manage the 'national economy' or address problems of 'national concern'.⁷⁵

In their joint judgment, Gummow, Crennan and Bell JJ likened the financial crisis to war or a natural disaster and concluded that the Executive was

⁷⁰ Ibid 93 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 119 (Toohey J).

⁷¹ (2009) 238 CLR 1.

⁷² Ibid 60 [127], 61-3 [129]-[133].

⁷³ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ).

⁷⁴ *Pape* (2009) 238 CLR 1, 60 [127], 63 [133].

⁷⁵ Ibid 48-9 [92]. See also *AAP Case* (1975) 134 CLR 338, 362, 364 (Barwick CJ).

the branch ‘capable of and empowered’ to respond to the crisis.⁷⁶ According to their Honours, the case could be ‘resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation’.⁷⁷ The plurality characterised the short-term fiscal measures as being necessary for the protection of the nation from a global financial and economic crisis.⁷⁸ The significance attributed to Australia’s acquisition of nationhood was that it expanded the areas of responsibility over which the capacities of the Commonwealth, and in particular, the capacity to appropriate and spend money could be exercised.⁷⁹ The majority accepted that the Commonwealth could exercise its capacity to contract and spend without statutory authorisation for the purpose of responding to a national economic emergency.

The influence of Australia’s attainment of nationhood on the ‘breadth’ of the executive power of the Commonwealth was summarised by French CJ in *Williams (No 1)*. His Honour was of the view that:

[T]he character and status of the Commonwealth as a national government is an aspect of the power and a feature informing all of its aspects, including the prerogatives appropriate to the Commonwealth, the common law capacities, powers conferred by statutes, and the powers necessary to give effect to statutes.⁸⁰

III NATIONHOOD AND ‘DEPTH’

It has been suggested that Australia’s acquisition of national status has not only expanded the ‘breadth’ of the executive power of the Commonwealth, but also its ‘depth.’ This section examines the judicial observations and statements that have been made regarding the content and scope of the nationhood power. It is demonstrated that, while there are judicial statements which suggest that the nationhood power has expanded the ‘depth’ of the executive power, the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. The weight of authority, with the notable exception of *Ruddock v Vadarlis* (*Tampa*

⁷⁶ *Pape* (2009) 238 CLR 1, 89 [233].

⁷⁷ *Ibid* 89 [233], 91 [241].

⁷⁸ *Ibid* 89 [233].

⁷⁹ See also Twomey, ‘*Pape*’, above n 6, 339.

⁸⁰ *Williams (No 1)* (2012) 248 CLR 156, 189 [30].

Case'),⁸¹ suggests that the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law.⁸²

A *The Content and Scope of the Nationhood Power*

In his judgment in the *AAP Case*, Mason J described the nationhood power as a *capacity* to engage in enterprises and activities 'peculiarly adapted' to a national government and which could not otherwise be carried on for the national benefit.⁸³ As discussed at the beginning of this article, Blackstone distinguished the Crown's common law capacities from the prerogative on the basis that the capacities were powers that the Crown shared in common with its subjects.⁸⁴ The Commonwealth is a 'juristic person' that can exercise power to contract and spend, hold and dispose of property, create trusts, register a company, enter into partnerships and sue and be sued, provided that it complies with relevant laws.⁸⁵ Blackstone observed that, in contrast to the prerogative, the Crown could not override the legal rights and duties of others in the exercise of its common law capacities.⁸⁶ In *Plaintiff M68 v Minister for Immigration and Border Protection* ('*Plaintiff M68*')⁸⁷ Gageler J similarly observed that the 'essential difference' between an act done in the execution of prerogative power and an act done in execution of a capacity, is that the former 'is an act which is capable of interfering with legal rights of others' whereas the latter 'involves nothing more than the utilisation of a bare capacity or permission, which can also be described as an ability to act or as a "faculty"'.⁸⁸

The activities that have been held by Australian courts to be supported by the nationhood power have included: the celebration of an event of national significance and the establishment of a corporation for this purpose⁸⁹ and the

⁸¹ (2001) 110 FCR 491, 543 [193].

⁸² See also Zines, 'Inherent', above n 6, 280; Twomey, 'Pape', above n 6, 339.

⁸³ (1975) 134 CLR 338, 397.

⁸⁴ Blackstone, above n 5, 232.

⁸⁵ Zines, *High Court*, above n 3, 345-6; Twomey, 'Pape', above n 6, 322-4, 326-7; Appleby and McDonald, above n 13, 254.

⁸⁶ Blackstone, above n 5, 232 cited in Zines, 'Inherent', above n 6, 280; *Plaintiff M68* (2016) 257 CLR 42, 98 [135] (Gageler J). See also Twomey, 'Pape', above n 6, 326-7.

⁸⁷ (2016) 257 CLR 42.

⁸⁸ *Ibid* 98 [135].

⁸⁹ *Davis* (1988) 166 CLR 79.

direct payment of money appropriated from the Consolidated Revenue Fund ('CRF') to individual taxpayers.⁹⁰ There is obiter authority that suggests that the nationhood power would also support the Commonwealth establishing national research and cultural programs and institutions, including the Commonwealth Scientific and Industrial Research Organisation ('CSIRO'),⁹¹ exploring foreign lands or seas⁹² and carrying out public inquiries and investigations.⁹³

It would appear, then, that the nationhood power has not supported executive action aimed at preventing, prohibiting, controlling or regulating the actions of individuals.⁹⁴ To the extent that the execution of the executive power has involved coercive measures, they have been contained in legislation enacted under the incidental power in s 51(xxxix) of the *Constitution*. Even then, the High Court has struck down any aspect of legislation that unduly interferes with the rights and freedoms of individuals or the states.⁹⁵ That is because, as Twomey has suggested, 'the incidental power could not be used to convert a non-coercive executive power into a coercive one'.⁹⁶

This was evident in *Davis*. In *Davis*, the majority found that the activities associated with the organisation and commemoration of the Bicentenary fell within the 'peculiar province of the Commonwealth in its capacity as the national and federal government' and were supported by the nationhood power.⁹⁷ These activities included the incorporation of a private corporation, namely, the Australian Bicentennial Authority ('Authority'). In commenting on the nature of the activities undertaken in *Davis*, Zines was of the view that 'the executive like anyone else had power to have incorporated a company to engage in a celebration if the purpose was within a sphere of federal responsibility'.⁹⁸ The nationhood power supported executive action that

⁹⁰ *Pape* (2009) 238 CLR 1.

⁹¹ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 397 (Mason J); *Davis* (1988) 166 CLR 79, 111 (Brennan J).

⁹² *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 412-3 (Jacobs J).

⁹³ *Ibid* 397 (Mason J).

⁹⁴ See also Twomey, '*Pape*', above n 6, 339; Zines, '*Inherent*', above n 6, 280.

⁹⁵ See especially *Tasmanian Dam Case* (1983) 158 CLR 1; *Davis* (1988) 166 CLR 79.

⁹⁶ Twomey, '*Pape*', above n 6, 326-7.

⁹⁷ *Davis* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).

⁹⁸ Zines, '*Inherent*', above n 6, 280.

fell within the common law capacities of the Crown and, therefore, within the 'depth' of the executive power.⁹⁹

While the executive action undertaken in *Davis* was non-coercive, the associated legislation had coercive aspects to it. Section 22 of the *Australian Bicentennial Authority Act 1980* (Cth) (*Bicentennial Authority Act*) made it an offence to use certain expressions and symbols relating to the Authority and the Bicentenary. In particular, s 22(6)(d)(i) prohibited the use of broad expressions such as 'Bicentenary', 'Bicentennial', '200 years', 'Australia', 'Sydney', 'Melbourne', 'Founding', 'First Settlement', 'Exposition', 'Expo', or 'World Fair' when used in conjunction with '1988', '1788', or '88'.¹⁰⁰ Section 23 made provision for the forfeiture of all articles and goods to the Commonwealth where an offence under s 22(1) had been committed. The Commonwealth alleged that the object of the provisions was to 'protect and enhance' the Authority and the commemoration of the Bicentenary.¹⁰¹

The majority accepted that s 51(xxxix) was capable of supporting measures that were necessary for the protection of the Authority, such as prohibitions on the unauthorised use of the Authority's name or symbols.¹⁰² Brennan J was of the similar view that provisions designed to 'suppress fraud, deceit or the misapplication of Commonwealth funds' were other examples of matters incidental to the execution of the executive power and the commemoration of the Bicentenary that would be supported by the incidental power.¹⁰³ However, Brennan J was adamant that 'where the Executive Government engages in [an] activity in order to advance the nation – an essentially facultative function – the execution of executive power is not the occasion for a wide impairment of individual freedom'.¹⁰⁴

Accordingly, the Court held that the incidental power could not support s 22(6)(d)(i) of the *Bicentennial Authority Act* because it constituted an unreasonable interference with the liberties of individuals and, in particular,

⁹⁹ Ibid 281.

¹⁰⁰ *Australian Bicentennial Authority Act 1980* (Cth) s 22(6)(d)(i).

¹⁰¹ *Davis* (1988) 166 CLR 79, 92.

¹⁰² Ibid 98-9 (Mason CJ, Deane and Gaudron JJ).

¹⁰³ Ibid 116. See also Twomey, 'Pape', above n 6, 327. Cf *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 166 [32] (French CJ, Gummow and Crennan JJ).

¹⁰⁴ (1988) 166 CLR 79, 112-3 (Brennan J). See also Twomey, 'Pape', above n 6, 327.

freedom of expression and political communication. The majority reasoned that the effect of the provision was to confer power on the Authority to proscribe the use of common expressions. These measures constituted 'an extraordinary intrusion into freedom of expression' and were regarded as being 'grossly disproportionate' to achieving the legitimate purpose of the *Bicentennial Authority Act*, namely, the protection of the commemoration and the Authority.¹⁰⁵ The regime in s 22(6)(d)(i) was not, therefore, considered as being reasonably appropriate and adapted to achieving the ends within the limits of constitutional power.¹⁰⁶ The purpose of the *Bicentennial Authority Act* may have been constitutionally valid, but the extent of the intrusion on free expression was held as being beyond the power of the Parliament.¹⁰⁷ In his judgment in *Davis*, Brennan J summarised the position regarding the executive power and incidental power as follows:

In my opinion, the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the efficacy of the execution by the Executive Government of its powers and capacities.¹⁰⁸

Therefore, while Brennan J was willing to concede that freedom of speech may sometimes be a 'casualty' of legislation enacted for the purpose of protecting the nation, he was not prepared to allow freedom of speech to be a casualty of an activity undertaken by the Executive Government for the purpose of advancing a nation 'which boasts of its freedom'.¹⁰⁹ The 'excessive and unjustified restriction of free expression'¹¹⁰ through the prohibition and imposition of criminal penalties in s 22(6)(d)(i) could not be characterised as being incidental to the execution of the nationhood power in this case.¹¹¹

¹⁰⁵ *Davis* (1988) 166 CLR 79, 99-100 (Mason CJ, Deane and Gaudron JJ).

¹⁰⁶ *Ibid* 99-100 (Mason CJ, Deane and Gaudron JJ), 101 (Wilson and Dawson JJ), 116-7 (Brennan J), 117 (Toohey J).

¹⁰⁷ See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality,' (1997) 21 *Melbourne University Law Review* 25.

¹⁰⁸ *Davis* (1988) 166 CLR 79, 112-3 (Brennan J). See also Twomey, '*Pape*', above n 6, 327.

¹⁰⁹ *Davis* (1988) 166 CLR 79, 116 (Brennan J).

¹¹⁰ Kirk, above n 107, 32.

¹¹¹ *Davis* (1988) 166 CLR 79, 116-7.

The majority judgment in *Davis* cohered with the earlier decision of the Court in the *Commonwealth v Tasmania* ('*Tasmanian Dam Case*').¹¹² The judges were unanimous that the legislative nationhood power could not support s 6(2)(e) of the *World Heritage Properties Conservation Act 1983* (*Cth*) ('*Conservation Act*'), which drastically curtailed the legislative and executive powers of the state of Tasmania to authorise or regulate conduct on its own land.¹¹³ In the opinion of Gibbs CJ, the nationhood power could not authorise the Commonwealth Parliament 'to prevent a State from making or permitting such lawful use of its land as it chooses'.¹¹⁴ Wilson J was not aware of any occasion 'when a coercive law declaring certain conduct to be unlawful and imposing penalties has been enacted by the Parliament otherwise than pursuant to a given head of power'.¹¹⁵ In similar vein, Deane J declared that the Commonwealth could not rely on the nationhood power to:

[A]rrogate to itself control of such property, achievement or endeavour or to oust or override the legislative and executive powers of the State in which such property is situate or such achievement to endeavour has been effected or is being pursued.¹¹⁶

In contrast, the legislation in *Pape* was regulatory, rather than coercive, in nature.¹¹⁷ While the *Tax Bonus Act* created rights for individual taxpayers to receive the payments and imposed a duty on the Commissioner to distribute the payments, the provisions did not proscribe certain conduct in the same way as the impugned provisions in the *Bicentennial Authority Act* and *Conservation Act*.¹¹⁸ The legislation was accordingly upheld as a valid exercise of the nationhood power and incidental legislative power.

In *Pape*, four Justices suggested that the nationhood power expanded the 'depth' of the executive power. This was evident where French CJ observed that 'the collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power'.¹¹⁹ According to French CJ, s 61 'is not limited to statutory powers and the prerogative. It has

¹¹² (1983) 158 CLR 1.

¹¹³ *Ibid* 109 (Gibbs CJ), 203-4 (Wilson J), 252-3 (Deane J).

¹¹⁴ *Ibid* 109 (Gibbs CJ).

¹¹⁵ *Ibid* 203 (Wilson J).

¹¹⁶ *Ibid* 253 (Deane J).

¹¹⁷ Twomey, '*Pape*', above n 6, 342.

¹¹⁸ *Ibid* 341.

¹¹⁹ *Pape* (2009) 238 CLR 1, 60 [127].

to be capable of serving the proper purposes of a national government'.¹²⁰ In similar vein, Gummow, Crennan and Bell JJ observed that the executive power extends beyond:

[T]he preferences immunities and exceptions which are denied to the citizen and are commonly identified with 'the prerogative'; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it.¹²¹

However, the executive action that was undertaken in *Pape* was characterised by French CJ as the withdrawal of funds from the CRF and the distribution of direct payments to taxpayers. These activities fell within the common law capacities of the Crown and, therefore, within the 'depth' of the executive power. The issue in *Pape* was whether the capacity to spend could be exercised for the purpose of protecting the nation against the adverse effects of the GFC, as 'national protection' was not included in the catalogue of powers enumerated in ss 51, 52 and 122 of the *Constitution*.¹²² That is, it concerned the issue of 'breadth' rather than 'depth'.

Gummow, Crennan and Bell JJ characterised the executive act as 'determining that there is the need for an immediate fiscal stimulus'.¹²³ This act was 'analogous to determining a state of emergency in circumstances of a natural disaster'.¹²⁴ The plurality was satisfied that this executive action was supported by the nationhood power. The nationhood power had, in the past, been held to support measures taken to protect the Commonwealth and the *Constitution*.¹²⁵ This particular executive act also fell within the 'depth' of the executive power. Section 61 incorporates all of the prerogatives appropriate to the Commonwealth, subject to the federal distribution of powers, including the prerogative powers relating to emergencies and the maintenance of the peace.¹²⁶

¹²⁰ Ibid.

¹²¹ Ibid 83 [214].

¹²² Twomey, 'Pape', above n 6, 339.

¹²³ *Pape* (2009) 238 CLR 1, 89 [232].

¹²⁴ Ibid 89 [233].

¹²⁵ See especially *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

¹²⁶ *Burmah Oil Co Ltd (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26.

While new prerogatives cannot be created, they can adapt to meet changing circumstances.¹²⁷ It is plausible that the act of determining that there is a need for an emergency fiscal stimulus would fall within the scope of the prerogative powers of the Crown.¹²⁸

It is a separate question as to whether the Commonwealth could exercise those prerogative powers. In contrast to the United Kingdom, the *Australian Constitution* divides and distributes power between the Commonwealth and the states relating to internal security.¹²⁹ However, as the action in *Pape* was taken to protect the nation as a whole from the effects of a global financial and economic crisis, it fell within the ‘breadth’ of the executive power of the Commonwealth. That is because, as discussed above, a consequence of Australia’s attainment of nationhood was that it expanded the subject matters of executive power to include the area of ‘national protection’.

The preceding discussion has demonstrated that the nationhood power has not, in fact, added ‘depth’ to the executive power of the Commonwealth. The weight of authority suggests that the nationhood power has not supported the Commonwealth engaging in activities (particularly coercive activities) that would otherwise be denied to it by the common law. There is, however, one decision of the Federal Court of Australia which indicates that the nationhood power has added ‘depth’ to the executive power, and it is considered below.

B *The Tampa Case: Expanding the ‘Depth’ of Executive Power?*

In the decision of the Full Court of the Federal Court in the *Tampa Case*, French J (with whom Beaumont J agreed) found that the Commonwealth could, in the absence of statutory authorisation, exercise its executive power to prevent the entry of non-citizens into Australia. This included detaining non-citizens on board a vessel in order to effect their exclusion and expulsion from Australian territorial waters and the deployment of officers from the Australian

¹²⁷ Winterton, *Parliament*, above n 3, 120-2; Twomey, ‘*Pape*’, above n 6, 319-20.

¹²⁸ See also Twomey, ‘*Pape*’, above n 6, 339.

¹²⁹ Section 119 of the *Constitution* is evidence of this: *R v Sharkey* (1949) 79 CLR 121, 151-2, 154 (Dixon J). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 964-5; Zines, ‘Inherent’, above n 6, 287-8; Peta Stephenson, ‘Fertile Ground for Federalism? Internal Security, the States and Section 119 of the *Constitution*’ (2015) 43 *Federal Law Review* 289.

Special Air Service Regiment ('SAS') for this purpose.¹³⁰ The power was described by French J as being 'central' to Australia's status as a sovereign nation. While French J made no express reference to the nationhood power in his judgment in the *Tampa Case*, his reliance on the reasoning of Jacobs J in the *AAP Case* and Brennan J in *Davis* suggest that the nationhood power provided the constitutional basis for the executive action undertaken by the Commonwealth and there is support for this contention in the academic literature.¹³¹

In the *Tampa Case*, French J seemingly rejected the proposition that the 'depth' of the executive power of the Commonwealth was limited to the Crown's prerogative powers, quoting with approval remarks made by Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*¹³² that 'in Australia...one looks not to the content of the prerogative in Britain, but rather to s 61 of the *Constitution*, by which the executive power of the Commonwealth was vested in the Crown'.¹³³ French J elaborated on this statement where he explained that:

The Executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative...While the Executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written *Constitution* distributing powers between the three arms of government reflected in Chs I, II and III of the *Constitution* and, as to legislative powers, between the polities that comprise the federation. The power is subject, not only to the limitations as to subject matter that flow directly from the *Constitution* but also to the laws of the Commonwealth made under it.¹³⁴

¹³⁰ The majority concluded that the executive action taken by the Commonwealth could not 'constitute a restraint upon their liberty': *Tampa Case* (2001) 110 FCR 491, 547-8 [212], 548 [214] (French CJ), 514 [95] (Beaumont J). This is arguable, especially as the rescued persons had no access to external communications while on board the *MV Tampa* and could not leave the vessel. See further *Tampa Case* (2001) 110 FCR 491, 511 [75], 511-2 [80] (Black CJ); Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 *International Journal of Refugee Law* 159, 181-8.

¹³¹ See especially Winterton, 'Limits', above n 19, 428-33; Winterton, 'Relationship', above n 19, 29-36; Zines, 'Inherent', above n 6.

¹³² (1988) 19 FCR 347.

¹³³ *Ibid* 369 (Gummow J) quoted with approval in the *Tampa Case* (2001) 110 FCR 491, 538-9 [179]. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J).

¹³⁴ *Tampa Case* (2001) 110 FCR 491, 540 [183].

In his examination of the executive power of the Commonwealth, French J referred with approval to the remarks of Jacobs J in the *AAP Case* and Brennan J in *Davis* that s 61 imports ‘the idea of Australia as a nation’ and assigns to the Executive functions relating generally to ‘the protection and advancement of the Australian nation’.¹³⁵ According to French J, the depth of the executive power conferred by s 61 was not limited to the Crown’s prerogative powers, but was ‘to be measured by reference to Australia’s status as a sovereign nation and by reference to the terms of the *Constitution* itself’.¹³⁶

The majority decision in the *Tampa Case* has been criticised by scholars as significantly expanding the scope of the executive power of the Commonwealth.¹³⁷ As Ernst Willheim has observed, ‘issues of external sovereignty are legally distinct from issues as to the internal distribution of powers as between the executive and the legislative branches of government’.¹³⁸ It may be that in international law the Commonwealth, as a sovereign polity, possesses the ‘right’ to determine who may enter its territory.¹³⁹ That fact alone does not resolve the question of which branch of government, namely, the Parliament or the Executive, should be conferred with the power to exercise that right.¹⁴⁰

French J reasoned that Australia’s acquisition of sovereignty had assigned ‘the gatekeeping function’ to the Commonwealth Executive.¹⁴¹ The ‘gatekeeping function’ – which was described as the power to determine who may enter Australian territory and the Australian community – was reflected in the conferral of powers on the Commonwealth Parliament to make laws with

¹³⁵ *Davis* (1988) 166 CLR 79, 110 citing *AAP Case* (1975) 134 CLR 338, 406 (Jacobs J) quoted in *Tampa Case* (2001) 110 FCR 491, 539 [180] (French J).

¹³⁶ *Tampa Case* (2001) 110 FCR 491, 542 [191].

¹³⁷ See, eg, Selway, above n 3; Zines, ‘Inherent’, above n 6; Willheim, above n 130; Evans, above n 22; Winterton, ‘Limits’, above n 19; Winterton, ‘Relationship’, above n 19; Gerangelos, ‘Winterton Thesis’, above n 19, 193-8; Donald Rothwell, ‘The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty (2002) 13 *Public Law Review* 118; Helen Pringle and Elaine Thompson, ‘The Tampa Affair and the Role of the Australian Parliament (2002) 13 *Public Law Review* 128; Penelope Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 *American Journal of International Law* 661.

¹³⁸ Willheim, above n 130, 186-7. See also Zines, ‘Inherent’, above n 6, 291-2. Similar observations were made in *CPCF* (2015) 255 CLR 514, 597 [265] (Kiefel J).

¹³⁹ *CPCF* (2015) 255 CLR 514, 597 [264] (Kiefel J).

¹⁴⁰ See also Evans, above n 22, 97; Willheim, above n 130, 186-7.

¹⁴¹ *Tampa Case* (2001) 110 FCR 491, 541.

respect to naturalisation and aliens (s 51(xix)), immigration and emigration (s 51(xxvii)) and the influx of criminals (s 51(xxviii)).¹⁴² French J was satisfied that the executive power of the Commonwealth extended to these subject matters which were, in his opinion, ‘central to the expression of Australia’s status and sovereignty as a nation’.¹⁴³

However, the question as to whether the executive power of the Commonwealth extended to the subject matters of ‘aliens’ and ‘immigration’ is a question of ‘breadth’.¹⁴⁴ There was no dispute in the *Tampa Case* that these subject matters fell within an area of Commonwealth responsibility. The main issue in the *Tampa Case* was whether the coercive activities of exclusion, detention and expulsion could be undertaken by the Commonwealth Executive in the absence of statutory authorisation.¹⁴⁵ French J concluded, in this regard, that ‘the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect exclusion’.¹⁴⁶

As demonstrated in the preceding part of this article, prior to the *Tampa Case* being decided, the nationhood power had not been held to support activities aimed at preventing, prohibiting, controlling or regulating the actions of individuals.¹⁴⁷ This was the view of the sole dissident, Black CJ, in the *Tampa Case*. His Honour observed that:

The Australian cases in which the Executive power has had an “interest of the nation” ingredient can be contrasted with those in which such a power has been asserted for coercive purposes. Thus, this Executive power has been validly used to set up the Australian Bicentennial Authority...and the CSIRO, but has been held not to be available to sustain deportation; detention or extradition of a fugitive; the arrest of a person believed to have committed a felony abroad; the

¹⁴² Ibid 542-3 [192].

¹⁴³ Ibid.

¹⁴⁴ See also Winterton, *Parliament*, above n 3, 27-47; Zines, ‘Inherent’, above n 6, 281; Evans, above n 22, 97.

¹⁴⁵ Simon Evans observed that French J did not distinguish between the subject matters of executive power and the activities which can be undertaken in relation to those subject matters in Evans, above n 22, 97.

¹⁴⁶ *Tampa Case* (2001) 110 FCR 491, 543 [193].

¹⁴⁷ See also Twomey, ‘*Pape*’, above n 6, 339; Zines, ‘Inherent’, above n 6, 280.

arbitrary denial of mail and telephone services; or compulsion to attend to give evidence or to produce documents in an inquiry.¹⁴⁸

This statement of Black CJ recognises that, apart from the majority decision in the *Tampa Case*, the authorities do not support the finding that the nationhood power extends to the coercive activities of exclusion, detention and expulsion of non-citizens in the absence of statutory authorisation. In the cases that have been considered in this article, the executive action that was supported by the nationhood power would also have been supported by the common law powers of the Crown.¹⁴⁹ The executive action undertaken by the Commonwealth in the *Tampa Case*, on the other hand, extended beyond the prerogative. As the dissent of Black CJ demonstrates, the persons on board the *MV Tampa* were, in effect, being detained by the Commonwealth.¹⁵⁰ It is a principle of the common law that the Executive cannot, through the exercise of its prerogative power alone, deprive an individual of liberty.¹⁵¹ The majority's finding that the nationhood power supported the executive action that was taken in the *Tampa Case* sits uncomfortably with the statements that have been made by the High Court about its nature and scope.

Two recent decisions of the High Court concerning the Commonwealth's controversial border protection policy, 'Operation Sovereign Borders', cast further doubt on whether the nationhood power could support coercive executive action taken to prevent the entry of non-citizens in Australia. The first of these decisions, *CPCF v Minister for Immigration and Border Protection* ('*CPCF*')¹⁵² is highly significant because, of the five judges that considered the scope of the non-statutory executive power of the Commonwealth, three judges held that the detention and removal of non-citizens to a place outside Australia could not be supported by the nationhood power.¹⁵³ This view was affirmed by Gageler J in the second of these decisions, *Plaintiff M68*.¹⁵⁴

¹⁴⁸ *Tampa Case* (2001) 110 FCR 491, 501 [31] (citations omitted).

¹⁴⁹ Twomey, 'Pape', above n 6, 339.

¹⁵⁰ *Tampa Case* (2001) 110 FCR 491, 511 [75], 511-2 [80].

¹⁵¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ) affirmed in the *Tampa Case* (2001) 110 FCR 491, 495 [5] (Black CJ).

¹⁵² (2015) 255 CLR 514.

¹⁵³ *Ibid* 568 [150] (Hayne and Bell JJ), 597-9 [266]-[271], 600 [277] (Kiefel J).

¹⁵⁴ (2016) 257 CLR 42.

The majority decision in the *Tampa Case* should not, therefore, detract from the weight of authority that suggests that the nationhood power is confined to the established common law powers of the Crown. This is an important limit on the content and scope of the nationhood power. It also provides an explanation as to why the main issue in cases involving the nationhood power has typically concerned whether the executive activity falls within an area of Commonwealth responsibility, rather than the legality of the activity itself.¹⁵⁵ As I demonstrate below, the High Court has consistently applied Mason J's 'peculiarly adapted' test to assess whether an executive act is supported by the nationhood power. The operation of this test is examined in the final part of this article.

IV ASCERTAINING THE SCOPE OF THE NATIONHOOD POWER: THE 'PECULIARLY ADAPTED' TEST

The concept of nationhood has been an influential factor in the High Court's interpretation of s 61 of the *Constitution*. While it has expanded the subject matters over which the executive power of the Commonwealth could be exercised, it has not undermined the federal distribution of powers.¹⁵⁶ In order to ascertain the validity of the impugned executive action, Mason J formulated his 'peculiarly adapted' test in the *AAP Case*. Mason J stated, in dicta that has proven to be of enduring significance, that:

[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.¹⁵⁷

Mason J's 'peculiarly adapted' test has received judicial endorsement in a series of subsequent cases concerning the scope of the non-statutory executive power of the Commonwealth decided in the decades following the *AAP Case*.¹⁵⁸ This

¹⁵⁵ See also Twomey, '*Pape*', above n 6, 339.

¹⁵⁶ Stephenson, above n 13, 175-6, 183-8 contra Twomey, '*Pape*', above n 6, 330.

¹⁵⁷ *AAP Case* (1975) 134 CLR 338, 397.

¹⁵⁸ Ibid endorsed in *Davis* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J) *Tasmanian Dam Case* (1983) 158 CLR 1, 108-9 (Gibbs CJ), 203-4 (Wilson J), 321-3 (Dawson J); *Pape* (2009) 238 CLR 1, 23 [8], 50 [95], 60-1 [128], 63 [133] (French

is because it strikes a balance between ensuring that the Commonwealth Executive has the flexibility to function effectively as the national government, while maintaining the federal distribution of powers and responsibilities effected by the *Constitution*.¹⁵⁹ As I demonstrate below, the High Court has consistently found that the nationhood power cannot be exercised in a way that interferes with, or undermines, the continued existence of the states as independent entities in the federation, or the exercise of powers and functions within their spheres of responsibility. The ‘peculiarly adapted’ test has, in fact, played an important role in confining the scope of the nationhood power.

A *The First Limb: ‘Peculiarly adapted to the government of a nation’*

The first limb of the ‘peculiarly adapted’ test requires that the enterprise or activity in question be ‘peculiarly adapted’ to a national government. Mason J did not set out specific criteria to assist in applying the first limb of the test. Instead, he provided some examples of activities that would, in his view be supported by the nationhood power, such as scientific research, including the establishment of the CSIRO and the expenditure of money on inquiries, investigations and advocacy related to public health.¹⁶⁰

Mason J did not intend to confine the nationhood power to these particular examples. Instead, he suggested that the activities that would be supported by the power would be decided on a case-by-case basis because:

The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government.¹⁶¹

Mason J’s remarks are reminiscent of an earlier observation made by Isaacs J that it was, in fact, the Court’s ‘duty’, in interpreting the *Constitution*, to ‘recognise the development of the Nation and to apply established principles to

CJ), 87-8 [228], 91-2 [242] (Gummow, Crennan and Bell JJ), *Williams (No 1)* (2012) 248 CLR 156, 191 [34], 216 [83] (French CJ); 250-1 [196] (Gummow and Bell JJ), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J).

¹⁵⁹ See further Stephenson, above n 13, 183-8.

¹⁶⁰ *AAP Case* (1975) 134 CLR 338, 397 (Mason J), 412-3 (Jacobs J).

¹⁶¹ *Ibid* 397-8. See also *Davis* (1988) 166 CLR 79, 111 (Brennan J).

the new positions which the Nation in its progress from time to time assumes'.¹⁶² The nationhood power was not, however, unlimited. Indeed, in the *AAP Case*, Mason J ultimately found that it could not support the Commonwealth formulating and administering the Australian Assistance Plan ('AAP').¹⁶³ Under the AAP, the Commonwealth made direct grants to Regional Councils for Social Development. The Regional Councils had been established to provide a wide range of social welfare services across Australia that had traditionally been the responsibility of the states and, indeed, could have been carried out by the states had a conditional grant been made to them under s 96.

Mason J was one of three dissentients that struck down the AAP. He was not prepared to find that the nationhood power could support the Commonwealth engaging in activities that were beyond its area of responsibility, merely on the basis of convenience.¹⁶⁴ Nor could it support the Commonwealth engaging in activities that it regarded as being 'of national interest or concern' or of a 'national nature'.¹⁶⁵ Something more was required to demonstrate that it was 'peculiarly adapted' to a national government. In commenting on this aspect of Mason J's judgment, Zines has observed that:

We are told that national need is not the test; nor apparently is the 'national nature of the subject matter'. Whether an enterprise can only be carried on by a national government is a vital factor, but mere convenience of national administration is not enough.¹⁶⁶

An analysis of the cases that have applied Mason J's test reveals that the High Court has taken into account certain factors in determining whether an activity is 'peculiarly adapted' to a national government. First, the Court has considered whether the activity is substantively connected with Australia's *national identity*.¹⁶⁷ It appears to be accepted that activities associated with national symbols, events, heritage and culture would satisfy the first limb of the peculiarly adapted test.¹⁶⁸

¹⁶² *Wooltops Case* (1922) 31 CLR 421, 438.

¹⁶³ *AAP Case* (1975) 134 CLR 338, 400-1.

¹⁶⁴ *Ibid* 398 approved in *Tasmanian Dam Case* (1983) 158 CLR 1, 109 (Gibbs CJ). Cf *AAP Case* (1975) 134 CLR 338, 412-3 (Jacobs J) where national coordination was held to be sufficient.

¹⁶⁵ *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ).

¹⁶⁶ Zines, *High Court*, above n 3, 417.

¹⁶⁷ *Davis* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).

¹⁶⁸ *Ibid*. Twomey has argued that national symbols would be supported by the prerogative powers of the Crown: Twomey, 'Pape', above n 6, 336.

Second, the *complexity* of the activity, and the extent to which it requires *national coordination* has been a relevant factor for the Court's consideration.¹⁶⁹ In the *AAP Case*, Jacobs J suggested that executive activities would be supported by the nationhood power if they required national coordination rather than local planning. National inquiries, research and exploration were examples given by Jacobs J as activities with a 'national flavour' that were supported by the nationhood power. In the opinion of Jacobs J, the AAP also satisfied this test. Its purpose was to coordinate the provision of social welfare services across the nation. It was, therefore, an example of an initiative that required national coordination rather than local planning.¹⁷⁰

In the *Tasmanian Dam Case*, Gibbs CJ attributed significance to the fact that the protection of the parks within Tasmania was not 'so complex' or involved 'action on so large a scale, that it requires national coordination to achieve, assuming that to be a test'.¹⁷¹ In contrast to Jacobs J in the *AAP Case*, who found that it was sufficient that the activity required national coordination, even though there may have been other means of carrying it out, Gibbs CJ was of the view that it needed to be shown that national coordination was the *only* way that the activity could have been implemented. Indeed, the availability of other means for the protection and conservation of the parks in the *Tasmanian Dam Case* militated against the finding that this was an activity that was, in fact, 'peculiarly adapted' to a national government.¹⁷² It was also significant in *Davis* and *Pape*, that the executive action concerned the nation as a whole.

Increasingly, however, the nationhood power has been defined as a power to protect the nation and respond to *national emergencies*.¹⁷³ As discussed above, the urgent nature of the GFC was a crucial factor for the majority in *Pape* in finding that the nationhood power supported the tax bonus

¹⁶⁹ *AAP Case* (1975) 134 CLR 338, 412-3 (Jacobs J); *Tasmanian Dam Case* (1983) 158 CLR 1, 109 (Gibbs CJ); *Davis* (1988) 166 CLR 79, 111 (Brennan J).

¹⁷⁰ *AAP Case* (1975) 134 CLR 338, 412-3.

¹⁷¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 109.

¹⁷² *Ibid.*

¹⁷³ This raises questions that are beyond the scope of this article about the appropriate role for the Court in determining whether there is an emergency and justiciability more generally: see *Pape* (2009) 238 CLR 1, 123 [353] (Hayne and Kiefel JJ); Hanna, above n 13.

payments.¹⁷⁴ It was also significant for the majority in *Williams (No 1)* that the case did not involve ‘a natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response’.¹⁷⁵ The provision of school chaplaincy services was not, therefore, an activity ‘peculiarly adapted’ to a national government. There was nothing on the facts of the case to suggest that only the Commonwealth had the means to implement a school chaplaincy program. The notion of a national ‘crisis’ or ‘emergency’ has proven to be an influential, if not determinative, factor for the Court in applying the ‘peculiarly adapted’ test.¹⁷⁶ Indeed, in *CPCF*, Hayne and Bell JJ referred to the ‘implied executive “nationhood power” to respond to national emergencies’.¹⁷⁷ Kiefel J similarly found that the case did not enliven the nationhood power, which, according to her Honour, was ‘capable of responding to events such as a national emergency’.¹⁷⁸

B *The Second Limb: ‘And which cannot otherwise be carried on for the benefit of the nation’*

While the nationhood power may have expanded the ‘breadth’ of the executive power, it has not done so in a way that is inconsistent with federalism. This was evident in the *AAP Case*, where the Chief Justice remarked that ‘the federal distribution of power for which the Constitution provides must be maintained’.¹⁷⁹ Gibbs J similarly observed that ‘the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution’.¹⁸⁰ Mason J was also reluctant to confer unbounded power on the Commonwealth Executive and observed that the scope of the nationhood power needed to be consistent with the federal character of the polity. In Mason J’s view:

It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this [nationhood]

¹⁷⁴ Ibid 60 [127], 63 [133] (French CJ), 89 [233] (Gummow, Crennan and Bell JJ).

¹⁷⁵ *Williams (No 1)* (2012) 248 CLR 156, 235 [146] (Gummow and Bell JJ), 250-1 [196], 267 [240] (Hayne J), 346-7 [499] (Crennan J), 362 [599] (Kiefel J).

¹⁷⁶ See also Twomey, ‘Post-*Williams*’, above n 13, 24.

¹⁷⁷ *CPCF* (2015) 255 CLR 514, 568 [150] (Hayne and Bell JJ).

¹⁷⁸ Ibid 596 [260] (Kiefel J).

¹⁷⁹ *AAP Case* (1975) 134 CLR 338, 364 (Barwick CJ).

¹⁸⁰ Ibid 378 (Gibbs J).

aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.¹⁸¹

The second limb of the 'peculiarly adapted' test requires that the activity 'cannot otherwise be carried on for the benefit of the nation'.¹⁸² The High Court has, in its application of this aspect of the test, considered whether the activity involved any competition with the executive competence of the states and whether there were other constitutional mechanisms that could have been utilised which gave the states the opportunity to consent to the activity. The second limb of Mason J's test, then, has acted as an important safeguard against the unmitigated expansion of the 'breadth' of the executive power. It has prevented the nationhood power from being exercised in a way that interferes with, or undermines, the continued existence of the states as independent entities in the federation, or the capacity of the states to exercise powers and functions within their spheres of responsibility.

1 *Competition with the Executive Competence of the States*

In ascertaining whether the impugned executive activity could otherwise have been carried on for the national benefit, the High Court has considered whether the exercise of Commonwealth executive power involved any competition with the executive competence of the states.¹⁸³ In his application of the 'peculiarly adapted' test in the *AAP Case*, Mason J expressed some concern that the Regional Councils would be 'operating not under the aegis of the States, but independently of and perhaps in competition with them and their institutions'.¹⁸⁴

¹⁸¹ Ibid 398 quoted with approval in *Davis* (1988) 166 CLR 79, 103 (Wilson and Dawson JJ); *Pape* (2009) 238 CLR 1, 50 [96] (French CJ), 117 [330], 124 [357] (Hayne and Kiefel JJ), 181 [519], 187 [533] (Heydon J); *Williams (No 1)* (2012) 248 CLR 156, 303-4 [363] (Heydon J), 348 [504] (Crennan J), 371 [584], 372 [587] (Kiefel J).

¹⁸² *AAP Case* (1975) 134 CLR 338, 397.

¹⁸³ Stephenson, above n 13, 183-8.

¹⁸⁴ *AAP Case* (1975) 134 CLR 338, 400.

The effect of the AAP was to reconfigure the Australian community into regions for the purpose of coordinating and providing a wide range of social welfare services. The Regional Councils would be established and directly funded by the Commonwealth to provide these services, which extended to child care, parent education, family counselling and housekeeping services, all of which fell within the executive competence and capacity of the states. This was a crucial factor for Mason J in striking down the AAP. He was not prepared to find that the nationhood power could be exercised to interfere with or undermine the federal distribution of powers for which the *Constitution* provides.

The exercise of the legislative nationhood power by the Commonwealth in the *Tasmanian Dam Case* also involved competition with the capacity of the Tasmanian Government to manage its own land. In an influential passage that has received judicial endorsement in *Davis*¹⁸⁵ and *Pape*,¹⁸⁶ Deane J considered that:

As one moves away from those matters which lie at the heart of the inherent powers of the Commonwealth, it becomes increasingly predictable that any such powers will be confined within areas in which there is no real competition with the States. There are, no doubt, areas within the plenitude of executive and legislative power shared between the Commonwealth and the States...which, while not included in any express grant of legislative power, are of real interest to the Commonwealth or national government alone. Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours.¹⁸⁷

In their application of the ‘peculiarly adapted’ test in the *Tasmanian Dam Case*, several members of the Court conceptualised the states as having responsibility over areas of legislative and executive competence that could not be interfered with by the exercise of Commonwealth power. In both *Davis* and *Pape*, the Court also considered whether there was any intrusion by the Commonwealth

¹⁸⁵ *Davis* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).

¹⁸⁶ *Pape* (2009) 238 CLR 1, 90 [239] (Gummow, Crennan and Bell JJ).

¹⁸⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 253.

on the executive competence of the states, but concluded that there was not. However, it is significant that in applying the ‘peculiarly adapted’ test, the Court considered whether the states had the real and practical capacity to carry out the activities in question or, indeed, whether that capacity was already being exercised.¹⁸⁸ The Court was careful to ensure that the nationhood power was not being exercised by the Commonwealth in a way that would interfere with the capacity of the states to function in their sphere of responsibility.

In their joint judgment in *Davis*, Mason CJ, Deane and Gaudron JJ considered whether the states could have effectively organised and commemorated the Bicentenary. The plurality noted that while the states had a ‘part to play, whether as part of an exercise in co-operative federalism or otherwise’,¹⁸⁹ this could not be allowed ‘to obscure the plain fact that the commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government’.¹⁹⁰ The interest of the states in the commemoration of the Bicentenary was ‘of a more limited character’.¹⁹¹ Brennan J also observed that the second limb of the ‘peculiarly adapted’ test invited ‘consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit’.¹⁹²

Similarly, in *Pape*, the majority was sensitive to the need to confine the Commonwealth Executive to those areas of responsibility allocated to it by the *Constitution* and ‘the character and status of the Commonwealth as the national government’, in its application of the nationhood power. However, the majority ultimately held that the stimulus payments satisfied the ‘peculiarly adapted’ test and did not interfere with the federal distribution of powers.¹⁹³ The majority’s judgment in *Pape* has been the subject of criticism from

¹⁸⁸ *Davis* (1988) 166 CLR 79, 93-4 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J); *Pape* (2009) 238 CLR 1, 62 [131], 63 [133] (French CJ), 90-1 [239] (Gummow, Crennan and Bell JJ). See also David Hume, Andrew Lynch and George Williams, ‘Heresy in the High Court? Federalism as a Constraint on Commonwealth Power’ (2013) 41 *Federal Law Review* 71, 78, 81.

¹⁸⁹ *Davis* (1988) 166 CLR 79, 94.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid* 111.

¹⁹³ *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 91-2 [241]-[242] (Gummow, Crennan and Bell JJ).

scholars¹⁹⁴ and members of the judiciary,¹⁹⁵ on the basis that the second limb of the ‘peculiarly adapted’ test was not strictly applied. It has been argued that the Commonwealth could have stimulated the economy through other means, namely, by enacting legislation pursuant to the taxation power in s 51(ii)¹⁹⁶ or by increasing social welfare payments under ss 51(xxiii) and 51(xxiiiA).¹⁹⁷ Alternatively, the Commonwealth could have utilised s 96 of the *Constitution* and made conditional grants to the states.¹⁹⁸

However, as discussed above, a critical feature of the judgments of French CJ and Gummow, Crennan and Bell JJ was their acceptance that the GFC posed an imminent threat to Australia’s economic security. Indeed, it was accepted by all parties that there was a threat posed to the national economy by the GFC and it was akin to a ‘national emergency’.¹⁹⁹ This invited the Court to consider whether the states had the capacity to respond, as swiftly and urgently as was required, in order to prevent a national economic recession. The influence of federalism is, therefore, still evident in *Pape*. It is significant that the majority felt compelled to explain why the states were not capable of addressing the immediate threat to the national economy posed by the GFC.²⁰⁰

The majority in *Pape* also ascribed relevance to the fact that there was no competition, in a practical sense, with the executive competence and authority of the states.²⁰¹ French CJ concluded, in this regard, that the states did not have the capacity or the resources to implement, within a short timeframe, measures that were ‘rationally adjudged’ as ‘avoiding or mitigating’ the adverse effects of the GFC in Australia.²⁰² In similar vein, Gummow, Crennan and Bell JJ considered whether the states could have responded effectively to the GFC, but concluded that only the Commonwealth had the resources to respond expeditiously to the emergency before it.²⁰³ Both limbs of the ‘peculiarly adapted’ test were satisfied. The threat posed by the GFC to the nation as a whole

¹⁹⁴ See especially Twomey, ‘*Pape*’, above n 6, 330.

¹⁹⁵ *Pape* (2009) 238 CLR 1, 123–4 [355]–[356] (Hayne and Kiefel JJ); 178–9 [513] (Heydon J).

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid* 123–4 [355]–[356] (Hayne and Kiefel JJ).

¹⁹⁸ *Ibid* 178–9 [513] (Heydon J).

¹⁹⁹ *Ibid* 123 [353] (Hayne and Kiefel JJ).

²⁰⁰ See also Hume, Lynch and Williams, above n 188, 83–4; Stephenson, above n 13, 186.

²⁰¹ *Pape* (2009) 238 CLR 1, 62 [131].

²⁰² *Ibid* 63 [133].

²⁰³ *Ibid* 90–1 [239], 91–2 [242].

warranted a national response, and importantly, there were no other practical means available, either to the Commonwealth or the states, that could have been implemented within the requisite timeframe.

Mason J's 'peculiarly adapted' test incorporates the principle of federalism to condition and constrain the scope of the nationhood power.²⁰⁴ It can be, as demonstrated by the decisions discussed above, an effective constraint on the scope of the nationhood power. What is striking about the recent decision of the High Court in *Williams (No 1)* is that the Court has used federalism to constrain the scope of executive power more broadly.²⁰⁵ A majority of the Court considered in that case whether the services covered by the National School Chaplaincy Program ('NSCP') fell within an area of responsibility allocated to the Commonwealth by the *Constitution*.

In his judgment, French CJ was concerned that an expansive Commonwealth spending power had the potential to 'diminish the authority of the States in their fields of operation'.²⁰⁶ His Honour concluded that the Commonwealth and states:

[H]ave concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the *Constitution*. The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of "a truly federal government".²⁰⁷

Gummow and Bell JJ referred approvingly to the observations made by Mason J on this point in the *AAP Case* and concluded that the states had the 'legal and practical capacity to provide for a scheme such as the NSCP'.²⁰⁸ This consideration, in their Honours' view, reflected 'concern with the federal

²⁰⁴ Stephenson, above n 13, 175-6, 183-8.

²⁰⁵ The relationship between federalism and Commonwealth executive power more broadly has been discussed in Hume, Lynch and Williams, above n 188; Appleby and McDonald, above n 13.

²⁰⁶ *Williams (No 1)* (2012) 248 CLR 156, 192-3 [37].

²⁰⁷ *Ibid* 216-7 [83].

²⁰⁸ *Ibid* 235 [146].

structure and the position of the States'.²⁰⁹ Furthermore, their Honours were of the view that the conduct of the public school system in Queensland was the 'responsibility' of that state.²¹⁰ Similar observations were made by Hayne, Crennan and Kiefel JJ in their respective judgments.²¹¹ They were of the view that the states were capable of providing the services covered by the NSCP, as underscored by Queensland's own funding scheme for school chaplaincy services. There was, therefore, 'direct competition' with an area of state competence and the capacity of the executive government of the states.²¹²

2 *Availability of Other Constitutional Mechanisms and State Consent*

The Court has, in applying the second limb of the 'peculiarly adapted' test, also considered the availability of other constitutional mechanisms that gave the states the opportunity to *consent* to the implementation of the impugned enterprise or activity. In the *AAP Case*, for example, both Barwick CJ and Mason J thought that the activities associated with the AAP could have been made the subject of conditions attached to a s 96 conditional grant²¹³ and implemented by the states, instead of the Regional Councils.

For the Chief Justice in particular, the appropriate constitutional mechanism for expenditure on and engagement in policy areas beyond the areas allocated to it by the *Constitution* was pursuant to a s 96 grant. In his Honour's opinion, apart from s 96, the Commonwealth could not 'enter that residual area left by the Constitution to the States, either by legislative or by executive act'.²¹⁴ Mason J adopted a similar view. The establishment and direct financing of the Regional Councils was not the only way in which the Commonwealth could have implemented the AAP. It was a scheme which could have been effectively administered by the states, had a conditional grant

²⁰⁹ Ibid 234-5 [144].

²¹⁰ Ibid.

²¹¹ Ibid 272-3 [257] (Hayne J), 347-8 [501]-[503] (Crennan J), 373 [591] (Kiefel J).

²¹² See also Stephenson, above n 13, 186-7.

²¹³ For additional analysis of s 96 grants see, eg, A J Myers, 'The Grants Power: Key to Commonwealth-State Financial Relations' (1970) 7 *Melbourne University Law Review* 549; Cheryl Saunders, 'Towards a Theory for Section 96: Part 1' (1987) 16 *Melbourne University Law Review* 1; Cheryl Saunders, 'Towards a Theory for Section 96: Part 2' (1988) 16 *Melbourne University Law Review* 699; Jonathan Crowe and Peta Stephenson, 'Reimagining Fiscal Federalism: Section 96 as a Transitional Provision' (2014) 33 *University of Queensland Law Journal* 221.

²¹⁴ *AAP Case* (1975) 134 CLR 338, 358.

been made to them under s 96.²¹⁵ According to Mason J, a s 96 grant was in fact, the appropriate way for the AAP to have been carried out.²¹⁶

Since the *AAP Case* was decided, several members of the Court have placed varying degrees of emphasis on the ‘consensual’ nature of s 96 grants.²¹⁷ The Court has employed s 96 to constrain the scope of the nationhood power, and executive power more broadly, in order to preserve the autonomy of the states and their capacity to choose when, and under what conditions, they will participate in the implementation of Commonwealth policy objectives.²¹⁸ In *Williams (No 1)*, the majority found that the NSCP, like the AAP, could have been made the subject of a conditional grant to the states.²¹⁹ Hayne J placed a particular emphasis on the ‘consensual nature’ of s 96.²²⁰ His Honour noted that if the Commonwealth was afforded a wide spending power, it ‘would not only give s 96 of the *Constitution* a place in the constitutional framework very different from the place it has hitherto been understood to occupy but also render it otiose’.²²¹ For Hayne J, s 96 was an ‘immediate textual foundation for limiting the power to spend’.²²²

Other members of the Court reasoned that there was nothing to support or justify the bypassing of s 96 in *Williams (No 1)*.²²³ The spending on the NSCP was not in the same category of urgency as the direct payments in *Pape*. Crennan J noted, in this regard, that there was no evidence to suggest that the Commonwealth was the level of government ‘exclusively, best or uniquely authorised’ to engage in this particular activity.²²⁴ Kiefel J similarly observed that the funding for the NSCP could have been ‘accommodated by grant on condition under s 96’.²²⁵ Her Honour was satisfied that the NSCP fell within the

²¹⁵ Ibid 400.

²¹⁶ Ibid 398.

²¹⁷ Ibid 357-8 (Barwick CJ); *Pape* (2009) 238 CLR 1, 113-4 [322] (Hayne and Kiefel JJ), 199 [569] (Heydon J); *Williams (No 1)* (2012) 248 CLR 156, 235-6 [148] (Gummow and Bell JJ), 269-70 [247]-[248] (Hayne J), 347-8 [501]-[503] (Crennan J), 373 [591]-[593] (Kiefel J).

²¹⁸ See also Hume, Lynch and Williams, above n 188, 79; Appleby and McDonald, above n 13, 267.

²¹⁹ *Williams (No 1)* (2012) 248 CLR 156, 348 [503] (Crennan J), 373 [591]-[593] (Kiefel J). See also 270-1 [251] (Hayne J).

²²⁰ Ibid 270 [248].

²²¹ Ibid 267 [243].

²²² Ibid 270-1 [251] (Hayne J).

²²³ Ibid 234 [143], 235 [146] (Gummow and Bell JJ), 348 [503] (Crennan J), 373 [592]-[593] (Kiefel J).

²²⁴ Ibid 348 [503].

²²⁵ Ibid 373 [593].

‘province of the States’.²²⁶ Accordingly, there was no justification for Commonwealth incursion into an area of state competence by executive action alone.

The importance of state consent is also evident in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*.²²⁷ In that case, Mason J found that the nationhood power could support the Commonwealth’s entry into an intergovernmental agreement with the states on matters of joint interest, provided that ‘the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution’.²²⁸ In finding that the nationhood power supported the agreement, Mason J placed emphasis on its consensual nature.²²⁹ The nationhood power was not being used to override or circumvent the federal distribution of powers, but to facilitate joint co-operative executive (and legislative) action on certain matters that fell outside the competence of both the Commonwealth and the states.

V CONCLUSION

This article has provided an account of the nature and scope of the nationhood power. In particular, it has demonstrated that the Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown. The constitutional significance of Australia’s acquisition of nationhood is that it expanded the subject matters of Commonwealth executive power, beyond those enumerated in ss 51, 52 and 122 of the *Constitution*, to include an area derived from the ‘character and status of the Commonwealth as the national government’. In ascertaining whether a sufficient connection exists between that area of responsibility and the impugned executive action, the Court has consistently applied Mason J’s ‘peculiarly adapted’ test. This test incorporates federalism as an important limit on the scope of the nationhood power.

There may not, therefore, be continuing utility in referring to the nationhood power as a separate category of executive power. With the

²²⁶ Ibid.

²²⁷ (1983) 158 CLR 535.

²²⁸ Ibid 560.

²²⁹ See further Cheryl Saunders, ‘Intergovernmental Agreements and the Executive Power’ (2005) 16 *Public Law Review* 294, 307.

exception of the *Tampa Case*, the activities that have been supported by this power would also have been supported by the existing categories of non-statutory executive power, namely, the capacities or prerogative powers of the Crown. It may be preferable to refer to the nationhood ‘aspect’ of the executive power, where a case involves the exercise of the non-statutory executive power within that area of responsibility derived from the ‘character and status of the Commonwealth as the national government’.

Following the decision of *Williams (No 1)*, Commonwealth contracts and associated expenditure will require prior legislative authorisation, unless they fall within an ‘exempt class’.²³⁰ It has been suggested that activities supported by the ‘nationhood power’ may fall within an exempt class.²³¹ It is plausible that the Commonwealth may increasingly seek to rely on the nationhood aspect of the executive power to support direct spending on programs, in order to circumvent the requirement of obtaining prior legislative authorisation. However the principle of accountability, which underpinned the majority’s reasoning in *Williams (No 1)*, would seem to require that contracting and spending supported by the nationhood aspect of the executive power have prior legislative authorisation, unless it is an emergency situation of the *Pape* kind.²³² It may, therefore, be necessary to distinguish between executive action undertaken for the purpose of national protection, and those activities connected with national identity or national coordination, in the post-*Williams* constitutional landscape.

²³⁰ Twomey, ‘Post-*Williams*’, above n 13, 9-10, 23-5; James Stellios, *Zines’s The High Court and the Constitution* (6th ed, Federation Press, 2016), 398-9; Appleby and McDonald, above n 13, 276.

²³¹ *Williams (No 1)* (2012) 248 CLR 156, 180 [4], 184-5 [34] (French CJ), 249-50 [194], 250-1 [196] (Hayne J), 342 [485] (Crennan J), 370 [582]-[583] (Kiefel J). See also 319 [402] (Heydon J). See further Twomey, ‘Post-*Williams*’, above n 13, 9-10, 23-5; Stellios, above n 230, 398-9; Appleby and McDonald, above n 13, 276.

²³² See further Twomey, ‘Post-*Williams*’, above n 13, 24-5; Appleby and McDonald, above n 13, 270-2, 276.