

## THE COMMONWEALTH EXECUTIVE POWER: HISTORICAL CONSTITUTIONAL ORIGINS AND THE FUTURE OF THE PREROGATIVE

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*This article argues that the Commonwealth's non-statutory executive power should be interpreted using an 'historical constitutional approach', first developed by JWF Allison for the United Kingdom. Some argue that the non-statutory executive power should be informed by the Crown's historical prerogative powers and the common law (the 'common law view'), while the High Court has recognised an inherent 'nationhood power' sourced directly in section 61 of the Australian Constitution, that does not require reference to the common law or the prerogatives (the 'inherent view'). Peter Gerangelos identified a potential jurisprudential shift after Gageler J seemingly adopted an historical approach in Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42. This article argues that interpreting section 61 through an historical constitutional lens would be in keeping with the origins, influences, and common law limitations on the development of the Crown's powers in Australia since Federation. This will better ensure fidelity to fundamental constitutional principles than the inherent approach.*

### I INTRODUCTION

High Court jurisprudence surrounding the non-statutory executive powers has demonstrated an inconsistency and divergence in approaches to interpreting executive powers. This article examines the ongoing developments of the prerogative power of the Commonwealth Executive, and argues that an interpretative methodology encompassing the constitutional history and historical

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sources of law is not only necessary to understand the nature and scope of the non-statutory executive power, but also to place limitations upon its exercise. If the non-statutory executive power broadens in scope without reference to specific criteria, it may become increasingly difficult for courts to determine its limits. Part II of this article first identifies the way that the royal prerogative powers form part of the non-statutory executive power by the vesting of executive power in the Queen in section 61 of the *Constitution*.<sup>1</sup> Part II then briefly discusses the nature of the prerogative powers which, whilst they have been defined, have proven somewhat difficult to apply. Despite this difficulty, Part II argues that the prerogatives, as recognised within the scope of section 61,<sup>2</sup> remain a vital part of the narrative when determining the content and limitations of the powers of the executive branch of government.

It is in Part II that the article draws upon George Winterton's distinction between the breadth of executive power (how power is federally distributed between the Commonwealth and the States), and the depth of executive power (what specific activities the executive can lawfully undertake in light of the separation of powers doctrine).<sup>3</sup> Winterton suggested that the content and scope of section 61 could be ascertained by having regard to its breadth and depth.<sup>4</sup> Applying this distinction, the depth of non-statutory executive power is to be determined and limited by reference to the general powers vested in the executive by the *Constitution*,<sup>5</sup> and the Crown's prerogative powers and common law capacities, since their content and limits are capable of being known and adapted through careful legal reasoning.<sup>6</sup> Furthermore, the common law recognises the principles of separation of powers, responsible government, and the rule of law,

1 Hereafter, references to the *Constitution* are references to the *Australian Constitution* unless otherwise specified.

2 There is disagreement as to whether it is the vesting of the power in the Crown or the term 'maintenance' that incorporates the prerogatives within section 61. For Gummow, Crennan, and Bell JJ in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 83 ('*Pape*'), it is 'the phrase "maintenance of this Constitution" in s 61'. In contrast, French CJ opined in *Williams v Commonwealth* (2012) 248 CLR 156, 185 [24] ('*Williams [No 1]*') that the prerogatives are incorporated by vesting the executive power of the Commonwealth in 'the Queen'. Similar to French CJ, Winterton concluded that vesting the executive power in the Crown is 'in effect, a shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of "the Queen"': George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 50 ('*Parliament, the Executive and the Governor-General*').

3 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 29–30, 40–4, 48–51; George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 29–30.

4 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 29–30, endorsed in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 96–7 [130]–[132] (Gageler J) ('*Plaintiff M68*').

5 These are clearly and concisely set out in Peter Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry' (2018) 37(2) *University of Queensland Law Journal* 191, 227–31 ('Reflections on the Executive Power').

6 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 31–4; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (n 3) 30. Although, Winterton took the view that the distinction between prerogative powers 'proper' and common law capacities has no utility in addressing the overall concern of limiting executive power: Winterton, *Parliament, the Executive and the Governor-General* (n 2) 112.

which serve as constitutional limitations on the depth of non-statutory executive power.<sup>7</sup> The ‘nationhood power’, which has resulted from the High Court interpreting section 61 as containing an inherent non-statutory executive power,<sup>8</sup> has been treated as a separate species of power that is not necessarily constrained by the prerogatives or the common law.<sup>9</sup> It has been described as ‘amorphous’ in nature,<sup>10</sup> as its content and limits are far less certain than the common law and the prerogatives.<sup>11</sup> This leads to the debate surrounding the interpretative approach to understanding executive power, which is analysed in Part III of this article.

Part III canvasses the two main approaches to interpreting the Commonwealth’s non-statutory executive power. The approach favoured in the literature is the ‘common law view’, which argues that the depth and breadth of the non-statutory executive powers should be determined in accordance with the prerogatives and the Australian common law, which has been informed by the historical and legal constitutional sources inherited from the United Kingdom (‘UK’).<sup>12</sup> Furthermore, the prerogatives and the common law are inherently subject to legislative control and parliamentary oversight, in keeping with parliamentary supremacy and responsible government, which have been founding principles for government in both the UK and Australia. However, the High Court has recently adopted what Nicholas Condylis has termed the ‘inherent view’,<sup>13</sup> finding additional inherent content directly in the text of section 61 of the *Australian*

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- 7 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 29–31; Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power through the High Court’s New Spectacles’ (2013) 35(2) *Sydney Law Review* 253, 255; Cheryl Saunders, ‘The Sources and Scope of Commonwealth Power to Spend’ (2009) 20 *Public Law Review* 256, 259.
- 8 *Davis v Commonwealth* (1988) 166 CLR 79 (‘*Davis*’); *Pape* (2009) 238 CLR 1; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–8 (Dixon J), 232 (Williams J) (‘*Communist Party Case*’); *Barton v Commonwealth* (1974) 131 CLR 477, 491 (McTiernan and Menzies JJ); *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J) (‘*AAP Case*’). For a comprehensive discussion of the inherent view and its emergence in the case law, see Nicholas Condylis, ‘Debating the Nature and Ambit of the Commonwealth’s Non-statutory Executive Power’ (2015) 39(2) *Melbourne University Law Review* 385.
- 9 *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 89 (Gummow, Crennan and Bell JJ).
- 10 Anne Twomey, ‘Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers’ (2010) 34(1) *Melbourne University Law Review* 313, 319 (‘Pushing the Boundaries’).
- 11 What is known is that the power only supports ‘enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’: *AAP Case* (1975) 134 CLR 338, 397 (Mason J). This formulation has been applied in subsequent cases as a limit on the application of the nationhood power: see, eg, *Davis* (1988) 166 CLR 79, 103 (Wilson and Dawson JJ), 111 (Brennan J); *Williams [No 1]* (2012) 248 CLR 156, 342 [485] (Crennan J), 370 [583] (Kiefel J).
- 12 Peter Gerangelos, ‘Section 61 of the *Commonwealth Constitution* and an “Historical Constitutional Approach”’: An Excursus on Justice Gageler’s Reasoning in the *M68 Case*’ (2018) 43(2) *University of Western Australia Law Review* 103 (‘An Historical Constitutional Approach’); Leslie Zines, ‘The Inherent Executive Power of the Commonwealth’ (2005) 16 *Public Law Review* 279 (‘The Inherent Executive Power’); Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 358–9 (‘*The High Court and the Constitution*’); Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3); Bradley Selway, ‘All at Sea: Constitutional Assumptions and “The Executive Power of the Commonwealth”’ (2003) 31(3) *Federal Law Review* 495; Winterton, *Parliament, the Executive and the Governor-General* (n 2).
- 13 Condylis (n 8).

*Constitution*.<sup>14</sup> The inherent view reflects the Commonwealth Government's status as an independent national government that need not be constrained by the common law or prerogative powers.<sup>15</sup> The inherent view is problematic because it is not grounded in accepted historical constitutional principles that have been crucial to Australia's development. Furthermore, the exact content of this inherent power, and the degree to which it is subject to parliamentary control, is unknown.<sup>16</sup> Part III argues that the common law view is preferable as it provides more readily ascertainable limits on the depth of executive power.

This leads to Part IV, which examines the 'historical constitutional approach', first espoused by JWF Allison for the UK's unwritten constitution,<sup>17</sup> and which Peter Gerangelos suggested may have value as an interpretative methodology for 'resolving difficult questions arising from s 61 of the *Constitution* and the ambit of the Commonwealth's executive power'.<sup>18</sup> This article argues that this approach should be adopted to build upon the strengths of the common law view and produce a greater understanding of the non-statutory executive power. It requires an examination of both the British and Australian common law and constitutional history for conceptual guidance on the language of section 61 of the *Constitution*, but does not interfere with the Australian prerogatives developing independently of the developments in the UK. Part IV then examines the relevant constitutional history that led to the form of executive power adopted by the framers of the *Australian Constitution*, and how the executive power uniquely developed in Australia. In particular, this examination of history serves to demonstrate that the common law constitutional principles of responsible government and parliamentary sovereignty adopted from the UK and adapted for the Australian context must continue to constrain non-statutory executive power.

Part V then critically examines recent case law and literature on the executive power, and how the historical constitutional approach limits the need to rely on the nationhood power in future. Gerangelos' analysis of Gageler J's judgment in *Plaintiff M68*<sup>19</sup> is insightful, identifying that his Honour seemingly adopts an historical constitutional approach to interpreting section 61 of the *Constitution*, with a focus on the common law and no mention of the inherent power.<sup>20</sup> It serves as a clear demonstration of how the approach can be applied to determine the scope of the non-statutory executive power without the need to refer to the inherent nationhood power. Condylis has argued that focusing on adapting the prerogative

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14 For an analysis of these two views, see Condylis (n 8). See also Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth *Constitution*, "Nationhood" and the Future of the Prerogative' (2012) 12(1) *Oxford University Commonwealth Law Journal* 97 ('Nationhood and the Future of the Prerogative').

15 Condylis (n 8) 391–6.

16 Peter Gerangelos notes that there is a danger that nationhood power may be immune from parliamentary control if it is sourced directly in a constitutional provision. This contrasts with the common law which is incorporated within section 61 but does not derive from it, and which is inherently subject to statute: Gerangelos, 'Reflections on the Executive Power' (n 5) 192.

17 JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press, 2007).

18 Gerangelos, 'An Historical Constitutional Approach' (n 12) 103–4.

19 (2016) 257 CLR 42.

20 Gerangelos, 'An Historical Constitutional Approach' (n 12).

to the Australian context ('to indigenise the prerogative') may do away with the need for a nationhood power altogether.<sup>21</sup> Whilst it is unlikely that the nationhood power would be abandoned in its entirety at this point,<sup>22</sup> Part V argues that an historical constitutional approach may limit the relevance of the nationhood power. This interpretational methodology is better suited to charting a course for adapting the Australian prerogative for novel situations, whilst continuing to subject the executive power to necessary historical constitutional principles of limitation.

Whilst Australia has moved on from its colonial ties to the UK, the utility of historical constitutional principles is ongoing. This article demonstrates that the relationship between the prerogatives, the common law, and the text and structure of the *Constitution*, as understood through an historical constitutional approach, provides the necessary lens for defining the scope and understanding the limits of the Commonwealth's non-statutory executive power.

## II THE ILL-DEFINED PREROGATIVE

The scope of the Commonwealth executive is set out in Chapter II of the *Australian Constitution*. Section 61, the first section of the Chapter, states simply:

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

Because section 61 does not expressly define the limits of executive power beyond where it vests and extends, section 61 creates 'a textual ambiguity' as to 'what activities fall within the scope of Commonwealth executive power'.<sup>23</sup> However, six key points can be deduced from this section. The first point, which is relevant to the scope of this article, is that the power conferred by section 61 is to be distinguished from the executive power of the States.<sup>24</sup> Executive power under section 61 is only exercisable by the Commonwealth executive, and the significance of this becomes more apparent in the breadth/depth dichotomy of executive power,<sup>25</sup> which is discussed later in this article. Secondly, the Commonwealth executive power is vested in the Queen and the government is carried out in her name (due to Australia being a constitutional monarchy). Thirdly, the executive power is exercisable by the Governor-General of the

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21 Condylis (n 8) 426–31.

22 Nicholas Condylis, Samuel Murray and Peter Gerangelos, 'Inherent Executive Power in Ireland: Lessons for Australia' (2019) 6(1) *Journal of International and Comparative Law* 1, 2.

23 Andrew Hanna, 'Nationhood Power and Judicial Review: A Bridge Too Far?' (2015) 39(2) *University of Western Australia Law Review* 327, 327.

24 Covering clause 6 of the *Australian Constitution* defines 'the Commonwealth' to mean the Commonwealth of Australia as established under the *Constitution*, and 'the States' are defined as 'parts of the Commonwealth'. Therefore, whilst the executive power conferred by section 61 cannot be exercised by the States, this does not mean that the power does not pertain to or affect the States.

25 Winterton, *Parliament, the Executive and the Governor-General* (n 2); Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (n 3).

Commonwealth.<sup>26</sup> Fourthly, the expression ‘execution ... of the laws of the Commonwealth’ is understood to refer to the ‘statutory executive power’.<sup>27</sup> Fifthly, the expression ‘maintenance of this Constitution’ has been interpreted as referring to the power to act without legislative authorisation, or the ‘non-statutory power’.<sup>28</sup> The sixth and final point is that the vesting of the executive power in the Queen therefore includes within the scope of the non-statutory executive power those royal prerogatives ‘accorded the Crown by the common law’.<sup>29</sup> The nature of the non-statutory executive powers is not expressly set out in the *Constitution*, so section 61 needs to be considered within its whole constitutional context. The history of constitutional law both in the UK and Australia is an important part of that context.<sup>30</sup>

The term ‘royal prerogative’, or Crown prerogative, is often used as a shorthand expression for those non-statutory powers of the executive branch of government,<sup>31</sup> although there is disagreement as to whether those terms should be used interchangeably. Loosely, the prerogative is described as that ‘for which the law has made no provision’.<sup>32</sup> Historically, prerogatives were the powers, immunities and entitlements enjoyed by the Crown alone, but in some jurisdictions such as the UK, they have also come to be understood to include the capacities that the Crown might share in common with natural persons.<sup>33</sup> Prerogative powers have also been referred to as the common law powers of the Crown.<sup>34</sup> However, it is important to clarify that the prerogative powers do not originally derive from the common law. The prerogative powers historically belonged to and derived their authority from the Crown itself. They have come to be recognised in the common

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- 26 Pursuant to the principles of responsible government where the Governor-General acts on the advice of responsible Ministers, excepting the ‘reserve powers’. For a detailed discussion of the reserve powers, see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018).
- 27 Statutory executive power refers to those powers that have been expressly prescribed or authorised either by legislation or provisions in the *Constitution*. This stems from the Commonwealth’s ability to act in ‘execution’ of the *Constitution* and Commonwealth legislation.
- 28 Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3) 26; Condylis (n 8) 386–7. Whilst the non-statutory executive power is recognised in the *Constitution*, it is called non-statutory because it does not require statutory approval, as recognised in *Williams [No 1]* (2012) 248 CLR 156; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (‘*CPCF*’); *Plaintiff M68* (2016) 257 CLR 42.
- 29 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 [86] (Gummow, Hayne, Heydon and Crennan JJ) (‘*Cadia Holdings*’). See also Winterton, *Parliament, the Executive and the Governor-General* (n 2) 27–8.
- 30 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 104.
- 31 Margit Cohn, ‘Medieval Chains, Invisible Inks: On Non-statutory Powers of the Executive’ (2005) 25(1) *Oxford Journal of Legal Studies* 97, 103.
- 32 *Laker Airways Ltd v Department of Trade* [1977] QB 643, 705 (Lord Denning MR).
- 33 See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] 1 AC 75, 99–100 (Lord Reid); *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 398 (Lord Fraser), 407 (Lord Scarman), 416 (Lord Roskill) (‘*CCSU*’); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453, 590 (Lord Bingham), 516 (Lord Mance) (‘*Bancoult [No 2]*’).
- 34 In *Cadia Holdings* (2010) 242 CLR 195, 223 [75] (Gummow, Hayne, Heydon and Crennan JJ), the prerogative powers were described as ‘part of the common law of England but, given its nature, as being out of the ordinary course of the common law’.

law over time,<sup>35</sup> and in this sense have become ‘common law powers’. Being classified as common law powers, they are not only subject to control and abrogation by statute, but also to definition by the courts.<sup>36</sup>

As the non-statutory executive powers have been increasingly covered, limited, or abrogated by statute, such as the power to levy and raise taxes, the remaining prerogatives have been described as ‘remnants of days yonder’,<sup>37</sup> and their scope ‘notoriously difficult’ to define.<sup>38</sup> However, some of the prerogative powers of the Crown are well-known and remain an important part of government power in Westminster-based systems of government,<sup>39</sup> such as the power to declare war or peace, or enter into treaties. Notable constitutional writers have attempted to define prerogative powers over the years, but without achieving consensus. Sir William Blackstone described the royal prerogatives as being ‘singular and eccentric’ because they are those ‘rights and capacities which the king enjoys alone, in contradistinction to others’, therefore excluding those rights and capacities which are shared in common with natural persons.<sup>40</sup> Blackstone’s definition is therefore a narrow one; only those peculiar powers which inhere in the sovereign can properly be called Crown prerogatives. Those capacities that the executive shares with other juristic persons,<sup>41</sup> such as the ability to enter into contracts, are excluded and treated as ordinary executive powers.<sup>42</sup> His definition has been cited approvingly in a number of High Court decisions.<sup>43</sup> In *Cadia Holdings Pty Ltd v New South Wales* (*‘Cadia Holdings’*), Gummow, Hayne, Heydon and Crennan JJ said:

Blackstone described the prerogative as part of the common law of England but, given its nature, as being out of the ordinary course of the common law. The ‘prerogative’ in the context of the present case concerns the enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen or, more specifically, of an exceptional right ...<sup>44</sup>

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35 See *New South Wales v Commonwealth* (1975) 135 CLR 337, 487 (Jacobs J).

36 Twomey, ‘Pushing the Boundaries’ (n 10) 325.

37 Cohn (n 31) 103.

38 Andrew Banfield and Greg Flynn, ‘Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action’ (2015) 68(1) *Parliamentary Affairs* 135, 137–8.

39 Lorne Sossin, ‘The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*’ (2002) 47(2) *McGill Law Journal* 435; Banfield and Flynn (n 38).

40 Sir William Blackstone, *Commentaries on the Laws of England: Book 1* (Clarendon Press, 1765) 232. See also HP Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 55.

41 Hanna (n 23) 328.

42 Whilst they are ‘ordinary’ powers as distinct from the prerogatives, they are still important powers of the Crown. As French CJ noted in *Williams [No 1]* (2012) 248 CLR 156, 193 [38]: ‘The Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity. The governmental contract “is now a powerful tool of public administration”’ (citations omitted).

43 See, eg, *Davis* (1988) 166 CLR 79, 108 (Brennan J). See also *Joseph v Colonial Treasurer* (1918) 25 CLR 32; *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25; *Barton v The Commonwealth* (1974) 131 CLR 477; *Williams [No 1]* (2012) 248 CLR 156.

44 (2010) 242 CLR 195, 223 [75] (citations omitted). The case concerned the royalties owed by Cadia Holdings Pty Ltd to the Minister for Mineral Resources of NSW, in respect of copper that had been mined in NSW. The key legal question was whether the common law prerogative rights as received in the

In contrast, AV Dicey argued that the Crown prerogatives consist of ‘the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown’,<sup>45</sup> meaning that his definition encompasses both the traditional prerogatives of the Crown and those capacities that the government shares with natural persons. In Dicey’s broader view, ‘[e]very act which the executive government can lawfully do without the authority of [an] Act of Parliament is done in virtue of this prerogative’.<sup>46</sup>

Dicey’s view has found favour in the House of Lords and the Privy Council.<sup>47</sup> British judges have called the ‘left-over’ power that derives from the ancient rights, privileges and powers of the King<sup>48</sup> ‘the clanking of mediaeval chains of the ghosts of the past’.<sup>49</sup> Recent UK jurisprudence has demonstrated a preference for Dicey’s view because it subjects all aspects of executive power to scrutiny, which is more in keeping with a modern focus on ensuring that the executive is subordinate and responsible to Parliament.<sup>50</sup> In contrast, the High Court of Australia has preferred Blackstone’s narrower definition as a ‘restrained approach to the prerogative [which] is consistent with Australia’s legal independence from Britain, the constraints of federalism and the paramountcy of the Commonwealth Parliament’.<sup>51</sup> Brennan J noted in *Davis v Commonwealth* (*‘Davis’*) that ‘an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory power (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity’.<sup>52</sup> Winterton took the view that there was little value in attempting to distinguish the narrow definition of the prerogative powers from the other common law powers of the Crown,<sup>53</sup> although it has been argued that common law capacities cannot negatively interfere with legal rights, whereas prerogative powers may.<sup>54</sup>

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colony of NSW included Crown ownership of copper as a ‘royal metal’. The High Court found that the Crown’s prerogative ownership of base metals contained in gold ore (such as copper) had been abridged by an English statute passed in 1688. Therefore, the prerogative right enjoyed by NSW could not be wider than the power inherited at settlement.

- 45 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1961) 424. Sir Frederick Pollock echoed this view, stating that the prerogative ‘is nothing more mysterious than the residue of the King’s undefined powers after striking out those which have been taken away by legislation or fallen into desuetude’, in an editorial note written at the end of the article written by V St Clair Mackenzie, ‘The Royal Prerogative in War-Time’ (1918) 34(2) *Law Quarterly Review* 152, 159.
- 46 Dicey (n 45) 425.
- 47 See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] 1 AC 75, 99 (Lord Reid); *CCSU* [1985] 1 AC 374, 398 (Lord Fraser), 407 (Lord Scarman), 416 (Lord Roskill); *Bancoult [No 2]* [2009] 1 AC 453, 490 (Lord Bingham), 516 (Lord Mance).
- 48 Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge, 2016) 17. See also Noel Cox, ‘The Gradual Curtailment of the Royal Prerogative’ (2012) 25 *Denning Law Journal* 1, 1–2.
- 49 *CCSU* [1985] 1 AC 374, 417 (Lord Roskill). See also Thomas Poole, ‘United Kingdom: The Royal Prerogative’ (2010) 8(1) *International Journal of Constitutional Law* 146; Cohn (n 31).
- 50 *Williams [No 1]* (2012) 248 CLR 156, 186 [25] (French CJ), quoting Cohn (n 31) 104.
- 51 *Williams [No 1]* (2012) 248 CLR 156, 344 [488] (Crennan J) (citations omitted).
- 52 *Davis* (1988) 166 CLR 79, 108 (Brennan J).
- 53 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 112.
- 54 Zines, *The High Court and the Constitution* (n 12) 345–6; Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 102–3; Zines, ‘The Inherent Executive Power’ (n 12) 280.



As to the content of the prerogatives, Evatt J observed in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* that the royal prerogatives are so ‘disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects’.<sup>55</sup> In his doctoral thesis, Evatt<sup>56</sup> attempted to separate them into three categories. The first category is ‘executive powers’, whereby the Crown has powers to do certain acts, such as declaring war or peace, conferring honours, coining money, and pardoning offenders. The second category is ‘privileges and immunities’, such as the priority of debts owing to the Crown over other creditors. The third is ‘proprietary rights’, such as control over certain metals and control over the territorial sea.<sup>57</sup> This categorisation highlights the disparate nature of the surviving prerogatives, and distinguishes the ‘personal rights of the monarch from the legal authority of the State’<sup>58</sup> and the powers of the Commonwealth from the powers of the States.

In determining whether a prerogative power exists, it is generally accepted that prerogative powers ‘have been inherited from the past’, and no new prerogative powers can be created.<sup>59</sup> The prerogative powers are considered a residue of the historical powers left in the hands of the Crown following the Revolution of 1688<sup>60</sup> and the resulting *Bill of Rights 1689* (Imp), in which the British Parliament asserted its supremacy and placed limitations on the remaining powers of the Crown (such as being subject to legislative abrogation and control). Lord Diplock famously said in *British Broadcasting Corporation v Johns (Inspector of Taxes)* that

it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.<sup>61</sup>

Whilst new prerogative powers cannot be created, the existing prerogatives can be identified and adapted to meet new circumstances.<sup>62</sup> However, caution should be taken because ‘the line between adaption of an existing prerogative and the

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55 (1940) 63 CLR 278, 320.

56 Herbert Vere Evatt was a High Court Justice, Attorney General and Minister for External Affairs, President of the United Nations General Assembly, Leader of the Labor Party (and Leader of the Opposition), and Chief Justice of the Supreme Court of NSW: see ‘Herbert Vere Evatt KC’, *High Court of Australia* (Web Page) <<http://www.hcourt.gov.au/justices/former-justices/former-justices/herbert-vere-evatt-kc>>.

57 HV Evatt, *The Royal Prerogative* (Law Book, 1987) 50. It was submitted in 1924 for the award of LLD from the University of Sydney.

58 *Ibid* 7.

59 Anne Twomey, ‘Post-Williams Expenditure: When Can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?’ (2014) 33(1) *University of Queensland Law Journal* 9, 14 (‘Post-Williams Expenditure’).

60 Against James II (1685–8). See Stephen CA Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009) ch 4; Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685–1720* (Penguin Books, 2007).

61 [1965] 1 Ch 32, 79.

62 Twomey, ‘Post-Williams Expenditure’ (n 59) 14, citing *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26; Winterton, *Parliament, The Executive and the Governor-General* (n 2) 120; Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers, 3<sup>rd</sup> ed, 2007) 621–2.

creation of a new power may be a fine one',<sup>63</sup> and so whether the prerogative has been adapted or expanded is a careful question for the courts.<sup>64</sup> 'The prerogative is therefore limited to those powers that can be identified by reference to historical use and which have not been subsequently abrogated by legislation'.<sup>65</sup>

Professor Leslie Zines argued that in the Australian context, where section 61 does not expand on what is included within the prerogative powers or those non-prerogative capacities, we must adopt an historical approach.<sup>66</sup> Winterton too advocated for the continued use of the prerogative powers to determine the ambit of non-statutory executive power because they serve as a useful tool for identifying the legal criteria required for deciding whether the executive is authorised to undertake a particular executive action. For instance, the prerogatives can affect or even override some individual common law rights and interests where the courts have determined that the purpose of the prerogative 'clearly requires such an effect',<sup>67</sup> but generally the courts will find that the prerogative powers 'may not be exercised in a manner that affects fundamental or "constitutional" common law rights'.<sup>68</sup> However, Anne Twomey has noted that this might be overstating the position. What is clear is that some prerogative powers can affect common law rights, but the courts can determine this on a case by case basis<sup>69</sup> in accordance with recognised fundamental constitutional principles that serve to limit government authority.

A final point about the content of the non-statutory executive power needs to be made here before moving to the next section. Due to Australia's federal constitutional arrangements, Winterton distinguished between the 'breadth' and 'depth' elements of the non-statutory executive power.<sup>70</sup> The 'breadth' dimension is concerned with the subject matters in respect of which the Commonwealth or state executives may take action according to the division of powers in a federal system.<sup>71</sup> The 'depth' aspect refers to the precise actions which the executive may lawfully undertake without statutory authorisation (authorised by the prerogatives and the common law), in line with the principles of the separation of powers and responsible government, concerning the relationship between the executive and Parliament.<sup>72</sup> This distinction has become 'part of the s 61 parlance in the

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63 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 120–1.

64 George Winterton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 407, 408.

65 Twomey, 'Post-Williams Expenditure' (n 59) 14.

66 Zines, 'The Inherent Executive Power' (n 12) 279.

67 Twomey, 'Pushing the Boundaries' (n 10) 325–6.

68 *Ibid* 325.

69 *Ibid* 326.

70 Robert French, 'The Executive Power' (Speech, Inaugural George Winterton Lecture, Sydney Law School, The University of Sydney, 18 February 2010) 22. French described the work of George Winterton as 'seminal work in the field': at 1.

71 *Plaintiff M68* (2016) 257 CLR 42, 96 [130] (Gageler J). His Honour expressly adopted this terminology.

72 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 30, 48.

literature',<sup>73</sup> and has been cited approvingly in the High Court.<sup>74</sup> Gerangelos has argued that Winterton's breadth/depth categorisation, in considering the separation of powers, responsible government and federalism, is 'an application of fundamental principles in the *Constitution* to fill out a proper appreciation of executive power'.<sup>75</sup>

Section 61 has been described as merely a 'rough map' to outline the executive power, since it does not provide a clear definition of the ambit of the power.<sup>76</sup> Winterton has argued that the first step in ascertaining the scope of the executive power is determining whether a particular executive action is a matter for the Commonwealth or the States (within the breadth of the executive power). It is then necessary to determine whether the action can be undertaken without legislative authority (within the depth of the power).<sup>77</sup> This article is concerned with limiting the non-statutory executive power in the depth dimension by reference to the prerogatives and the common law, and therefore limiting or obviating reliance on the nationhood power in future. This leads to the discussion in the next section as to the current competing approaches to interpreting the non-statutory executive power of the Commonwealth.

### III THE CURRENT APPROACHES TO UNDERSTANDING THE EXECUTIVE'S NON-STATUTORY EXECUTIVE POWERS

Two main schools of thought have emerged regarding section 61 of the *Constitution*. The first is the 'common law view', which holds that the non-statutory executive power of section 61 of the *Constitution* should be interpreted according to Australia's common law heritage, and the history and role of the royal prerogative powers. The key proposition of this view is that the common law provides legally discernible criteria that can limit executive action and allow its constitutionality to be clearly tested.<sup>78</sup> The second, the 'inherent view', holds that the executive power is sourced in section 61 and must contain within it the authority to act for the benefit of the nation, considering Australia's character and

73 Condylis (n 8) 398; Gerangelos, 'Nationhood and the Future of the Prerogative' (n 14) 103–5; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 177–81; Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (n 7) 261–2; Twomey, 'Pushing the Boundaries' (n 10) 320; Zines, 'Inherent Executive Power' (n 12) 281.

74 *Williams [No 1]* (2012) 248 CLR 156, 312–13 [385] n 578, where Heydon J said that the distinction is 'not only neat but illuminating'.

75 Gerangelos, 'An Historical Constitutional Approach' (n 12) 131.

76 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 28–9, citing Isaacs J in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 440 ('*Wooltops Case*') that 'the domain of the Commonwealth executive power ... is described but not defined in sec[ti]on] 61'. Winterton goes on to cite Evatt J in *Farley's Case* (1940) 63 CLR 278, 321 that section 61 'only defines the general limits of the King's executive authority in respect of the Commonwealth and does not determine what the Executive may lawfully do upon any given occasion': at 29.

77 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 34, agreeing with the model for assessing breadth and depth adopted in *Johnson v Kent* (1975) 132 CLR 164, 169–70 (Barwick CJ).

78 Condylis (n 8) 400; Gerangelos, 'Nationhood and the Future of the Prerogative' (n 14) 98.

status as a modern federal polity.<sup>79</sup> On this view, the non-statutory executive power in section 61 contains inherent content beyond the prerogatives and the common law. Many leading constitutional scholars prefer the common law view,<sup>80</sup> whilst the inherent view has been almost exclusively supported in cases decided by the Federal Court of Australia and the High Court.

The outcome of this debate is critical to an interpretation of the relationship between sections 51(xxxix) and 61 of the *Australian Constitution*. Section 51(xxxix) is the ‘express incidental’<sup>81</sup> head of legislative power which authorises the Commonwealth Parliament to legislate with respect to

matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.<sup>82</sup>

This section provides for the ‘legislative facilitation of the execution of the executive power of the Commonwealth’.<sup>83</sup> Gerangelos has warned that by a combination of sections 51(xxxix) and 61, the power of the Commonwealth Government may ‘be enhanced if the content of s 61 is expanded to include inherent content, particularly if this extends to subject matter not otherwise within the enumerated heads of legislative power in the Constitution’.<sup>84</sup>

As will be discussed below, the High Court has limited the inherent ‘nationhood power’ in accordance with federalism concerns, which limits the breadth of the power, but the High Court may inadvertently be adding to the depth of non-statutory executive power by finding that ‘the executive power of the Commonwealth conferred by s 61 involves much more than the common law prerogatives of the Crown’.<sup>85</sup> This ‘inherent nationhood power’ remains an elusive concept, making it ‘difficult to identify legally-discernible criteria’.<sup>86</sup> Therefore, the prerogatives still have a crucial role in ascertaining and limiting what the executive may lawfully do absent prior statutory authorisation.

### A The Common Law View

The common law view focuses on interpreting and constraining the non-statutory executive power by reference to the Crown’s prerogatives.<sup>87</sup> Under this

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79 Condylis (n 8) 391–4; Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 97–9.

80 Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3); Winterton, *Parliament, the Executive and the Governor-General* (n 2); Leslie Zines, ‘Commentary’ in Evatt (n 57) ch 5; Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14); Condylis (n 8) 400.

81 Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 97.

82 *Australian Constitution* s 51(xxxix).

83 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 128, quoting *Plaintiff M68* (2016) 257 CLR 42, 93 [122] (Gageler J), which cited *Brown v West* (1990) 169 CLR 195, 202 (the Court).

84 Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 97.

85 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J).

86 Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 99. Here, Gerangelos notes that considerations that derive from policy and subjective considerations may exist to test the validity of executive action absent statutory authorisation, but such considerations are not particularly suited in judicial determinations.

87 Condylis (n 8) 387.

‘once orthodox position’,<sup>88</sup> the lawfulness of executive action is analysed by considering whether it has been historically accepted or rejected as a common law power of the Crown. Condylis has written about the emergence of the common law view in the literature. He summarised this development by drawing attention to three broad periods.<sup>89</sup> First is the rather long period between Federation in 1901 and the mid-1970s. Sir John Quick and Sir Robert Garran, who were both heavily involved in the drafting of the *Australian Constitution*, devoted only two pages to their analysis of the executive power in section 61 in their book, *The Annotated Constitution of the Australian Commonwealth*.<sup>90</sup> Sir William Harrison Moore, a professor who was an expert on federalism during the process of federation,<sup>91</sup> was considerably more helpful, and explained:

The power to execute and maintain the *Constitution* does not mean that the Executive Government may do all acts necessary to carry out any provision of the *Constitution*; it must be construed, like everything else in the *Constitution*, by reference to the established principles of English law ... [W]here a power or duty committed to ‘the Commonwealth’ is of such a kind as is according to common law exercisable by the Executive, the Commonwealth Executive is empowered to take such action as the common law allows. ... [i]n pursuance of its duty to maintain the *Constitution* and the law of the Commonwealth.<sup>92</sup>

Before his appointment to the High Court, HV Evatt adopted an analysis of executive power that was also in keeping with a common law view in his doctoral thesis.<sup>93</sup>

During the second period of development, the literature was responding to an apparent shift in the High Court’s interpretation of section 61.<sup>94</sup> It was during this period that Winterton published his breadth/depth dichotomy.<sup>95</sup> He saw the role of the prerogative, stemming from the power of the Crown and recognised in the British common law, as a necessary limit on the depth dimension of executive power. He was concerned with any emphasis on the text of the *Constitution* that did not appreciate ‘its fundamental adoption of responsible government ... which must also accommodate federalism and the separation of powers’.<sup>96</sup> This led Winterton to reject the existence of any inherent executive power arising from the mere existence of the Commonwealth as a national polity beyond those powers which already existed in the common law.<sup>97</sup> This analysis demonstrates ‘the

88 Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14); Condylis (n 8) 388.

89 Condylis (n 8) 397.

90 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 701–2.

91 From Sir William Harrison Moore, Sir Owen Dixon acquired ‘a love and profound grasp of common law principles, and a lively interest in constitutional and legal development’: see ADG Adam, ‘Jesting Pilate and Other Papers and Addresses’ (1967) 5(4) *Melbourne University Law Review* 507, 507.

92 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2<sup>nd</sup> ed, 1910) 297–8.

93 Evatt (n 57) 26–8, 35–7.

94 Condylis (n 8) 397–8.

95 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 29–30; Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3) 29.

96 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 196, citing Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3) 34–5.

97 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 97–8.

fundamental importance of subjecting executive power to law ... and maintaining a consistent narrative within the common law constitutional tradition from which the Commonwealth *Constitution* emerged'.<sup>98</sup>

Seemingly in agreement with this, Cheryl Saunders has suggested that the framers of the *Constitution*, in phrasing section 61 in very brief terms, likely intended that the executive power would be understood and interpreted in accordance with the common law conception adopted from Britain.<sup>99</sup> In particular, the prerogative and the *Australian Constitution* were developed 'within the constitutional context of parliamentary supremacy over the executive' which by extension implies the executive's subjection to legislation.<sup>100</sup> Crennan J observed that 's 61 and, more generally, Ch II of the *Constitution* were shaped by the institution of responsible government and the exercise of executive power under the Westminster system of Britain, as at the date of Federation'.<sup>101</sup> The nature of the prerogative powers, being capable of legislative abrogation or control, is in keeping with this responsible government heritage. The interpretation of section 61 and therefore the Commonwealth executive power must be informed by an understanding of the historical context in which the Australian system of government and the *Constitution* were created.<sup>102</sup> The common law and the prerogatives are essential parts of that context.

The third key period in the development of the common law view was the response in the literature to the recent cases of *Pape v Commissioner of Taxation* ('*Pape*'),<sup>103</sup> *Williams v Commonwealth* ('*Williams [No 1]*')<sup>104</sup> and *Williams v Commonwealth [No 2]* ('*Williams [No 2]*'),<sup>105</sup> which demonstrate that the High Court has shifted to the inherent view. However, prior to these cases, the common law view appeared to be the predominant view, particularly in the literature. The executive power of the Commonwealth of Australia was still tied to British constitutional doctrine:<sup>106</sup> the well-established, traditional British conception of what those powers entail, and what applications they are limited to.<sup>107</sup>

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98 Gerangelos, 'Reflections on the Executive Power' (n 5) 195.

99 Cheryl Saunders, 'Australia: New Perspectives on the Scope of Executive Power' (2013) 1 *Public Law* 174, 174 ('Australia: New Perspectives').

100 Gerangelos, 'Nationhood and the Future of the Prerogative' (n 14) 123.

101 *Williams [No 1]* (2012) 248 CLR 156, 349 [508] (citations omitted).

102 Saunders, 'Australia: New Perspectives' (n 99) 174.

103 (2009) 238 CLR 1.

104 (2012) 248 CLR 156.

105 (2014) 252 CLR 416.

106 See the view of Isaacs J in *Commonwealth v Kreglinger* (1926) 37 CLR 393, 411–12 and *Farey v Burvett* (1916) 21 CLR 433, 452 where his Honour indicated in both cases that he understood the *Australian Constitution*, and therefore interpretation of its terms within, including section 61, to be influenced by the Imperial Legislature and the common law of England.

107 *Re Diffort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J) ('*Re Diffort*'); Chief Justice James Spigelman, 'Public Law and the Executive' (2010) 34(1) *Australian Bar Review* 10, 19–20; Duncan Kerr, 'Executive Power and the Theory of its Limits: Still Evolving or Finally Settled?' (Conference Paper, UNSW Gilbert and Tobin Centre of Public Law 2011 Constitutional Law Conference, 18 February 2011)  
<[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011%20Con%20Law%20Conferece%20Paper%20D%20Kerr\\_0.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011%20Con%20Law%20Conferece%20Paper%20D%20Kerr_0.pdf)>.

The first obvious judicial consideration of the relationship between section 61 and the prerogatives was in the *Wooltops Case*, in which Isaacs J said that

the executive authority of the Commonwealth Government embraced all the common law powers of the Imperial Government, and that ‘laws of the Commonwealth’ *included the common law ... Section] 61, when carefully examined, simply applies to the new constitutional structure*, the Commonwealth, but with the necessary adaptation, the basic principle of the law of the Empire that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality.<sup>108</sup>

Read carefully, it appears that Isaacs J was supporting the view that section 61 is a confirmation of the pre-existing state of the law, where the executive power belongs to the Crown, rather than suggesting that section 61 is the source of the non-statutory executive powers. This would appear to be supported by Evatt J in the case of *R v Hush; Ex parte Devanny*:

Whatever powers or duties are conferred or imposed upon the King’s executive government, by any section of the *Constitution, or by such portion of the Royal prerogative as is applicable*, may lawfully be exercised; *but section] 61 itself gives no assistance in the ascertainment or definition of such powers and duties.*<sup>109</sup>

It can be inferred that Evatt J, in saying that section 61 provides no assistance in the ascertainment of definition of the prerogatives, was also of the view that section 61 is not the textual source of the non-statutory executive powers.

In *Barton v Commonwealth*, Mason J opined that the scope of the executive powers in section 61 ‘includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law’.<sup>110</sup> However, this should not be read to suggest that Mason J is arguing that section 61 also includes some other executive power that is newly created by section 61. Section 61 tells us that the executive power of the Commonwealth includes statutory and non-statutory powers; it does not expressly create any new authorities.

Therefore, the common law view asserts that section 61, by virtue of incorporating the prerogatives of the Crown as recognised in the common law, is to be interpreted in accordance with the common law, which sets out discernible criteria for testing the constitutionality of Commonwealth executive action and imposes traditional limits on the exercise of the power. As Winterton has argued, no new prerogatives can be created, but they can be developed in the common law to adapt to new circumstances.<sup>111</sup> He observed that the prerogative powers provide principles, rules and precedents which are ‘the subject of considerable literature and heritage shared with comparable nations such as the United Kingdom, Canada and New Zealand’,<sup>112</sup> and therefore provide a sufficient body of law to draw upon. By interpreting the Commonwealth’s non-statutory powers in accordance with the common law, those powers cannot be expanded beyond those limits which have

108 (1922) 31 CLR 421, 438 (emphasis added).

109 (1932) 48 CLR 487, 511 (emphasis added).

110 (1974) 131 CLR 477, 498.

111 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 120–2.

112 Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3) 34–5.

been traditionally imposed on the powers of the Crown.<sup>113</sup> The main issue which the common law view is trying to avoid is that if section 61 were to be interpreted without reference to the common law, the executive power would remain unpredictable, possibly self-defining, and susceptible to unconstitutional applications.<sup>114</sup>

## B The Inherent View

Despite the common law view being the ‘once orthodox position’, the concept of a power to defend the nation is not new. In the 1915 case of *R v Kidman*, which concerned retrospective legislation, Isaacs J held that the Commonwealth has ‘an inherent right of self-protection ... [which] carries with it – except where expressly prohibited – all necessary powers to protect itself and punish those who endeavour to obstruct it’.<sup>115</sup> The landmark decision of the *Australian Communist Party v Commonwealth* (‘*Communist Party Case*’)<sup>116</sup> in 1951 concerned whether sections 51(xxxix) and 61, read together, could support legislation to protect the nation from the perceived threat of communism. Whilst Dixon J pointed out that Australia does require protection from both external and internal threats, the Commonwealth’s implied powers of self-protection should not extend to authorising the executive to exercise an ‘unexaminable’ power based on some vague formula that may ‘subvert the *Constitution*’.<sup>117</sup>

However, the concept of an implied nationhood power, that a national executive government must have, gained momentum in the cases of *Barton v Commonwealth*<sup>118</sup> and *Victoria v Commonwealth* (‘*AAP Case*’).<sup>119</sup> Mason J said in the *AAP Case* that

the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity ... in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.<sup>120</sup>

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113 Condylis (n 8) 401.

114 Ibid 400–1.

115 (1915) 20 CLR 425, 440–5. In this case, Kidman was challenging the validity of retrospective provisions in the *Crimes Act 1914* (Cth) under which he had been found guilty of defrauding the Commonwealth Government.

116 (1951) 83 CLR 1, 187–8 (Dixon J), 232 (Williams J). However, this interpretation of the executive power was limited to ‘maintaining’ the *Constitution*, and for addressing such activities as sedition and subversion, for the purpose of preserving the national interest.

117 Ibid 187–8 (Dixon J); Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia* (Cambridge University Press, 2015) 197–8.

118 (1974) 131 CLR 477, 491 (McTiernan and Menzies JJ), 498 (Mason J). Justices McTiernan and Menzies noted that the executive has an inherent power than can only be limited by statute. But given that the common law prerogatives can only be limited by statute (including the *Constitution*), it is unclear why an additional source of executive power would be needed.

119 (1975) 134 CLR 338.

120 Ibid 397. The *AAP Case* concerned whether the Commonwealth executive could appropriate funds to the Australian Assistance Plan for the purpose of making grants to the Regional Councils for Social Development. The case turned on the relationship between the appropriations power in section 81, the



Twomey has noted that this expansion of Commonwealth executive power ‘was made subject to the caveat that such enterprises and activities’ lie outside the scope of state power as nationhood ‘concerns matters that are truly “national” in nature’.<sup>121</sup> Arguably then, this case should be understood as only expanding the breadth dimension of executive power, that is, determining existing powers and capacities by reference to national considerations. This would seem to be supported by *Commonwealth v Tasmania* (*Tasmanian Dam Case*), in which Deane J said that the nationhood power is confined to areas in which there is no competition with the states and matters that are ‘truly national endeavours’.<sup>122</sup> However, Mason J’s comments in the *AAP Case* have been relied upon as support for the clear shift towards identifying section 61 as the paramount authority on the executive power, over the prerogatives and the common law.

The inherent view was more strongly reinforced in two 1988 cases, two years after the commencement of the *Australia Acts*, being the High Court case of *Davis*<sup>123</sup> and the Federal Court case of *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (*Re Ditfort*),<sup>124</sup> where the Courts were willing to interpret the non-statutory executive power by reference to the Commonwealth’s status as a national government. Indeed, Gummow J noted in *Re Ditfort* 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’.<sup>125</sup> Relevantly, the issue in that case was whether or not the exercise of the power in question was justiciable, and so arguably Gummow J’s comment regarding the content of the prerogatives should be limited to the issue of justiciability, rather than to a general analysis of the content of the executive power. Significantly, neither case expressly identified an inherent power separate and distinct from the prerogatives or the common law.

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executive power in section 61, and the incidental legislative power in section 51(xxxix). Justices McTiernan, Jacobs and Murphy held that the plan was valid, and Stephen J held that Victoria did not have standing to challenge the appropriation. Therefore, the legislation was held to be valid.

121 Twomey, ‘Pushing the Boundaries’ (n 10) 327.

122 (1983) 158 CLR 1, 253 (*Tasmanian Dam Case*).

123 (1988) 166 CLR 79. An issue in *Davis* was whether the incorporation of a company for the celebration of the Bicentenary was within the ambit of the Commonwealth Executive. The plaintiffs challenged the constitutional validity of certain sections of the *Australian Bicentennial Authority Act 1980* (Cth) on the basis that section 83 of the *Constitution* did not extend to the appropriation of money to celebrate the Bicentenary. In the joint judgment of Mason CJ, Deane and Gaudron JJ, their Honours held that the celebration of the Bicentenary ‘falls fairly and squarely within the federal executive power’ as it is ‘pre-eminently the business and concern of the Commonwealth as the national government’: at 94. Therefore, section 51(xxxix) enabled the Commonwealth Parliament to legislate in aid of the executive to incorporate the company and ‘for carrying out and implementing a plan or programme for the commemoration’: at 94. This is despite the fact that the Bicentenary was the celebration of the establishment of the colony of NSW, rather than the establishment of the Commonwealth.

124 (1988) 19 FCR 347.

125 Ibid 369. *Re Ditfort* concerned a bankrupt Mr Ditfort, who sought the annulment of a sequestration order on the basis that his extradition from Germany to Australia had been affected by misleading statements from the Australian Government to the German Government. In determining whether the matter was justiciable, Gummow J warned against determining whether a matter is justiciable in Australia by reference to the prerogatives in the UK: at 370.

In 2001, the Full Court of the Federal Court of Australia expanded the application of the inherent nationhood power as a source of the Commonwealth executive's coercive non-statutory abilities.<sup>126</sup> The case of *Ruddock v Vadarlis* ('*Tampa Case*')<sup>127</sup> concerned whether the Commonwealth possessed a non-statutory executive power independent of the *Migration Act 1958* (Cth) ('*Migration Act*') to lawfully seize control of the ship the MV Tampa, to prevent the 433 'unlawful non-citizens' on board from landing in Australia.<sup>128</sup> In finding that the relevant power did exist, the majority (French J, with Beaumont J agreeing) reasoned that historical conceptions and limitations on the royal prerogative in the UK did not limit the depth of non-statutory executive power in Australia, relying perhaps incorrectly on Gummow J in *Re Ditfort*.<sup>129</sup>

The main judgment was delivered by French J, who moved away from an emphasis on the common law as the source of a closed list of prerogative powers and instead focused on section 61 as the paramount source of executive power. French J opined that the power

to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under ... the *Constitution*, the ability to prevent people not part of the Australia[n] community, from entering.<sup>130</sup>

His Honour said that the phrase 'maintenance of the *Constitution*' in section 61 'imports the idea of Australia as a nation',<sup>131</sup> and that section 61 was not constrained by the royal prerogative.<sup>132</sup> His Honour stated that the relevant power was 'conferred as part of a negotiated federal compact expressed in a written *Constitution* distributing powers between the three arms of government'.<sup>133</sup>

In French J's view, the *Migration Act* had not extinguished or replaced the non-statutory executive power of the Commonwealth since it did not expressly state that the Act was now covering the whole area. His Honour therefore set a narrow test for the displacement of the non-statutory executive power, such that '[t]he greater the significance of a particular Executive power is to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power'.<sup>134</sup>

In contrast, Black CJ, who was in dissent in the *Tampa Case*, relied upon his analysis of common law authorities, many of which were English cases. His Honour stated that a common law royal prerogative to exclude aliens in times of peace is 'at best doubtful'.<sup>135</sup> He criticised the reasoning of the majority on the

126 Condylis (n 8) 388–9.

127 (2001) 110 FCR 491 ('*Tampa Case*').

128 The language adopted in the *Migration Act 1958* (Cth) ('*Migration Act*'). This involved the deployment of Australian Special Air Service Regiment forces to effect the expulsion of the non-citizens from Australia's territorial waters.

129 (1988) 19 FCR 347, 369, as relied on by French J in *Tampa Case* (2001) 110 FCR 491, 539 [179].

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

131 Ibid 539 [180], referring to the observations of Jacobs J in *AAP Case* (1975) 134 CLR 338, 406.

132 *Tampa Case* (2001) 110 FCR 491, 540 [183]; Kerr (n 107) 7.

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

134 Ibid 540 [185].

135 Ibid 501 [30].

basis that he found it strange that a ‘doubtful and historically long-unused power to exclude or expel’ should be read into section 61 under the guise of national interest, when ‘according to English constitutional theory new prerogative powers cannot be created’.<sup>136</sup> In any case, if the prerogative previously existed, Black CJ held that it had been abrogated by the *Migration Act* on the basis that ‘once a particular statutory regime is in place, there can be no parallel Executive right in the area expressly covered’.<sup>137</sup> Further, his Honour took issue with the majority reasoning that an inherent non-statutory executive power could be used for coercive measures. Critically, he observed that the previous High Court authorities that the majority relied on for recognising a nationhood power were not concerned with activities ‘aimed at preventing, prohibiting, controlling or regulating the actions of individuals’.<sup>138</sup> His Honour opined that

[t]he 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 ... 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 arbitrary denial of mail and telephone services; or compulsion to attend to give evidence or to produce documents in an inquiry.<sup>139</sup>

This echoes the reasoning of Wilson J in the *Tasmanian Dam Case*, where his Honour cautioned that the enactment of a coercive law on the basis of an implied nationhood power would be ‘wholly subversive of the *Constitution*’.<sup>140</sup>

French CJ was able to further develop his reasoning in the *Tampa Case* in the High Court decision of *Pape*.<sup>141</sup> Whilst not involving a coercive power like in the *Tampa Case*, in *Pape*, the nationhood power was found to support the making of fiscal stimulus payments. In 2009, the Rudd Government attempted to stimulate the Australian economy during the ‘global financial crisis’ by providing a ‘tax bonus’ to certain qualifying Australians under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). The High Court unanimously agreed that the Commonwealth Government could not rely on sections 81 and 83 of the *Constitution* to spend appropriated monies unless the expenditure was authorised by a Commonwealth legislative or executive power. However, a 4:3 majority followed the reasoning of French J in the *Tampa Case* and held that section 61 provided the basis for exercising the incidental power under section 51(xxxix) to authorise a ‘tax bonus’. French CJ continued to distance the non-statutory executive power from its common law prerogative origins by explaining that section 61

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136 Ibid.

137 Ibid 507 [61].

138 Peta Stephenson, ‘Nationhood and Section 61 of the *Constitution*’ (2018) 43(2) *University of Western Australia Law Review* 149, 172.

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

140 (1983) 158 CLR 1, 203–4. See also Aroney et al (n 117) 199.

141 (2009) 238 CLR 1. See Anne Twomey, ‘The Constitutional Legacy of the High Court under Chief Justice French’ (2017) 91(1) *Australian Law Journal* 23, 23.

is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.<sup>142</sup>

Justices Gummow, Crennan and Bell in a similar vein agreed that section 61 confers executive powers that extend beyond the historical prerogative.<sup>143</sup> It is clear from these judgments that the High Court identified a separate inherent component to section 61.

Twomey has criticised the *Pape* decision on the basis that none of the Justices attempted to determine where the nationhood power fits within the hierarchy of laws. She argued:

The major problem with the *Pape* case is that the majority relied on an implied executive nationhood power without giving adequate justification for that reliance and without clearly explaining how that power is to be implied from the text and structure of the *Constitution*, and what limits necessarily apply to it. There is little more in the judgments than bald assertions and references back to prior judgments that themselves fail adequately to ground such an implied power in the *Constitution*.<sup>144</sup>

Twomey asked whether the nationhood power is to be treated as having the ‘same status as express constitutional powers’, or whether it is ‘more akin’ to a prerogative power or Crown capacity which are both subject to statute.<sup>145</sup> If it is derived directly from section 61, which is a constitutional provision that cannot simply be altered or limited by statute, then it may create a pocket ‘of executive immunity from parliamentary control’.<sup>146</sup> No attempt was made to set out its content or limits, or to distinguish between the different types of non-statutory executive power, and in which category the nationhood power sits.<sup>147</sup>

The case of *Williams [No 1]* discussed the inherent power in the context of an executive ‘capacity’, specifically a capacity to contract and spend.<sup>148</sup> The judgment did not answer any of Twomey’s questions arising from *Pape*. The case concerned a challenge to the Commonwealth’s attempt to fund a chaplaincy program in public schools in Queensland. As there was no legislation to support the relevant agreements, section 61 did not empower the executive to enter into contracts to execute a scheme to fund school chaplains. Distinct from the facts of *Pape*, in this case there was no ‘natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response’.<sup>149</sup> Significantly, French CJ reasoned that determining the field of non-statutory executive power would need to be derived from a proper construction of the

142 *Pape* (2009) 238 CLR 1, 60 [126]–[127] (citations omitted).

143 *Ibid* 83 [214]–[215].

144 Twomey, ‘Pushing the Boundaries’ (n 10) 341.

145 *Ibid* 338.

146 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 192.

147 Twomey, ‘Pushing the Boundaries’ (n 10) 339.

148 (2012) 248 CLR 156, 206 [62] (French CJ), 252 [200] (Hayne J), 320 [405] (Heydon J), 362 [559] (Kiefel J).

149 *Ibid* 235 [146] (Gummow and Bell JJ). See also *ibid* 250–1 [196], 267 [240] (Hayne J), 346–7 [499] (Crennan J), 362 [559] (Kiefel J).

powers available to the Commonwealth by virtue of its status as a national government of a federation.<sup>150</sup> He was concerned that an unconstrained nationhood power would potentially ‘diminish the authority of the States in their fields of operation’,<sup>151</sup> relating to the breadth dimension in Winterton’s dichotomy. The majority separately held that whilst the Crown has an unlimited ability to contract at common law, the *Constitution* limited the power in this respect.<sup>152</sup>

The Commonwealth Government reacted by immediately enacting legislation purporting to retrospectively validate the chaplaincy program, as well as hundreds of others which the *Williams [No 1]* decision cast into doubt.<sup>153</sup> This legislation was challenged in *Williams [No 2]* and the High Court found that the legislation was invalid on the ground that it was not supported by an existing head of power in section 51. Significantly, the High Court accepted that ‘[t]he history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth’,<sup>154</sup> but then qualified this by stating that

questions about the ambit of the Executive’s power to spend must be decided in light of *all* of the relevant provisions of the *Constitution*, not just those which derive from British constitutional practice ... [T]he determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power.<sup>155</sup>

Whilst the cases of *Williams [No 1]* and *Williams [No 2]* found that the nationhood power could not support the Commonwealth’s funding programs, they confirmed the position in *Pape* that section 61 is a source of inherent executive power that is based on considerations of ‘nationhood’, and is beyond what may be permitted in the common law.<sup>156</sup> In these cases, the High Court failed to provide a clear analysis of the content or limits of the nationhood power, or whether the constitutional limitations that apply to the prerogatives (the rule of law, responsible government, and separation of powers) would also restrict the exercise of the nationhood power in its depth dimension. There was no clear analysis of what a national interest is, what constitutes an emergency or a crisis, or circumstances where the power may not be exercised. The rationale offered did little more than first determine that a national government must have a power to act for the national interest, and then determine that there must be one inherent in section 61 without providing a justification for the power beyond enabling government. The next section argues that these cases should be restricted to considerations of the breadth dimension of non-statutory power only, to avoid the continual increase of the depth of executive power.

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150 Ibid 188–91 [29]–[34] (French CJ).

151 Ibid 192–3 [37] (French CJ).

152 Ibid 203–6 [58]–[61] (French CJ), 232–3 [134]–[137], 236–9 [150]–[159] (Gummow and Bell JJ), 253–4 [204]–[206], 258–9 [215]–[216] (Hayne J), 347–8 [501]–[503] (Crennan J), 368–9 [577], 370 [581], 373–4 [594]–[595] (Kiefel J).

153 *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), amending the *Financial Management and Accountability Act 1997* (Cth).

154 *Williams [No 2]* (2014) 252 CLR 416, 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

155 Ibid 468–9 [80]–[81] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis in original).

156 Gerangelos, ‘Nationhood and the Future of the Prerogative’ (n 14) 128.

### C The Inherent View Constrained?

Proponents of the common law view have found issue with the *Tampa Case* and the three High Court cases of *Pape*, *Williams [No 1]* and *Williams [No 2]*.<sup>157</sup> Gerangelos has argued that these cases do not provide strong support for the inherent view at the expense of the common law.<sup>158</sup> Indeed, whilst they appeared to be a clear jurisprudential break, they demonstrate only that the *Constitution* itself was treated as the *critical* source of authority,<sup>159</sup> rather than the *only* source. Further, these nationhood cases relied on the dictum of the *AAP Case* and *Davis*. In *Davis*, Mason CJ, Deane and Gaudron JJ stated that the *legislative* power may extend beyond the express heads of power in section 51 to ‘such powers as may be deduced from the establishment and nature of the Commonwealth as a polity’.<sup>160</sup> The correct reading of the *AAP Case* and *Davis* should have been restricted to the breadth dimension,<sup>161</sup> and understood as extending the legislative capabilities of the Commonwealth in matters affecting the nation, in light of federalism and the division of powers, rather than adding to the depth of the executive power.<sup>162</sup> Future recourse to an inherent power to address ‘national considerations’ should be limited to only determining the breadth dimension ‘in which the common law prerogatives of the Crown may operate’.<sup>163</sup>

In addition, Peta Stephenson has argued that the nationhood cases (with the notable exception of the *Tampa Case*) should not be read as supporting the Commonwealth ‘engaging in coercive activities that would have been denied to it at common law’.<sup>164</sup> Only the statutory or prerogative powers of the executive may be used to coerce or affect individual rights. This is consistent with Twomey’s observations that the prerogatives can affect some individual common law rights and interests where required,<sup>165</sup> but the courts can determine this on a case by case basis<sup>166</sup> by reference to the clear criteria and limitations set out in the common law prerogatives. This provides further support for the argument that the nationhood cases should be read as only affecting the spheres within which the Commonwealth may operate<sup>167</sup> rather than expanding or adding to the depth of the executive power beyond the common law prerogatives and capacities.<sup>168</sup> If, after the common law prerogatives have been considered, no existing prerogative power can be found,

157 *Tampa Case* (2001) 110 FCR 491; *Pape* (2009) 238 CLR 1; *Williams [No 1]* (2012) 248 CLR 156; *Williams [No 2]* (2014) 252 CLR 416.

158 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 199.

159 *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).

160 (1988) 166 CLR 79, 93. On page 101, their Honours appear to be concerned with the breadth dimension.

161 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 199–200.

162 *Ibid* 199.

163 *Ibid* 200. Here, Gerangelos was drawing on the judgment of Jacobs J in *AAP Case* (1975) 134 CLR 338, 405–6.

164 Stephenson (n 138) 153; Zines, ‘The Inherent Executive Power’ (n 12) 280; Twomey, ‘Pushing the Boundaries’ (n 10) 339.

165 Twomey, ‘Pushing the Boundaries’ (n 10) 325–6.

166 *Ibid* 326.

167 Stephenson (n 138) 153; Gerangelos, ‘Reflections on the Executive Power’ (n 5) 198; Zines, ‘The Inherent Executive Power’ (n 12) 281; Twomey, ‘Pushing the Boundaries’ (n 10) 339.

168 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 198.

and it is still necessary for the executive to act in national interests, then the dictum of Mason J in the *AAP Case* requiring that the power should be ‘peculiarly adapted’<sup>169</sup> becomes particularly important. This description emphasises that the implied nationhood power is bounded by what is absolutely *necessary* for the benefit of the nation, rather than merely what is desirable.<sup>170</sup> If the nationhood power is exercised too readily, and the breadth and depth dimensions of non-statutory executive power are conflated, there is the potential for ‘self-definition and aggrandizement’ of the executive power.<sup>171</sup> The nationhood power should be reserved for only the direst of circumstances, and any questions relating to the depth of executive power should always be answered first by reference to the common law prerogatives and capacities.<sup>172</sup>

Following *Pape*, Chief Justice French, in delivering the Winterton Lecture in his personal capacity, declared that there is ‘room, therefore, for further academic discussion and suggestions for a principled approach to appropriate limits upon executive power’.<sup>173</sup> In the next section, this article argues that the approach should be an historical constitutional one. This approach seeks to limit the depth dimension of the non-statutory executive power by reference to the British origins and subsequent Australian developments of the Crown prerogatives and the common law. Whilst Professor Gummow cautioned that the discussion of Australia’s constitutionalism should not be ‘controlled’ by British constitutionalism,<sup>174</sup> it must be remembered that the Australian common law is derived and adapted from the British common law. To deny this history would be to ignore the crucial influences on Australian sources of law. Australia’s constitutional history and the common law prerogatives serve to inform the text of the *Constitution*, including section 61, and the *Constitution* modifies the common law of Britain for the Australian context, to produce a common law of Australia.<sup>175</sup> It is this common law that can determine the nature and scope of the Australian executive power.

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169 (1975) 134 CLR 338, 397.

170 Martin Hinton and Sue Milne, ‘The Executive Power’ in Martin Hinton and John M Williams (eds), *The Crown: Essays on Its Manifestation, Power and Accountability* (University of Adelaide Press, 2018) 149, 170.

171 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 203.

172 Ibid 198.

173 French (n 70) 27.

174 Sir William Gummow, ‘The *Constitution*: Ultimate Foundation of Australian Law?’ (2005) 79(3) *Australian Law Journal* 167, 171 (citations omitted).

175 Ibid 172, 180–1; Condyllis (n 8) 416. This is in keeping with the dictum in *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (*‘Marquet’*), where their Honours stressed that Australian constitutional norms need to be sourced in Australian law.

## IV AN HISTORICAL CONSTITUTIONAL APPROACH

### A The Argument for Adopting an Historical Constitutional Approach

JWF Allison has argued for what he called ‘an historical constitutional approach’ to interpreting the unwritten and changing UK Constitution. In particular, Allison argued that ‘constitutional arrangements that have continued from the recent or distant past into the present with change or reform intrinsic to those arrangements’ are fundamental sources of constitutional principles and law.<sup>176</sup> Allison argued that the historical Constitution of the UK should be understood as comprising the ‘legal and political rules, principles, and practices relating to government ... in view of their historical formation – the modes by which they were attained and the normative historical accounts of their attainment’.<sup>177</sup> Gerangelos has argued that this approach cannot be applied without qualification to the *Australian Constitution*. However, in circumstances where the written text is sparse or ambiguous, such as with section 61, then Allison’s historical constitutional approach may be useful in developing an accurate contemporary interpretation.<sup>178</sup>

The use of historical sources when interpreting the *Australian Constitution* is not a new concept. Constitutional writers have had to rely heavily on the Constitutional Convention Debates and the historical context in which the *Constitution* was written in their attempts to define the executive power, including the prerogatives.<sup>179</sup> The plurality judgment in *R v Kirby; Ex parte Boilermakers’ Society of Australia* stated that the broad division of power found in the *Constitution* ‘is determined according to traditional British conceptions’,<sup>180</sup> meaning those ‘conceptions founded in the common law of England and its overlay of constitutional convention’.<sup>181</sup> These conceptions include the common law prerogatives and the principle of responsible government.<sup>182</sup> Mason J too noted the significance of understanding the *Constitution* within its common law context, particularly in the case of section 61, which is understood to include the prerogative powers ‘accorded to the Crown by the common law’.<sup>183</sup>

The value in Allison’s thesis for the Australian context is elevating history and historical constitutional principles from mere considerations to an integral part of

176 Allison (n 17) 16; Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 110.

177 Allison (n 17) 19.

178 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 110–12.

179 Winterton, *Parliament, The Executive and the Governor-General* (n 2) 27–8; Twomey, ‘Pushing the Boundaries’ (n 10); William Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 5<sup>th</sup> ed, 1976) ch 9; Campbell Sharman, ‘Defining Executive Power: Constitutional Reform for Grown-Ups’ (1997) 56(2) *Australian Journal of Public Administration* 107. Note that Andrew McLeod warns of the dangers of relying too heavily on the British constitutional history for modern applications of the executive powers: see Andrew McLeod, ‘The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*’ (2010) 32(1) *Sydney Law Review* 123.

180 (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

181 Enid Campbell, ‘Parliament and the Executive’ in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 88, 88.

182 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 105.

183 *Barton v Commonwealth* (1974) 131 CLR 477, 498.



an interpretive methodology. Professor Zines argued that ‘[t]he nature of what lies within the sphere of the executive branch of government necessarily requires an historical understanding’.<sup>184</sup> This was echoed in the judgment of Gageler J in *Plaintiff M68*, where his Honour said that ‘[t]he nature of Commonwealth executive power can only be understood within [its] historical and structural constitutional context’.<sup>185</sup> Importantly, adopting Allison’s historical constitutional approach would not limit considerations only to British sources, nor does it attempt to discern meaning from the brief text of section 61. It draws upon those British and Australian historical developments and sources of law that have informed the Australian executive power.

British constitutional history has defined the relationship between the executive and legislative branches, and the common law informs us of the historical limitations placed upon the prerogative powers of the Crown. An historical constitutional approach does not seek to supplant the Australian common law with the current British common law. Rather, it gives context to the development of the Australian prerogative, which began in the UK and continues to be informed by those constitutional conceptions and traditions which remain relevant to Australia’s system of government today.<sup>186</sup> This approach will not constrain the law to the ancient or long-abandoned principles, but rather will allow for the continuing evolution of the law and constitutional principles, informed by history. As Winterton said of the *Constitution*:

It was born into a common law world, albeit one capable of development, for adaptability is one of the common law’s most fundamental and valuable qualities. This is especially true of Ch II of the *Constitution*, which was deliberately drafted to reflect the supposed law of the *Constitution*, not its practice, even in 1900. An interpretation of Ch II which ignores British and Australian constitutional history by taking its words at face value is not ‘post-colonial’, but rather one which judges the constitutional architecture merely by its façade.<sup>187</sup>

That being said, an historical constitutional approach will need to be adapted for Australia’s written *Constitution*. As noted in *Attorney-General (WA) v Marquet* (*Marquet*), Australia has its own sources of constitutional norms.<sup>188</sup> But without the guidance of the common law and historical constitutional principles, the text of the *Constitution* alone is insufficient for a full and proper understanding of the Commonwealth executive power. The ‘Australian common law’<sup>189</sup> has, for better or worse, developed under the influence of Australia’s pre- and post-Federation ties to the UK.

Helen Irving has raised many concerns about the use of history to determine legal disputes. Her main concern is with the originalism debate, and the use of historical sources in an attempt to ascertain certain historical intentions, whether

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184 Zines, ‘The Inherent Executive Power’ (n 12) 279.

185 (2016) 257 CLR 42, 96 [129].

186 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 113.

187 Winterton, ‘The Relationship Between Commonwealth Legislative and Executive Power’ (n 3) 34–5 (citations omitted).

188 (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

189 *Marquet* (2003) 217 CLR 545; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

that be the intentions of the framers of the *Constitution*, or the intentions behind the drafting of historical legislation still in force.<sup>190</sup> For Irving, the term ‘history’ appears to have two meanings: the first is to mean things of or in the past, being historical materials or records; the second refers to the description and interpretation of the past.<sup>191</sup> The Federal Convention Debates are one such example of records of the past. There is no rule against judges consulting such historical records, but Irving has argued that judges are not historians and they should not be relying upon such sources to determine present legal questions.<sup>192</sup> She cautioned that when history is used in constitutional interpretation, it should be used with great care and only rarely,<sup>193</sup> ‘and history used in the service of interpretation must be persuasive as part of the legal reasoning’.<sup>194</sup>

However, as the *Tampa, Pape*, and *Williams [No 1]* and *Williams [No 2]* cases have shown, there is a danger in ignoring or discounting historical sources such as the common law prerogatives in favour of developing a modern but vague ‘nationhood’ power. Winterton argued that even if an ‘originalist’ interpretation is rejected in favour of a contemporary one, ‘Ch II of the *Constitution*, including s 61, cannot be interpreted sensibly without reference to the Crown’s prerogative powers’.<sup>195</sup> Determining the nature and scope of the prerogative powers is one of those rare occasions where it is necessary to consider constitutional history and historical sources of law, and how they have influenced the evolution of government. To ensure great care is taken when using these sources, an interpretative jurisprudential methodology would articulate and justify the current legal relevance of certain probative historical sources.<sup>196</sup> An historical constitutional approach will mean that future considerations of the executive power will be able to draw on all relevant and available sources of law and history to answer questions concerning the depth of executive power and what an executive government may lawfully do.

## B The British Origins of the Royal Prerogative

In constitutional monarchies like Australia, as well as Canada, New Zealand, and the UK, a fundamental principle of government is that much of the legal basis for the executive and its powers comes from the historical powers of the Crown.<sup>197</sup> Combined with the *Constitution* and statutes, the Crown continues to be a fundamental source of authority not only for the executive, but also for Australia’s

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190 Helen Irving, ‘Constitutional Interpretation, the High Court, and the Discipline of History’ (2013) 41(1) *Federal Law Review* 95, 95 (‘Constitutional Interpretation’).

191 Helen Irving, ‘Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning’ (2015) 84(3) *Fordham Law Review* 957, 960.

192 Helen Irving, ‘What is History, Again?’, *AUSPUBLAW* (Blog Post, 5 February 2018), <<https://auspublaw.org/2018/02/what-is-history-again/>>.

193 Irving, ‘Constitutional Interpretation’ (n 190) 95.

194 *Ibid* 122.

195 Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (n 3) 34–5.

196 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 106.

197 Noel Cox, ‘The Importance of the Royal Prerogative in Contemporary Governance’ (2009) 18(3) *Commonwealth Lawyer* 25, 25.

framework for permanent government.<sup>198</sup> The Commonwealth executive power must be considered within the context of its British and colonial history.<sup>199</sup>

Adam Tomkins has written that ‘[i]n England power started with the Crown’, not as a result of some clear singular event, but as something that emerged over time.<sup>200</sup> It was linked to the quality of sovereignty, ‘bound up with the idea of *majesty*’.<sup>201</sup> Blackstone, writing during the reign of George III, described the Monarch as ‘the executive power of the English nation’<sup>202</sup> and the quality of the Monarch’s power, understood to be the prerogative, as ‘that special pre-eminence, which the king hath’.<sup>203</sup> The UK Constitution is ‘based for the *most part* on Royal prerogative’,<sup>204</sup> which stems from the royal character and authority of the monarch, rooted in the monarch’s political person, and informed by the authority of the Crown itself.<sup>205</sup>

However, drawing upon Sir Henry Finch and Henry de Bracton, Blackstone noted that the prerogatives of the monarch do not stretch ‘to the doing of any wrong’, as ‘*rex debet esse sub lege, quia lex facit regem*’ [the King is subject to the law, because law makes the King].<sup>206</sup> A fundamental principle underpinning the UK Constitution was and is those limitations that are placed upon the Crown so that ‘it is impossible [the Crown] should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject’.<sup>207</sup> It is only when these prerogatives are exercised according to law, subject to checks and restrictions, that they may give effect to good government.<sup>208</sup> This means that ‘the prerogative of the Crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice’.<sup>209</sup> The prerogative must be ‘bounded by constitutional convention, statute, and common law’.<sup>210</sup>

Similarly, John Locke wrote that the ‘power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* that which is called *prerogative*’.<sup>211</sup> There will be situations and circumstances

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198 Ibid.

199 Selway (n 12) 505.

200 Adam Tomkins, *Public Law* (Oxford University Press, 2003) 39.

201 Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press, 2015) 22.

202 Blackstone (n 40) 183.

203 Ibid 232.

204 Bruce M Hicks, ‘British and Canadian Experience with the Royal Prerogative’ (2010) 33(2) *Canadian Parliamentary Review* 18, 18.

205 Blackstone (n 40) 232–3.

206 Ibid 231–2.

207 Ibid 230.

208 Ibid 233.

209 Ibid 239.

210 Hicks (n 204) 18.

211 John Locke, *Two Treatises of Government* (Whitmore and Fenn and C Brown, rev ed, 1821) bk 2, 328 § 160. Of course, it should be noted that Locke’s political ethics would exclude Roman Catholics, atheists, women, vagabonds, and beggars from the political processes of the Commonwealth. But beyond these

which the legislature is unable to foresee or cannot respond to efficiently,<sup>212</sup> and therefore it is necessary for the executive to exercise a prerogative in response. However, Locke argued that those government powers are held on trust, and the executive is only authorised to act for the purposes of securing the public good.<sup>213</sup> The natural rights of the people serve as a continual limit on the powers of the sovereign. The logical extension of this claim is that there must be certain limits on a current executive in keeping with those traditional limits. Prerogative powers should only be exercised for the good of society, and any exercise of that power should not breach traditional constitutional principles.

Those traditional constitutional principles were the products of gradual change in Britain, and are drawn from a collection of laws and conventions, rather than being found in one singular document. They evolved as responses to various events in history and changes to the nature of monarchy.<sup>214</sup> The rise of the Parliament and the origins of the current Westminster system of government are as a result of the royal prerogative,<sup>215</sup> which continues to be important to the authority and legitimacy of government. However, these historical changes to the political system of the UK have also seen most of the personal powers once held by the monarch now rest with parliament and the executive,<sup>216</sup> due in large part to the emergence of parliamentary sovereignty.<sup>217</sup> These have increased the limitations on the prerogative, reducing the number of ways the executive can act absent statutory or constitutional authority.<sup>218</sup> These limitations apply to the ‘depth’ dimension of the prerogative powers that Winterton referred to,<sup>219</sup> and these limits

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prejudices (typical at the time), the Lockean theory of the state is one that relies on the social contract for its authority, and must serve the public good for its legitimacy.

212 Ibid 327–8 § 159.

213 Ibid 332–3 § 165.

214 Cheryl Saunders, ‘The Scope of Executive Power’ (Speech, Senate Occasional Lecture, Parliament House, Canberra 28 September 2012) <[http://www.aph.gov.au/~~/link.aspx?\\_id=C8C131542382464EB28135A33F9EA201&\\_z=z](http://www.aph.gov.au/~~/link.aspx?_id=C8C131542382464EB28135A33F9EA201&_z=z)>.

215 Over time, the Kings and Queens handed more and more of their powers to Parliament. Bruce Hicks argues that Parliament exists in the UK *because* of the royal prerogative. In England, the King permitted the emergence of the Parliament; it is the prerogative of the monarch to summon members, and Parliament is assembled by an action of the Crown: Hicks (n 204) 18. Significant dates in this development include the creation of the *Magna Carta* in 1215 AD, the Glorious Revolution in 1688, and the *Bill of Rights 1689* (Imp). These all secured the permanency of Parliament and declared that certain abuses of the Crown’s prerogatives were unconstitutional. See *Coronation Oath Act 1688* (Imp) s III under which the King and Queen solemnly promised and swore ‘to Govern the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same’; Edward Vallance, *The Glorious Revolution: 1688 – Britain’s Fight for Liberty* (Little Brown, 2006) ch 8; MRL Kelly, *King and Crown: An Examination of the Legal Foundation of the British King* (PhD Thesis, Macquarie University, 1998) 181–6; John Maddicott, ‘Origins and Beginnings to 1215’ in Clyve Jones (ed), *A Short History of Parliament: England, Great Britain, the United Kingdom, Ireland and Scotland* (Boydell Press, 2012) 3, 7.

216 Hilaire Barnett, *Constitutional and Administrative Law* (Cavendish Publishing Limited, 4<sup>th</sup> ed, 2002) ch 6, 137.

217 Nick Seddon, ‘The Crown’ (2000) 28(2) *Federal Law Review* 245, 246.

218 Examples include creating new offences, dispensing with the law, and infringing upon certain fundamental common law rights: see Appleby and McDonald (n 7) 255.

219 Winterton, *Parliament, the Executive and the Governor-General* (n 2) 29–31, 48–51.

continue to be ‘driven by principles of separation of powers, responsible government, accountability and the rule of law’.<sup>220</sup>

### C The Prerogative Powers as Developed in Australia

When Australia was first settled<sup>221</sup> as a number of separate British colonies, it was the standard practice that the settlers instituted such of the laws and customs of England that were suited to or necessary in the colony.<sup>222</sup> This included the statutory and common law of England, as well as the royal prerogatives, due to the indivisible nature of the Crown.<sup>223</sup> Each of the six colonies came to have a constitution which was legislated by the Imperial Parliament. The British Monarch was represented by a Governor in each colony,<sup>224</sup> and the prerogative powers were those ‘Imperial’ prerogative powers to be exercised either by the Monarch on the advice of British Ministers, or by the Governor where those prerogative powers had been delegated to the Governor.<sup>225</sup>

The development of the British prerogative powers in the colonies formed the background of the deliberations of the framers of the *Australian Constitution*,<sup>226</sup>

220 Appleby and McDonald (n 7) 255, citing Cheryl Saunders, ‘The Sources and Scope of Commonwealth Power to Spend’ (n 7) 259.

221 That Australia was ‘settled’ has been subject to continual debate. Some say that Australia was invaded and conquered; others say it was ceded. There is simply not enough room in this article to address the debate. However, the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 decided that Australia was a settled country and that British sovereignty did not immediately extinguish native title. For a more detailed discussion on settlement and indigenous rights, see Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); Irene Watson, ‘Re-Centring First Nations Knowledge and Places in a Terra Nullius Space’ (2014) 10(5) *AlterNative: An International Journal of Indigenous Peoples* 508; Irene Watson, ‘The Future is Our Past: We Once Were Sovereign and We Still Are’ (2012) 8(3) *Indigenous Law Bulletin* 12; Richard H Bartlett, ‘Aboriginal Land Claims at Common Law’ (1983) 15(3–4) *University of Western Australia Law Review* 293; Mick Dodson, ‘Constitutional Recognition of Indigenous Australians’ (Speech, Senate Occasional Lecture, Parliament House, Canberra, 5 August 2011).

222 Sir William Blackstone said that ‘colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of an infant colony’: Sir William Blackstone, *Commentaries on the Laws of England* (JB Lippincott, 1893) vol 1, 107, perhaps informed by Lord Mansfield’s judgment in *Campbell v Hall* (1774) 98 ER 1045 (KB). Note that this qualification regarding the customs and English laws that colonists take to new colonies did not appear in earlier publications of Blackstone. Previously, Blackstone had said: ‘that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For the law is the birth-right of every subject, so wherever they go they carry their laws with them’: Blackstone (n 40) 104–5. See also Noel Cox, ‘The Royal Prerogative in the Realms’ (2007) 33(4) *Commonwealth Law Bulletin* 611, 616; *Cooper v Stuart* (1889) 14 App Cas 286.

223 *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Indian Association of Alberta* [1982] 1 QB 892; Cox, ‘The Royal Prerogative in the Realms’ (n 222) 618.

224 In Commonwealth countries, ‘Letters Patent’ are public orders or proclamations of the Crown issued under the royal prerogative power and having the force of law. Prerogative instruments are a form of legislation that do not require the consent of parliament. They are often issued for the purpose of granting an office, right or title, and for creating government offices. In particular, Letters Patent are issued for the appointment of Crown representatives, such as Governors and Governors-General in Commonwealth countries and colonies.

225 Except where the prerogatives had been abrogated by colonial legislation: see Selway (n 12) 501.

226 *Ibid* 502.

who set out to create a constitution that was acceptable to both the Imperial Government and the people of the Australian colonies, and that could maintain the federal system of government in Australia for years to come. At the point of Federation, which distributed the powers amongst the constituent bodies politic, the powers vested in the Commonwealth and state governments were those as already existed in the colonies prior to Federation. The power of the Crown under the *Australian Constitution* predated and was coexistent with the creation of the Commonwealth of Australia, and continued after that creation.<sup>227</sup> Following Federation on 1 January 1901, the Commonwealth Government of Australia could exercise the executive power of government stipulated in section 61 and the royal prerogatives,<sup>228</sup> and was responsible for advising the Monarch in relation to matters concerning Australia.<sup>229</sup> As a consequence of Australia's independence from the UK, the Commonwealth executive power now included those prerogatives of the Crown that were relevant to the Commonwealth of Australia.<sup>230</sup> In effect, the British prerogatives became Australian prerogatives. The respective Parliaments could legislate to create new statutory powers, but no new common law prerogative powers could be created. As Isaacs J said in *R v Kidman*, '[t]he Executive cannot change or add to the law; it can only execute it'.<sup>231</sup>

Winterton summarised the five main arguments for employing the prerogative as 'the yardstick for determining the ambit of Commonwealth executive power'.<sup>232</sup> First, reference to the prerogative implements 'the well-established principle in common law countries' that the common law can assist in the interpretation of ambiguous constitutional and statutory provisions.<sup>233</sup> Secondly, the prerogative 'constitutes a substantial body of principles, rules and precedents' which have been established over a period of hundreds of years.<sup>234</sup> Thirdly, following on from the last point, the prerogative, though occasionally difficult to determine, is inherently more certain and therefore provides greater guidance for both the government and

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227 MRL Kelly, 'The Queen of the Commonwealth of Australia' (2001) 16(1) *Australasian Parliamentary Review* 150, 153. The Letters Patent and the accompanying Instructions, along with the *Australian Constitution* and the necessary accompanying Royal Assent via the Royal Commission of Assent 9 July 1900 (UK), are the four key documents which created the Commonwealth of Australia.

228 However, this did not extend to all prerogative powers. For example, Australia could not independently exercise the power to declare war or to enter into treaties. See Anne Twomey, 'Sue v Hill: The Evolution of Australian Independence' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (Federation Press, 2000) 77, 80–7.

229 However, Australian Ministers did not directly advise the Monarch until 1930, regarding the appointment of Sir Isaac Isaacs as the Governor-General. The Governor-General remained an Imperial officer until 1926, and the change in practice was confirmed at the 1930 Imperial Conference. The first Governor-General of the Commonwealth of Australia was John Adrian Louis Hope, the seventh Earl of Hopetoun. Upon taking office, he swore three oaths: the Oath of Allegiance, Oath of Office, and the Judicial Oath. In all of these oaths, he swore to serve her Majesty Queen Victoria. But in the Judicial Oath, he swore to do right to all manner of people after the laws and usages of this Commonwealth. It is interesting because he had sworn to exercise executive powers according to the Judicial Oath to do right. By Australia's third Governor-General, the Judicial Oath was dropped.

230 Selway (n 12) 501.

231 (1915) 20 CLR 425, 441.

232 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (n 3) 35.

233 Ibid.

234 Ibid.

citizens.<sup>235</sup> There is no similar body of established principles or criteria to draw upon when applying notions of nationhood power. Fourthly, the prerogative originated under England's system of parliamentary supremacy, which was inherited by Australia.<sup>236</sup> This system subjects the prerogative to legislative control. Finally, the subjection of the prerogative powers to parliamentary control is desirable under Australia's system of responsible government, whereby the executive is responsible to Parliament, and the rule of law is strengthened by subjecting executive action to judicial review.<sup>237</sup>

Sir Gerard Brennan, writing extrajudicially, argued that the framers of the *Australian Constitution* 'recognized that responsible government rests on control of executive power by the elected government. This is effected by requiring the Governor-General to exercise executive power only on the advice of the Government in accordance with long established convention'.<sup>238</sup> Brennan then quotes Mason J:

The principle that in general the Governor defers to, or acts upon, the advice of his Ministers ... is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government.<sup>239</sup>

Professor Moore argued that the system of responsible government concerning the exercise of the prerogative powers reinforced the subordination of the executive powers generally to the exercise of legislative powers. He remarked:

The executive power is so closely allied to the legislative that it may be impossible to draw any other line than that which expediency and practical good sense command ... [W]e are not encouraged to believe that the executive can make good an independent sphere of its own, free from legislative interference and control.<sup>240</sup>

The clear emerging argument is that the depth of executive power must be consistent with the historical constitutional principles of responsible government and the separation of powers,<sup>241</sup> being 'fundamental' constitutional doctrines<sup>242</sup> for both Australia and the UK. The scope of section 61 should be determined by reference to the prerogatives, the common law and any powers expressly granted to the executive via legislation to ensure that Parliament can perform its supervisory function in scrutinising and limiting the actions of the executive.

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235 Ibid.

236 Ibid.

237 Ibid 35–6.

238 Sir Gerard Brennan, 'A Pathway to a Republic' (Speech, George Winterton Memorial Lecture, University of Sydney, 17 February 2011) 7, referring to Edmund Barton, 'Official Report of the National Australasian Convention Debates' (Speech, 19 April 1897) 910.

239 Brennan (n 238) 7, quoting *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364 (Mason J). Sir Anthony Mason then went on to become Chief Justice of the High Court and was succeeded by Sir Gerard Brennan.

240 Moore (n 92) 98; Hinton and Milne (n 170) 155.

241 Gerangelos, 'Nationhood and the Prerogative Power' (n 14) 101.

242 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 411–12 (Isaacs J).

## V THE FUTURE OF THE COMMONWEALTH EXECUTIVE POWER: ADOPTING AN HISTORICAL CONSTITUTIONAL APPROACH

Whilst *Pape* and the *Tampa Case* form part of the common law, and the historical constitutional approach places significant value on the interpretative benefit of the common law, arguably these cases were not a natural progression from the judgments in the *AAP Case* or *Davis*, but rather they represented a ‘jurisprudential break’.<sup>243</sup> They therefore have limited utility for future examinations of the executive power if the historical constitutional approach is adopted. Had this approach been adopted in *Pape*, the payment may still have been valid by reference to existing powers recognised in the common law. Gerangelos has suggested that reliance on an inherent executive power was not necessary to decide *Pape*, as the High Court could have determined that the executive had the non-prerogative capacity to make an *ex gratia* payment (subject to appropriation) for the national interest (the breadth dimension).<sup>244</sup> Such reference to the common law and traditional conceptions of executive power, mirroring the dissenting judgment of Black CJ in the *Tampa Case*, may have made for a ‘far more judicially manageable standard’ than a reference to inherent executive power.<sup>245</sup>

There may yet be another jurisprudential shift. Peter Gerangelos recently analysed the judgment of Gageler J in the case of *Plaintiff M68* and argued that his Honour appeared to place heavy reliance on ‘historical conceptions’ of executive power, seemingly in an application of the very approach put forth by Allison.<sup>246</sup> This article will not attempt to repeat that same analysis here, however it is useful to summarise the judgment of Gageler J in *Plaintiff M68* as the context for this section of the article.

The 2017 case of *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (*Plaintiff S195*)<sup>247</sup> was the first High Court decision regarding the executive power since Kiefel CJ was sworn into the office of Chief Justice. The case concerned Australia’s detention of an Iranian citizen in Papua New Guinea for the purpose of deportation.<sup>248</sup> In a unanimous joint judgment that relied heavily

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243 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 197.

244 Ibid 201. Here, Gerangelos notes that an *ex gratia* payment which amounts to the giving of a gift can be regarded as a common law capacity, shared with natural persons. See also Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 140.

245 Gerangelos, ‘Reflections on the Executive Power’ (n 5) 208.

246 Gerangelos, ‘An Historical Constitutional Approach’ (n 12).

247 (2017) 261 CLR 622 (*Plaintiff S195*).

248 The case concerned Australia’s detention of an Iranian citizen in Papua New Guinea for the purpose of deportation. The plaintiff was aboard a vessel that was intercepted at sea by officers of the Commonwealth of Australia in July 2013. He was taken to Christmas Island and, as he did not have a visa, he was determined to be an ‘unlawful non-citizen’ and an ‘unauthorised maritime arrival’ under sections 14 and 5AA respectively of the *Migration Act*, and removed to Papua New Guinea under regional processing arrangements. By December 2016, the plaintiff was determined by the relevant Minister in Papua New Guinea to not be a refugee, and his removal was ordered. One point in contention in *Plaintiff S195* (2017) 261 CLR 622 was whether the Commonwealth Executive had the legal authority under section 61 of the *Australian Constitution* to enter into the Memorandum of Understanding with Papua New Guinea, and the subsequent regional processing arrangements in light of *Namah v Pato*



on *Plaintiff M68*, the High Court held that the detention was authorised under the *Migration Act* without need to rely on the executive power in section 61. This meant that the High Court in *Plaintiff S195* left the judgment of Gageler J in *Plaintiff M68* undisturbed.

The case of *Plaintiff M68* dealt with a similar set of facts involving the detention of an ‘unlawful non-citizen’ in a processing centre in Nauru. In that case, French CJ, Kiefel and Nettle JJ in a joint judgment, and Bell and Gageler JJ in separate judgments, held that entering into the Memorandum of Understanding was authorised by the non-statutory executive power, and that section 198AHA of the *Migration Act* validly gave administrative effect to that arrangement.<sup>249</sup> Significantly, Gageler J went so far as to say that without the authorising statute, the detention would have been outside the scope of the non-statutory executive powers of the executive and therefore could not be authorised under section 61.<sup>250</sup>

Justice Gageler discussed the Commonwealth executive power at length. He opined that since executive power is not defined in section 61, it should be understood within its historical and structural constitutional context, and the purpose of Chapter II of the *Constitution*, being to establish ‘a national responsible government ... in light of constitutional history and the tradition of the common law’.<sup>251</sup> This is because the limitations placed upon Commonwealth executive power are ‘rooted in constitutional history and the tradition of the common law’, and that this has not been affected by the High Court’s decisions in *Pape, Williams [No 1]* or *Williams [No 2]*.<sup>252</sup> Section 61 cannot be understood without ‘reference to common law principles bearing on the operation of responsible government’ and ‘the general principles of the constitutional law of England’, which remain pertinent to modern understandings of the constitutional text.<sup>253</sup>

Justice Gageler also noted that the Commonwealth executive ‘was established to take from its inception the form of a responsible government which was to have its own distinct national identity and its own distinctly national sphere of governmental responsibility’.<sup>254</sup> His Honour confirmed the continuing usefulness of the depth/breadth dichotomy analysis, such that Commonwealth executive action needed to satisfy both dimensions to be a valid exercise of executive power.<sup>255</sup> According to Gerangelos, this is indicative of ‘important underlying

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(2016) SC1497 (Supreme Court of Papua New Guinea). The High Court found that it was unnecessary to determine whether section 61 supported the arrangements with Papua New Guinea, finding instead that they were given effect by the relevant statute. See Short Particulars, *Plaintiff S195*, S195/2016, <[http://www.hcourt.gov.au/assets/cases/s195-2016/Plf-S195-2016\\_SP.pdf](http://www.hcourt.gov.au/assets/cases/s195-2016/Plf-S195-2016_SP.pdf)>.

249 *Plaintiff M68* (2016) 257 CLR 42, 74 [54] (French CJ, Kiefel and Nettle JJ), 77 [66], 77 [68] (Bell J), 109 [177]–[178], 111–12 [185] (Gageler J). Section 198HA of the *Migration Act* was validly enacted under s 51(xix) (the ‘aliens’ power). In their joint judgment, French CJ, Kiefel and Nettle JJ held that it was unnecessary to determine whether section 61 authorised the detention, since it was authorised by the statute.

250 *Plaintiff M68* (2016) 257 CLR 42, 108–9 [174]–[175].

251 *Ibid* 99 [138].

252 *Ibid* 99 [139].

253 *Ibid* 99–100 [140]–[142].

254 *Ibid* 92 [119].

255 *Ibid* 96–7 [130]–[132].

normative tenets of political and constitutional morality' by subjecting executive power to the separation of powers and responsible government doctrines and the guiding principles of the common law.<sup>256</sup> Through his examination of constitutional history and the depth/breadth dichotomy, Gageler J was seemingly adopting an historical constitutional approach.

Two other currently presiding Justices, Kiefel CJ and Keane J, did not enter into a discussion of the content or scope of section 61 in *Plaintiff M68*,<sup>257</sup> nor have they since had occasion to address Gageler J's apparent historical constitutional approach to interpreting the non-statutory content of section 61. However, in looking at their judgments in the case of *CPCF v Minister for Immigration and Border Protection* ('*CPCF*'),<sup>258</sup> there appears to be a divide regarding the common law and inherent views.

In *CPCF*, Keane J drew on French J's reasoning in the *Tampa Case* that under section 61 the executive had the power to prevent asylum seekers arriving by boat from entering Australia's borders by virtue of being a sovereign nation.<sup>259</sup> In building upon this, Keane J opined:

It is settled that the executive power referred to in s 61 of the *Constitution* includes powers necessary or incidental to the execution and maintenance of the laws of the Commonwealth. ... Given that it is clear that the executive power extends thus far, recognition that it extends to the compulsory removal from Australia's contiguous zone of non-citizens who would otherwise enter Australia contrary to the *Migration Act* can hardly be controversial.<sup>260</sup>

In adopting the reasoning of French J in the *Tampa Case*, and suggesting that section 61 grants power to the executive by virtue of its status as a national government, Keane J's judgment would appear to be an endorsement of the inherent nationhood power.<sup>261</sup>

In a seeming endorsement of the common law view, Kiefel J (as she then was) found that the scope of the power in section 61 is 'informed by the prerogative powers of the Crown',<sup>262</sup> referring to the judgment of Black CJ, who was in dissent in the *Tampa Case* and appeared to favour the common law view. However, Condylis argues that Kiefel J's judgment did not go far enough, as her Honour failed to consider whether the Australian common law, informing the prerogative powers in Australia, should clearly break from the British common law or be informed by it.<sup>263</sup>

Condylis argues that the prerogative in the English common law is not suited to Australia's constitutional landscape, but that a 'native' or 'indigenous' form of the prerogative adapted for Australia's purposes should be considered when

256 Gerangelos, 'An Historical Constitutional Approach' (n 12) 131–2.

257 (2016) 257 CLR 42, 60–75 [1]–[55] (French CJ, Kiefel and Nettle JJ); 112–31 [189]–[265] (Keane J). Instead, their Honours focused on the statutory authority under the *Migration Act*.

258 (2015) 255 CLR 514. This case was decided before *Plaintiff M68*. By a 4:3 majority, the High Court found that the Commonwealth's detention of 157 Tamil asylum seekers on board an Australian customs vessel for almost a month was legal under section 72(4) of the *Maritime Powers Act 2013* (Cth).

259 *CPCF* (2015) 255 CLR 514, 648 [482], quoting *Tampa Case* (2001) 110 FCR 491, 543 [193] (French J).

260 *CPCF* (2015) 255 CLR 514, 648–9 [484].

261 See also Condylis (n 8) 428–9.

262 *CPCF* (2015) 255 CLR 514, 595 [259].

263 Condylis (n 8) 430.

interpreting section 61.<sup>264</sup> He argues that this would allow the common law view to be reformulated in a way that makes it more reconcilable with the High Court's dictum in *Marquet* that Australia has considered and must consider its own common law.<sup>265</sup>

This article argues that an historical constitutional approach is already positioned to strike a balance between the English constitutional history and Australia's own unique development of constitutional principles, such that it is an Australian prerogative power that should inform an interpretation of the non-statutory executive power in section 61. This is because it is a balance that is needed, rather than abandoning those historical constitutional principles that were introduced into and uniquely developed in Australia.

Gerangelos has argued that 'recourse must be had to "historical" constitutional sources, even those pre-dating the [*Constitution*], to achieve accurate contemporary interpretation ... where those sources remain presently relevant as recognised sources of law'.<sup>266</sup> The traditional principles of responsible government and parliamentary sovereignty are particularly relevant for interpreting section 61 of the *Constitution*. As Gerangelos has cautioned, a constitutional power derived directly from section 61 may not be subject to legislative abrogation,<sup>267</sup> as Parliament cannot legislate to remove a power granted by the *Constitution*. However, historical considerations of the development and constitutionalisation of responsible government in Australia,<sup>268</sup> federalism,<sup>269</sup> and the historical rise of parliamentary sovereignty in England to reduce the powers of the Crown, when considered together in equal measure, would suggest that any executive power emanating from section 61 must be subject to legislative control.<sup>270</sup>

The prerogatives, which have been informed by their British constitutional origins and development in Australia, would then be the foundation of determining the ambit of executive action, to meet the requirements of an independent federal polity.<sup>271</sup> This allows for the executive power to be adapted, rather than expanded, when dealing with new, unique situations,<sup>272</sup> provided that the common law too 'should also adapt so as to provide practical solutions to particular legal problems'.<sup>273</sup> As noted by Gerangelos, the reasoning of Gageler J in *Plaintiff M68* may point to future 'retracing and refinement of the jurisprudence of the High Court on the ambit of the Commonwealth's executive power in s 61' through a

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264 Ibid 423–4. Condylis notes that this was also suggested by Gerangelos: Gerangelos, 'Nationhood and the Future of the Prerogative' (n 14) 125.

265 Condylis (n 8) 424, citing *Marquet* (2003) 217 CLR 545. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

266 Gerangelos, 'An Historical Constitutional Approach' (n 12) 110.

267 Ibid 127–8.

268 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–9 (Full Court).

269 Condylis (n 8) 425.

270 Gerangelos, 'An Historical Constitutional Approach' (n 12) 128.

271 Gerangelos, 'Nationhood and the Future of the Prerogative' (n 14) 125.

272 Condylis (n 8) 406. See also Winterton, 'The Prerogative in Novel Situations' (n 64) 408.

273 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 528 [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

lens of constitutional history,<sup>274</sup> and will provide the necessary approach for defining the scope and limits of the executive power.

## VI CONCLUSION

The nature and scope of the executive power of the Commonwealth will likely continue to be debated as it appears to expand and contract. Cases on the executive power in section 61 rarely come before the High Court. No singular judicial decision or academic volume has been able to settle the matter, and perhaps never will. However, as noted above, former Chief Justice French suggested that there ‘is room, therefore, for further academic discussion’,<sup>275</sup> and a continued analysis of the development of the executive power will serve to enhance and refine the understanding of the power, which can only assist in its future application.

The *Australian Constitution* drew heavily from its British origins to model Australia’s constitutional government.<sup>276</sup> A fundamental principle guiding Australia, as a constitutional monarchy, is that much of the authority for the executive power of the Commonwealth originates in the Crown. It gives legitimacy to the structure of Australia’s government. Those powers are subject to the system of responsible government that the framers adopted from the British Constitution. This article has canvassed the historical development of the Commonwealth executive power, tracing its origins in British constitutional history, through the rise of parliament and gradual curtailment of the royal prerogative. The Crown and the prerogative continue to play a significant role in modern Australian government. The difficulty, as stated, lies in determining to what extent those origins should limit the development of the executive power for an Australian context.

The core point of divergence between the common law and inherent views is the first port of call in determining the scope of the executive power: the common law prerogatives, or the ‘terms of the *Constitution* itself’.<sup>277</sup> The main strengths of the inherent view of the non-statutory executive power is that the power is not stagnant, and is capable of being used in matters that are time-sensitive, such as border protection and responding to a global financial crisis. However, this approach also lacks discernible criteria for easily determining the validity of such actions. Therefore, any inherent non-statutory executive power should be restricted to the ‘breadth’ dimension of executive power, rather than investing the Commonwealth with any additional powers that may not be subject to parliamentary or judicial scrutiny. The historical origins of the executive power are therefore still vital for ascertaining the nature and scope of the powers of government. The assumptions underlying the *Constitution*, such as responsible government, and the interpretation of relevant sections of the *Constitution*, have

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274 Gerangelos, ‘An Historical Constitutional Approach’ (n 12) 109–10.

275 French (n 70) 27.

276 Noting of course that it also drew upon the American federal model in distributing government powers between the Commonwealth and the states.

277 *Tampa Case* (2001) 110 FCR 491, 542 [191] (French CJ).

been informed by the common law and conventions adopted from Britain. However, these must be read in light of how they have been adapted for the Australian federal context.

Despite the dictum of Gageler J in *Plaintiff M68*, the decision in *Pape* and its consequences for section 61 continue to apply. However, *Pape* did not have the effect of rendering the prerogative irrelevant. It continues to enjoy a significant role in determining the nature and scope of the executive power. Section 61 should be interpreted in light of the common law of Australia, informed but not bound by the historical prerogative of the UK. Such an approach would not be antithetical to the core of the inherent view, that the text of the *Constitution* is still the paramount law in Australia, which is a modern independent polity with unique national interests. As Professor Finn wrote following the introduction of the *Australia Acts*, '[w]ith Australian law at long last coming of age, the need is there to look anew – if not for the first time – at our own past, at our own institutions, at the nature and workings of our own governmental system'.<sup>278</sup>

This article has demonstrated that there is no current clear legal test or approach adopted by the High Court for questions surrounding the executive power in section 61. However, an historical constitutional approach would allow consideration of both the text of the *Constitution* and the common law that was fundamental to the establishment and development of the law in Australia. This will ensure that the executive power will be interpreted consistently with the broader historical context which imports into Australia's *Constitution* those traditional constitutional principles that are central to legitimate government. This approach may better assist in resolving the ongoing debate surrounding the Commonwealth's non-statutory executive power.

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278 Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) vii.