

Murdoch University
School of Law

**THE STREAM CANNOT RISE ABOVE ITS SOURCE: THE PRINCIPLE OF RESPONSIBLE
GOVERNMENT INFORMING A LIMIT ON THE AMBIT OF THE EXECUTIVE POWER OF
THE COMMONWEALTH**

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This thesis is presented in fulfilment of the requirements of a Bachelor of Laws with
Honours at Murdoch University in 2016

Word Count: 19,329

(Excluding title page, declaration, copyright acknowledgment, abstract, acknowledgments and
bibliography)

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Full Name of Degree: Bachelor of Laws with Honours

Thesis Title: The stream cannot rise above its source: The principle of Responsible Government informing a limit on the ambit of the Executive Power of the Commonwealth

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Year: 2016

ABSTRACT

The Executive Power of the Commonwealth is shrouded in mystery. Although the scope of the legislative power of the Commonwealth Parliament has been settled for some time, the development of the Executive power has not followed suit.

Over the last decade, the High Court has developed jurisprudence on the Executive Power – largely invoking more questions than answers – and while not conclusively defining it, certainly suggesting that there are limits. This thesis argues that one limit is the principle of responsible government.

Responsible government requires that the Executive government be accountable to the Parliament. The accountability aspect allows Parliament to scrutinise the conduct of the Executive. This is of critical importance because the Executive has its own sphere of activity, acting through its non-statutory power, prerogative power and nationhood power. When the Executive acts, the activities necessarily require the expenditure of money. The money the Executive expends is not its own money, rather, it is public money in the Consolidated Revenue Fund.

This thesis examines two key cases of expenditure initiated by the Executive government; *Pape*, and the impugned *Tax Bonus Act* that provided the fiscal stimulus package in the wake of the 2008 Global Financial Crisis; and *Williams*, which was a contract between the Commonwealth Government and Scripture Union Queensland for funding under the National Schools Chaplaincy Programme.

Overall, this thesis highlights that as responsible government is entrenched in the *Constitution*, and the final say on all expenditure is provided by Parliament as representative of the people, the outcomes of the *Pape* and *Williams* cases point to the High Court limiting the ambit of the Executive Power by reference to the principle of responsible government.

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ACKNOWLEDGEMENTS

Without some very important people, I wouldn't have been able to complete this thesis. No words could ever do justice to how thankful I am for them and for their support.

At the beginning of the year, a very good friend who, having written his own thesis the year before, gifted me with invaluable advice: 'there will always be another case to read, another article to support your analysis and another paragraph you can write. At the end of the day, back yourself. You know what you're doing.' Aaron, thank you for your encouragement and ability to get me back on track.

Mark and Dush; thank you for the much needed breaks and the reminder that America is only around the corner!

Lorraine; my supervisor, thank you for your support not only during this thesis, but since my first moot in 2013. Your guidance and friendship is invaluable.

Judge Eaton; thank you for giving me a better start in a career in law than I could ever have wished for. As a mentor and as a friend, I could not ask for any better.

Danny; the hours of studying, assignment writing and exam preparation over the course of our degrees wouldn't be the same if we didn't do it together. I couldn't think anything better than to start and finish my law degree with my best friend.

Lizz; for believing in me when I didn't believe in myself. I can't thank you enough for being by my side every step of the way.

Nicholas, Danijela and Matthew; you have put up with a lot for the past four years – exam stress, assignment stress, barely being home, my rambling on about obscure topics just to name a few – but you have unfailingly supported me throughout.

Finally, I dedicate this thesis to my mum and dad for your unconditional love and sacrifice. Everything that I have achieved is because of you two. I hope I have made you both proud.

CHAPTER ONE: INTRODUCTION

This thesis examines the manner in which the Executive Government of the Commonwealth functions and participates in the Government of Australia. In particular, it will examine the High Court's treatment of Executive Government action. The examination argues that the High Court is informed by the principle of responsible government as a method to limit the ambit of the Executive power. In particular, it will demonstrate that the High Court has limited the ability of the Executive to participate in activities without legislative support because it is against the principle of responsible government.

The first two sections of this Chapter introduce the difference between the High Court's treatment of legislative power, on the one hand, and executive power, on the other. Broadly, it highlights a marked difference in the High Court's application of reasoning between the two spheres of power; expanding legislative power and limiting executive power.

By way of background: at the time of the Great Australasian Convention Debates, the Framers of the *Constitution* regarded legislative and executive power as co-extensive.¹ By co-extensive, this paper adopts the approach of the literature to mean that the respective fields of power were conceived to be as powerful as each other. Despite this, the High Court saw fit to expand the ambit of legislative power. It did so, contrary to its original conception, into fields of activity that the Framers of the *Constitution* never expected.² An illustration of this is provided in the next section.³ In contrast, the High Court's treatment of the executive power differs. Its judicial treatment demonstrates a reluctance to define the executive power's limits – neither conclusively expanding or limiting the power – rather, eschewing any attempt at doing so and in its place, engaging the power only when absolutely necessary. In this author's view, the Australian conception of the executive power is unique to the Commonwealth of Australia⁴ and is still finding its place within the framework of

¹ Another word that is often used is 'coterminous'.

² The author is not entering the debate on whether or not the High Court *should* have done so. The author merely notes this as fact.

³ See 'I A Shift of Legislative Power'.

⁴ I will illustrate the difference of the Executive Power of the Commonwealth of Australia by reference to both the Executive Power of the United Kingdom and of the United States of America.

the Australian Federation.⁵ I write the preceding sentence to demonstrate that the executive power is in no way as established as the legislative power;⁶ it is a reference point with which to base the ambit of this thesis.

I A SHIFT OF LEGISLATIVE POWER

Responsible government formed a key part in shaping the Commonwealth of Australia. It was discussed at length during the Great Australasian Convention Debates⁷ and is entrenched in the structure of the *Constitution*.⁸ However, since Federation in 1901, we have seen dramatic changes in the manner in which the powers that govern the Commonwealth of Australia are exercised due to a change in the interpretation of the *Constitution*. The major change was that in the *Engineers Case*⁹ in 1920. The preceding 15 years, following the appointment of Higgins and Isaacs JJ, saw the High Court of Australia have a marked shift in the approach taken to interpreting the *Constitution*.¹⁰

The three founding Justices, Griffith CJ, Barton and O'Connor JJ, interpreted the *Constitution* utilising the method known as originalism. This approach interpreted the *Constitution* according to its original meaning.¹¹ This interpretation sought to

⁵ This thesis will not discuss that particular topic; it is a large and complex issue which requires a wider scope than this dissertation allows. Such an analysis is apt for a much larger body of work.

⁶ By this I assert that the High Court has very clearly defined the scope of Commonwealth legislative power. See: *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*').

⁷ See, eg, *Official Report of the National Australasian Convention Debates*, Sydney 2 March to 9 April, 1891; *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May, 1897; *Official Record of the debates of the Australasian Federal Convention: Second Session*, Sydney, 2 September to 24 September, 1897; *Official Records of the Debates of the Australasian Federal Convention: Third Session*, Melbourne, 20 January to 17 March, 1898.

⁸ See below at Chapter Two: Responsible Government in Australia; Part II Representative Government and Part III Responsible Government.

⁹ *Amalgamated Society of Engineers v Adelaide Steamship Co Pty Ltd* (1920) 28 CLR 129 ('*Engineers*').

¹⁰ See, eg, *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087; *Federated Engine Drivers' and Firemen's Association of Australia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398; *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148; *Federated Municipal and Shire Council Employees Union of Australia v The Lord Mayor, Alderman, Councillors and Citizens of Melbourne and Others* (1918-1919) 25 CLR 508.

¹¹ *D'Emden v Pedder* (1904) 1 CLR 91 114 (Griffith CJ, Barton and O'Connor JJ); *Deakin v Webb* (1904) 1 CLR 585, 616 (Griffith CJ). See: J D Heydon, 'Theories of constitutional interpretation: a taxonomy' (2007 Winter) *Bar News: Journal of the NSW Bar Association* 12. Heydon describes seven theories of 'originalist' interpretation. They are: the 1900's meaning: 13-16; connotation and denotation: 16; ambulatory words: 16-17; the evolutionary nature of legal expressions: 17; essential and non-essential elements of 1900 meaning: 17-18; the centre and the circle; the core and the penumbra: 18-19 and the actual intention of the founders: 19. See also, Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9th ed, 2013) 120 [1.8.13].

‘avoid any corresponding reduction in the powers of the States which would be inconsistent with the *Constitution*’s broader federal vision.’¹²

Following the addition of Higgins and Isaacs JJ to the High Court,¹³ a split emerged when interpreting the *Constitution*. The split resulted in a shift from unanimous decisions to a 3:2 majority. The split arose from a competing interpretive approach, literalism, which was consistently utilised by Higgins and Isaacs JJ. A literal approach interprets the *Constitution* in accordance with the plain and ordinary natural meaning of the words.¹⁴ It, in effect, gives words their widest possible meaning. As decided by the *Engineers* majority¹⁵ when expanding the reach of Commonwealth legislative power,¹⁶ the legislative power is “*plenary*” and “*ample*” ... as the Imperial Parliament in the plenitude of its power possessed and could bestow.¹⁷ In an effort to reverse this decision, appeal to the Privy Council was attempted. It was, however, refused, ‘virtually without reasons.’¹⁸

The effect of the literalist approach has been an expansion of the breadth of activity that can be undertaken by engaging the legislative power of the Commonwealth. Subsequently, successive cases at which the federal division of legislative power has been in dispute have been consistently decided in favour of the Commonwealth.¹⁹ There is no doubt that the apogee of the *Engineers* decision is that of the *New South Wales v Commonwealth*,²⁰ which I refer to at this point to as a clear example of the expansive approach that the High Court has adopted in relation to the legislative powers of the Commonwealth. A short description of that litigation is as follows.

¹² Greg Craven, ‘The Crisis of Constitutional Literalism in Australia’ (1992) 30(2) *Alberta Law Review* 492, 496.

¹³ By way of amendments made to the *Judiciary Act 1903* (Cth) that increased the number of sitting justices from three to five. See: *Judiciary Act 1905-1906* (Cth).

¹⁴ For a discussion on literalism, see: Heydon, above n 11, 26. I refer to literalism only to establish the concept of interpretation according to the plain and ordinary meaning of its words.

¹⁵ (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁶ Through overturning previous precedent and rejecting the doctrines of implied intergovernmental immunities and state reserved powers. See also *D’Emden v Pedder* (1904) 1 CLR 91; *Peterswald v Bartley* (1904) 1 CLR 497; *Federated Amalgamated Government Railway and Tramway Association v New South Wales Traffic Employees Association* (1906) 4 CLR 488.

¹⁷ *Amalgamated Society of Engineers v Adelaide Steamship Co Pty Ltd* (1920) 28 CLR 129, 163 (Knox CJ, Isaacs, Rich and Starke JJ), citing *Hodge v The Queen* (1883) 9 App Cas 117, 132 (Lord Fitzgerald).

¹⁸ Murray Gleeson, ‘The Influence of the Privy Council on Australia’ *Anglo-Australian Lawyers Society*, speech delivered in Sydney on 31 May 2007, 2.

¹⁹ Craven, above n 12, 495; David Hume, Andrew Lynch and George Williams, ‘Heresy in the High Court? Federalism as a constraint on Commonwealth power’ (2013) 41 *Federal Law Review* 71, 86.

²⁰ *New South Wales v Commonwealth* (2006) 229 CLR 1 (‘*Work Choices*’). See Hume, Lynch and Williams, above n 19, 74.

Work Choices was a challenge brought by five States and two trade unions against the Commonwealth regarding the constitutional validity of the *Work Choices Act*.²¹ The focus of the litigation was the contention of the plaintiffs that the Commonwealth's corporations power in s 51(xx) of the *Constitution* did not support an entire national industrial relations regime to apply to a majority of employees in Australia.²² In a judgment that is recognised as giving the words of s 51(xx) of the *Constitution* their widest possible meaning,²³ the High Court held that the corporations power extends to any law which alters the rights, powers or duties of a constitutional corporation, as well as to laws which have a less direct but nonetheless sufficiently substantial connection to constitutional corporations.²⁴ What this shows is that the High Court has treated the legislative power, a power routinely exercised by the Commonwealth Government, in such a way as to expand its scope to what, arguably, is able to encompass nearly any activity the Commonwealth wishes to participate in.

II DID THE EXECUTIVE POWER REALLY FOLLOW?

The other power the Commonwealth Government routinely exercises is Executive Power. As the following discussion will show, the High Court has treated the Executive Power differently to the legislative power of the Commonwealth Government.

As I will explain in Chapter Two, members of the Commonwealth Government are able to exercise both legislative power and executive power if they are Ministers of State because our *Constitution* provides that Ministers of State must sit in one of the Houses of Parliament.²⁵ In short, they are 'the government of the day.' Chapter Two establishes the system that provides a check on Ministers exercising the Executive Power – representative and responsible government – in which Parliament scrutinises Executive action.

²¹ *Work Choices Act 2005* (Cth).

²² Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 7.

²³ Greg Craven, 'How the High Court Failed Us', *Australian Financial Review* (Melbourne) 24 November 2006, 92, cited in *ibid* 3.

²⁴ See eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 114-5 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), adopting *Re Pacific Coal Pty Ltd* (2000) 203 CLR 346, 375 [83].

²⁵ *Constitution* s 64.

As I will discuss in Chapters Three and Four, there has been a struggle documented by cases since the mid-1970s where the Executive exercises power which appears to be power that either should be, or can only be, exercised by Parliament. That is, the Executive Government of the Commonwealth exercises power that is thought to be power held by the Parliament. On its face, such an exercise of power would breach a fundamental doctrine entrenched in our *Constitution*: the separation of powers doctrine. It provides that each arm of government conducts its activities separately and does not act outside its own sphere.²⁶ For the Commonwealth of Australia, the Parliament legislates, the Executive administers and the Judiciary adjudicates. *Prima facie*, the three arms of government hold separately distributed powers that, when taken together, govern Australia. They are kept separate because *power corrupts, and absolute power corrupts absolutely*. Famously written by Montesquieu in *De l'esprit de lois* in 1748,²⁷ this is necessary to avoid tyranny.²⁸ Despite the *prima facie* separation, the powers run deeper. For example, interpretation of Ch II of the *Constitution* provides added layers to the Executive Power: the Executive's non-statutory power, prerogative power and the concept of 'Nationhood'.²⁹ These layers, constitutionally embedded in s 61, provide the Executive Government of the Commonwealth with a type of lawmaking power.

Section 61 of the *Constitution* was heavily debated during the Great Australasian Convention Debates. An early version of the now s 61³⁰ read:

The executive power and authority of the commonwealth shall extend to *all matters with respect to which the legislative powers of the parliament may be exercised*, excepting only matters, being within the legislative powers of a state, with respect to which the parliament of that state for the time being exercises such powers.³¹

Sir Samuel Griffith introduced a motion to amend this version; to omit all of the words after 'extend to' and insert 'the execution of the provisions of this constitution,

²⁶ Clarke, Keyzer and Stellios, above n 11, 105 [1.7.1], [1.7.2].

²⁷ 'The Spirit of Laws.'

²⁸ Clarke, Keyzer and Stellios, above n 11, 105 [1.7.1], [1.7.2].

²⁹ I will discuss this in detail in Chapter Three: III The Bases of Executive Power.

³⁰ The then clause 8 of Ch II. As at 6 April 1891.

³¹ See *Williams v Commonwealth* (2012) 248 CLR 156, 297 [347] (Heydon J) – emphasis in the original ('*Williams*').

and the laws of the commonwealth.³² Sir Samuel reasoned that the ‘amendment covers all that is meant by the clause, and is quite free from ambiguity.’³³ This, as Heydon J opines in *Williams*, suggests amplitude in the powers conferred by s 61.³⁴

Opinions of Commonwealth Attorneys-General, notably Alfred Deakin and Sir Littleton Groom, advocate for a ‘coextensive’ executive power. The second opinion ever given by a Commonwealth Attorney-General, on 28 May 1901, provides that although the executive power derives from ‘its fountain head – the Crown [...] [i]ts powers are at least coextensive with its legislative charter.’³⁵ That Attorney-General, Deakin, further provided in the *Vondel Opinion* that he ‘wholly disagreed’ with the opinion of the Attorney-General for South Australia, Sir John Gordon, that in matters affecting external affairs ‘no power exists in the Commonwealth Government regarding either external affairs or the proposition of consuls’, because ‘the Commonwealth has no executive power apart from Commonwealth legislation’.³⁶ Further, Deakin’s opinion was that no attempt to define the Executive Power was made because it might involve ‘limitation of the executive power’³⁷ and:

[h]ad it been intended to limit the scope of the executive power to matters on which the Commonwealth Parliament had legislated, nothing would have been easier to say so. ... The framers of that clause evidently contemplated the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define, flowing naturally and directly from the nature of the Federal

³² See: Anne Twomey, ‘Pushing the Boundaries of Executive Power - *Pape*, the Prerogative and Nationhood Powers’ (2010) 34(1) *Melbourne University Law Review* 313, 315-16.

³³ *Official Report of the National Australasian Convention Debates* (Sydney), 6 April 1891, 777-8 (Sir Samuel Griffith).

³⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 299 [351] (Heydon J).

³⁵ Alfred Deakin, ‘Position of Commonwealth and States in Relation to Treaties: Source and Extent of Commonwealth Executive Power and External Affairs Power: Nature of Adherence to Treaties: Channel of Communication Between States and Empire or Foreign Powers’ in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (Australian Government Publishing Service, 1981) 3. Note that this comment was not directly applicable to this Opinion, rather, it was more of a passing comment. Deakin elaborated on this concept in the *Vondel Opinion* and further provided ‘Executive power exists antecedently to, and independently of, legislation; and its scope must be at least equal to that of the legislative power – exercised or unexercised: see Alfred Deakin, ‘Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth’ in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (Australian Government Publishing Service, 1981) 131.

³⁶ *Ibid* 129-30.

³⁷ *Ibid* 130.

Government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted.³⁸

Deakin concluded that '[i]t is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends.'³⁹ Sir Littleton Groom, Commonwealth Attorney-General in 1907, stated that 'it must be taken to be settled law that the executive power of the Commonwealth is coextensive with the range of its legislative powers'.⁴⁰ Finally, as Heydon J noted in *Williams*, the executive power was exclusively used by the Commonwealth for the first six months of federation – the first Commonwealth statute receiving royal assent on 25 June 1901.⁴¹

This suggests that executive power being equal to – or as broad as – the legislative power of the Commonwealth was intended by the framers of the *Constitution*. This, however, was exclusively debated in the pre-*Engineers* conception of Commonwealth legislative power; that it would be interpreted narrowly. If the Opinions above are correct in that the executive power is coextensive with legislative power, the result necessarily is that pre-*Engineers*, the executive power was also limited as against the plenary power of the States. The corollary is that post-*Engineers*, the executive power would be as powerful and can be engaged in the same way. Therefore, by analogy to the above example of *Work Choices*, if the corporations power in s 51(xx) ably provided the subject matter power to enact legislation to support the regime, the executive power could also provide the subject matter power for the Commonwealth to enact the regime. Clearly, this is not the case.

³⁸ Ibid.

³⁹ Ibid 131.

⁴⁰ Sir Littleton Groom 'Whether Coextensive with Legislative Power: When is State Executive Power Displaced: Whether Commonwealth has Power By Executive Act to Permit Landing of Foreign Troops or Crews' in *ibid* 360. As the Opinions' of Alfred Deakin, this Opinion also concerned the power to pass laws with respect to external affairs.

⁴¹ *Williams v Commonwealth* (2012) 248 CLR 156, 313 [386] (Heydon J) – see his Honour's footnote [fn 581].

III SCOPE OF THIS THESIS

The High Court, unwavering of the *Engineers* view with respect to Commonwealth legislative power,⁴² has not applied the same reasoning to the Executive Power.⁴³ This thesis will argue that the High Court has treated the Executive Power differently, in a limited sense, because to do otherwise is against the principle of responsible government. This is because responsible government provides for accountability of the Executive to Parliament. The importance of this is broadly summarised as follows: the executive is accountable to the legislature. The legislature, as a body, is accountable to the people through the Members of Parliament representing their electorates. The legislature has the exclusive power to raise money; therefore, the legislature has the exclusive power to authorise expenditure.⁴⁴ This is because the money raised and expended is not the Commonwealth Government's own money. It is public money. Parliamentarians act as representatives of those whom the money is raised from and so there is an accountability check directly linked to the citizenry. When the Executive Government acts, whether contracting or through legislation, money is required to execute those actions. The Executive Government cannot spend that money without the approval of Parliament. The approval of expenditure comes in the form of an Appropriation Act.⁴⁵

My thesis is divided into the following chapters. Chapter Two introduces the concept of responsible government. Chapter Three provides an outline of the Executive Power. Chapter Four analyses two key cases, *Pape*⁴⁶ and *Williams*⁴⁷ with the principles identified in Chapters Two and Three. I argue that the result of those two cases altered existing ideas about a wide and non-justiciable executive power to one that is now more closely checked by Parliament through the principle of responsible government. Chapter Five, in conclusion, finds that while Executive Power is still

⁴² As it is seen in the lead up of cases to, and including, *New South Wales v Commonwealth* (2006) 229 CLR 1.

⁴³ See Shipra Chordia, Andrew Lynch and George Williams, '*Williams v Commonwealth – Commonwealth Executive Power and Australian Federalism*' (2013) 37(1) *Melbourne University Law Review* 189, 215-16.

⁴⁴ The importance of money in this context is that for the government to undertake activities or enter into contracts, it inevitably requires expenditure.

⁴⁵ I will describe this process in detail in: 'Chapter Four: II Pape: B Sections 81, 83 and Parliamentary Accountability'.

⁴⁶ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*').

⁴⁷ *Williams v Commonwealth* (2012) 248 CLR 156.

largely undefined and will likely take decades of jurisprudence to conclusively identify, it is one that is limited by responsible government.

CHAPTER TWO: RESPONSIBLE GOVERNMENT IN AUSTRALIA

This Chapter introduces the concept of responsible government and its function in Australia's system of government. The principle of responsible government is one of accountability; where the government of the day, the Executive, is held accountable for its actions to the Parliament.⁴⁸ The importance of accountability to Parliament is paramount because it is Parliament who represents the citizenry.⁴⁹ Therefore, one cannot have responsible government without representative government.⁵⁰

This Chapter explains responsible government in the following way. Part I introduces Australia's system of government.⁵¹ Part II will identify the representative aspect of the government, with Part III providing an outline of responsible government. Part IV will identify the key features of responsible government in Australia as identified in the *Williams* case, in order to assist the subsequent argument in Chapter Four.

I AUSTRALIA'S SYSTEM OF GOVERNMENT

Australia's system of government is divided into three parts.⁵² These parts are known as the 'arms' of government. They are recognised in the *Constitution* by separating the functions and powers of each arm into a separate Chapter.⁵³ Relevantly, Chapter I provides for the Legislature, Chapter II provides for the Executive and Chapter III provides for the Judicature.⁵⁴

⁴⁸ James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6th ed, 2015) 548.

⁴⁹ *Ibid* 549.

⁵⁰ The concept is partly unique to Australia's hybrid parliamentary system; it derives from the British Westminster system and, as will be explained, adapted to Australia's system of government.

⁵¹ I will not be defining the State governments and their role in Australia. I am only discussing the Commonwealth Government.

⁵² The federal system of government is divided into six parts in the *Australian Constitution*. Along with the three 'Commonwealth' parts (as written), there is also Ch IV 'Finance and Trade', Ch V 'The States' and Ch VI 'New States' (of which s 122 – the territories power – resides). The importance of Ch IV 'Finance and Trade' in to the distribution of federal power will be expanded on in Chapter Four insofar as it relates to limiting executive power.

⁵³ There are eight chapters in the *Constitution*.

⁵⁴ I observe that the conceptual basis of the *Constitution* is the 'free agreement of the people – all of the people – of the federating Colonies to unite in the Commonwealth under the *Constitution: Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ). I draw importance from this observation in the idea that it is still the people that give power to the *Constitution* by electing representatives to Parliament to exercise the powers and functions of the government as provided. The significance is that the power exercised must be checked by those who represent the people.

A *The Parliament*

The Parliament is the legislative body of the Commonwealth of Australia. It is established in accordance with Chapter I of the *Constitution*, and consists of the Queen and two legislative chambers.⁵⁵ The chambers are the House of Representatives, commonly known as the ‘lower house’, and the Senate, the ‘upper house’. It is the Parliament, along with the Governor-General acting as the Queen’s representative in Australia, that enables the Australian government to pass legislation for and provide governance of, the Commonwealth of Australia. In the Australian political system, after an election, the political party with a majority of seats⁵⁶ in the House of Representatives has the ability to form government. This is because it is the majority party who is able to pass legislation freely, at least in theory, through the House of Representatives.⁵⁷

B *The Executive Government*

The Executive Government of the Commonwealth is ‘vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’.⁵⁸ To assist the Governor-General in the exercise of the Executive Government, the Governor-General is advised by a body known as the Federal Executive Council.⁵⁹ The Council consists of all of the Ministers and Assistant-Ministers of the Commonwealth.⁶⁰ These Ministers are the Ministers of State, otherwise known as the Cabinet, and are charged to ‘administer ... departments of State of the Commonwealth’.⁶¹ An interesting dichotomy is embedded within s 64 of the *Constitution*, where it reads:

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

⁵⁵ *Constitution* s 1.

⁵⁶ Presently, the House of Representatives has 150 seats. Therefore, in order to obtain majority, a political party must win 76 seats to form government.

⁵⁷ By convention, the leader of the party with a majority of seats in the House of Representatives is appointed the Prime Minister of Australia.

⁵⁸ *Constitution* s 61.

⁵⁹ *Constitution* s 62.

⁶⁰ David Clark, *Principles of Australian Public Law* (LexisNexis Butterworths, 3rd ed, 2010) 4 [1.6].

⁶¹ *Constitution* s 64.

This requires that the Ministers of State, who, in theory, are to give independent advice to the Governor-General in the Government of the Commonwealth, to also be members of Parliament. Therefore, although '[c]abinet and party may not be recognised in the *Constitution*...they are the keys to the exercise of power.'⁶²

At the time of Federation, the forefathers of our *Constitution*, known as the Framers, effectively created a unique,⁶³ hybrid system,⁶⁴ that was a mix between the Westminster Parliamentary system of the United Kingdom⁶⁵ and the federal political of the United States of America. The Framers adopted elements of each.⁶⁶ For example, Westminster comprises the House of Commons, similar to the Australian House of Representatives, and the House of Lords, equivalent to the Australian Senate,⁶⁷ and the Queen. Further, like Australia's political system, and largely from where Australia adopted the practice, the political party with the most seats in the House of Commons forms the government of the day. The Queen appoints the Prime Minister on recommendation and further appoints the Ministers of State on recommendation.

The Framers of the *Australian Constitution* also borrowed heavily from the *United States Constitution*. The United States of America have Articles I, II and III,⁶⁸ which Australia mirrored as Chapters I, II and III.⁶⁹ In the United States of America, their legislature, known as Congress, also comprises two chambers known as the House of Representatives and the Senate. The Executive Government of the United States of America, however, are completely separate from Congress. Executive appointees are selected by the President him or herself. Further, the President does not sit in the

⁶² Patrick Weller, 'Parliamentary accountability for non-statutory executive power: Impossible dream or realistic aspiration?' (2005) 16 *Public Law Review* 314, 314.

⁶³ Gabrielle Appleby and Adam Webster, 'Executive Power under the Constitution: A Presidential and Parliamentary System Compared' (2016) 87 *University of Colorado Law Review* 1129, 1140.

⁶⁴ See generally: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁶⁵ Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government: Volume I Principles and Values* (The Law Book Company Limited, 1995) 76.

⁶⁶ See Elaine Thompson, 'The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation' (2001) 24(3) *University of New South Wales Law Journal* 657, 663.

⁶⁷ The House Commons in the United Kingdom and the House of Representatives share the same colour, as do the House of Lords and the Senate. They are, respectively, coloured green and red.

⁶⁸ The American term 'Article' is analogous to the Australian 'Chapter'.

⁶⁹ They are analogously entitled: Article I – Legislative, Chapter I – The Parliament; Article 2 – Executive, Chapter II – The Executive Government; Article III – Judicial; Chapter III – The Judicature.

United States Congress, rather, the President occupies a position occupied similar to our Monarch.

C *The Judicature*

The Judicature is the adjudicative arm of our federal government. It derives power from Chapter III of the *Constitution*, namely, through s 71, which provides that:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The Judicature is where we turn to resolve disputes between citizens and citizens; citizens and the States; citizens and the Commonwealth; States and the States and the Commonwealth and the States.⁷⁰ It is vested with both original⁷¹ and appellate⁷² jurisdiction. Original jurisdiction, however, is not to be confused with the inherent jurisdiction possessed by the State Supreme Courts.⁷³

Consistent with s 71 of the *Constitution*, Parliament has created other courts invested with federal jurisdiction. These courts are the Family Court of Australia,⁷⁴ the Federal Court of Australia,⁷⁵ and the Federal Circuit Court of Australia.⁷⁶

These Courts, known as ‘Chapter III Courts’, are identifiable through unique features.⁷⁷ First is security of tenure. Section 72 of the *Constitution* now provides that the ‘appointment of a Justice of the High Court shall be for a term expiring upon

⁷⁰ See *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 353, 357 (Griffiths CJ).

⁷¹ *Constitution* s 75. See also the additional original jurisdiction of the High Court in s 76; *Judiciary Act 1903* (Cth) ss 30(a), 38, 39B and 44.

⁷² *Constitution* s 73.

⁷³ See eg, *Supreme Court Act 1935* (WA) s 16.

⁷⁴ *Family Law Act 1975* (Cth) s 21(1).

⁷⁵ *Federal Court of Australia Act 1976* (Cth) s 5.

⁷⁶ *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth) s 2. The Federal Circuit Court of Australia was formerly the Federal Magistrates Court, which operated from 1999-2013. See *Federal Magistrates Act 1999* (Cth).

⁷⁷ Unique in contrast to that of the State Supreme Courts.

his attaining the age of seventy years.’⁷⁸ Early iterations of tribunals purporting to exercise federal judicial power were held invalid by the High Court due to a lack of tenure.⁷⁹

Secondly, federal judicial power must be engaged to decide controversies; not to provide opinions. As held by the Court in *Re Judiciary and Navigation Acts*, the Court must ‘not merely provide an opinion but an authoritative declaration of the law.’⁸⁰ Judicial power itself has been difficult to define over the years and has been the subject of much judicial opinion.⁸¹ Much concerns the separation of powers doctrine, particularly between the executive and judicial branches.⁸²

Thirdly, linked with the concept of a Chapter III Court possessing original, rather than inherent, jurisdiction is that federal judicial power can be utilised by State Supreme Courts; however, Chapter III Courts cannot exercise State judicial power. The leading illustration of this is the cross-vesting of jurisdiction between the courts of Australia, which allow certain courts to hear particular matters that were originally jurisdictionally locked. In 1987, the Commonwealth and the States assented to a scheme known as the *Cross Vesting Scheme*. It was facilitated by the Parliament and each State legislature passing a near identical act, entitled the *Jurisdiction of Courts (Cross-vesting) Act 1987*.⁸³

⁷⁸ The amendment occurred in 1977. See *Constitution Alteration (Retirement of Judges) Act 1977* (Cth). Note that although prior to this limitation, Chapter III judges were appointed for life, life tenure was not explicit in the *Constitution*. All that was proved by way of removal was by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. It did so by adding the words ‘The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and that a person shall not be appointed as a Justice of the High Court if he has attained that age.’

⁷⁹ Cf *New South Wales v Commonwealth* (1915) 20 CLR 54 (*‘The Wheat Case’*); *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 424 (*‘Alexander’s Case’*).

⁸⁰ *Re Navigation and Judiciary Acts* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

⁸¹ See eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *R v Davison* (1954) 90 CLR 353; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Lutton v Lessels* (2002) 210 CLR 333.

⁸² See eg, *R v Spicer; Ex parte Australian Builders’ Labourers Federation* (1957) 100 CLR 277; *Thomas v Mowbray* (2007) 233 CLR 307; *State of South Australia v Totani* (2010) 242 CLR 1.

⁸³ See: *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Q); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA); *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT).

There are two components to the *Scheme*. First, the *Scheme* grants original and appellate jurisdiction by and upon each of the participating courts. The participating courts are the State Supreme Courts, the Federal Court and the Family Courts.⁸⁴ The High Court, District Courts⁸⁵ and the various Magistrates Courts (or other courts of summary jurisdiction) are excluded. Secondly, the *Scheme* provides the ability to transfer proceedings to the ‘more appropriate’, or best suited court.⁸⁶ As the scheme stood in 1987, it allowed a transfer of judicial power from a State or Territory Court to each other State or Territory Court, from the Federal Courts⁸⁷ to each State and Territory Court and from each State and Territory Court to the Federal Courts.⁸⁸

A change occurred in 1999. A challenge to the cross-vesting scheme was brought in *Re Wakim; Ex parte McNally*,⁸⁹ a matter in which, on the jurisdictional point, it was argued that the Federal Court could not be conferred with the power to hear a negligence claim through its accrued jurisdiction in consequence of it hearing a bankruptcy claim. The High Court held that while the *Cross Vesting Scheme* can grant federal judicial power onto State Courts, and State judicial power onto other State courts, the power cannot flow from State Supreme Courts to Federal Courts. This is because the jurisdiction of the High Court in Ch III of the *Constitution*, and, therefore, Federal Courts, are created from, and are therefore limited by, the *Constitution*, whereas State Supreme Courts are conferred with inherent jurisdiction derived from the Courts of England.⁹⁰ The *Constitution’s* reference to State Supreme Courts necessitates that those Courts are taken as they are found and in order to facilitate the formation of the Commonwealth, relinquished some of their power.⁹¹

⁸⁴ Including the Family Court of Western Australia.

⁸⁵ Known in Victoria as the County Court.

⁸⁶ See: *BHP Billiton Limited v Schulz* (2004) 211 ALR 523. See also *Oceanic Sun Line Special Shipping Co Ltd v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. Cf *Spiliada Maritime Corp v Consulex Ltd* [1987] 1 AC 460.

⁸⁷ I include the Family Court here as it is a ‘federal’ court – or a Chapter III Court caught by the scheme.

⁸⁸ The Federal Court of Australia and the Family Courts.

⁸⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

⁹⁰ See, eg, *Supreme Court Act 1935* (WA) s 16(1) Subject as otherwise provided in this Act, and to any other enactment in force in this State, the Supreme Court (a) is vested with and shall exercise such and the like jurisdiction, powers, and authority within Western Australia and its dependencies as the Courts of Queen’s Bench, Common Pleas, and Exchequer, or either of them, and the judges thereof, had and exercised in England at the commencement of the *Supreme Court Ordinance 1861*.

⁹¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

II REPRESENTATIVE GOVERNMENT

The first colonial government was that of the New South Wales colony, created in 1823 by an Act of the Imperial Parliament.⁹² It created the New South Wales Supreme Court and a Legislative Council, by which laws could be passed ‘for the peace, order and good government of New South Wales.’⁹³ At this time, the law considered by the Legislative Council could only be brought for consideration by the Governor of the colony. In 1842, ‘provision was made for representative government. The Imperial Parliament established a Legislative Council with two-thirds of its members to be elected on a restricted, property-based franchise.’⁹⁴ Then, in 1850, provision was made⁹⁵ enabling New South Wales to amend its Constitution. The Constitution, as amended, created ‘a bicameral legislature with a Legislative Assembly elected on the basis of a property and income-based franchise and a Legislative Council with members nominated by the Governor on the advice of an Executive Council with ministers drawn predominately from the assembly.’⁹⁶ This encouraged the colonies of Victoria, South Australia and Tasmania to enact their own Constitutions in 1855-6,⁹⁷ Queensland followed suit in 1867⁹⁸ and Western Australia in 1890.⁹⁹ This provided ‘great stability in both the structure of the Australian parliaments and their electoral processes’¹⁰⁰ and ‘autonomy and freedom’ to the colonies.¹⁰¹

Such a system made its way into the federal *Constitution*. Strictly with the people in mind, at the federal level, a representative government (or representative democracy)¹⁰² is ‘understood to mean a system of government where the people in free elections [elect] their representatives to the legislative chamber which occupies

⁹² 4 Geo IV c 96.

⁹³ Clarke, Keyzer and Stellios, above n 11, 94 [1.6.1].

⁹⁴ Ibid.

⁹⁵ *Australian Constitutions Act (No 2) 1850* (UK) 13 & 14 Vict c 59.

⁹⁶ Clarke, Keyzer and Stellios, above n 11, 94 [1.6.1].

⁹⁷ *Victoria Constitution Act 1855*, 18 & 19 Vict c 55; *Constitution Act 1855* (Tas); *Constitution Act 1856* (SA). See: Appleby and Webster, above n 63, 1137-8.

⁹⁸ The State of Queensland was founded in 1859.

⁹⁹ Clark, above n 60, 176 [7.5].

¹⁰⁰ Ibid [7.2].

¹⁰¹ Appleby and Webster, above n 63, 1137-8.

¹⁰² See: Thompson, above n 66.

the most powerful position in the political system.’¹⁰³ It is provided for in the Australian bicameral system in the case of Senators, by being chosen for each State, by the people of that State, as one electorate.¹⁰⁴ In the case of the House of Representatives, they are directly chosen by the people of the Commonwealth.¹⁰⁵

The High Court in *Lange* noted that sections of the *Constitution*, namely ss 1, 7, 8, 13, 24, 25, 28, 30 and 128, provide a basis for representative government.¹⁰⁶ It is, however, subject to ss 7, 10, 22, 24, 30, 31, 34, 39, 46-48 and 51(xxxvi) of the *Constitution*, which gives ‘the Parliament considerable discretion to alter the form of electoral laws, and consequently the type of “representative government” that might exist.’¹⁰⁷

Finally, representative government has received judicial comment. Mason CJ in *Australian Capital Television* provided that:

[t]he very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. ... [T]he representatives who are Members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.¹⁰⁸

¹⁰³ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 200 (McHugh J). See also *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J).

¹⁰⁴ *Constitution* s 7.

¹⁰⁵ *Constitution* s 24.

¹⁰⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁰⁷ Clarke, Keyzer and Stellos, above n 11, 97 [1.6.8]. See *McGinty v Western Australia* (1996) 186 CLR 140; *Langer v Commonwealth* (1996) 186 CLR 302. The electoral voting system was challenged twice in 2016; unsuccessfully in *Day v Australian Electoral Officer for the State of South Australia; Madden v Australian Electoral Officer for the State of Tasmania* [2016] HCA 20 and *Murphy v Australian Electoral Commissioner* [2016] HCA 36.

¹⁰⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137, 138 (Mason CJ).

In summary, the essence of representative government is that the ultimate source of control of governmental power in Australia is the Australian people.¹⁰⁹

III RESPONSIBLE GOVERNMENT

Responsible government ‘traditionally has been considered to encompass “the means by which Parliament brings the Executive to account” so that “the Executive’s primary responsibility in its prosecution of government is owed to Parliament.”’¹¹⁰ It is considered a ‘foundation stone of the Australian constitutional edifice [and] requires that a government obtain and maintain the confidence of the House of Representatives.’¹¹¹

There are principles by which responsible government operates. Those principles are largely not provided by formal written rules, rather, by convention for their legitimacy and authority.¹¹² It will be seen that some are constitutionally entrenched. These conventions include the following. First, the Governor-General must choose Ministers who enjoy confidence of the House of Representatives; though, in exercise of this power, responsible government requires the Governor-General to take ‘account of the functional necessity that the government *obtain and maintain* the support of the House of Representatives.’¹¹³ Additionally, the leader of the political party with a majority of seats the House of Representatives is the leader of the government¹¹⁴, known as the Prime Minister. In practice, the representatives appointed as Ministers come from that political party or coalition of parties.¹¹⁵

¹⁰⁹ See: *McGinty v Western Australia* (1996) 186 CLR 140, 273 (Gummow J), citing John Stuart Mill in his 1861 publication ‘Considerations on Representative Government’.

¹¹⁰ *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ) - footnote omitted.

¹¹¹ Michael Crommelin AO, ‘Governor-General and the Republic: Powers of the Head of State’ (2015) 38 *Melbourne University Law Review* 1118, 1127, referring to *Egan v Willis* (1998) 195 CLR 424, 448-53 [35]-[45] (Gaudron, Gummow and Hayne JJ), 472-5 [94]-[99] (McHugh J), 496 [140], 501-3 [152]-[155] (Kirby J).

¹¹² Clarke, Keyzer and Stellios, above n 11, 96 [1.6.4]. Though one reference to ‘responsible government’ is made in the *Crown Suits Act 1947* (WA) s 8(4). Note, though, that there is indirect reference relating to responsible government in the *Victorian Constitution*. See: Clark, above n 60, 19 [1.32]. Clark provides at that pinpoint that the ‘*Constitution Act 1975* (Vic) refers to the *Constitution Act 1855* (Vic) in which the term appears’.

¹¹³ Crommelin AO, above n 111, 1129 – emphasis added.

¹¹⁴ See above, ‘Chapter Two: I Australia’s System of Government A *The Parliament*’.

¹¹⁵ Clark, above n 60, 20 [1.32]; Clarke, Keyzer and Stellios, above n 11, 96 [1.6.5]. The authors also note that this convention applies to State Governors and are conscious that in Queensland, there is only one legislative chamber.

Second, Ministers must be members of either the House of Representatives or the Senate.¹¹⁶ Justice Gummow discusses this aspect in detail in *McGinty v Western Australia* to provide that there is a link between the ‘representative’ and ‘responsible’ aspects of our system of government ‘not from express terms so much as from the requirement in the last paragraph of s 64 that a Minister be a member of the Senate or the House of Representatives.’¹¹⁷

Third, the Governor-General acts on advice of the Ministers.¹¹⁸ However, as Appleby and Webster provide, ‘[t]he exercise of executive power in Australia must not only be understood by reference to the conventions, but also to the modern practice of responsible government.’¹¹⁹ This ‘modern practice’ is aptly articulated in *Egan v Willis*: to ‘question and criticise the government on behalf of the people’.¹²⁰ This is conducted through ‘the established mechanisms of parliamentary debate and question time, and the requirement that members of the Executive provide information to Select Committees of both Houses of Parliament.’¹²¹

Finally, ‘the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.’¹²²

Of particular importance when holding Ministers to account comes the role of the Senate, who, ‘through the use of its power of censure, has developed an important role in holding ministers answerable.’¹²³ While the power of censure is not under examination in this thesis, this illustrates how the Executive, through an individual Minister, is accountable to Parliament and the repercussions that censure can have on

¹¹⁶ See *Constitution* s 64.

¹¹⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 296 (Gummow J) – emphasis added.

¹¹⁸ See *Constitution* s 62.

¹¹⁹ Appleby and Webster, above n 63, 1143.

¹²⁰ *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ).

¹²¹ *Williams v Commonwealth* (2012) 248 CLR 156, 361 [515] (Crennan J). See: Weller, above n 62, 316-17.

¹²² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹²³ Thompson, above n 66, 664.

government.¹²⁴ In practice, however, strict responsibility is changing due to a ‘reduced political expectation that Ministers will be responsible to Parliament for the actions of their department.’¹²⁵ This is because, first, the sizes of departments are increasing; and secondly, the centralisation of decision making power vests in the Prime Minister and Cabinet. Therefore, individually, Ministers may increasingly have little autonomy over their own departments.¹²⁶ Therefore, securing accountability of *all* government activity is the very essence of responsible government.¹²⁷

The great significance of these conventions to the Australian system of government is illustrated, as the Court in *Lange* observed, by their embedding in ss 6, 49, 61, 62, 64, 83 and 128 of the *Constitution*.¹²⁸ This was analysed by the Court in *Egan v Willis*, critically, that:

those provisions of the Commonwealth Constitution which prescribe the system of responsible government [necessarily imply] ‘a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government...’¹²⁹

To broadly summarise, responsible government, then, is ‘that form of government in which the executive is drawn from the legislature and is constitutionally responsible to it.’¹³⁰ That function of the legislature, in this context, is to scrutinise Executive conduct.¹³¹ It holds the Executive to account, thus giving rise to the idea of

¹²⁴ Ibid 665. Censure is a formal expression of disapproval.

¹²⁵ Appleby and Webster, above n 63, 1149.

¹²⁶ Ibid.

¹²⁷ *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ) – footnote omitted.

¹²⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558-9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹²⁹ *Egan v Willis* (1998) 195 CLR 424, 451-2 [42] (Gaudron, Gummow and Hayne JJ). See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹³⁰ Malcolm Aldons, ‘Responsible, Representative and Accountable Government’ (2001) 60(1) *Australian Journal of Public Administration* 34, 35. See also the comment of Barwick CJ: ‘the *Australian Constitution* is built upon confidence in a system of parliamentary responsibility’: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24.

¹³¹ Christos Mantziaris, ‘Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege’ (Research Paper No 12, Laws and Bills Digest Group, Parliament of Australia, 1999-2000) 3.
<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP12#exploration>

‘accountable government.’¹³² Its effect is that ‘the actual government of the State is conducted by officers who enjoy the confidence of the people.’¹³³ This is the link¹³⁴ between ‘representative’ and ‘responsible’ government, by which the Executive is ultimately held to account by the people through their elected representatives. The ‘people’ are the ‘national group, the people of the Commonwealth’.¹³⁵ This is particularly necessary because although ‘[c]abinet and party are not recognised in the *Constitution*[,] they are the keys to the exercise of power.’¹³⁶

IV RESPONSIBLE GOVERNMENT AFTER WILLIAMS

The first part of this Chapter outlines and illustrates the importance of the separation of powers and its implementation in separating the three arms of government of the Commonwealth of Australia. It is a cornerstone of the *Constitution* and of the function of the Australian system of government. The second and third parts together introduced the concept of representative and responsible government and, particularly, how the *Constitution* entrenches these aspects to establish how government action is held to account by the citizenry.

Here, this paper argues that the traditional responsibility aspects of responsible government have been modified to suit the needs of contemporary Australian government. It does so as follows. First is a short discussion on a key aspect of responsible government: oversight of expenditure.¹³⁷ Second, the paper argues that after *Williams*, responsible government now takes account of two considerations: federal considerations and accountability considerations.

A Oversight of Expenditure

By way of background: there are functions specific to each House of Parliament and functions common to both Houses.¹³⁸ Of the common functions, one, known as

¹³² See generally: Aldons, above n 130.

¹³³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) – footnote omitted.

¹³⁴ *Ibid* 558-9.

¹³⁵ Elisa Arcioni, ‘Section 53 of the Constitution: An overlooked reference to the constitutional people’ (2013) 87 *Australian Law Journal* 784, 788.

¹³⁶ Weller, above n 62, 314.

¹³⁷ This is introductory and a substantive account will be provided in Chapter Four: III *Williams*, A *Oversight of Expenditure*.

¹³⁸ See: Aldons, above n 130, 36-8.

manifest legitimation, is described as ‘putting the parliamentary stamp of approval on decisions made elsewhere.’¹³⁹ In this sense, it is Parliament’s assent, by way of legislation, to Executive decisions. This paper analyses this in the context of assent to Executive expenditure. As I will analyse in Chapter Four, key issues in the *Pape* and *Williams* cases concern what is necessary for Parliament to assent to expenditure in support of the impugned Executive activities. The focus is on whether an Appropriation Act is sufficient for Parliament’s, and therefore, the people’s, consent to expend to support executive activity, or whether supporting legislation, which expressly displays fully-informed parliamentary approval, is required.

Executive expenditure has received judicial comment. In *Egan v Chadwick*, Priestley JA implies that ‘the expenditure of public money provided a criterion for the boundaries of executive activity subject to the scrutiny of Parliament.’¹⁴⁰ His Honour provides that:

[t]he entire conduct of the administration of the laws by the Executive is only possible by the use of people employed, in one way or another, by the Executive and by the use of assets of one kind or another, which may be publicly or privately owned but which in the latter case must be paid for. Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.¹⁴¹

¹³⁹ Ibid 38. Aldons also characterises the media as forming a big part in the accountability of Parliament as there are direct links to the citizen: 39-40.

¹⁴⁰ Mantziaris, above n 131, 15.

¹⁴¹ *Egan v Chadwick* [1999] NSWCA 176, [135] (Priestley JA) (Spigelman CJ and Meagher JA agreeing).

B *Australian Constitutional Considerations*

The concept of responsible government is recognised to adapt to the changing circumstances of government.¹⁴² Chapter Four argues that such a change began in *Pape* and developed in *Williams*.¹⁴³ This part provides a summary.

The paper argues that although the Court has accepted traditional aspects of responsible government,¹⁴⁴ one outcome of the holding in *Pape* and *Williams* provided a more Australian focused meaning,¹⁴⁵ particularly with regard to a two-tiered federal, as opposed to a unitary, system of government.

In upholding the plaintiff's claim in *Williams*, the majority judgments placed emphasis on structural considerations on the *Constitution*, which look at federal considerations¹⁴⁶ and accountability considerations.¹⁴⁷ The combination of this is argued to be a reformulation on the 'foundation of limitations on the Commonwealth Executive not previously appreciated.'¹⁴⁸ This is particularly emphasised by Gummow and Bell JJ, as their Honours provide that 'constitutional coherence is now key to understanding the Executive's powers'.¹⁴⁹ The two considerations refer to responsibility 'both nationally and federally.'¹⁵⁰ This paper argues that the national and federal considerations act as a limit on an expansion of the ambit of the Executive Power.

¹⁴² *Nationwide News v Wills* (1992) 177 CLR 1, 71-2 (Deane and Toohey JJ); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 230, 231 (McHugh J); *Egan v Chadwick* [1999] NSWCA 176 [15] (Spigelman CJ); Stellos, above n 48, 11-12, 548-9; Mantziaris, above n 131, 12.

¹⁴³ See Chapter Four: Controlling the Elusive: Responsible Government informing a limit on Executive Power.

¹⁴⁴ Outlined above in Part II Representative Government and Part III Responsible Government.

¹⁴⁵ Gabrielle Appleby and Steven McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 274.

¹⁴⁶ *Ibid* 263-70.

¹⁴⁷ *Ibid* 270-2.

¹⁴⁸ *Ibid* 273.

¹⁴⁹ *Ibid* 273.

¹⁵⁰ *Ibid* 273.

CHAPTER THREE: THE EXECUTIVE POWER

This Chapter introduces the Executive Power of the Commonwealth. First, it traces the evolution of our present form of Executive Government from the concept of the Crown. Second, it introduces the Executive Government's ability to act. Third, it establishes that the Executive Government is one of limited powers and explores why this is so.

I THE EXECUTIVE GOVERNMENT OF THE COMMONWEALTH

The Executive Government of the Commonwealth is provided for in Ch II of the *Constitution*, suitably entitled 'The Executive Government'. Much of the power on which the Executive Government relies is provided in s 61, that:

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.

Most power contained within s 61 was imported through the common law upon federation.¹⁵¹ An example is prerogative power.¹⁵² The recognition of this ancient and traditional power¹⁵³ illustrates that the form of Executive Government in Australia today derives from the Crown in the Westminster system.

A *The Crown*

An ample summary of the idea that is 'the Crown' is provided in *Sue v Hill*¹⁵⁴ in the joint judgment of their Honours Gleeson CJ, Gummow and Hayne JJ. The following five paragraphs are adapted from pages 497-500 of the judgment. Their Honours' summary is abridged as follows.

¹⁵¹ I note that the status of the extent of prerogative power the Commonwealth of Australia received is subject to debate and is largely unclear. In a recent decision of the High Court - which did not decide the issue - it was indicated that the power received by the Commonwealth Executive upon federation is not plenary as that of the Executive of the United Kingdom due to, *inter alia*, that the Commonwealth of Australia is a federal system as opposed to a unitary system: *Williams v Commonwealth* (2014) 252 CLR 416, 469 [82]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ). Crennan J agreed with the comments of the plurality save for the subject of the litigation being characterised differently under s 51(xxiiiA): 471 [99].

¹⁵² *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

¹⁵³ Sir John Comys, *A Digest of the Laws of England, Vol VII* (5th ed, 1826).

¹⁵⁴ *Sue v Hill* (1999) 199 CLR 462.

First, the use of the term ‘the Crown’ identifies the body politic. In Australia’s system of government, the Executive comprises the Federal Executive Council, or cabinet, through which the Governor-General, sitting as the Head of State, undertakes Executive action upon the Council’s advice. It is the ‘ultimate decision making body of the government.’¹⁵⁵

Secondly, it identifies the office of which is the manifestation of the international personality of a body politic (described above), by whom and to whom diplomatic representatives are accredited and by whom and with whom treaties are concluded. Further, it is a corporation sole and has perpetual continuance.¹⁵⁶ The Crown refers to the Monarch. Traditionally, the Monarch assents to legislation once it is passed through the Houses of Parliament.¹⁵⁷ This developed from the steady growth of Parliament’s authority in England. In short, once a Bill is passed through the House of Commons and the House of Lords, it is then presented to the Monarch for Royal Assent or veto. In Australia, assent is given by the Governor-General through its function as the Queen’s representative as provided by s 61 of the *Constitution*.¹⁵⁸ In contemporary practice, particularly since the passage of the *Australia Act*, assent is no longer on behalf of the Queen and her Dominion, rather, solely on behalf of the Commonwealth of Australia.¹⁵⁹

Thirdly, the Crown identifies the government; that being the executive branch as distinct from the legislative branch.

Fourthly, the use of the term ‘the Crown’ arose during the course of colonial development in the nineteenth century, identifying the paramountcy of the powers of the United Kingdom, the ‘parent state.’

Finally, the phrase ‘under the Crown’ in the preamble to the *Constitution* and ‘heirs and successors in the sovereignty of the United Kingdom’ in covering clause 2

¹⁵⁵ Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Kosh, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2nd ed, 2007) 222.

¹⁵⁶ Clark, above n 60, 210 [8.2].

¹⁵⁷ Known as ‘Royal Assent’.

¹⁵⁸ *Sue v Hill* (1999) 199 CLR 462, 498 (Gleeson CJ, Gummow and Hayne JJ).

¹⁵⁹ The effect of the *Australia Act* is discussed below at ‘C Transition to the Modern Day Executive’.

involves the use of the Crown as referring to ‘the Queen’¹⁶⁰ – or the person occupying the hereditary office of Sovereign of the United Kingdom – or her heirs under the rules of succession of the United Kingdom.¹⁶¹

B *The Role of the Monarch in Australia*

The role of the Monarch is now largely ceremonial. As summarised by Blackshield and Williams, writing on the Executive Power’s exercise in the name of the Monarch:

...the ceremonial jewelled headpiece is used as a metonymous figure of speech as a depersonalised symbol of the monarch, who is in turn treated as a personalised symbol of what in other constitutional systems is usually referred to as the State.¹⁶²

That power now, as noted,¹⁶³ is exercised in Australia by the Governor-General as the Head of State on advice of the Federal Executive Council. As explained by Professor Corbett:

[...] the prerogative powers of the Crown were personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament. In Australia, however, those powers were never personal powers of the King [...] in the scheme of colonial government, the powers of the Crown and the Prerogative really represent [...] those paramount powers which would naturally belong to a parent State in relation to [...] its dependencies...¹⁶⁴

Examining the historical role of the Monarch is important to establish that it is Parliament who provides a check to that Executive Power. This developed from the

¹⁶⁰ In recognition of the fact that at federation, the Sovereign was her Majesty Queen Victoria.

¹⁶¹ Note that as at 26 March 2015, following the Perth Agreement, the *Succession to the Crown Act 2013* (UK) is in force. It, *inter alia*, removed male-based primogeniture and provides for absolute primogeniture. If, for example, the first child of Prince William and Princess Catherine, the Duke and Duchess of Cambridge, was born on or after 26 March 2015 and was female, and then had a second child who was male, the Act provides that the first-born female will be the next in line to the throne after her father.

¹⁶² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006) 520.

¹⁶³ See: Chapter Two: I Australia’s System of Government, B *The Executive* and above: I The Executive Government of the Commonwealth, A *The Crown*.

¹⁶⁴ Pitt Corbett, ‘The Crown as Representing the State’ (1904) 1 *Commonwealth Law Review* 145, 146-7.

rise of parliamentary supremacy in the United Kingdom, where the Monarch was accountable to the House of Commons for the actions of the Crown. As discussed,¹⁶⁵ it is the case in Australia that the Executive is responsible to the Parliament.

C *Transition to the Modern Day Executive*

A distinction to draw from Professor Corbett's quotation above is whether one refers to the office of the Crown or the 'office holder'. As discussed, in the Australian system of government, we refer to the office holder as exercising the power, not the Sovereign itself.¹⁶⁶

Australian constitutional theory provides that the idea of the Executive now known arose 'once the colonies acquired an element of self-government "under the Crown"'.¹⁶⁷ As recognised in *Engineers*, at that time, the office of 'the Crown [was] one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities...'¹⁶⁸ This is known as the theory of 'indivisibility of the Crown'.

The theory of indivisibility of the Crown emerged to ensure that prerogative power was only exercised by the Crown – being the Monarch of the United Kingdom. This was because at that time there were both 'British subjects' and 'subjects of the Queen'. Though textually distinct, the terms appear, *prima facie*, similar. A plain reading alludes that the former are citizens of the United Kingdom, as distinct from the latter, appearing to be any of her Majesty's citizens across the Commonwealth Dominions. It is the case that the terms are used in parallel and, in effect, render the same meaning. A useful illustration is provided in *Nolan v Minister for Immigration & Ethnic Affairs*:

The terms 'British subject' and 'subject of the Queen' were essentially synonymous. The British Empire continued to consist of one sovereign State and its colonial and other dependencies with the result [that] there was no need to modify either the perception of an indivisible Imperial Crown or the

¹⁶⁵ See: Chapter Two: I Australia's System of Government: B *The Executive*.

¹⁶⁶ See: *ibid*.

¹⁶⁷ Clarke, Keyzer and Stellios, above n 11, 860 [8.2.1].

¹⁶⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

doctrine that, under the common law, no subject of the Queen was an alien in any part of Her Majesty's dominions...¹⁶⁹

Following this was recognition of 'the transition from Empire to Commonwealth and the emergence of Australia and other Dominions as independent sovereign nations within the Commonwealth'¹⁷⁰ of nations. The transition was not instant and, prior to the discussion addressing the transition, it is helpful to refer to the comprehensive review of the history of the Executive Power to its present day form, as provided by Gageler J in *Plaintiff M68-2015*.¹⁷¹ Of significance, his Honour, quoting Professor Finn, provided:

"Responsible government left unsevered the many constitutional links with the Queen. Even the royal power of veto of colonial legislation remained. And in each colony the Queen's representative, the Governor, persisted as a fixture on the local stage. But also so did the Executive Council, a body hitherto formed of official appointees to advise the Governor in the exercise of the majority of his powers."¹⁷²

Those 'links'¹⁷³ are: first, the *Balfour Declaration*; secondly, the *Statute of Westminster*; and thirdly, the *Australia Acts*. Over a 60-year period, each link was broken. In short, it involved the passage of legislation from the British Parliament, as the Imperial Government, providing more power to each of the Commonwealth Dominions. Beginning with the *Balfour Declaration*, each Dominion rose to have the same legislative power as the British Parliament. It continued with the *Statute of Westminster*, which provided that from then on, British Legislation would no longer bind on the Dominions. Finally, the *Australia Acts*, considered the final link to be broken, statutorily abolished appeals to the Privy Council and no longer bound the State Governments to legislation passed by the British Parliament.

It is the result of these events that an independent Executive Government – that being wholly independent of the control and oversight of the United Kingdom – took form.

¹⁶⁹ *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

¹⁷⁰ *Ibid* 184.

¹⁷¹ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 90 ALJR 297, 321-4 [115]-[128] (Gageler J).

¹⁷² *Ibid* 321 [116] (Gageler J).

¹⁷³ Though Gageler J refers to these as links, Professor Finn has referred to them as 'ties': see Paul Finn 'A Sovereign People, A Public Trust' in Finn (ed), above n 65, 1, and generally: Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987). Each adjective refers to the same concept.

Each event is now developed

1 *The Balfour Declaration*

The *Balfour Declaration* occurred in 1926. It arose from a request of the Canadian Prime Minister, the Right Honourable Mackenzie King, following concerns of ‘British influence’ in a Canadian political crisis,¹⁷⁴ and the decision of the Privy Council in *Nadan v R* [1926] AC 482. The request was for an Imperial Conference and was attended, along with the Canadian Prime Minister, by the Prime Minister’s of the United Kingdom, Australia, New Zealand, Newfoundland and South Africa.

The *Balfour Declaration* provided that:

Great Britain and the Dominions ... are autonomous communities within the British Empire equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown...¹⁷⁵

Effectively, the *Balfour Declaration* announced that the Dominions of the Commonwealth were equal in power to that of the Imperial Parliament.

2 *The Statute of Westminster*

The second step, the adoption of the *Statute of Westminster 1931* (UK) arose after an Imperial Conference on Dominion Legislation and Merchant Shipping Legislation was held in 1929. A recommendation of the Imperial Conference was that the Imperial Parliament legislate to free the self-governing dominions from their ‘legal subservience to Imperial legislation.’¹⁷⁶ The recommendations were taken to the 1930 Imperial Conference of Dominion Prime Ministers and were endorsed. The *Statute of Westminster* provided, *inter alia*, that the Imperial Parliament ‘would enact new legislation in areas of Dominion constitutional responsibility only with the “request and consent” of their parliaments.’¹⁷⁷

¹⁷⁴ Known as the ‘King-Byng’ affair, the crisis occurred when the Governor-General of Canada, the Lord Byng of Vimy, refused the request of Prime Minister King to dissolve Parliament and call a general election.

¹⁷⁵ *Balfour Declaration*, Report of Imperial Conference (1926) Cmd 2768.

¹⁷⁶ Clarke, Keyzer and Stellios, above n 11, 41 [1.2.13].

¹⁷⁷ *Ibid.*

Australia adopted the *Statute of Westminster* in 1942 by passing the *Statute of Westminster Adoption Act 1942* (Cth). As provided by s 3, the *Adoption Act* applied retroactively to 3 September 1939. This was necessary so Australia could justify its use of war powers in World War II without committing war crimes under British law.¹⁷⁸

3 *The Australia Acts*

The third and final act that completed the separation of the links that bound Australia to the United Kingdom was the enactment of the *Australia Act 1986*. The process began in 1984 by an agreement of the Commonwealth and State governments to ‘terminate the relics of the states’ colonial pasts.’¹⁷⁹ Two methods were used in order to achieve this. First, a request, coupled with supporting legislation from the States and the Commonwealth, was made to the British Parliament to consent to and enact a Bill that contained the substantive provisions severing the final links between Australia and England. The enactment of a Bill by the British Parliament is said to have been passed ‘out of a perceived need for abundant caution’¹⁸⁰ so to ‘ensure no argument could occur as to the validity of the arrangements.’¹⁸¹ The second method was for a Bill to be enacted by the Commonwealth Parliament at the request of all State legislatures under s 51(xxxviii) of the Constitution.¹⁸²

For the legislative sphere, the *Australia Act* terminated the British Parliament’s power to legislate for the States. Further, it gave the State Legislatures the power to legislate contrary to British legislation which previously had overriding force. This was provided for because s 2 of the *Statute of Westminster* did not apply to the States.¹⁸³ For the Executive sphere, it provided that the powers and functions of the

¹⁷⁸ It was more recently engaged in analysing the case in *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

¹⁷⁹ Clarke, Keyzer and Stellios, above n 11, 45 [1.2.21].

¹⁸⁰ *Sue v Hill* (1999) 199 CLR 462, 491 (Gleeson CJ, Gummow and Hayne JJ).

¹⁸¹ Stellios, above n 48, 459.

¹⁸² Gabriel A Moens and John Trone, *Lumb Moens & Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 9th ed, 2016) 24 [31]. Both methods were utilised as there was uncertainty in the scope of s 51(xxxviii). In 1999, Gleeson CJ, Gummow and Hayne JJ commented that s 1 of the *Australia Act 1986* (Cth) had been validly enacted by the Commonwealth Parliament utilising s 51(xxxviii): *Sue v Hill* (1999) 199 CLR 462, 491-2 [63].

¹⁸³ Stellios, above n 48, 456.

Monarch in State matters are now vested in State Governors.¹⁸⁴ In the judicial arena, appeals to the Privy Council were formally terminated.¹⁸⁵

Coming into force on 3 March 1986, the *Australia Act* marked the end of the legal sovereignty¹⁸⁶ of the Imperial Parliament. The traditional monarchical executive power was now solely exercisable by the Cabinet of the Commonwealth of Australia¹⁸⁷ and it was now recognised that ‘ultimate sovereignty resided in the Australian people.’¹⁸⁸

II THE BASES OF EXECUTIVE POWER

*The sparse and sometimes cryptic wording of s 61, the constitutional provision that vests executive power, has rendered elusive the goal of identifying a unified and judicially accepted theory for executive power.*¹⁸⁹

Executive power is not defined within s 61 itself.¹⁹⁰ Though the power has been analysed and discussed in numerous cases and academic articles, attempts at an exhaustive definition have been expressly avoided.¹⁹¹ Unlike s 51, the construction

¹⁸⁴ Moens and Trone, above n 182, 25-6 [32].

¹⁸⁵ *Australia Act 1986* (Cth) s 11. Note that prior to this, in 1968 and 1975, the Commonwealth enacted legislation that limited appeals with respect to Commonwealth law and appeals from the High Court, respectively the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth). The High Court denied a s 74 certificate of appeal to the Privy Council in *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 and provided ‘[A]lthough the jurisdiction to grant a certificate stands in the Constitution, such limited purpose as it had has long since been spent.’ [5] (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). For a comprehensive history, see Gleeson, above n 18, speech delivered in Sydney on 31 May 2007.

¹⁸⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ).

¹⁸⁷ In a practical sense.

¹⁸⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ).

¹⁸⁹ Andrew McLeod, ‘The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*’ (2010) 32 *Sydney Law Review* 123, 123-4.

¹⁹⁰ George Winterton, ‘The Relationship between Commonwealth Legislative and Executive Power’ (2004) 25 *Adelaide Law Review* 21, 24.

¹⁹¹ See *Williams v Commonwealth* (2012) 248 CLR 156, 226-7 [121] (Gummow and Bell JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 462-3 [220] (Gummow and Hayne JJ); Michael Crommelin, ‘The Executive’ in Greg Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books, Sydney, 1986) vol 6, 127, 147; P H Lane, *Lane’s Commentary on the Australian Constitution* (Law Book Co, 2nd ed, 1997) 434; Geoffrey Lindell, ‘The changed landscape of the Executive Power of the Commonwealth after the *Williams* case’ (2013) 39(2) *Monash University Law Review* 348, 353. Note the High Court expressed that the executive power had not been defined in *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J), and in the year 2000 ‘the scope of the power remains open to some debate’: *R v Hughes* (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see generally: Winterton, above n 190, 24.

of s 61 ‘is not weighted down by a rich body of jurisprudence.’¹⁹² Judicially, it has been described as ‘generic’,¹⁹³ and in commentary, as ‘notoriously elusive’.¹⁹⁴ Despite this, what has been identified analysis over the years are the aspects of executive power – or the bases on which the Executive acts. The bases of Executive Power, as French CJ provided in *Williams*, non-statutory power, prerogative power and power deriving from its status as a national government – the nationhood power.¹⁹⁵ These will be discussed in turn.

A *Non-Statutory Power*

The non-statutory aspect of the Executive Power refers to the Executive’s ability to act without legislation.¹⁹⁶ This part of the discussion focuses on the aspect of non-statutory power that is not recognised as prerogative or nationhood power. The ability to act by engaging prerogative or nationhood power will be discussed in turn below.¹⁹⁷

The Executive has a limited ability to act without legislation required to support the action or activity. In the text of s 61, text that is recognised as ‘meagre and highly abstract’,¹⁹⁸ there are two phrases of significance. The first is ‘the execution and maintenance of this Constitution’. The second is ‘the execution and maintenance ... of the laws of the Commonwealth.’ The former is simply defined as the ‘Commonwealth’s ability to act in “execution” of the *Constitution* and federal laws.’¹⁹⁹ This pre-supposes an existing law that requires execution.²⁰⁰ The latter is

¹⁹² Hume, Lynch and Williams, above n 19, 91.

¹⁹³ *Le Mesurier v Connor* (1929) 42 CLR 481, 514.

¹⁹⁴ Grant Donaldson, ‘Aspects of State Executive Powers’ (2013) 36(2) *University of Western Australia Law Review* 145, 145.

¹⁹⁵ *Williams v Commonwealth* (2012) 248 CLR 156, 184-5 [22] (French CJ). Note that this not to ignore the four classes his Honour identified in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [126]-[127]. It is unnecessary to comment on the executive power to ‘execute’ the laws of the Commonwealth as provided textually in s 61. Additionally, it is unnecessary to comment on other executive powers derived from other sections of the *Constitution*, for example, as Twomey notes, ss 72 and 119. See: Twomey, above n 32, 316 at fn 21.

¹⁹⁶ Of course, the Executive can be delegated authority from Parliament to make subordinate legislation: see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

¹⁹⁷ See: B *Prerogative Power* and C *Nationhood Power*.

¹⁹⁸ Winterton, above n 190, 25.

¹⁹⁹ Nicholas Condylis, ‘Debating the Nature and Ambit of the Commonwealth’s Non-Statutory Executive Power’ (2015) 39 *Melbourne University Law Review* 385, 386. With reference to *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 431-2 (Knox CJ and Gavan Duffy J).

²⁰⁰ Martin Redish, *The Constitution as Political Structure* (Oxford University Press, 1995) 117.

interpreted as ‘a power to act without legislative authorisation’.²⁰¹ It is, therefore, referred to as non-statutory executive power²⁰² and reflects ‘the absence of parliamentary approval.’²⁰³

Prior to *Williams*, there was a long-standing assumption that the Commonwealth could act without legislation so long as the action *could* fall within Commonwealth legislative power. This is commonly referred to as Winterton’s ‘breadth’ conception of the executive power.²⁰⁴ This assumption is expressed in the *AAP Case*, as seen by Barwick CJ’s statement that ‘the executive may only do what has been or could be the subject of valid legislation.’²⁰⁵ The assumption has received treatment in both a number of cases heard prior²⁰⁶ and subsequent²⁰⁷ to the *AAP Case* and is the subject of considerable commentary.²⁰⁸

Despite the force behind the opinion in the *AAP Case*, the Court in *Williams* held that this conclusion cannot be drawn from the *AAP Case*.²⁰⁹ Apart from delegated

²⁰¹ Condylis, above n 199, 386 – referring to *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J).

²⁰² See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 564-5 [141] (Hayne and Bell JJ).

²⁰³ Condylis, above n 199, 386-7.

²⁰⁴ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29-30, 40-4.

²⁰⁵ *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ). See also 379 (Gibbs J), 396 (Mason J) and 405-6 (Jacobs J). Note that the expression by Gibbs and Mason JJ is written in the negative, that the power ‘does not reach beyond’ rather than ‘extend to the limit of’ the legislative power.

²⁰⁶ *Joseph v Colonial Treasurer of NSW* (1918) 25 CLR 32, 46-7 (Isaacs, Powers and Rich JJ); *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 10 (Knox CJ, Gavan Duffy, Rich and Starke JJ); *Attorney-General (Vic); ex rel Victorian Chamber of Manufactures v Commonwealth* (1925) 52 CLR 533, 567 (Starke J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643-4 (Latham CJ); *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 321 (Evatt J).

²⁰⁷ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 61 (Barwick CJ), 113 (Aickin J); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ), 110 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 248 CLR 1, 59 [124] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).

²⁰⁸ See: Michael Crommelin and Gareth Evans, ‘Explorations and Adventures with Commonwealth Powers’ in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (Heinemann, 1977) 24, 43; P H Lane, *The Australian Federal System* (Law Book, 2nd ed, 1979) 430-1; Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 255; Peter Gerangelos, ‘Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 189, 192, 195; Twomey, above n 32, 321; 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, 104.

²⁰⁹ *Williams v Commonwealth* (2012) 248 CLR 156, 180 [4], 187 [27] (French CJ), 232 [135] (Gummow and Bell JJ), 358 [544] (Crennan J).

legislative authority, the executive may not create law, only execute it.²¹⁰ French CJ, for example, accepts that executive activity need not always rely on statutory authorisation, however, limits this to ‘the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth *once that law has taken effect*.’²¹¹ His Honour supports this with reference to statements in *Re Residential Tenancies Tribunal* that limit the autonomy of the executive to the ordinary course of administering government²¹² and action appropriate to its position in the *Constitution*,²¹³ for example, ‘the administration of departments of State under s 64’.²¹⁴ This has been further defined as ‘the ordinary services of government.’²¹⁵ Other examples are the power to *enter* into contracts or agreements, employ staff and own and convey property.²¹⁶ Therefore, it includes ‘salaries for public service employees, maintenance of buildings and equipment and other *recurrent* expenses.’²¹⁷ Gummow and Bell JJ are unequivocal in rejecting the proposition that the executive power is co-extensive with legislative power,²¹⁸ because if it were so, it would ‘undermine the basal assumption of legislative predominance inherited from the United Kingdom and would distort the relationship between Ch I and Ch II of the *Constitution*.’²¹⁹ Crennan J forcefully rejects the idea that the executive could do anything that could be characterised under a legislative head of power because it would resemble prerogative power.²²⁰ Finally, Hayne J, while not deciding on this point, specifically noted that as a result of *Pape*, the Executive Power of the Commonwealth ‘does not exist separate to and independent of the scope of the legislative power with respect to spending regarding every matter that the legislative power has competence over.’²²¹ Though *Williams* represents an enormous shift from the position in the *AAP Case*, the position is by no means

²¹⁰ Ibid, 187 [27] (French CJ). See also *R v Kidman* (1915) 20 CLR 425, 441 (Isaacs J).

²¹¹ Ibid 191, [33] (French CJ) – emphasis added.

²¹² *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 455 (McHugh J).

²¹³ Ibid 464 (Gummow J).

²¹⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 191 [34] (French CJ).

²¹⁵ Gabrielle Appleby, ‘There must be limits: the Commonwealth spending power’ (2009) 37 *Federal Law Review* 93, 96.

²¹⁶ Twomey, above n 32, 316. I italicise ‘enter’ to draw attention to the fact that I do not state the capacity of the Commonwealth to enter into a contract to support the proposition that the Commonwealth can execute the contract or to spend money associated with the fulfilment of the terms of such a contract. All I intend to convey is that the Commonwealth has a contractual capacity, and therefore by entering into a contract, is able to satisfy the common law criterion of having an ‘intention’ to enter contractual relations.

²¹⁷ Appleby, above n 215, 96 – emphasis in the original.

²¹⁸ *Williams v Commonwealth* (2012) 248 CLR 156, 232 [134] (Gummow and Bell JJ).

²¹⁹ Ibid [136] (Gummow and Bell JJ).

²²⁰ Ibid 358 [544] (Crennan J).

²²¹ Ibid 249 [194] (Hayne J).

decisively settled.²²² Subsequent cases are required to clarify and solidify the position.

B Prerogative Power

Traditionally, prerogative power is (or was) exercised by custom or necessity by the Monarch. It is loosely described as that ‘for which the law has made no provision.’²²³ It is well established that the Commonwealth of Australia has prerogative power.²²⁴ Prerogative power was imported into s 61 at federation²²⁵ and its use extends to singular and specific actions.²²⁶ Evatt J in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* provided three classes of prerogative. The first are executive prerogatives, such as the power to declare war, make peace, enter into treaties and establish Royal Commissions.²²⁷ The second pertain to certain preferences and immunities, such as being a priority creditor and immunity from the court process. The third are proprietary rights, such as precious metals, royal fish, treasure trove and ownership of the foreshore.²²⁸

In keeping with its traditional origins, new prerogative powers cannot be created.²²⁹ Existing prerogatives can adapt to modern circumstances;²³⁰ however, Winterton warns that Courts should exercise caution in doing so because ‘the line between adaption of an existing prerogative and the creation of a new power may be a fine

²²² See eg, the powerful dissent of Heydon J in *Williams v Commonwealth* (2012) 248 CLR 156, 282-336 [291]-[449]. Note also the weight of commentary against the proposition: Michael Crommelin and Gareth Evans, ‘Explorations and Adventures with Commonwealth Powers’ in Evans (ed), above n 208, 24, 43; Lane, above n 208, 430-1; Zines, above n 208, 255; Peter Gerangelos, ‘Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis’ in Lane and Gerangelos, above n 208, 189, 192, 195; Twomey, above n 32, 321; Gerangelos, above n 208, 128-31.

²²³ *Laker Airways Ltd v Department of Trade* [1977] QB 643, 705 (Lord Denning MR).

²²⁴ *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 437-9 (Isaacs J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); *Sue v Hill* (1999) 199 CLR 462, 501-3 [90]-[94] (Gleeson CJ, Gummow and Hayne JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ).

²²⁵ *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

²²⁶ Comys, above n 153, 45, 48. Note that I do not intend to provide a comprehensive summary of every prerogative power. Nor do I intend to provide a comprehensive overview of prerogative power. The intention here is to establish that prerogative power exists and is a limited power.

²²⁷ See eg, *Clough v Leahy* (1904) 2 CLR 39.

²²⁸ *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 320-1 (Evatt J).

²²⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ), quoting *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ). See 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.

²³⁰ Twomey, above n 229, 14.

one'.²³¹ It is conclusive that prerogative power does not establish broad areas of discretion within which the executive may do as it pleases.²³² It is limited 'to those powers that can be identified to historical use and which have not been subsequently abrogated by legislation.'²³³

It is long acknowledged by the High Court 'that the executive power of the Commonwealth includes the Crown's prerogative powers which are appropriate to the Commonwealth's constitutional sphere of activity.'²³⁴ It is in this way that the prerogative is limited to reflect the constitutional landscape of Australia: that of a federal, and not a unitary state.²³⁵ It affects the way the prerogative operates for the Commonwealth of Australia as distinct from the way the Royal Prerogative in the United Kingdom operates because it must take into account the inherent power of the State Executive.²³⁶ State Executive power is derived directly from the United Kingdom whose constitutional system is built on convention. This is in sharp contrast to the debated, refined and written rules of the *Australian Constitution* that provide for both a central Commonwealth and various State governments to operate concurrently, within their own respective roles. This is further supported by commentary, providing that the prerogative is not 'at large and must be interpreted

²³¹ Winteron, above n 204, 120-1. See eg, *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26.

²³² *Williams v Commonwealth* (2014) 252 CLR 416, 469 [82]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265, 285 (Gummow J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Sue v Hill* (1999) 199 CLR 462, 501-3 [90]-[94] (Gleeson CJ, Gummow and Hayne JJ), 525-6 [165]-[166] (Gaudron J); *Williams v Commonwealth* (2012) 248 CLR 156, 187 [27], 192-3 [36]-[37], 203-6 [58]-[61] (French CJ), 228-33 [125]-[137], 236-9 [150]-[159] (Gummow and Bell JJ), 253-4 [204]-[206], 258-9 [215]-[216] (Hayne J), 347-8 [501]-[503], 352-3 [518]-[524], 355-8 [535]-[544] (Crennan J), 368-9 [577], 370 [581], 373-4 [594]-[595] (Kiefel J). Cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ); *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ).

²³³ Twomey, above n 229, 14.

²³⁴ Winteron, above n 190, 26. See fn 39: *Barton v Commonwealth* (1974) 131 CLR 477 (Mason J); *Johnson v Kent* (1975) 132 CLR 164, 169 (Barwick CJ), 174 (Jacobs J); *Victoria v Commonwealth* (1975) 134 CLR 338, 405-6 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 108 (Brennan J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 464, 474 (Gummow J).

²³⁵ *Sue v Hill* (1999) 199 CLR 461, 501-3 [90]-[94] (Gleeson CJ, Gummow and Hayne JJ). See also, Seddon's phrase '...the prerogative powers "inherited", so far as relevant and applicable to Australia...': Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 76 [2.11] – my emphasis. See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law – A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 157. Note, however, that English constitutional history remains influential in determining executive power, including prerogative power: Gerangelos, above n 208, 117.

²³⁶ And given further legitimacy in time of tension by the *Colonial Laws Validity Act 1865* 28 & 29 Vict c 63. See generally: Seddon, above n 235.

consistently with the imperatives of Australian federalism.²³⁷ Viewing it otherwise would be contrary to Australia's system of responsible government.²³⁸

C Nationhood Power

The concept of 'nationhood' is unique to Australian Executive Power. It is not non-statutory power. Nor is it characterised as prerogative power. It operates independently of these aspects of the Executive Power.²³⁹ Nationhood power is an implied power that stems from the Commonwealth of Australia's existence and character as a national government.²⁴⁰ The most accepted description of the nationhood power is that of Mason J in the *AAP Case*, that:

[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.²⁴¹

Its measure is by 'reference to Australia's status as a sovereign nation and by reference to the terms of the *Constitution* itself.'²⁴² Its scope, however, is still unclear.²⁴³

1 *The History of the Nationhood Power*

Though most of the jurisprudence on the nationhood power has been provided in the 41 years since the *AAP Case*, the first half of the 20th century hinted at 'an alternative

²³⁷ Gerangelos, above n 208, 106.

²³⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ); *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 577-9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Williams v Commonwealth* (2012) 248 CLR 156, 204 [58] (French CJ), 351 [515] (Crennan J). See also: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ), 123 [335] (Hayne and Kiefel JJ); McLeod, above n 189, 138; Cheryl Saunders, 'The sources and scope of the Commonwealth power to spend' (2009) 20 *Public Law Review* 256, 261-2.

²³⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 543 [193] (French J).

²⁴⁰ See *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ), 396 (Mason J), 406 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J); *Ruddock v Vadarlis* (2001) 110 FCR 491, 542 [191] (French J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [214]-[215] (Gummow, Crennan and Bell JJ).

²⁴¹ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J).

²⁴² *Ruddock v Vadarlis* (2001) 110 FCR 491, 542 [191] (French J).

²⁴³ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 48-9 [92] (French CJ); Twomey, above n 32, 327-42; Appleby and Webster, above n 63, 1164.

functional power lurking directly in s 61.²⁴⁴ A somewhat faint idea of nationhood presented in *R v Burgess; Ex parte Henry*²⁴⁵ in which it was held that treaty implementation is valid when the treaty is bona fide²⁴⁶ and of international concern – though in this author’s view, such a process is more a function of Australian prerogative. More decidedly, after World War II, the judgments of *Burns v Ransley*²⁴⁷ and *R v Sharkey*²⁴⁸ provided the first engagement of nationhood power when enacting legislation against subversion and sedition. This led Dixon J in the *Australian Communist Party Case* to express that the power of nationhood confers a protective aspect, and reflected²⁴⁹ that:

[h]istory and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.²⁵⁰

Preferring the view of the United States on this topic, his Honour quotes from Black’s *American Constitutional Law*²⁵¹ that:

[i]t is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities.²⁵²

From here, jurisprudence on the nationhood power lay stale for approximately 20 years until *Barton v Commonwealth*.²⁵³ Casting a wider scope than the precise refinement in the *AAP Case*, Mason J commented on executive power in s 61 more generally, that the power:

²⁴⁴ Condylis, above n 199, 392 – referring to *R v Kidman* (1915) 29 CLR 425, 438 (Griffith CJ), 440 (Isaacs J).

²⁴⁵ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

²⁴⁶ Though this aspect of *bona fides* is likely displaced by the geographic externality principle: *XYZ v Commonwealth* (2006) 227 CLR 532.

²⁴⁷ *Burns v Ransley* (1949) 79 CLR 101. See 116 (Dixon J).

²⁴⁸ *R v Sharkey* (1949) 79 CLR 121. See 148 (Dixon J).

²⁴⁹ Peter Gerangelos, ‘The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, ‘Nationhood’ and the Future of the Prerogative’ (Legal Studies Research Paper No 12/85, November 2012) Sydney Law School, 33.

²⁵⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187 (Dixon J). See also 232 (Williams J).

²⁵¹ Citations omitted.

²⁵² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188 (Dixon J).

²⁵³ *Barton v Commonwealth* (1974) 131 CLR 477.

extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.²⁵⁴

As provided at the beginning of this section,²⁵⁵ one year later in the *AAP Case*, Mason J provided what is to date the most accepted description of and test for an engagement of nationhood power.²⁵⁶

2 *Davis v Commonwealth*

The nationhood power was again at issue in *Davis v Commonwealth*.²⁵⁷ The case concerned the validity of sections of the *Australian Bicentennial Authority Act 1980* (Cth)²⁵⁸ which, *inter alia*, created the Australian Bicentennial Authority for the purpose of commemorating the 200 years of Australia since settlement by the First Fleet in 1788. The Act further provided, *inter alia*, that the use of any ‘prescribed expressions’²⁵⁹ in connection with the sale or supply of goods, are prohibited without obtaining express permission of the Authority. The challenge arose when the plaintiff, Louis Edward Davis,²⁶⁰ was refused permission to sell t-shirts with the words ‘200 years of suppression and depression’. ‘1788’ and ‘1988’ bordered the t-shirts.

The Court ultimately held that ss 22²⁶¹ and 23²⁶² were invalid and that s 22(6)(d)(i) was invalid to the extent that it referred to the expression ‘200 years’.

Of significance in this judgment was an acceptance of both of Mason J’s observations in *Barton v Commonwealth* and the *AAP Case* as referred above,²⁶³ and

²⁵⁴ *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

²⁵⁵ See: III The Bases of Executive Power C *The Nationhood Power*.

²⁵⁶ In particular, Heydon J was critical of the defendants deliberate omission of the final 13 words (‘and which cannot otherwise be carried on for the benefit of a nation’) of Mason J’s nationhood test: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 177-80 [511]-[518] (Heydon J).

²⁵⁷ *Davis v Commonwealth* (1988) 166 CLR 79.

²⁵⁸ Specifically, ss 6-18, 22, 23 and 25.

²⁵⁹ Such expressions included ‘bicentenary’, ‘bicentennial’, ‘200 years’, ‘Australia’, ‘Sydney’, ‘Melbourne’, ‘founding’, ‘first settlement’, ‘exposition’, ‘expo’ and ‘world fair’. These terms could not be used in connection with ‘1788’, ‘1988’ or ‘88’.

²⁶⁰ Along with Allan Santo and Ernie Creighton.

²⁶¹ Offensive goods.

²⁶² Any goods that offended against s 22 would be forfeit to the Commonwealth.

an extension to the effect that the status of the States were expressly captured within the definition. This was provided by Mason CJ, Deane and Gaudron JJ as follows:

[T]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.²⁶⁴

Wilson and Dawson JJ took a cautious view of the nationhood power when reviewing the ‘protective’²⁶⁵ aspect, expressing that there is ‘nothing to support the notion that the Commonwealth Parliament has power to legislate with respect to anything it regards of national interest and concern.’²⁶⁶ With respect to Mason J’s ‘character and status of the Commonwealth as a national government’ concept, their Honours viewed this as ‘an element to be considered in the construction of s 61 of the Constitution’.²⁶⁷

Their Honours pointed out what was provided by Gibbs J in the *AAP Case* that ‘the growth of Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution.’²⁶⁸

Finally, Brennan J provided that the nationhood power is twofold in that it has a protective aspect ‘against forces which would weaken it’, and an advancement aspect ‘whereby its strength is fostered.’²⁶⁹

3 *What is ‘the nation’*

What then is the ‘nation’ which nationhood protects and advances? Brennan J provided a complete and historically based description that:

²⁶³ *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ). See also 110-11 (Brennan J).

²⁶⁴ *Ibid* 93-4 (Mason CJ, Deane and Gaudron JJ).

²⁶⁵ The ‘subversion’ and ‘sedition’ cases of *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121 and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

²⁶⁶ *Davis v Commonwealth* (1988) 166 CLR 79, 102 (Wilson and Dawson JJ).

²⁶⁷ *Ibid* 103 (Wilson and Dawson JJ).

²⁶⁸ *Ibid* 102-3 (Wilson and Dawson JJ).

²⁶⁹ *Ibid* 110 (Brennan J).

...the Constitution did not create a mere aggregation of colonies, redistributing the powers between the government of the Commonwealth and the governments of the States. The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite ‘in one indissoluble Federal Commonwealth’, melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition...²⁷⁰

And, in effortlessly capturing the vision and aspiration of the Framers:

The end and purpose of the Constitution is to sustain the nation.²⁷¹

IV A POWER SO LIMITED: THE CONSTRAINTS ON THE EXECUTIVE POWER

With ‘the nation’ in mind, the *Constitution* sustains the nation because the *Constitution* created one indissoluble Commonwealth that ‘will last indefinitely – perhaps until Australia loses independence after total defeat at the hands of a foreign power, or until human existence itself ends.’²⁷²

A conclusion to draw from the discussion of responsible government (in Chapter Two) and Executive Power (above) is that the *Constitution* provides all that is needed for Australia to function as a nation.²⁷³ However, as much as the citizenry need the *Constitution* that establishes the functioning of the country, the *Constitution* needs the citizenry to trust in it and recognise its legitimacy as an institution, to pay taxes for revenue raising and to abide by the laws created thereunder. For example, access to the constitutional system of government is provided by the election of members of both the House of Representatives and the Senate by vote of the people.²⁷⁴ If the Australian populous did not elect anyone to the Parliament, no one

²⁷⁰ Ibid 110 (Brennan J). See also: *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, Preamble, covering clause 3.

²⁷¹ *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

²⁷² Heydon, above n 11, 12.

²⁷³ See: Suri Ratnapala, ‘Fiscal federalism in Australia: Will *Williams v Commonwealth* be a pyrrhic victory?’ (2014) 33(1) *University of Queensland Law Journal* 63, 66, 71.

²⁷⁴ See *Constitution* ss 7 and 24.

could exercise the legislative powers of the Commonwealth in s 51, 52 or 122 of the *Constitution*, no executive government could be formed under s 61, nor Ministers of State be selected under s 64 and there would be no Federal Executive Council for the Governor-General to act in Council with, or take advice of, which would, of course, preclude appointments to Chapter III Courts. The *Constitution* and the citizenry require each other to survive.

Responsibility of the function of Australia is directly effected by the election of representatives to Parliament. Access to the Executive arm of government, therefore, is a corollary of that election. The Executive as an institution is legitimised by the citizenry. If the Executive is seen as the head, then the citizenry, through Parliament, must surely be seen as the neck. Accountability must always be to the people. Executive power is, therefore, limited by reference to the people.

CHAPTER FOUR: CONTROLLING THE ELUSIVE: RESPONSIBLE GOVERNMENT INFORMING A LIMIT ON EXECUTIVE POWER

*The control of the use of the executive power is not an easy project.*²⁷⁵

The Executive power has come to the forefront of constitutional litigation in the French Court over the better part of the last decade. Governmental activities that have engaged the executive power as a platform for activities have been litigated on their constitutional basis.²⁷⁶ This Chapter examines two recent cases that have refined the scope of the Executive Power of the Commonwealth: *Pape* and *Williams*.

Before I begin, I pause to make the following observation and endorse the view of a prominent commentator, Anne Twomey. As Twomey noted, it may take decades of future cases to refine the new understanding of the Executive's capacity to spend money and enter into contracts; and for the High Court to provide guidance through a 'comprehensible and logical set of principles and rules.'²⁷⁷

The following discussion does not attempt to enter the debate to provide what that guidance is or should be. The discussion is instead aimed at persuading the reader that there is rationality in the argument that the principle of responsible government has informed a limit on the ambit of executive power.

I PAPE

A *Facts*

In the wake of the Global Financial Crisis in 2008, the Rudd-Labor Government, through the Minister for Families, Housing, Community Services and Indigenous Affairs, introduced the *Tax Bonus for Working Australians Bill 2009* into the House of Representatives.²⁷⁸ The Bill's purpose was to 'immediately support jobs and strengthen the Australian economy during a severe global recession.'²⁷⁹ The

²⁷⁵ Nick Seddon, 'The interaction of contract and executive power' (2003) 31 *Federal Law Review* 541, 550.

²⁷⁶ Of which I express no view on the merits of the activities.

²⁷⁷ Twomey, above n 229, 9.

²⁷⁸ The Bill was introduced on 4 February 2009.

²⁷⁹ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 February 2009, 175.

application of the Bill was to provide \$7.7 billion of financial support²⁸⁰ to 8.7 million taxpayers, through one-off payments from between \$300 - \$950, depending on the taxable income of the taxpayer in the year ended 30 June 2008. This original Bill was defeated in the Senate. A new Bill, entitled the *Tax Bonus for Working Australians Bill (No 2) 2009*, was introduced on 12 February 2009. The change between the two Bills was that the newly introduced Bill provided payments between \$250 - \$900 for taxpayers earning between nil and \$100,000 in the year ended 30 June 2008. A further Bill, the *Tax Bonus for Working Australians (Consequential Amendments) Bill (No 2) 2009* was introduced simultaneously.

Following the Second Reading speeches and parliamentary voting, the Bills received assent on 18 February 2009. They were entitled, respectively, the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) and the *Tax Bonus for Working Australians (Consequential Amendments) Act (No 2) 2009* (Cth).

Bryan Pape²⁸¹ sued the Federal Commissioner of Taxation in the original jurisdiction of the High Court. Pape sought a declaration that the *Tax Bonus Act* was invalid and an injunction to prevent the payment he was entitled under the Act, in the sum of \$250, being paid to him.

First, this paper analyses the *Pape* Court's treatment of ss 81 and 83. The view reached was unanimous. The analysis argues that this is a positive shift toward higher accountability and responsible government because it limits the ability of the Commonwealth to spend by reference to substantive legislative power, not political considerations. Secondly, the paper analyses the Court's treatment of the executive power. The discussion is critical of the Court's treatment of executive power, principally because of the conclusions drawn about the executive power without a clear explanation to *how* the power comes about. A key aspect of this criticism draws from Heydon J's judgment. The analysis will develop an aspect of Heydon J's judgment that implores a tighter conception of the nationhood power – one that can be traced to the structure of the *Constitution*.

²⁸⁰ Net. The gross package was \$8.2 billion. The net figure is as a result of the legislative process.

²⁸¹ At that time a barrister and lecturer at the University of New England in Armidale, NSW. Now deceased. Subsequently referred to as 'Pape' or the 'Plaintiff'.

B *Appropriations: Sections 81, 83 and Parliamentary Accountability*

Pape reformulated the understanding of appropriation in its entirety. A long standing assumption that appropriations ‘for the purposes of the Commonwealth’ were to be found by reference to s 81 of the *Constitution*²⁸² was decided to be incorrect. Before beginning on the discussion of ss 81 and 83 in *Pape*, it is prudent to establish what an appropriation is.

1 *What is an appropriation*

An appropriation is defined as:

The segregation by Act of Parliament of a sum of money in the consolidated revenue fund for the purposes of expenditure by the government.²⁸³

Further, an appropriation Bill is defined as:

A proposed law which, when enacted, segregates but does not authorise the expenditure of money from the consolidated revenue fund for the purposes of government.²⁸⁴

Finally, the fund referred to in the above definitions, the Consolidated Revenue Fund, is defined as:

The fund into which all revenues raised or received by the Commonwealth are paid. No money may be withdrawn from the consolidated revenue fund except under appropriation made by law, so that the power to authorise expenditure by the Commonwealth is held exclusively by the federal Parliament.²⁸⁵

²⁸² As held in: *Victoria v Commonwealth* (1975) 134 CLR 338.

²⁸³ Ray Finkelstein QC and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 36-7. The editors draw their definition from *Combet v Commonwealth* (2005) 224 CLR 494; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 and *Williams v Commonwealth* (2012) 248 CLR 156.

²⁸⁴ Ibid 37 – known as ‘earmarking funds’: *Victoria v Commonwealth* (1975) 134 CLR 338, 411 (Jacobs J).

²⁸⁵ Ibid 36-7, citing in support of the definition: *Constitution ss 81 and 83*; *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) and *Combet v Commonwealth* (2005) 224 CLR 494.

Further, while there is not unanimity on the precise composition of the Consolidated Revenue Fund,²⁸⁶ in broad terms, it is all monies received by the Commonwealth.²⁸⁷ From the standpoint of funds that are expended by the Commonwealth, monies forming the Consolidated Revenue Fund – as constitutionally mandated - are ‘not expended except under the authority of Parliament.’²⁸⁸

Therefore, an appropriation – the process of the withdrawal of money - as approved by its appropriation Bill,²⁸⁹ is the movement of monies which is sanctioned by ‘an Act by which parliament authorises the expenditure of moneys’²⁹⁰ of the Commonwealth. In viewing the mechanics of appropriation, the appropriation Bill ‘earmarks’²⁹¹ the funds in question, identifies it as the funds for expenditure and isolates it from the rest of the Consolidated Revenue Fund, while providing the authority to satisfy s 83 of the *Constitution* to allow those funds to be constitutionally withdrawn.

(a) *Types of appropriations*

There are two types of appropriations. First is an appropriation ‘for the ordinary and annual services of the Government, and for related purposes.’ It is given an ‘odd number’, for example, ‘*Appropriation Act (No 1) 2016-2017 (Cth)*’.²⁹² Appropriations the subject of an ‘odd numbered’ appropriation Act include ‘salaries for public service employees, maintenance of buildings and equipment and other *recurrent* expenses.’²⁹³

²⁸⁶ *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

²⁸⁷ Charles Lawson, ‘Re-Invigorating the Accountability and Transparency of the Australian Government’s Expenditure’ (2008) 32 *Melbourne University Law Review* 879, 884. For a fulsome discussion of what monies may or may not form part of the Consolidated Revenue Fund, see 881-90. See also: Charles Lawson, ‘“Special Accounts” under the *Constitution*: Amounts Appropriated for Designated Purposes’ (2006) 39(2) *University of New South Wales Law Journal* 114, 120-6 and generally: Enid Campbell, ‘Parliamentary Appropriations’ (1971) 4 *Adelaide Law Review* 145.

²⁸⁸ *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 599 (McHugh J).

²⁸⁹ To which I will refer interchangeably as appropriation Act.

²⁹⁰ Campbell, above n 287, 153. Note that Campbell further provides, citing an opinion of Alfred Deakin as Commonwealth Attorney-General in 1901-1902, that ‘no particular form of words need be used for an Act to take effect as an appropriation. This certainly this cannot accord with the current view.

²⁹¹ *Victoria v Commonwealth* (1975) 134 CLR 338, 411 (Jacobs J).

²⁹² For more information on what is an ‘ordinary annual service of the Government’, see above at Chapter Three, II The Bases of Executive Power, A *Non-Statutory Power*.

²⁹³ Appleby, above n 215, 96. For more information ‘ordinary annual services of the Government’, see above at Chapter Three, II The Bases of Executive Power, A *Non-Statutory Power*.

Second is an appropriation ‘for certain expenditure, and for related purposes.’ It is given an ‘even number’, for example, *Appropriation Act (No 2) 2016-2017* (Cth). Appropriations the subject of an ‘even numbered’ appropriation Act include: the construction of public works and buildings; the acquisition of sites and buildings; items of plant and equipment which are clearly definable as capital expenditure; grants to the States under s 96 of the *Constitution*; and new policies not authorised by special legislation.²⁹⁴

(b) *How to appropriate*

The above definitions and commentary²⁹⁵ assist to inform how appropriations are conducted. The leading juridical description is that of Viscount Haldane. His Lordship’s explanation is that:

[N]o money can be taken out of the consolidated fund into which the revenues of that State have been paid, excepting under a distinct authorisation from Parliament itself.²⁹⁶

His Lordship’s view has informed the High Court’s view on this principle.²⁹⁷

In Australia, appropriation is the *process* by which money is drawn from the Consolidated Revenue Fund.²⁹⁸ The process of drawing money from the Consolidated Revenue Fund, through the mechanisms of ss 81 and 83 of the *Constitution*, are discussed next²⁹⁹. The following is a summary. First, s 83 of the

²⁹⁴ *Combet v Commonwealth* (2005) 224 CLR 494, 573-4 [150] (Gummow, Hayne, Callinan and Heydon JJ); Harry Evans (ed), *Odgers’ Australian Senate Practice* (CanPrint Communications Pty Ltd, 12th ed, 2008) 285-6. This practice is known as the ‘Compact of 1965’. It became practice in May 1965 after an agreement between the Senate and the government as to what to what types of services would *not* be regarded as the ordinary and annual services of government (a reference to the constitutionally imposed inability of the Senate to amend an appropriation Bill for the ‘ordinary and annual services of government’: See *Constitution* s 53). See: *Williams v Commonwealth* (2012) 248 CLR 156, 340 [472] (Crennan J). For more on the history of this, see *Combet v Commonwealth* (2005) 224 CLR 494, 573-4 [150]-[152] (Gummow, Hayne, Callinan and Heydon JJ). See also Australia, Senate, *Journals of the Senate*, 1976-1977, No 82, 17 February 1977, 572.

²⁹⁵ Campbell, above n 287, 145.

²⁹⁶ *Auckland Harbour Board v The King* [1924] AC 318, 326.

²⁹⁷ See *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd v Commonwealth* (1922) 31 CLR 421; *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²⁹⁸ I italicise ‘process’ to highlight that it is not the action of the withdrawal in isolation, rather certain criteria that require fulfilment in order to complete an appropriation.

²⁹⁹ See 2: *Section 81 Pre Pape: The decision in AAP*; 3 *Pape: Reformulation of Appropriation* and 4: *Post-Pape: The new mechanics*.

Constitution requires an appropriation be ‘under law.’ This is a reference to appropriation Acts, as discussed above.³⁰⁰ Secondly, in order to be an appropriation under law to satisfy s 83 of the *Constitution*, the appropriation must be ‘for the purposes of the Commonwealth’, as provided by s 81 of the *Constitution*. The phrase ‘purposes of the Commonwealth’ has been subject to differing interpretations and was recently settled by the Court in *Pape*.

2 Section 81 Pre-Pape: The decision in AAP

The *AAP Case* concerned what is referred to as a ‘line-item appropriation’. It was a challenge from the State of Victoria of the validity of an appropriation of \$5,970,000 of the Consolidated Revenue Fund by the *Appropriation Act (No 1) 1974-1975* (Cth). The impugned ‘line-item’ comprised two sub-items in Item No 4 of Division 530 in the Second Schedule of the Appropriation Bill, the first being for ‘Grants to Regional Councils for Social Development’, and the second for ‘Developments and Evaluation Expenses’. Known as the ‘Australian Assistance Plan’, the aim was for the Commonwealth to assist in the development, at a regional level within a nationally coordinated framework, of integrated patterns of welfare services, complementary to income support programmes and the welfare-related aspects of health, education, housing, employment, migration and other social services.

While the *AAP Case* ultimately turned whether or not the Australian Assistance Plan was supported by power reposed in the Commonwealth,³⁰¹ it provided the High Court the opportunity to examine appropriations.

Although the judgments are varied and the issue was not resolutely concluded,³⁰² it appears the approach of Mason J was the principal view moving forward, namely that the purposes of the Commonwealth are to be found within the words of s 81 itself³⁰³ and that is ‘for such purposes as the Parliament may determine.’³⁰⁴ Mason J

³⁰⁰ See: 1 *What is an appropriation and (a) How to appropriate*.

³⁰¹ The Court ultimately held that such a plan was outside the scope of Commonwealth power.

³⁰² Lawson, above n 287, 903.

³⁰³ *Victoria v Commonwealth* (1975) 134 CLR 338, 392 (Mason J) This was even so although earlier authority had provided that the power to appropriate was able to be provided if identifiable within a Commonwealth legislative power: *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424, 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

³⁰⁴ *Ibid* 396 (Mason J).

identified as support for this interpretation the powerful opinion of Latham CJ three decades earlier, that:

...the provisions in s 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes...³⁰⁵

What was provided was that ‘the Commonwealth had unrestricted authority to make grants to any recipient it chose, so long as an appropriation could be secured.’³⁰⁶ It was the case that engaging in an activity required constitutional authority – for example, legislative or executive power.³⁰⁷

This view was maintained by a majority of the Court in *Combet v Commonwealth*,³⁰⁸ to the effect that ‘the burden of properly elaborating the purposes of the Commonwealth [falls] squarely upon Parliament as a matter for Parliament to resolve’.³⁰⁹ Practically, it was a political decision for the government of the day. Necessarily this implies a subjective reasoning process, changing as often as the government. Therefore a purpose of the Commonwealth was anything that the government needed it to be – a political decision. As the *Constitution* is a federal document, the balance of power - including financial power – requires balance. Casting a wide and unpredictable scope of power is, in the words of one commentator, ‘one more step away from a federation towards Commonwealth hegemony.’³¹⁰

³⁰⁵ *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 256 (Latham CJ). McTiernan J also identified this passage at 138 CLR 338, 369. See also 384 (Stephen J), 410-11 (Jacobs) and 417 (Murphy J).

³⁰⁶ Saunders, above n 238, 258.

³⁰⁷ *Ibid.*

³⁰⁸ *Combet v Commonwealth* 224 CLR 494, 522 (Gleeson CJ), 477 (Gummow, Hayne, Callinan and Heydon JJ).

³⁰⁹ Lawson, above n 287, 904. Note that to resolve the ambiguity, the 1988 Constitutional Commission recommended amending s 81 to ‘allow appropriation of the Consolidated Revenue Fund for any purpose that the Parliament thinks fit’: see Australian Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 2, 831. This would have had the effect of rendering s 81 non-justiciable: see 834.

³¹⁰ Twomey, above n 32, 343.

The Court's decision in *Pape* on the mechanics of appropriations resulted in a number of changes in the way an appropriation is conceived.³¹¹ Appleby stated almost presciently when writing just prior to the *Pape* decision, that s 81 'is not a power at all but a parliamentary fiscal supervision mechanism'.³¹² The reasons of the holding in *Pape* are as follows.

First, the Court unanimously held that ss 81 and 83 of the *Constitution* do not confer substantive power to spend.³¹³ Section 81 merely regulates the relationship between the Executive and the Parliament, by providing 'control by the Parliament over purposes to which the Consolidated Revenue Fund may be applied' and s 83 'regulate[s] withdrawal of money from the Treasury of the Commonwealth'.³¹⁴ An appropriation 'acts as a parliamentary control on the allocation and expenditure of public funds'.³¹⁵ It does not, as Heydon J robustly states, give the Commonwealth 'untrammelled power to spend'.³¹⁶ This is highlighted by the fact that '[i]t appears in a chapter that is not concerned with the bestowal of powers alongside provisions that stipulate the manner in which public moneys may be expended'.³¹⁷ To find the purpose of the Commonwealth, one must find its source 'in some other head of Commonwealth legislative power'.³¹⁸ The legislative powers are substantive powers of the Commonwealth. Such powers derive from:

the exercise of the legislative powers of the Commonwealth. It may also be an element or incident of the executive power of the Commonwealth derived from s 61, subject to the appropriation requirement and supportable by legislation made under the incidental power in s 51(xxxix).³¹⁹

³¹¹ As the Court unanimously held, albeit in separate decisions, that ss 81 and 83 of the *Constitution* do not provide a substantive power to spend, the discussion that follows draws from each judgment to create the argument.

³¹² Appleby, above n 215, 112, 123.

³¹³ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 [111] (French CJ), 73 [178], 78 [197], 80 [202], 82-3 [209]-[210] (Gummow, Crennan and Bell JJ), 105 [296] (Hayne and Kiefel JJ), 211 [602] (Heydon J).

³¹⁴ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 113 [320] (Hayne and Kiefel JJ).

³¹⁵ McLeod, above n 189, 127.

³¹⁶ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 210 [601] (Heydon J).

³¹⁷ McLeod, above n 189, 127.

³¹⁸ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 211-12 [603] (Heydon J).

³¹⁹ *Ibid* 55 [111] (French CJ).

As a result, the ‘appropriations power’ is now only ‘the Parliament’s ability to confer authority on the Executive to spend moneys from the Consolidated Revenue Fund.’³²⁰

Further, this had the important effect changing the reference point of a ‘purpose of the Commonwealth’. Originally thought to be any purpose(s) that Parliament thinks fit, it is now limited to ‘the purposes otherwise authorised by the *Constitution* or statutes made under the *Constitution*.’³²¹

The shift of reference point of a ‘purpose of the Commonwealth’ had many significant consequences for the Commonwealth’s power to spend. First, it confined the scope to one that was originally near unlimited to one that is confined to the ambit of the powers provided to the Commonwealth. These powers, important to responsible government, are the powers that were drafted and debated during the Convention Debates and refined into the powers they are today. Secondly, it now gives ‘minimal significance’³²² to the power of an appropriation Act, as it now is recognised as only a withdrawal mechanism, rather than conferring substantive power itself. Pape himself, speaking at a conference in 2010, was critical of the High Court in saying that ‘the High Court has given the executive a magic genie, but no criteria how it is to be used, let alone stopped’.³²³ Lynch points out the factor that ‘this new genie labours under restrictions that the one previously thought to lurk in the lamp of s 81 did not.’³²⁴ Those restrictions appear to be, *inter alia*, based on accountability to the Parliament by the legislative power reposed on Parliament. This significantly reduces and constrains the scope of the power to spend.³²⁵ This can be illustrated in the following way. In modern Australian politics, the government of the day holds a majority of the House of Representatives.³²⁶ As a result, the ‘government’ (the Executive) comprises both the executive and legislative arms.³²⁷

³²⁰ McLeod, above n 189, 128.

³²¹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55-6 [113] (French CJ).

³²² Duncan Kerr, ‘*Pape v Commissioner of Taxation*: Fresh Fields for Federalism?’ (2009) 9(2) *Queensland University of Technology Law and Justice Journal* 311, 313.

³²³ Bryan Pape, ‘Stopping Stimulus Spending, or is the Sorcerer’s Apprentice Controlling the Executive’, *Third Sir Harry Gibbs Memorial Oration*, 6.

³²⁴ Andrew Lynch, ‘Commonwealth Financial Powers – Taxation, Direct spending and Grants – Scope and Limitations’ [2011] *University of New South Wales Faculty of Law Research Series* 23, [17].

³²⁵ McLeod, above n 189, 140.

³²⁶ Martin Lumb, ‘Composition of the 44th Parliament’ *Parliamentary Library Briefing Book – Key issues for the 44th Parliament* (Commonwealth of Australia, 2013) 5

³²⁷ Without taking account of the Senate.

Under the *AAP Case* and *Combet* conception of ‘purposes of the Commonwealth’ the government had *carte blanche* to decide what a ‘purpose of the Commonwealth’ was when appropriating. Under the *Pape* reformulation, the limitation is provided for by the fact that a *purpose* of the Commonwealth is restricted to what is within Commonwealth power.³²⁸ Therefore, the Commonwealth cannot utilise the withdrawal mechanism unless it is for a Commonwealth purpose. A Commonwealth purpose is limited to the breadth of the legislative powers of ss 51, 52 or 122 of the *Constitution*, or the combination of ss 61 and 51(xxxix) of the *Constitution*.

4 *Post-Pape: The new mechanics*

Broadly speaking, the mechanics of an appropriation as a result of *Pape* are as follows. As is constitutionally entrenched, the Commonwealth cannot withdraw money from the Treasury unless there is an ‘appropriation made by law’.³²⁹ That appropriation is in the form of an appropriation Bill. In order for an appropriation Bill to be lawful, the appropriation must be ‘for the purposes of the Commonwealth’.³³⁰ To determine ‘purpose(s) of the Commonwealth’, a purpose must be within Commonwealth power by reference to the enumerated legislative heads of power the Commonwealth possess, or by the combination of the Commonwealth’s executive power coupled with the incidental power. This ostensibly means that the Commonwealth cannot spend money on something it does not have the power to legislate with respect to. Admittedly, the breadth of Commonwealth legislative power is extensive.

While the controversy of the breadth of legislative power has been settled for roughly a decade,³³¹ the breadth and scope of the executive power is far from settled. In fact, following *Pape*, more unsettled than ever.³³²

C *Executive Power*

The view that the Executive Power extended to support the *Tax Bonus Act* was held by the barest of majorities (4:3) and commentators are generally critical of the

³²⁸ And further dispels any doubt as to whether a purpose of the Commonwealth is justiciable.

³²⁹ *Constitution* s 83.

³³⁰ *Constitution* s 81.

³³¹ See: *New South Wales v Commonwealth* (2006) 229 CLR 1.

³³² Saunders, above n 238, 260.

Court's findings as the Court appeared to state a conclusion why the Executive Power supported the Act without explaining why.³³³ This paper examines the judgments in turn.

1 *French CJ*

One commentator in particular is 'devastating'³³⁴ in critique, and focuses on French CJ's conception of executive power, specifically with regard to his Honour's support of a nationhood power 'outside of the prerogatives and the capacities of the Crown', that are 'not to be treated as a species of the royal prerogative'.³³⁵ His Honour's reasoning was that 'the collection of statutory and prerogative powers and non-prerogative capacities [form] part of, but [do] not [complete], the executive power,³³⁶ because s 61 'has to be capable of serving the proper purposes of a national government.'³³⁷ The nature of the additional power was left unexplained'.³³⁸

The 'inherent' power, unlike the prerogative does not have definable limits.³³⁹ The lack of definable limits can have dire consequences for responsible government. This is because question of a 'proper purpose' of a national government is a political as opposed to legal question, which has the potential to create barriers of non-justiciability. Allowing an ambiguous area of power such as this unchecked has the potential to open a wide range of activities to the Commonwealth – particularly if policies are skilfully drafted.

Additionally, his Honour confirmed that the nationhood power is an 'implied head of legislative competence'³⁴⁰ which leads legislative power, in this case, s 51(xxxix).³⁴¹ This is inconsistent with responsible government because responsible government necessitates that it is for Parliament to be able to ensure that executive power is subject to legislative control.³⁴²

³³³ See eg: Twomey, above n 32; McLeod, above n 189; Lynch, above n 324.

³³⁴ Lynch, above n 324, [12].

³³⁵ *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 [183] (French J).

³³⁶ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ).

³³⁷ *Ibid* 59 [125], 60-1 [128] (French CJ).

³³⁸ Twomey, above n 32, 332.

³³⁹ Gerangelos, above n 208, 106, 122.

³⁴⁰ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63-4 [133] (French CJ).

³⁴¹ Saunders, above n 238, 261-2.

³⁴² Gerangelos, above n 208, 114.

Further, French CJ reasoned that whether a matter falls within part of the nationhood power is determined by whether or not it is peculiarly within the capacity and resources of the Commonwealth.³⁴³ The approach appears to focus on fiscal might and not by reference to powers referable within the *Constitution*. Therefore, by comparison to the ‘Indian rope trick’, Twomey concludes that *Pape* ‘has left an implied executive nationhood power floating untethered above the *Constitution*, to be used in the future as a justification for Commonwealth legislation on anything that the Commonwealth regards as an “emergency” that it considers can be best addressed by the Commonwealth financial power. It is one more step away from a federation towards Commonwealth hegemony.’³⁴⁴

2 *Gummow, Crennan and Bell JJ*

The plurality judgment is somewhat tighter than that of the Chief Justice in their treatment of the Executive Power. Their Honours state that ‘the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it’.³⁴⁵ However, when accepting that the executive power protects the body politic of Australia,³⁴⁶ their Honours qualify that Parliament’s ability to legislate by enlivening the executive power³⁴⁷ ‘does not mean that it may do so in aid of any subject *which the executive government regards as of national interest and concern*.’³⁴⁸ Effectively, that executive power is limited by the *Constitution* and its distribution of power.³⁴⁹

³⁴³ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63-4 [133] (French CJ).

³⁴⁴ Twomey, above n 32, 343.

³⁴⁵ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ). This is with apparent approval of *Re Residential Tenancies Tribunal (NSW): Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J) and *Ruddock v Vadarlis* (2001) 119 FCR 491, 540 (French J).

³⁴⁶ *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J). Also accepted by French CJ at (2009) 238 CLR 1, 59 [125] and 60-1 [128].

³⁴⁷ By engaging s 51(xxxix).

³⁴⁸ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 87-8 [228] (Gummow, Crennan and Bell JJ) – emphasis added.

³⁴⁹ This is not to say that their Honours are ‘limiting’ the ambit of the executive power, rather, providing that it is inherently limited. Their Honours opine that the executive power to respond to a crisis of this kind (or war, or natural disaster) and of this scale is derived directly from the Executive Power of the United Kingdom: 89 [233]. Arguably, one could view their Honours’ opinion is to the effect that the Executive Power of the Commonwealth of Australia is as powerful as the Executive Power of the United Kingdom. At the time of *Pape*, this may have been so, although it appears that this is no longer the case. As Bell J joined in the joint judgment of *Williams v Commonwealth* (2014) 252 CLR 416, at 469 [82], [83] which loosely stands for the proposition that the executive power of the Commonwealth of Australia is not as wide as that of the Executive Power of the United Kingdom;

Their Honours focus on the ‘emergency’³⁵⁰ in question – recognising the circumstances of the global economic downturn to amount to a ‘global financial and economic crisis’³⁵¹ - and opine that the Executive Government is the appropriate arm of the government to deal with this issue, because of the ‘roots’ of ‘the executive power exercised in the United Kingdom’ dealt with emergencies.³⁵² This assessment of the status of the prerogative in s 61 arguably considers that the Executive Power is equal with to the Executive Power that the United Kingdom exercised over Australia.³⁵³ Here, their Honours suggest that the power with which the United Kingdom could act on behalf of Australia was transferred to Australia upon assent to the *Australia Acts*. Critically, this comes ‘perilously close to stating conclusions without disclosing the underlying reasoning.’³⁵⁴ Without a tracing to its source, it is difficult to control the ambit of the power.

3 *Hayne and Kiefel JJ*

The joint judgment, while noting that the executive power is not bounded by express grants of legislative power³⁵⁵ due to its ability to act through non-statutory, prerogative and nationhood powers, finds that the ambit of executive power ‘is not unlimited and ... its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*.’³⁵⁶ Further, their Honours unequivocally reject the proposition that the executive power recognised in s 61 is the same as the executive power of the United Kingdom at the time of Federation,³⁵⁷ and give greater weight to the proposition that any exercise of executive power must take account of the spheres of responsibility vested in each arm of government through each respective chapter of the *Constitution*.³⁵⁸ The ability to account for the executive power by reference to powers entrenched within and across the

although not settled, it does cast the former proposition into doubt. Crennan J agreeing at 471 [99]. Gummow J had retired from the Court in 2012 and was replaced by Gagler J – who of course did not participate in either of the *Williams* cases as he was the Solicitor-General of the Commonwealth and appeared for the Commonwealth in *Williams*.

³⁵⁰ And do conclude that it is a ‘crisis’

³⁵¹ McLeod, above n 189, 134.

³⁵² Saunders, above n 238, 261.

³⁵³ Ibid 262. Known as the ‘Lockean view’ of the prerogative power.

³⁵⁴ McLeod, above n 189, 137.

³⁵⁵ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 103 [290] (Hayne and Kiefel JJ).

³⁵⁶ Ibid 115-16 [327] (Hayne and Kiefel JJ).

³⁵⁷ Ibid 119-20 [336]-[339] (Hayne and Kiefel JJ).

³⁵⁸ Twomey, above n 32, 343.

Constitution provides greater control and oversight by Parliament, particularly by being better informed when it comes to releasing funds to support expenditure for programs and activities which rely on executive power as the source. This view is supported by their Honours' reasoning that when a 'crisis' is claimed, the Court 'may be required to examine the constitutional facts on which it is based' to examine if a 'crisis' is actually met.³⁵⁹ This demonstrates that their Honours did not wish the executive power to become self-defining.³⁶⁰ Necessarily, this requires the executive power to be accountable.

Here, their Honours diverge from the majority³⁶¹ because:

the mere fact that only the Commonwealth had the administrative and financial resources to provide a "tax bonus" in response to such a crisis or emergency did not mean that s 61 applied ... Section 61 could not be relied upon merely because the provision of a 'tax bonus' was viewed by the Executive as more convenient.³⁶²

This significantly limits attempts at broad use of Executive Power. Passing a threshold question such as this does affirm the view that the Executive Power must be exercised in limited circumstances because it promotes the idea that the executive does not have *carte blanche* power to do as it pleases in 'the execution and maintenance of this Constitution'. Rather, the appropriate circumstances must arise for the unique executive powers to be exercised in lieu of the entrenched and well defined legislative powers of the Commonwealth.

4 *Heydon J*

Heydon J's conception of the rule of law is the tightest of the Court in *Pape*. His Honour's analysis is extremely detailed; each Commonwealth submission is considered, carefully, logically and with precision. His Honour displays is reluctant to accept the existence of any implied executive power, for example, while recognising that 'there is a power to legislate in relation to exploration;³⁶³ science

³⁵⁹ Saunders, above n 238 262.

³⁶⁰ Gerangelos, above n 208, 115.

³⁶¹ French CJ, Gummow, Crennan and Bell JJ.

³⁶² David Thomas, 'Commonwealth power and the fiscal stimulus' [2009-2010 Summer] *Bar News* 28, 29.

³⁶³ *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ), 413 (Jacobs J).

and technology;³⁶⁴ research;³⁶⁵ inquiries and advocacy into matters affecting public health;³⁶⁶ inquiries, planning and coordination on a national scale³⁶⁷ and national initiatives in science, literature and the arts[.]³⁶⁸ *how this power can be recognised has not been explained.*³⁶⁹ In *Pape*, one issue was whether or not there was an implied executive power to manage the national economy. His Honour held there was no such implied power as there are ‘extensive powers to do this.’³⁷⁰

Regarding the nationhood power, Heydon J criticised the Commonwealth for their submissions on Mason J’s nationhood test.³⁷¹ The Commonwealth omitted the final 13 words of the test: *and which cannot otherwise be carried on for the benefit of the nation.* His Honour was not prepared to let the executive power slip out of a referable grasp into a realm where it is for the government to decide what is for the ‘purpose of the nation’ as opposed to this being done by reference to the *Constitution*.

Ultimately, his Honour did not recognise that the nationhood power supported the *Tax Bonus Act* because there were two other methods that could have achieved the fiscal stimulus of the *Tax Bonus Act*. The first, either a lowering of tax or an increase in tax rebate.³⁷² The second, an act of cooperative federalism by s 96 grant, with the condition that the States distribute the grant money to the citizens of the State.³⁷³ His Honour appears very conscious of the need to contain the executive power and to ensure that before turning to undefined powers, it is of critical importance to the nature of the federation to ensure that *every* enumerated option is canvassed and exhausted first. For responsible government, this ensures that Parliament is able to scrutinise these decisions. This is highlighted by his Honour stating ‘the mere fact that controlling economic crises is a matter of national interest does not lead to the conclusion that the Commonwealth has any power to control them apart from the

³⁶⁴ Ibid 362 (Barwick CJ), 397 (Mason J).

³⁶⁵ Ibid 413 (Jacobs J).

³⁶⁶ Ibid 397 (Mason J).

³⁶⁷ Ibid 412 (Jacobs J).

³⁶⁸ *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

³⁶⁹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 175 [506] (Heydon J).

³⁷⁰ Ibid 176-7 [509] (Heydon J), for example: ss 51(i), (ii), (iii), (iv), (ix), (xii), (xiii), (xiv), (xvi), (xvii), (xix), (xx), (xxvii), (xxix), (xxx) and (xxvii), 90, 96 and 115.

³⁷¹ See Chapter Three: III The Bases of Executive Power, C Nationhood. Note in particular, his Honour’s criticism is also derived from the *significant* support Mason J’s conception has received and the basis on which it came to be, particularly the pioneering nationhood power jurists: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J); *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

³⁷² *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 176 [513] (Heydon J).

³⁷³ Ibid 178-9 [515]-[518] (Heydon J).

powers expressly granted to it.³⁷⁴ His Honour observes that the specificity of these provisions disprove the proposition of a wide implied power to manage the national economy because there is no synergistic relationship created by aggregating heads of power.³⁷⁵

D *The nationhood power: Responsibility is required*

Heydon J's dissent from the majority view is more extreme than that of Hayne and Kiefel JJ. His Honour's view is that the Executive Power must be 'tethered' to the *Constitution* rather than floating above it. Heydon J found that the nature of the Executive Power appeared 'inherently subjective' and 'unsuitable to adjudicate'.

This is at odds with French CJ's understanding of the nationhood power is that it 'completes' the arsenal of the Executive Power. If this is so, it must be able to be referable to the *Constitution* in order for it to be appropriately scrutinised by Parliament. The power must be able to be traced back to the *Constitution*, rather than concluding that it is within s 61. If not, there is no responsibility of the Executive when exercising the power and no accountability to the people – those whose monies pay for the activities – through Parliament.

II WILLIAMS

A *Facts*

The plaintiff, Ronald Williams, challenged the validity of expenditure under a contract made by the Commonwealth with a private service provider, Scripture Union Queensland (SUQ), for the delivery of 'chaplancy services' into schools

³⁷⁴ Ibid 174 [504] (Heydon J). To see his Honour's opinion of this in detail – which this author recommends – see: 168-77 [487]-[510].

³⁷⁵ Ibid 176-7 [509] (Heydon J). Hayne and Kiefel JJ also recognise this: 125 [360]. Heydon J elaborates on this further when saying that it is a 'fallacy' suggest that the executive power to enact valid legislation pursuant to s 51(xxxix) is 'more extensive than that which which could have been enacted under s 51(i)-(xxviii)': 198 [564] and provided, by way of example, that if the Executive Power of the Commonwealth could be used to make payments independently of s 96, the Commonwealth could bypass the restrictions of ss 51 and 52': 199 [569]. Further, Heydon J places reliance on Barwick CJ in the *AAP Case* that although it 'couldn't be denied that the economy of the nation is of national concern[,] no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget... [t]he national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power.': (1975) 134 CLR 338, 362.

operated by the Queensland State Government.³⁷⁶ The delivery of chaplaincy services was funded by the National Schools Chaplaincy Programme (NSCP). The plaintiff's standing derived from the provision of services to the Darling Heights State School, Queensland, where his children attend as students.

The Darling Heights State School received a funding agreement after lodging an application on 4 April 2007. The application was successful. Its stated purpose was 'the provision of funding under the NSCP on behalf of Darling Heights State School.'³⁷⁷ As a result, the agreement required that SUQ provide chaplaincy services in accordance with the application for funding.³⁷⁸

The Commonwealth submitted that the expenditure met the necessary condition of a parliamentary appropriation for each year it was made. However, it was the case that 'no Act of Parliament conferred power on the Commonwealth to contract and expend money in this way. The Commonwealth relied upon the executive power under s 61 of the *Constitution*.'³⁷⁹

One issue raised in this case was the 'extent to which the executive power authorises the Commonwealth to make contracts and spend public money.' This was raised because, due to the reasons of the Court in *Pape*, the Court held, despite a long-standing assumption, that parliamentary appropriation is not a source of spending power.³⁸⁰

The Court held 6:1 that the NSCP was invalid. The paper analyses two submissions put by the Commonwealth. The first, the broad basis submission, asserted that the Executive's power to contract and spend is equivalent to that of a juristic person; in effect, it was unlimited.³⁸¹ The second, the narrow basis submission, argued that the

³⁷⁶ *Williams v Commonwealth* (2012) 248 CLR 156, 179 [2] (French CJ).

³⁷⁷ *Ibid* 183 [15] (French CJ).

³⁷⁸ It is not relevant to articulate the specific element noted by French CJ at 248 CLR 183 [17].

³⁷⁹ *Williams v Commonwealth* (2012) 248 CLR 156, 179 [2] (French CJ).

³⁸⁰ *Ibid*.

³⁸¹ As summarised by Hayne J: It was submitted by the Commonwealth that the 'capacities' of the executive to spend money lawfully available to it, or enter into a contract: do not involve interference with what would otherwise be the legal rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place. To amplify and provide support for this proposition, the Commonwealth parties further submitted that neither s 51(xxxix) (the incidental power) nor s 96 (the grants power) required some other conclusion: *Ibid* 243 [177].

Executive could take any action that *could* be the subject of legislation, so long as there was valid appropriation supporting expenditure.

This section analyses each submission separately, analysing and commenting on the separate judgments. It is difficult to draw a *ratio* from *Williams* as each judgment has a slightly different focus.³⁸² The paper does not attempt to draw one here, although it does draw together holistically what Court said.³⁸³

The following analysis is conducted by reference to the responsible government considerations discussed in Chapter Two, Part IV. They are first, oversight of expenditure, and secondly, Australian constitutional considerations.

B *Oversight of Expenditure*

The oversight of expenditure considerations largely informed the rejection of the Commonwealth's broad basis submission. The Court commented at length on the nature of the Executive government's contractual capacities and, critically, the importance of Parliament in the appropriation process. The paper argues that the limit imposed on contractual capacities are informed by the importance of Parliament in the appropriation process, because responsible government considerations require proper scrutiny of expenditure. That is, the contractual capacities of the Executive government are limited because expenditure requires the appropriation process which is conducted by Parliament.

1 *Contractual capacities*

Contractual capacity in *Williams* was concerned not with capacities in the contractual sense, rather, whether there was a limit on the Executive's power to make a

³⁸² Literature prior to *Williams* notes that '[i]t has become something for a pattern for cases concerning the validity of Commonwealth appropriation and expenditure to lack a clear *ratio decidendi*': McLeod, above n 189, 124.

³⁸³ The case did not raise issues about the executive acting within the scope of a prerogative: see *Williams v Commonwealth* (2012) 248 CLR 156, 216-17 [83] (French CJ). There was some discussion of a nationhood power, however the Court unanimously rejected that this power could be engaged: see *Williams v Commonwealth* (2012) 248 CLR 156, 216-17 (French CJ), 235 [146] (Gummow and Bell JJ), 267 [240] (Hayne J), 319 [402] (Heydon J), 348 [503] (Crennan J); 373 [594] (Crennan J). As such, an analysis of these powers will not form a substantive part of this analysis; they will be referred to when necessary to outline arguments of responsible government.

contract.³⁸⁴ The limit must take account of three fundamental factors. First, as the Executive government is a polity, it expends public, as opposed to private, money.³⁸⁵ Secondly, the Parliament, a separate branch of government than, is vested with the exclusive power of raising and expending money, which provide ‘carefully crafted checks’ of parliamentary control. Finally, Parliament itself has limited powers due to the distribution of power across the *Constitution*. A corollary is that the Consolidated Revenue Fund cannot be spent as the Executive chooses’ because it is Parliament that has exclusive control over the Consolidated Revenue Fund.³⁸⁶

Governmental capacity to contract is not dependent on assumptions about capacity; it is determined through constitutional interpretation.³⁸⁷ Such interpretation provides that it is the function of the Executive, rather than Parliament, to make contracts. This is made clear as follows: the Executive has power offer, accept and, as a corporation sole³⁸⁸ has the requisite capacity to form intention to create legal relations. Further, it does have the power to offer consideration in the sense that Dixon J described in *Bardolph* as ‘contracting for the expenditure of moneys’.³⁸⁹

The Executive, however, is:

answerable politically to Parliament for their acts in making contracts. *Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public money.*³⁹⁰

Additionally, responsibility to Parliament was cited in *Bardolph* as the central limitation on the Executive’s power to contract.³⁹¹

It is this key reason that the Executive’s power to contract is limited by reference to the *Constitution*. Therefore, the power to contract is ‘limited by reference to the

³⁸⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 252-3 [200], [201] (Hayne J).

³⁸⁵ *Ibid* 236 [151] (Gummow and Bell JJ), 352 [519] (Crennan J), 368-9 [577] (Kiefel J).

³⁸⁶ *Ibid* 241 [173], 258-9 [215], [216] (Hayne J).

³⁸⁷ *Ibid* 254 [206] (Hayne J).

³⁸⁸ Clark, above n 60, 210 [8.2].

³⁸⁹ *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J).

³⁹⁰ *Ibid*, see *Williams v Commonwealth* (2012) 248 CLR 156, 255 [207] (Hayne J) – Hayne J’s emphasis.

³⁹¹ Selena Bateman, ‘Constitutional dimensions of State executive power: An analysis of the power to contract and spend’ (2015) 26 *Public Law Review* 255, 277.

extent of the legislative power of the Parliament.³⁹² It is Parliament's role in scrutinising Executive action to approve or reject requests for appropriation – the Executive cannot segregate monies from the Consolidated Revenue Fund without parliamentary approval in the form of an Appropriation Act.

Finally, the Court's jurisprudence on the Executive power to contract has not conclusively determined how far the contractual capacity of the Commonwealth extends.³⁹³ Rather, what is recognised is that neither the States nor the Commonwealth have unlimited power to contract – that is, the power of a juristic person to contract.³⁹⁴ It is clear that the King is less powerful than his subjects.³⁹⁵

2 *Parliament's role in the appropriation process*

Parliament's role of appropriation is critical to the Executive's contractual capacity because expenditure begins and ends with ss 81 and 83 of the *Constitution*.³⁹⁶ The ability to engage ss 81 and 83 is held exclusively by Parliament and are procedural mechanisms allowing segregation of monies from the Consolidated Revenue Fund for expenditure by the Executive.³⁹⁷ The relationship between Parliament and the Executive is important. It was moulded by the concept of responsible government in the British system; 'responsible government was seen then as a "government under which the Executive is responsible to – nay, is almost the creature of – the

³⁹² *Williams v Commonwealth* (2012) 248 CLR 156, 271 [252] (Hayne J).

³⁹³ *Ibid* 255 [207] (Hayne J). See: 256-7 [209]-[212]. See also: *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421; *Kidman v Commonwealth* (1925) 37 CLR 233.

³⁹⁴ *Ibid* 257 [212] (Hayne J). Note: *Clough v Leahy* (1904) 2 CLR 139 does not support the proposition that the Commonwealth has the same power to contract as a natural person because the Commonwealth can make inquiries such as a Royal Commission. Further, this is a significant limitation on the polity of a State government to contract; commentators have argued that the contractual capacity of a State Executive is 'unlimited' by reference to the inherent powers and contractual capacity of the British Crown. See: Seddon, above n 235, and for the distinction drawn that *Bardolph* concerned the actions of a State government and did not have the same considerations when contracting as the Commonwealth government: Twomey, above n 229, 12, 22.

³⁹⁵ See: Lindell, above n 191, 348. Cf. *New South Wales v Bardolph* (1934) 52 CLR 455, 475 (Evatt J).

³⁹⁶ See *ibid* 352.

³⁹⁷ *Williams v Commonwealth* (2012) 248 CLR 156, 193-4 [39] (French CJ), 224, [114] (Gummow and Bell JJ), 248 [191] (Hayne J), 340 [472]-[474], 341 [478] (Crennan J), 362 [559] (Kiefel J). See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 23 [5], 35 [53], 55-6 [111]-[113] (French CJ), 72-5 [176], [178], [180], [183]-[184] (Gummow, Crennan and Bell JJ), 100-1 [283], 105 [296], 113 [320] (Hayne and Kiefel JJ), 210 [600], 213 [607] (Heydon J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ). See also: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

Legislature”³⁹⁸. That relationship between Parliament and the Executive is further supported by structural considerations of the *Constitution*.³⁹⁹ These considerations are discussed in this paper’s analysis of the narrow basis submission.

A further consideration of the Chief Justice was the position of the Senate in protecting the interests of the States, which, his Honour admits is ‘a weak control’.⁴⁰⁰ Appleby and McDonald note that his Honour refers to the function of the Senate, that being to ‘protect the interests of the States’,⁴⁰¹ however, point out that s 7 of the *Constitution* provides that the role of the Senate is to ‘protect the interests of the *people* of each state, not the states as polities’,⁴⁰² and that his Honour ‘appears to have aligned the two’.⁴⁰³ It is well known that the effectiveness of the Senate acting as a ‘States house’ to protect the interests of the States has long been surpassed by Senators voting in accordance with ‘the party line’.⁴⁰⁴ Further, the limitations placed on the Senate, particularly its inability to amend odd numbered Appropriation Acts under s 53 of the *Constitution* display the Senate’s lack of power as compared to the House of Representatives.⁴⁰⁵ The Senate, of itself, does not utilise the power with which it was conceived to use.⁴⁰⁶ The author’s view is it is erroneous to look to the Senate in isolation to promote the interests of responsible government, rather, it must be undertaken by Parliament.

Finally, it is clear the Court found that Executive action falls within the confines of the *Constitution*. These confines enable oversight of Executive activity. If the action did not fall within the confines, the Executive does not have power to act and,

³⁹⁸ Ibid 349 [508] (Crennan J). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ) – her Honour’s footnote (fn 680) provides that this approves the comments made by Lord Haldane, that when a member of House of Commons introduced the Bill for the *Australian Constitution* into the Imperial Parliament distinguished it from the *American Constitution*; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 438, 446, 449-51 (Isaacs J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114 (Evatt J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558-9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³⁹⁹ Ibid 251, [197], 271 [251], [252], [253] (Hayne J). See: *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 371 (Dixon J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 119 [336], [337], [338] (Hayne and Kiefel JJ).

⁴⁰⁰ *Williams v Commonwealth* (2012) 248 CLR 156, 205-6 [61] (French CJ).

⁴⁰¹ Ibid.

⁴⁰² Appleby and McDonald, above n 144, 264 [fn 59].

⁴⁰³ Ibid.

⁴⁰⁴ Chordia, Lynch and Williams, above n 43, 205. Also known as ‘party solidarity’. See: Hume, Lynch and Williams, above n 19, 80.

⁴⁰⁵ See *Williams v Commonwealth* (2012) 248 CLR 156, 232-3 [136] (Gummow and Bell JJ); Lindell, above n 191, 368-9.

⁴⁰⁶ Cf *Williams v Commonwealth* (2012) 248 CLR 156, 316-17 [396] (Heydon J).

importantly, the Executive ‘is not authorised by the *Constitution* to expand its powers by contract.’⁴⁰⁷

In summary, a rejection of the broad basis submission accords with the principle of responsible government. If the Executive Government had power to contract in the same manner as a juristic person, then as long as valid appropriation provided the necessary expenditure, the Executive could enter into any contract it saw fit.

C *Australian Constitutional Considerations*

Australian constitutional considerations, as briefly explained in Chapter Two, Part IV comprise of structural considerations, those being considerations of the distribution of powers across the *Constitution* that regard to federalism and accountability. These concern the structure of the *Constitution* and the institutions thereunder.

This section examines the ‘narrow basis submission’. The narrow basis submission was based on statements of three Justices in the *AAP Case*, to the effect that the executive power could be engaged to allow the government to act in any matter that *could* be the subject of legislation, provided that appropriation supported the expenditure required.⁴⁰⁸ Therefore, that the Executive could act within the confines of the enumerated heads of power granted to Parliament by the *Constitution*.⁴⁰⁹ During written and oral argument, this was referred to as the ‘Common Assumption’.⁴¹⁰ Originally accepted by all parties, including interveners, in written submissions, and relied upon during oral argument, counsel for the Attorney-General for Western Australia, as intervener,⁴¹¹ renounced written submissions on this point. Following Western Australia was Victoria and Queensland, and then the plaintiff and most interveners, except New South Wales, joined.⁴¹² Although the marked departure and new agreement of what was considered the ‘state of the law’ does not

⁴⁰⁷ Ibid 373-4 (Kiefel J).

⁴⁰⁸ See: *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ).

⁴⁰⁹ See: Ibid 338, 362 (Barwick CJ), 379 (Gibbs J), 396 (Mason J). I will interchangeably refer to this as the *AAP* submission.

⁴¹⁰ See generally: *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011); *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011); *Williams v Commonwealth* [2011] HCATrans 200 (11 August 2011).

⁴¹¹ Mr. R M Mitchell SC, Acting Solicitor-General for Western Australia.

⁴¹² See: *Williams v Commonwealth* (2012) 248 CLR 156, 179 [3] (French CJ); 296 [343] (Heydon J).

‘bind the court’,⁴¹³ the Court, by majority, agreed. What is intriguing, however, is that the Court had never ‘decided’ that the common assumption was correct; rather, its correctness had been *assumed* in a number of successive cases.⁴¹⁴ Moreover, the Common Assumption did not allow the Government *carte blanche* to engage in activities that could be supported by legislation – Parliament *always* had the ability to control or withhold the Executive from engaging in these activities by either blocking expenditure requests or passing legislation prohibiting engagement in such activity.⁴¹⁵ The Court in *Williams* has added an extra layer of protection, of increased responsibility, to Parliament’s oversight ability, by requiring legislation that supports the activity.

1 *The relationship between Chapter I and Chapter II of the Constitution*

Four justices, French CJ, Gummow, Crennan and Bell JJ rejected the narrow basis submission on the basis that the Executive power to enter contracts to spend money is limited to activities that are supported by legislation.⁴¹⁶

In dealing with the proposition derived from the *AAP Case*, French CJ opines that the understanding of the meaning of the proposition has been misinterpreted. Noting the Common Assumption (above) and its construction from the separate comments of Barwick CJ, Gibbs and Mason JJ in the *AAP Case*, it is Mason J’s comments that were ‘most influential’.⁴¹⁷ In full, it is as follows:

Although the ambit of the [executive] power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*.⁴¹⁸

⁴¹³ Ibid 296 [344] (Heydon J).

⁴¹⁴ Lindell, above n 191, 362. See: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 61 (Barwick CJ), 113 (Aickin J); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ), 110 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 59 [124] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).

⁴¹⁵ Ibid. 365.

⁴¹⁶ *Williams v Commonwealth* (2012) 248 CLR 156, 187 [27], 192-3 [36]-[37], 216-17 [83] (French CJ), 236-9 [150]-[159] (Gummow and Bell JJ), 353 [524] (Crennan J). Hayne and Kiefel JJ did not address this because in their respective opinions, the law could not be supported by a head of legislative power: 271 [252], 281 [288] (Hayne J), 373 [594] (Kiefel J). Heydon J dissented on the basis that the impugned activity fell within s 51(xxiiiA) of the *Constitution*: 321-33 [408]-[441] (Heydon J).

⁴¹⁷ Chordia, Lynch and Williams, above n 43, 207.

⁴¹⁸ *Victoria v Commonwealth* (1975) 134 CLR 338, 396 (Mason J).

Focusing on this,⁴¹⁹ French CJ provides that this concept of Executive Power is ‘consistent with that most recently discussed by this Court in *Pape*.’ It did not ‘afford support for the broad proposition that the Executive Government can do anything about which the Parliament of the Commonwealth *could* make a law.’⁴²⁰ This is because Mason J’s opinion in *AAP* was written in the negative - to what the Executive Power could not go beyond – as opposed to the positive, or what the Executive Power can extend to. Regardless, French CJ draws the distinction that the Court in *AAP* did not draw: that ‘the subject matters of legislative power are specified for the Parliament to yield a law with respect to a subject matter within the constitutional grant of legislative authority, not to give content to the executive power.’⁴²¹ Therefore, it ‘was not to be understood as affirming that [the executive could act upon] any subject on which legislation might be passed.’⁴²² Clearly, his Honour considers that what is included in Ch II of the *Constitution* cannot be informed by reference to power in Chapter I; such content must be defined within its own sphere.

This is heavily supported by Gummow and Bell JJ who unequivocally state that the *AAP Case* does not support any proposition that the spending power of the Executive government is co-extensive with those activities which could be the subject of legislation supported by any head of power in s 51 of the *Constitution*.⁴²³ Citing two reasons, their Honour’s provide first the well settled example that there can be no taxation except under authority of statute;⁴²⁴ and note that ‘these heads and other heads of legislative power [such as marriage and divorce, and bankruptcy and insolvency by executive decree] in Ch II are contemplated by the power given to the Parliament by Ch III to make laws conferring upon federal courts jurisdiction in matters arising under federal laws.’⁴²⁵ Further, ‘while heads of power in s 51 carry with them the power to create new offences,⁴²⁶ the Executive cannot create a new offence⁴²⁷ and cannot dispense with the operation of any law.’⁴²⁸ Secondly, ‘such a

⁴¹⁹ With which Gibbs J opines in near analogous terms and is not inconsistent with that of Barwick CJ.

⁴²⁰ *Williams v Commonwealth* (2012) 248 CLR 156, 189 [30] (French CJ), endorsing the view of Isaacs J that ‘the Executive cannot change or add to the law; it can only execute it.’: *Kidman v Commonwealth* (1925) 20 CLR 425, 441.

⁴²¹ *Williams v Commonwealth* (2012) 248 CLR 156, 187 [26], [27] (French CJ).

⁴²² Chordia, Lynch and Williams, above n 43, 208.

⁴²³ *Williams v Commonwealth* (2012) 248 CLR 156, 232 [134] (Gummow and Bell JJ).

⁴²⁴ *Ibid* [135] (Gummow and Bell JJ).

⁴²⁵ *Ibid*.

⁴²⁶ See: *R v Kidman* (1915) 20 CLR 425.

⁴²⁷ See: *Davis v Commonwealth* (1988) 166 CLR 79, 112 (Brennan J).

proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the *Constitution*.⁴²⁹ Force for this proposition is enhanced by Crennan J, who agreed with this point.⁴³⁰

This illustrates the importance of responsible government, enhancing Executive accountability and ‘minimis[ing] the potential for abuse of Executive power’.⁴³¹ When considering this against the loose conception of Executive power that appeared to come out of the decision in *Pape, Williams* tightens the accountability aspect of responsible government by reference to the notion of parliamentary supremacy.

What is apparent from this is that the ‘executive power to enter into contracts or spend public money is in most cases limited to that for which it has authority positively conferred on it by statute.’⁴³² The support of legislative power is essential to responsible government because the fact of supporting legislation shows that the activity has been scrutinised and approved by Parliament.

Crennan J distinguished the *AAP Case* with the present case by providing that the *AAP Case* concerned the bypass of the federal distribution of power, whereas in this case, the power purportedly exercised appears to be an attempt at exercising prerogative power.⁴³³ In particular, her Honour focused upon principles of responsible government that limit the exercise of prerogative power, highlighting that if there was such a capacity, a source of power must be established.⁴³⁴

No such power had been established and this was further recognised by her Honour concluding that as the NSCP did not form ‘a recognised part of the Commonwealth

⁴²⁸ *Williams v Commonwealth* (2012) 238 CLR 156, 232 [135] (Gummow and Bell JJ). See also *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348, 357-8 [5]-[8] (French, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁴²⁹ *Ibid* [136] (Gummow and Bell JJ).

⁴³⁰ *Ibid* 358 [544] (Crennan J): the proposition disregards the ‘constitutional relationship between the Executive and Parliament’.

⁴³¹ Lindell, above n 191, 370.

⁴³² Shipra Chordia, Andrew Lynch and George Williams, ‘*Williams v Commonwealth [No 2]* – Commonwealth Executive power and spending after *Williams [No 2]*’ (2015) 39 *Melbourne University Law Review* 306, 308.

⁴³³ *Williams v Commonwealth* (2012) 248 CLR 156, 356-7 [538]-[539] (Crennan J), after analysing passages in *Victoria v Commonwealth* (1975) 134 CLR 338, 361-2 (Barwick CJ), 379 (Gibbs J), 396 (Mason J), 404-5 (Jacobs J).

⁴³⁴ Twomey, above n 229, 20.

Government administration’ (and therefore, not validly part of an odd numbered Appropriation Act), there was an insufficient level of parliamentary scrutiny and more was required.⁴³⁵ The basis for this consideration was with reference to the post-*Pape* understanding of ss 81 and 83 of the *Constitution*, that ‘purposes of the Commonwealth’ must be determined by reference to Commonwealth legislative power.⁴³⁶ The importance of this is that it alludes to a more rigorous parliamentary scrutiny and approval process⁴³⁷ and further entrenches the accountability aspects of *Pape*, which aligns it with extra parliamentary oversight, by way of legislation, for Executive activity.

2 *The importance of s 96 of the Constitution*

The importance of s 96 is discussed at length by Gummow and Bell JJ. This structural consideration and how it functions within the federal structure of the *Constitution*, was recently reformulated in *ICM Agriculture* where it was held that a State cannot refer power to the Commonwealth to acquire property ‘on terms other than just’⁴³⁸ as a condition of a s 96 grant.⁴³⁹ The importance of this is twofold. First, it has been long recognised that in terms of economic bargaining power, the States, due to the vertical fiscal imbalance, are in a subservient position vis-à-vis the Commonwealth. The requirement in s 96 that the Commonwealth is able to make grants ‘on such terms and conditions’ it thinks fit is apt for use to the Commonwealth’s advantage. Secondly, although the States are in a position of lesser bargaining power, the act of agreeing to the condition of the grant is a voluntary act,⁴⁴⁰ is therefore ‘wear[ing] consensual aspect.’⁴⁴¹ If the Executive were able to

⁴³⁵ *Williams v Commonwealth* (2012) 248 CLR 156, 354-5 [532] (Crennan J); Twomey, above n 229, 20.

⁴³⁶ *Williams v Commonwealth* (2012) 248 CLR 156, 356 [538] (Crennan J).

⁴³⁷ Lindell, above n 191, 371.

⁴³⁸ See: *Constitution* s 51(xxxi).

⁴³⁹ *Williams v Commonwealth* (2012) 248 CLR 156, 236 [147] (Gummow and Bell JJ). See *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 [46] (French CJ, Gummow and Crennan JJ); 198 [136]-[137] (Hayne, Kiefel and Bell JJ).

⁴⁴⁰ Chordia, Lynch and Williams, above n 43, 205. Cf Ratnapala, above n 273, 82. Further, cf the recent view in the United States of America where a grant to a State under Congress’ spending power was invalid because the State was impermissibly compelled to accept it: *National Federation of Independent Business v Sebelius* 567 US ___ (2012). This decision also considered representative government: 48 (Roberts CJ), 34-5 (Scalia, Kennedy, Thomas and Alito JJ). Note that the conceptualisation of each nation, the United States of America as an alliance of States toward a common goal (or goals), and the Commonwealth of Australia as an ‘indissoluble federal Commonwealth’ where the States have a constitutional role, are markedly different – the effect of what are, *prima facie*, similar ‘national’ powers may have distinct and separate consequences.

⁴⁴¹ *Victoria v Commonwealth* (1975) 134 CLR 338, 357 (Barwick CJ).

engage in expenditure that is supported only by Ch II of the *Constitution*, it would not only bypass the requirements of s 96 requiring State consent; it would also entail that the Executive could expend monies on *any* activity it sees fit because it would take parliamentary oversight – through Parliament’s control over Ch IV of the *Constitution* - out of the process, therefore eroding, undermining and subverting Parliament (and voluntary acceptance by the State(s)).⁴⁴² It must be remembered that Parliament’s power prevails.⁴⁴³

Further, their Honours’ use of the passage of Barwick CJ in the *AAP Case* highlights the significance of s 96 in the federal structure; particularly that if the States did not need to consent, ‘it not only alters what may be called the financial federalism of the *Constitution* but it permits the Commonwealth to effectively interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the *Constitution* to the State.’⁴⁴⁴

Responsible government ‘dictated the conclusion that the power should be confined to circumstances where legislative power has actually been exercised to support the executive action.’⁴⁴⁵

III THE NEW ROLE OF RESPONSIBILITY AND ITS EFFECT ON THE EXECUTIVE POWER

As a *precis*, *Pape* and *Williams* show that when Executive activity is impugned and requires an interpretation of the Executive Power exercised, if appropriate steps are not taken to limit the ambit of the executive power, responsible government – through a lack of transparency and accountability – is affected.⁴⁴⁶ The clear issue is the depth of executive power.⁴⁴⁷ When interpreting the depth of the executive power (or the ‘maintenance’ limb of s 61), it must be consistent with responsible government.⁴⁴⁸ If not, Parliament cannot perform its oversight function to scrutinise

⁴⁴² Hume, Lynch and Williams, above n 19, 85.

⁴⁴³ Donaldson, above n 194, 147.

⁴⁴⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 235-6 [148] (Gummow and Bell JJ). See *Victoria v Commonwealth* (1975) 134 CLR 338, 357-8 (Barwick CJ).

⁴⁴⁵ Hume, Lynch and Williams, above n 19, 91.

⁴⁴⁶ Cf Saunders, above n 238, 259.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Gerangelos, above n 208, 101.

the Executive. Further, it allows the Executive to engage in activity free from accountability considerations.

Following *Williams*, the argument that the executive power is co-extensive with legislative power is no more, although, one commentator argues that Gummow, Crennan and Bell JJ indicated this in *Pape* by not considering whether there was a legislative power to make laws with respect to emergencies, because, if their Honours' did so, it would indicate the executive power to do so is derived from the legislative power of the Commonwealth.⁴⁴⁹

The recognition that executive's capacity to enter into contracts and expend money derives from the text and structure of the *Constitution* is key to the argument that there is a responsibility and oversight aspect as it necessarily entails that Parliament has oversight of the functions relating to expenditure, particularly due to fact that all expenditure is of public money.⁴⁵⁰ Responsible government was not met by ministerial accountability to Parliament or valid appropriation, the passage of legislation is required.⁴⁵¹ Because of this, it is 'inconceivable that the authors of the *Constitution* intended by s 96 to create a new source of federal power that is virtually unlimited.'⁴⁵²

Further, 'the most significant feature of *Williams* was the Court's willingness to rely on considerations of constitutional structure and coherence in determining the ambit of Commonwealth power.'⁴⁵³ Constitutional structure and coherence enhance Parliament's supervisory role. The supervisory role of Parliament now extends to 'authorising certain executive activities and transactions *before* those activities are entered into or carried on by the government and its agencies.'⁴⁵⁴ As extensively discussed, that authorisation is by way of legislation. That need for legislation displays 'parliamentary scrutiny above and beyond that given to appropriations.'⁴⁵⁵ This is particularly important because 'appropriations are generally stated in such

⁴⁴⁹ McLeod, above n 189, 135.

⁴⁵⁰ Chordia, Lynch and Williams, above n 43, 200. See *Williams v Commonwealth* (2012) 248 CLR 156, 236 [151] (Gummow and Bell JJ), 258-9 [216] (Hayne J), 352 [518]-[519] (Crennan J), 368-9 [577] (Kiefel J). See also: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J).

⁴⁵¹ Bateman, above n 391, 266.

⁴⁵² Ratnapala, above n 273, 78.

⁴⁵³ Hume, Lynch and Williams, above n 19, 92.

⁴⁵⁴ Lindell, above n 191, 383 – emphasis in the original.

⁴⁵⁵ Twomey, above n 229, 24.

broad purposes that Parliament usually has little idea about what the money will be spent on.⁴⁵⁶

Moreover, because *Williams* recognised ‘that the scope of the Commonwealth executive power is not coextensive with its legislative power... Commonwealth executive [action] must now be authorised by the [Parliament],⁴⁵⁷ its effect, which may now appear trite to say, is that all that is now needed is a validly enacted statute that authorises the expenditure of appropriated money.⁴⁵⁸ If the Commonwealth wishes to take a different route, that is, through engaging with s 96, it still accords with the ‘prism’⁴⁵⁹ that expenditure must be viewed through in light of *Williams*, ensuring first, parliamentary oversight for determining expenditure.⁴⁶⁰

Additionally, when looking at the ‘responsibility’ aspect in isolation, it does, at least in theory, increase the control of the Senate as part of parliamentary scrutiny, engaging in methods as noted by Heydon J, such as:

[S]eek[ing] information and criticis[ing] proposals to spend money through the Senate Estimates Committee, through correspondence with responsible ministers, through debate on Appropriation Bills, and through the questioning of the ministers who are Senators, or their representatives, in the Senate.⁴⁶¹

There is concurrence in Crennan J’s judgment about the importance of these scrutiny mechanisms, though her Honour refers to the power of *Parliament*, through all of its members in debate and ‘Question Time’.⁴⁶²

Finally, responsible government is a ‘fundamental constitutional doctrine.’⁴⁶³ While *Williams* provided new considerations for responsible government, particularly in light of the Australian constitutional structure, the Court’s increased focus on responsible government began in *Pape*. The importance of the reformulation of the

⁴⁵⁶ Anne Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money* (Constitutional Reform Unit, Report No 4, 2014) Sydney Law School, 41.

See: *Williams v Commonwealth* (2012) 248 CLR 156, 241 [174], 261 [222] (Hayne J).

⁴⁵⁷ Chordia, Lynch and Williams, above n 43, 230.

⁴⁵⁸ Twomey, above n 229, 12. See also: Donaldson, above n 194, 148-9.

⁴⁵⁹ Lindell, above n 191, 373.

⁴⁶⁰ Chordia, Lynch and Williams, above n 43, 216.

⁴⁶¹ *Williams v Commonwealth* (2012) 248 CLR 156, 316-17 [396] (Heydon J).

⁴⁶² *Ibid* 351 [515] (Crennan J).

⁴⁶³ *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 411-12 (Isaacs J).

basis of an appropriation⁴⁶⁴ that brought the ‘purposes of the Commonwealth’ out of non-justiciable domain and into an arena where it can be scrutinised, debated, amended and legislated, is where responsibility and accountability over the Executive is at its highest. As was discussed in Chapter Three, the *Constitution* requires trust for its continued operation. The nation of Australia ‘summoned’⁴⁶⁵ into existence at federation was one that was carefully planned. Most importantly, this required positive assent to the polity that was created – the Commonwealth of Australia. The significance of that continued assent is reflected in the power of Parliament, and the scrutiny of Executive action monitored through responsible government and accountability of the Executive by Parliament. It is long recognised that the stream cannot rise above its source;⁴⁶⁶ the power of the Commonwealth was crafted with the people, by the people and it was for the people. The people, through Parliament, remain the ultimate source of power. The people decide its limit.

⁴⁶⁴ See Chapter Four: Controlling the elusive: Responsible Government as a limit on Executive Power, II *Pape*, B *Appropriations: Sections 81, 83 and Parliamentary Accountability*, 4 *Post Pape: The new mechanics*.

⁴⁶⁵ *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

⁴⁶⁶ *Heiner v Scott* (1914) 19 CLR 381, 393 (Griffith CJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

CHAPTER FIVE: CONCLUSION

This thesis analysed the Executive Power of the Commonwealth and determines that the Executive Power is limited by the principle of responsible government.

Chapter One introduced the idea that, although during the Convention Debates and at Federation, the Framers conceived the Executive Power to be as wide as the legislative power of the Commonwealth, the High Court has taken a different approach. Whilst the High Court expanded the reach of Commonwealth legislative power, the Executive Power has not been expanded in the same manner; the Court has seen fit to treat the Executive Power differently.

Chapter Two introduced the principle of responsible government. It did so by briefly outlining Australia's system of government at the Commonwealth level, and then introducing the traditional concepts of representative government and responsible government, derived at Westminster and adapted to Australia. By emphasising that representative and responsible government principles are entrenched in the *Constitution*, the Chapter suggests a heightened importance of responsibility and accountability to Executive activity. Finally, the Chapter argues that the traditional principle of responsible government has been modified by the *Williams Case*, accentuating an importance on both Parliament's oversight of expenditure, and constitutional considerations that are unique to the *Australian Constitution*.

Chapter Three traced the history of the Executive Power in its present form from its beginnings as the Crown in the United Kingdom. The tracing exercise first illustrated the identity of the Executive arm of government and how it is perceived to those who interact with it. The tracing exercise continues to demonstrate how the Commonwealth Executive Power evolved from its subservience to the Crown of the United Kingdom as the Imperial Dominion to its own legislative and executive independence. The Chapter then moves to introduce the three bases on which the Executive government acts: exercising non-statutory powers, prerogative power and the nationhood power. The location of these powers in s 61 of the *Constitution* creates a difficulty when defining their ambit. Though no exhaustive attempt has been made, the High Court, along with commentators, are beginning to shed light on the true nature of the Executive Power. It is an evolving power which will require

decades of jurisprudence to refine. Finally, the Chapter argues that the Executive Power is limited by responsible government in the following way: the *Constitution* and the people who abide by it require each other for their continued existence. It is the *Constitution* that provides for the functioning of the Commonwealth of Australia, and it is the people who provide representatives, through election, to the offices under the *Constitution*. Power flows to the *Constitution* by the people; the people, through their parliamentary representatives remain the final check on Executive Power. Each Executive decision must come to Parliament for its approval or refusal.

Chapter Four analysed *Pape* and *Williams* by reference to the principle of responsible government and outlines why the two decisions provide for closer scrutiny of Executive activity. First, *Pape* reformulated the way that appropriations are viewed. The result of the reformulation was a significantly reduced ability of Executive expenditure because a ‘purpose of the Commonwealth’ is now defined by reference to the legislative power of the Parliament, rather than any purpose that the Executive think is a purpose of the Commonwealth. The analysis of the Court’s treatment of the Executive Power in *Pape* is generally critical, due to the majority’s (French CJ, Gummow, Crennan and Bell JJ’s) conclusion that the nationhood power can be engaged to support the impugned *Tax Bonus Act* in the circumstances it was enacted, without proffering a fulsome explanation of reasons as to why. In this regard, the analysis moves to highlight, and prefer, Heydon J’s dissent (and to a lesser extent Hayne and Kiefel JJ’s) on the basis that the nationhood power needs to be referable to the *Constitution* in order for Parliament to be able to properly scrutinise activity undertaken by engagement of the nationhood power.

Second, the Chapter analyses *Williams*, looking at two key aspects: the need for oversight of expenditure and Australian constitutional considerations. The oversight of expenditure considerations gained importance by the Court rejecting the proposition that the Executive’s power to contract is unlimited. Key to the rejection of this proposition is the fact that when the Executive expends money, it is not their own. The money is ‘public money’, raised through taxation and, therefore, the power to raise this money is exclusively reposed in the Parliament. The corollary is that Parliament approves the expenditure of money through an appropriation Act. Therefore, it is the Parliament who allow the Executive to engage in activities through the Parliament’s ability to withhold funds from the Executive. The

constitutional considerations examine the structure of the *Constitution*, particularly the relationship between Ch's I and II, and the importance of s 96. The relationship between Ch I and II of the *Constitution* brought about the rejection of the submission that the Executive can do anything that *could* be the subject legislation because the powers are coextensive. The majority's (French CJ, Gummow, Crennan and Bell JJ) reasoning in this regard points to the notion of parliamentary supremacy; a consideration that is important to responsible government because of Parliament's representative aspect. The importance of s 96 focused on the 'consensual aspect' of the power – that is, that the States voluntarily accept a s 96 grant. As s 96 is located in Ch IV of the *Constitution*, the same Chapter as ss 81 and 83, Parliament has ultimate control over the expenditure process.

Ultimately, *Pape* and *Williams* demonstrate that the Court now looks to balancing the powers across the *Constitution*. A consequence of this balance highlights the dominance of Parliament, particularly with respect to expenditure. Though dominance of Parliament may appear, *prima facie*, as an imbalance; in effect, Parliament's dominance ensures that responsibility and accountability of Executive remains constant and is enlivened to properly scrutinise and limit Executive action.

I POSTSCRIPT

Though French CJ has come under critique for his views of the executive power in *Pape*, his Honour, in this author's opinion, took great care in engaging with the executive power to only what was necessary for the case at hand. His Honour certainly has had a leading role in shaping the Executive Power. The amorphous nature of the executive power necessitates a cautious, case by case approach to establishing – if at all possible – its boundaries. Certainly the 'French' conception of Executive Power has been a key talking point among critics ever since the *Tampa Case*,⁴⁶⁷ and as the Hon. Chief Justice French AC provided in an article in 2008,⁴⁶⁸ his good friend, the late George Winterton, was particularly critical. As the Chief Justice resigns from office on 29 January 2017, students, academics and lawyers will

⁴⁶⁷ *Ruddock v Vadarlis* (2001) 110 FCR 491.

⁴⁶⁸ Robert French, 'Vale George Winterton: friend and critic', *The Australian* (online), 21 November 2008 <<http://www.theaustralian.com.au/business/legal-affairs/vale-george-winterton/story-e6frg986-1111118095102>>

no longer have the benefit of his Honour's curial development of the Executive Power. We will be the worse for it.

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