

Executive Power and the Theory of its Limits: Still Evolving or Finally Settled?

UNSW Gilbert and Tobin Centre of Public Law
2011 Constitutional Law Conference
18 February 2011

Hon. Duncan Kerr SC¹

Introduction

In 1649 King Charles I went to his death utterly convinced of his divine right as a King declaring: 'a sovereign and a subject are clean different things.'

Three decades earlier his father, James I, had set down in writing the legal and political doctrine his son was to pay for with his life:

Kings are justly called gods, for that they exercise a manner or resemblance of divine power on earth...God hath power to create or destroy make or unmake at his pleasure, to give life or send death, to judge all and to be judged nor accountable to none; ...and the like power have kings: they make and unmake their subjects, they have the power of raising and casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only...²

Yet, notwithstanding His Majesty's claim to rule by divine right, it was during the reign of James I, that the status of the Crown was first explicitly stated to be subject to the law. In the *Case of Proclamations*³ it was resolved 'by the two Chief Justices, Chief Baron and Baron Althan, upon conference betwixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before...[and] that the King hath no prerogative but that which the law of the land allows him.'

Charles I's execution was briefly followed by republican rule. However, it was the almost bloodless 'Glorious Revolution' which, after the Restoration, removed James II and installed William and Mary as joint sovereigns, but subject to the Declaration of Right and the Parliament⁴, that finally ended all plausible claims for the Crown to govern Britain other than as a constitutional monarchy.

Whilst not without its twists and turns, the unwritten constitution of Britain continued to evolve such that it is now indisputable that the discretionary

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² King James I *Works* (1609) Ch 20.

³ (1610) 12 Co. Rep. 74

⁴ On 13 February 1690 William and Mary accepted the throne of England having agreed to the terms of the Parliament's Declaration of Right. They were jointly crowned on 11 April taking the oath prescribed by the *Coronation Oath Act 1688*: "solemnly promis[ing] and swear[ing] to govern the people of this kingdom of England, and the dominions thereunto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same".

powers of a British King or Queen cannot be added to and, with some very limited exceptions arguably allowed for such prerogative powers as remain must be exercised only upon the advice of a Prime Minister who is responsible to an elected Parliament.⁵

By 1867 Bagehot was describing the Crown as exercising only the 'dignified,' component of the British constitution⁶.

Today the modern British monarchy may lack even dignity; but it is centuries beyond those ancient times when a King or Queen could exercised personal rule and might lament, in the words Shakespeare put in the mouth of Henry IV; 'uneasy lies the head that wears a Crown'⁷.

In 1964 Lord Diplock bluntly dismissed the argument that the British Crown could assert a monopoly over broadcasting with the statement 'it is 350 years and a civil war too late for the Queen's Court to broaden the prerogative'.⁸

Yet the position in Australia has recently changed and now appears starkly different. In a recent article in the *Australian Bar Review* the Chief Justice of New South Wales, writing extra-judicially, observed:

The extent of the executive power of the Commonwealth appears to have been cut free from the traditional conception of prerogative powers in a manner which means that there is now no source of guidance as to the boundaries of executive power⁹.

His Honour continued:

In terms of our legal history, this is quite a dramatic development. In England a King was executed and a civil war waged to limit the scope of the prerogative and to assert the supremacy of parliament. However, the executive power is, apparently, no longer confined to well-established traditional categories¹⁰.

The three presentations at this session will explore the implications of cutting free Australian executive power from the historic notions of limited prerogative powers. My contribution will seek to explain how this circumstance arose, its significance and to identify what has been resolved and what remains unresolved in consequence of these changes.

⁵ For example to refuse an election to, or to dismiss, a Prime Minister who has lost the confidence of the House of Commons when another appears to have had the confidence of the House reposed in him or her. The scope of these 'reserve powers' remains contentious in Australia following the dismissal of the Whitlam government by Governor-General Sir John Kerr. For a larger discussion and consideration of these 'reserve powers' in the Australian context see George Winterton, *Parliament, the Executive and the Governor-General* (1983) 13-38

⁶ Walter Bagehot *The English Constitution* 1867

⁷ *Henry IV* Part 2, Act 3, Scene 1, 31.

⁸ *British Broadcasting Corporation v Jones* [1965] Ch 32 at 79.

⁹ The Hon J J Spigelman AC, Public law and the executive (2010) 34 *Aust Bar Rev* 10-24 at 19.

¹⁰ *Ibid* at 20.

Simon Evans will follow and will propose a theory to underpin the direction the law may, and should, evolve.

Peter Gerangelos will conclude this session by exploring how Australia's ultimate evolution to a Republic might intersect with our evolving understanding of executive power.

Section 61: From Imperial doctrine to constitutional conundrum

Section 61 of the Constitution is cryptic as to the content of the Executive power. Its terms are as follows;

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.

The actual constitutional role of the Queen and her Governor-General and the nature of the executive power that can be exercised by them cannot be discerned by a simple reading of the text of the *Constitution*. Assumptions, implications and unwritten conventions deriving respectively from the doctrine of responsible government and from the principle of the rule of law both 'form part of the fabric upon which the written words of the Constitution are superimposed.'¹¹

The doctrine of responsible government and the conventions associated with it serve to restrain the exercise of any significant personal power by the Governor-General¹².

However, the notion of responsible government says nothing about the content and scope of those powers.

When the Commonwealth of Australia was formed in 1901 the primacy of the *Constitution* as law was axiomatic because the *Constitution* was then regarded as an enactment of the Imperial Parliament and, hence, binding on all colonial institutions.

Isaacs J explained the then orthodox position as follows:

¹¹ *Commonwealth v Kreglinger* (1926) 37 CLR 393 at 413 (Isaacs J). In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135. Mason CJ, referring to this passage, drew a distinction between 'implications' and 'unexpressed assumptions upon which the framers proceeded in drafting the Constitution'; and applied Isaac J's expression only to the former. The distinction is important, the former being regarded as part of the text whereas the latter's significance might range from useful interpretive factors to assumptions that have become irrelevant with the passage of time; but in the present context such distinctions are immaterial. See B M Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *PLR* 234 at 234.

¹² See fn 4 above.

I apprehend, therefore, that it is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in interpreting the Australian *Constitution* of every fundamental [British] constitutional doctrine existing and fully recognised at the time the *Constitution* was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature.¹³

Applying that doctrine inevitably led to the conclusion that the executive power conferred by s61 included aspects of the Crown's 'prerogative' powers¹⁴.

The 'prerogative' was that bundle of rights possessed by the Crown quite distinct in law from the rights of common persons. Over time as the divine right of kings was displaced by responsible government the prerogative became seen to be less an element of individual Royal power as an ordinary aspect of government.¹⁵

The early jurisprudence of the High Court was to the effect that all of the prerogative powers of the Crown possessed by British monarch at the time of the making of the *Constitution*, as were capable of application in Australia, powers described by Dicey¹⁶ as 'the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown' had been conveyed to the Governor-General by s61 and were exercisable by him or her as if he or she were a constitutional monarch¹⁷.

Thus Isaacs J said of s.61;

These provisions carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia.¹⁸

That understanding of the discretionary powers conferred by s 61 carried with it a number of legal consequences consistent with the Rule of Law.

First, the prerogative powers were vestigial, leftovers from mediaeval times when English Kings ruled as absolute monarchs; and residual—so that they

¹³ *Commonwealth v Kreglinger* (1926) 37 CLR 393 at 411-412

¹⁴ There was however a lively debate in the first decades of Federation as to whether the prerogatives as to international affairs and to declare war had been reserved to the Imperial Crown: see Herbert V Evatt, 'Certain Aspects of the Royal Prerogative' Doctoral Thesis University of Sydney; published as *The Royal Prerogative*, 1987 at 142-170

¹⁵ 'In itself...a striking testimony to the manner in which accepted political doctrines become part of the law of the land through recognition by the Judges:' Evatt, *ibid* at 25. Some quaint personal prerogative rights of the British Crown that had survived in England had no logical application in Australia, for example those relating to the Crown's right to land Royal Fish (sturgeon and whale) on the shores of England and Scotland.

¹⁶ A V Dicey *Law of the Constitution* 10th ed 424

¹⁷ See above fn 4.

¹⁸ *Farey v Burvett* (1916) 21 CLR 433 at 452

could be lost by disuse or abolished by statute¹⁹ and no new prerogative power could be created²⁰.

Second, the scope of the prerogative was justiciable²¹.

Third, all the powers included within the prerogative, while sometimes elusive to state, were capable of classification and identification²².

However, the view of s61 as limited by the prerogative was intimately bound up with the early High Court's conception of the legitimacy of the Constitution as flowing from its status as binding Imperial legislation.²³

Once the Constitution's binding power was held not to derive from Imperial law but from a mandate sourced 'exclusively in the original adoption and subsequent maintenance of its provisions by the people'²⁴ there was refocused judicial attention on its text. In a critical point of departure from earlier references to the prerogative Gummow J (then a judge of the Federal Court) reasoned;

In Australia...one looks not to the content of the prerogative in Britain, but rather to s61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown²⁵.

This revolution in thinking made it possible to imagine a reading of s 61 that would differ from the position asserted by the late Professor George Winterton, that:

the government is limited to those powers falling within the Crown's prerogative powers. In other words, the government can "maintain" the Constitution and the laws of the Commonwealth, only to the extent allowed by the Crown's prerogative powers.²⁶

¹⁹ George Winterton has persuasively dismissed the argument that prerogative powers conferred by s 61 were not subject to parliamentary control; Winterton G, *Parliament, the Executive and the Governor-General*, Melbourne University Press 1983, 33

²⁰ *Case of Proclamations* (1611) 77 ER 1352

²¹ *Ibid*

²² Identifying the precise limits of what was inherited by this means was the subject of considerable debate and scholarship. The most influential analysis of the prerogative as it applied to the Dominions was that of Herbert V Evatt, '*Certain Aspects of the Royal Prerogative*' Doctoral Thesis University of Sydney; published as *The Royal Prerogative*, 1987.

²³ See for example Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at 597:

[The *Constitution*] is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our Constitution this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we treat their powers simply as authorities belonging to them by law. American doctrine treats them as agents for the people who are the source of power...

²⁴ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 102 at 171 (Deane J)

²⁵ *Re Ditfort; Ex parte DCT* (1988) 19 FCR 347 ('Re Ditfort') at 369

²⁶ George Winterton 'The Limits and Use of Executive Power by Government' (2003) 22 *Federal Law Review* 421, 428

Was it possible that the Australian Governor-General might exercise greater discretionary and arbitrary powers than could the Queen he or she represented and in whose name his or her powers are exercised?

The decision in *Vadarlis*

*Vadarlis*²⁷ elevated this question from theoretical speculation to practical importance. French J, later to become Chief Justice of the High Court of Australia, delivered the leading judgment in the Full Court of the Federal Court of Australia.

The *Vadarlis* case arose in controversial and politically charged circumstances.

The basic facts are well known. A Norwegian vessel, the *MV Tampa*, was boarded by Australian Defense Forces acting on instructions from the Government in order to prevent it making port in Australia and discharging rescued 433 asylum seekers. If the power to undertake that action existed, the source of the power to do so had to be located outside of those conferred by statute. The *Migration Act 1958* conferred neither the power to authorize the vessel's boarding nor the ongoing detention²⁸ of the asylum seekers.

Mr Vadarlis, a Victorian solicitor acting pro bono, sought orders in the nature of *habeas corpus* in the Federal Court seeking the release of the asylum seekers.

At first instance North J had granted the application. His Honour gave short shrift to the claim for an executive power to detain and remove those aboard the *Tampa*:

The [*Migration*] Act [1958] contains comprehensive provisions concerning the removal of aliens (ss198-9). In my view the Act was intended to regulate the whole area of removal of aliens. The long title of the Act is "[a]n Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons". It leaves no room for the exercise of any prerogative power on the subject: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC²⁹.

The Minister appealed.

Two critical questions fell for determination by the Full Court of the Federal Court of Australia. They were (a) whether the Commonwealth Executive possessed any power independent of statute to prevent the entry of aliens and (b) if so whether such power had been displaced by the detailed provisions of the *Migration Act 1958* that regulated the identical subject matter.

²⁷ *Ruddock v Vadarlis* (2001) 110 FCR 491 on appeal from *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297

²⁸ North J's finding of fact that the asylum seekers had been detained was not challenged on appeal;

²⁹ *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 at [121],[122]

A majority, French J, Beaumont J concurring, upheld the Minister's appeal. Their Honours concluded that the necessary executive power existed³⁰.

Referring to the reasoning of Gummow J in *Re Ditfort* French J rejected the proposition that any source of the Executive's power to exclude aliens must be an aspect of the prerogative. His Honour stated:

The executive power of the Commonwealth under s. 61 cannot be treated as a species of the royal prerogative....While the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government reflected in Chapters I, II and III of the Constitution and, as to legislative powers, between the polities that comprise the federation. The power is subject, not only to the limitations as to subject matter that flow directly from the Constitution but also to the laws of the Commonwealth made under it. There is no place then for any doctrine that a law made on a particular subject matter is presumed to displace or regulate the operation of the executive power in respect of that subject matter. The operation of the law upon the power is a matter of construction³¹.

It was thus immaterial whether or not a prerogative power to expel aliens had ever existed, still existed or had been lost through disuse. The prerogative did not constrain s.61's bounds³².

The problem of how to identify the additional content was dealt with cursorily, French J stating:

The "spheres of responsibility vested in the Crown by the Constitution" and referred to by Mason J in *Barton* were described in *Davis* as "...derived from the distribution of legislative powers effected by the Constitution itself and from the character and status of the Commonwealth as a national polity". In like vein Brennan J agreed generally with the observation of Jacobs J in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 ('AAP') at 406 that the phrase "maintenance of the Constitution" imports the idea of Australia as a nation...Brennan J saw the phrase as assigning to the Executive government functions relating "not only to the institutions of government but more generally to the protection and advancement of the Australian nation" ³³

Thus included in the armory of the Executive acting under s. 61 was all that flowed from the conception of Australia as a nation— and from the *Constitution's*

³⁰ The question of whether the power ought to have been regarded as having been displaced is discussed later in this paper—see pp 13-16.

³¹ at [183]

³²at [197]

³³ at [180]

assignment to the Executive of the role of promoting the nation's protection and advancement.

Yet both *Davis* and the *AAP Case* had concerned legislative, rather than executive power. The direct relevance of those cases was therefore contestable³⁴.

There are persuasive Rule of Law reasons to reject an easy analogy between executive and legislative power. In a recent essay Stephen Gageler³⁵ suggested that the High Court's approach should differ depending on whether or not it is foreseeable that political accountability can be relied on to resolve contending views of the appropriate balance and constraint on governmental powers.

This is a crude summary of a much refined argument but if Gageler's thesis is accepted there is a rational (if rarely articulated) explanation as to why many otherwise plausible arguments about the invalidity of legislation passed by a representative bi-cameral Parliament have been rejected by the High Court; their merits left for political rather than judicial determination— and a powerful reason, given the Executive has come to dominate the House of Representatives, such that there is little effective check through Parliamentary processes on that power, why strict judicial review must apply to any claimed discretionary executive powers which would be otherwise uncoupled from effective review.

Whatever criticisms may apply to their reasoning, the majority in *Vadarlis* concluded the executive power conferred by s. 61 extended beyond the prerogative. It authorized the military to board the vessel to prevent the entry into Australia of those aboard. Given the approving reference to Brennan J's views in *Davis*³⁶ their Honours may be assumed to have formed the view that the power to board the Tampa, detain the asylum seekers and prevent their coming ashore on Australian territory was necessary 'for the protection and advancement of the Australian nation'. French J stated:

³⁴ Because the *AAP Case* is a rare example of a judgment from which no clear ratio can be derived (see L Zines, *The High Court and the Constitution*, 5th ed, Federation Press, 2008, 354) reliance on the dicta of Jacobs and Brennan JJ was a slender reed upon which to base strong conclusions. And, while *Davis* is authority for the proposition that the 'implied nationhood' power can support a range of legislative measures (in that case associated with appropriations for and the regulation of activities associated with the celebration of the Australian bicentennial), it is also authority for the proposition that such legislative power has only a narrow remit—the Court striking down aspects of Commonwealth legislation that purported to limit the private use of words and symbols extending beyond that which was reasonably required for the protection of the Bicentennial celebrations a point later remarked on by Heydon J in *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009); 257 ALR 1 [521]. Any limits that *Davis* imposed on coercive actions not authorised by legislation and supported only by executive fiat, were not explored in *Vardalis*.

³⁵ Stephen Gageler, *Beyond the text, A vision of the structure and function of the Constitution* (2009) 32 *Australian Bar Review* 138-157. In this article Gageler suggests the *Constitution* is best understood as a framework designed to enlarge the powers of self government of the unified people of Australia through institutions of government, central and state, structured to be politically accountable to those people.

³⁶ at [180]; see the text referring to fn58

In my opinion, absent statutory authority, there is such a [s.61] power at least to prevent entry to Australia. It is not necessary, for present purposes, to consider its full extent. It may be that, like the power to make laws with respect to defence, it will vary according to circumstances. Absent statutory abrogation it would be sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result. Absent statutory authority, it would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave³⁷.

Black CJ, in dissent, criticized the reasoning of the majority as leaving little or no scope for any underlying notions such as the rule of law and responsible government to operate and identified the novel constitutional significance of the majority's conclusions. His Honour pointedly observed;

If it be accepted that the asserted executive power to exclude aliens in time of peace is at best doubtful at common law, the question arises whether s. 61 of the *Constitution* provides some larger source of such a power. It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s. 61 of the Constitution by virtue of general conceptions of 'the national interest'. This is all the more so when according to English constitutional theory new prerogative powers cannot be created³⁸.

The High Court: *Pape* and Executive Power

Pape's importance, in so far as this discussion is concerned, is that a majority of the High Court applied a similar approach to the source of executive power, as had the majority of the Full Court of the Federal Court in *Vadarlis*.

The litigation in *Pape* challenged the validity of *The Tax Bonus for Working Australians Act (No 2) 2009* passed by the Parliament as part of a package of urgent measures the government argued were necessary to provide economic stimulus to the economy and to prevent Australia falling into recession.

The Act provided for lump sum payments of a minimum of \$250 to be made to all persons with a tax liability of at least \$1 in the then current tax year; expenditure the government argued was needed to create immediate increased demand in the economy. The plaintiff, a legal academic, issued a writ seeking a declaration that the *Tax Bonus* legislation was invalid. The case was given expedition. On 3 April 2009 the High Court by a majority of 4/3 delivered judgment in favour of the validity of the Act.

It was not until 7 July 2009 that the Court's reasons for decision were published. The reasons revealed that the judges, surprisingly but unanimously, had rejected the arguments the Commonwealth had put that:

³⁷ at[197]

³⁸ at [30]

- Section 81 of the *Constitution* was a grant to the Parliament of the power to appropriate the Consolidated Revenue Fund for any purpose (save one explicitly prohibited) it thinks fit;
- the Executive necessarily had power to expend any money lawfully appropriated; and,
- the Parliament had power to enact a law requiring that payment, and to regulate the conditions to be met before payment is made³⁹.

Those issues having been resolved against the Commonwealth, the High Court was required to consider whether it might be incidental to the executive power vested in the Governor General by s 61 for the Parliament to legislate to appropriate the Consolidated Revenue Fund to permit the executive to spend public moneys to respond to the then global economic crisis.

In the event the legislation survived solely because a 4/3 majority of the High Court accepted that the power to legislate for an appropriation was incidental to the executive power conferred by s 61. Hayne and Kiefel JJ and Heydon J dissented.

The majority, French CJ and Gummow, Crennan and Bell JJ concluded that the executive power authorized the Commonwealth undertaking short-term measures to meet adverse economic conditions affecting the nation as a whole⁴⁰. The joint majority judgment emphasized that the Executive was the arm of government most capable and empowered to respond to any national crisis whether it is war, natural disaster or economic crisis⁴¹.

Aspects of that notion were far from novel. Executive power, like Legislative power, has always been permitted to expand when required in defense of the realm⁴². Extraordinary powers and discretions have been reposed in the Executive and accepted as legitimate by the High Court in times of war⁴³. But whether the exigencies of 'war' provide an appropriate analogy to an economic crisis may be doubted—a point to be returned to later in this discussion.

French CJ explained his understanding of Commonwealth executive power as follows:

Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional

³⁹ See Hayne and Keifel JJ at [287]

⁴⁰ French CJ [133]

⁴¹ Gummow, Crennan and Bell JJ [233]

⁴² *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75

⁴³ See the sweeping dicta of Issacs J in *Farey v Burvett* (1916) 21 CLR 433 at 453 in which the limits of the defence power were said to be 'bounded only by the requirements of self-preservation'.

museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government⁴⁴.

Gummow, Crennan and Bell JJ similarly agreed that s. 61 conferred powers extending beyond those that had been historically identified as the prerogative.⁴⁵ Their Honours premised their conclusion that s 61 permitted the executive to act to combat the financial crisis on the fact that only the national government had the necessary resources to meet the then economic emergency.

It is not to the point to regret the aggregation of fiscal power in the hands of the Commonwealth over the last century. The point is that only the Commonwealth has the resources to meet the emergency which is presented to it as a nation state by responding on the scale of the Bonus Act.⁴⁶

As had the majority in *Vadarlis*, their Honours adopted⁴⁷ the statement of Brennan J in *Davis v The Commonwealth* (1988) 166 CLR 79 at 111:

It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s 61 does confer on the Executive Government power ‘*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*’ to repeat what Mason J said in the *AAP Case*. In my respectful opinion that is an appropriate formulation for a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth.

However, such a criterion clearly involves contestable judicial policy choices.

The dissentients disputed the majority’s underlying premise—observing that ‘words like “crisis” and “emergency” do not readily yield criteria of constitutional validity.’⁴⁸

The minority judgments made strong claims that an equally effective economic stimulus package could have been delivered had the Commonwealth simply used uncontroversial powers and taken advantage of its financial entitlement to make grants upon condition to the States.⁴⁹

Therefore even accepting that there was a financial crisis requiring a national response the dissentients nonetheless concluded that the provision of financial stimulus was not an activity ‘*which cannot otherwise be carried on for the benefit*

⁴⁴ *Pape* at [127]

⁴⁵ [214]-[215]

⁴⁶ Gummow, Crennan and Bell JJ [242]

⁴⁷ [228]

⁴⁸ Hayne and Keifel JJ [347]

⁴⁹ Hayne and Keifel JJ [343]-[357], Heydon J [519]-[520]

of the nation,' and accordingly their Honours found that there had been no occasion for any expansion of executive power⁵⁰.

The result in *Pape* was to confirm that there is no longer any prospect of the High Court going back to the notion that the prerogative forms a limiting boundary to the power conferred by s61.

But *Pape* also highlights that the limit of the executive power so conferred remains unpredictable and unsettled.

Probable and possible restraints on s 61 power

The reasoning of the majority in both *Vadarlis* and *Pape* releases the discretionary and arbitrary power vested in the Australian Governor-General from the known bounds of the prerogative. In both *Vadarlis* and *Pape* the justices comprising the majorities declined to make definitive statements as to the extent of s 61 leaving its scope, and the plenitude of Commonwealth executive powers, yet to be defined and inherently uncertain.

If there are limits they must be discerned by interrogating the Delphic terms of s.61, subject of course to constitutional prohibitions⁵¹.

As Spigelman has observed, the delineation of the permissible scope of the executive power of the Commonwealth may await development on a case by case basis⁵².

However, contained in the majority judgments in *Pape* can be found a number of obiter statements that justify confidence that caution will be exercised before further arbitrary power is conceded to the executive. There are also indications that many of the older cases that served to limit prerogative power will continue in force but under a new guise.

French CJ stated that future questions about the application of the executive power to the control or regulation of conduct or activities under coercive law, absent authority conferred by a statute made under some head of power other than s 51(xxxix) alone, are likely to be answered conservatively.

They are likely to be answered bearing in mind the cautionary words of Dixon J in the *Communist Party Case*: 'History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those

⁵⁰ Hayne and Keifel JJ [343]-[357], Heydon J [519]-[520]

⁵¹ French CJ states that the exigencies of national government can be invoked neither to set aside the distribution of powers nor to abrogate constitutional prohibitions. But that gives little guidance. As His Honour observed; 'This important qualification may conjure the "Delphic" spirit of Dixon J in the *Pharmaceutical Benefits Case*. But to say that is to say no more than that there are broadly defined limits to the power that must be applied case by case' *Pape* at [127].

⁵² The Hon J J Spigelman AC, Public law and the executive (2010) 34 *Aust Bar Rev* 10-24 at 19

holding executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected'⁵³.

His Honour noted that s 61 could not operate to set aside the distribution of powers between the Commonwealth and the States or the distribution of powers between the three branches of the federal government: nor could it abrogate any constitutional prohibitions⁵⁴. Given his earlier reference to the *Communist Party Case* the Chief Justice may have been suggesting that aspects of the Rule of Law must be comprehended within the notion of 'constitutional prohibitions' but the passage remains self-confessedly Delphic.⁵⁵

The joint judgment of Gummow Crennan and Bell JJ reaffirmed⁵⁶ (albeit without identifying a doctrinal basis for their conclusion) their support for the authority of earlier decisions of the High Court upholding the incapacity of the Executive Government to dispense with obedience to the law⁵⁷ and imposing a need for statutory authority to support extradition from Australia of fugitive offenders⁵⁸. Their Honours also noted the statement by Latham CJ in the *Pharmaceutical Benefits Case*⁵⁹ that the executive government of the United Kingdom cannot create a new offence. They appear to have approved of the conclusion that a similar limitation also applies in Australia⁶⁰.

But even acknowledging these important obiter statements large questions still remain to be answered—if the known ambit of the prerogative no longer expresses the unregulated content of executive power conferred by s 61 of the Constitution, how are future boundaries to be discerned and what might be a coherent modern rationale for the acceptance by the majority joint judgment of the authority of the earlier, differently premised, decisions of the High Court?

Executive Power and Statute Law

Differences emerged in *Vadarlis* not only as to the scope of executive power but also as to whether that power had been displaced by reason of the detailed statutory provisions in the *Migration Act 1958*. While every member of the Full Court accepted that Parliament might cut back its scope, the majority held that there was no presumption that a law on a particular subject matter displaced or regulated the operation of the executive power conferred by s. 61. The absence of that presumption elevated that which Black CJ regarded as a [disputed] 'prerogative' power to a constitutional grant under s. 61 which could only be removed by unambiguous legislative language.

⁵³ at [10]

⁵⁴ at [127]

⁵⁵ *ibid*

⁵⁶ at [227]

⁵⁷ *A v Hayden (No 2)* (1984) 156 CLR 614 and *White v Director of Military Prosecutions* (2007) 231 CLR 570

⁵⁸ *Vasiljkovic v Commonwealth* (2006) 227 CLR 614

⁵⁹ *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 (*Pharmaceutical Benefits Case*)

⁶⁰ at [243]-[244]

The majority accordingly held that the executive's right to act independently of statute had not been limited or abrogated despite the *Migration Act 1958*'s very detailed terms. The parallel executive power authorizing that action was conferred directly by the Constitution and could be removed only by unambiguous text⁶¹.

The question is whether the Act operates to abrogate the executive power under s. 61 to prevent aliens from entering into Australia. There are no express words to that effect. It is necessary then to look to whether by implication it has that effect. It is not necessary for this purpose either to determine the full extent of the executive power or the full effect of the Act upon it. It is sufficient to ask whether the Act evinces a clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of a vessel carrying non-citizens apparently intending to land on Australian territory and the power to prevent such a vessel from proceeding further towards Australian territory and to prevent non-citizens on it from landing upon Australian territory⁶².

It is worth examining this proposition more closely.

Few, if any, examples exist of the unregulated s. 61 powers vested in the Governor-General being expressly abolished by the Commonwealth Parliament. When Parliament has legislated in detail on a subject matter the assumption has been that any parallel, unregulated, executive powers would be subsumed and abrogated by the statute and thus be incapable of further use⁶³.

This assumption, of course, may have been an error. In *Oates v Attorney-General*⁶⁴ a Full Court of the High Court referred with apparent approval to Mason J's views in *Barton v The Commonwealth*⁶⁵ that the Parliament is not to be supposed to abrogate a prerogative of the Crown unless it does so by express words or necessary intendment⁶⁶.

⁶¹ A similar approach to the continuing subsistence of the prerogative in the face of statutory language which on its face appeared cover the field and thus exclude recourse to the powers claimed was taken by the Fiji High Court in the much criticized decision *Qarase v Bainimarama* Unreported 9 October 2008 (Gates ACJ, Byrne and Pathik JJ). There, notwithstanding the provisions in the Fiji Constitution, which required the President to act on advice, the Court held 'the National Security prerogative could only be abrogated by express words or by words of necessary implication' [132]. The prerogative power of the President of Fiji therefore permitted the President lawfully to ratify the overthrow of an elected government by the military and then to appoint the military Commander as the Interim Prime Minister.

⁶² at [201]

⁶³ See for example *Brown v West* (1990) 169 CLR 195 at [12]; *White v Director of Military Prosecutions* (2007) 235 ALR 455

⁶⁴ (2003) 214 CLR 496 ('Oates') at [34] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ)

⁶⁵ (1974) 131 CLR 477 at 501; also referred to by French J in *Vadarlis*

⁶⁶ Identical reasoning was applied in the Federal Court of Australia; *Mokbel v Attorney-General* 162 FCR 278

But *Oates* appears to be no longer good authority for that proposition. In *Jarratt v Commissioner of Police (NSW)*,⁶⁷ a later case, the NSW government sought to rely on the Crown's prerogative or common law right to dismiss its servants without cause. Rejecting that proposition McHugh, Gummow and Hayne JJ stated⁶⁸;

The applicant held, and was dismissed from, a statutory office, not one created under what appears to be the obsolete or at least obsolescent prerogative power recognised by s 47 of the *Constitution Act*. By necessary implication, the prerogative found in s 47, and which might have been employed to create the applicant's position as Deputy Commissioner as one at pleasure, was abrogated or displaced by the Act itself. Speaking in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* of the principle laid down in *Attorney-General v De Keyser's Royal Hotel*, McHugh J said:

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

In another subsequent decision, *Northern Territory v Arnhem Land Trust*⁶⁹ a strong High Court majority, including three justices who had participated in *Oates*, endorsed the approach taken in *Jarratt*.

Glesson CJ, Gummow, Hayne and Crennan JJ observed;

"Just as 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament' the comprehensive statutory regulation of fishing in the Northern Territory provided for by the Fisheries Act has supplanted any public right to fish in tidal waters."⁷⁰

While neither case has explicitly distinguished or overruled *Oates*, as *Jarrett* and *Northern Territory* express the most recent considered views of the High Court on this crucial issue of statutory construction, the High Court's rejection of *Oates* and *Vadarlis* on this point appears necessarily to be implicit.

Further from a 'rule of law' perspective the approach taken by the High Court in the *Jarratt* and *Northern Territory* seems preferable and more consistent with the modern approach to statutory interpretation. It can hardly be supposed that any Parliament would intend that unregulated executive powers would survive its comprehensive statutory codification of an area of activity.

⁶⁷ (2005) 224 CLR 44 ('Jarrett')

⁶⁸ at [85], .

⁶⁹ (2008) 248 ALR 195 ('Northern Territory')

⁷⁰ at [27]

While not beyond all doubt, this aspect of the relationship between the law applying to executive power and statute law would seem to have been settled.

Executive Power, s 51(vi) and Crises

As earlier noted, executive power, like legislative power, has always been permitted to expand when required in defense of the realm. As Hayne J stated in *Thomas v Mobray*:

..., [T]he defence of the nation is peculiarly the concern of the Executive. The wartime cases like *Lloyd v Wallach*, *Ex parte Walsh*; *Little v The Commonwealth* and *Wishart v Fraser* recognise that "in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which [the Executive] must exercise"⁷¹.

But whether the exigencies of 'war' provide an appropriate analogy for the peacetime expansion of executive power through the coupling of s61 with incidental legislative powers conferred by s51 (xxxix) may be doubted.

The analogy cannot hold unless Commonwealth legislation in time of war, or in response to threats such as terrorism, can be supported otherwise than though having its constitutional roots in the defence power.

Blackshield and Williams⁷² point out that in *Farey v Burvett* (1916) 21 CLR 433 Isaacs J appeared to envisage a separate executive power being available to respond to wartime emergencies independent of the defence power in s 51(vi). On that analysis the express incidental power, s51(xxxix), would then operate to confer legislative competence on the Parliament.

However, as Blackshield and Williams then note, 'although these suggestions have certain resonance in later decisions on the 'nationhood power,' they have never been tested'. In *Thomas v Mowbray*⁷³ the High Court referred exclusively to the defence power in circumstances where, if it existed, an implied executive power to protect the constitution from sedition or subversion might have been expected to have been proposed or discussed.⁷⁴

⁷¹ *Thomas v Mobray* (2007) 233 CLR 307; 237ALR 194 at [505]; internal footnotes omitted.

⁷² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed) 2006 at 854. In *Thomas v Mowbray* (2007) 233 CLR 307; 237ALR 194 the High Court referred only to the defence power in circumstances where, if it existed an implied executive power to protect the constitution from sedition or subversion might have been expected to have been discussed. On the other hand it may be objected that little should be read into that example, that given that the crucial point in *Thomas v Mowbray* was the High Court's ruling that the defence power *extended* to laws about domestic terrorism—so there was no necessity to seek an alternative basis to support the validity of the impugned legislation.

⁷³ (2007) 233 CLR 307

⁷⁴ On the other hand it may be objected that little should be read into that example, that given that the crucial point in *Thomas v Mowbray* was the High Court's ruling that the defence power *extended* to laws about domestic terrorism—so there was no necessity to seek an alternative basis to support the validity of the impugned legislation.

To the extent that *Pape* opens the door to the use of the incidental power to respond to any national crisis—including war and war like exigencies, it poses a challenging conundrum. If the executive is entitled to claim that new powers are needed to respond to an emergency, to prepare for the defence of the realm or to address a national crisis; and that claim can then engage the incidental power to legislate in support of the claimed need, the whole process may rightly be criticized as self-referential and akin to the executive reciting itself into power.

If that is possible it poses very difficult questions as to how such power could be limited⁷⁵. As Hayne and Keifel JJ's dissent in *Pape* illuminated, public claims of a 'crisis' or 'emergency' are often made but such words do not readily yield criteria for constitutional validity⁷⁶.

An objection to 'making the conclusion of the legislature final and so the measure of the operation of its own power' underpinned Dixon J's reluctance to sanction legislation incidental to an implied power to protect the constitution in the *Communist Party Case*⁷⁷.

Logically a similar objection to the executive setting the measure of its own powers should be equally, or more, potent.

Hayne and Keifel JJ drew on the legacy of the *Communist Party Case* to reinforce their rejection of the approach that commended itself to the majority in *Pape*, observing, that if the majority was correct 'the extensive litigation about the ambit of the defence power during World War II was beside the point'⁷⁸.

How this fundamental tension will be resolved in future cases remains to be seen.

A Separation of Powers Conundrum

Lord Birkenhead highlighted the blurred and overlapping boundaries of British history and politics and the law governing the prerogative when he observed the latter represented 'not in truth the statement of a legal doctrine but the result of a constitutional struggle.'⁷⁹

Once the former Imperial basis for constitutional doctrine regarding the content of executive power is discarded, the absence of any textual markers as to the

⁷⁵ It may be that Latham CJ reference to the very limited extent to which s 51(xxxix) empowers the Parliament to make laws not incidental to the execution of another head of *legislative* power⁷⁵ cited by the joint majority judgment points to the incidental legislative power being not only unavailable to support laws creating offences but also laws creating rights or imposing duties. So construed the incidental power would available only to facilitate the Executive undertaking such things as are permitted to ordinary citizens such as entering into contracts and spending money.

⁷⁶ [347]-[352]

⁷⁷ At p 193

⁷⁸ [347]

⁷⁹ *Viscountess Rhondda's Claim* [1922] 2 A.C. 339 at 353, see also Herbert V Evatt *Certain Aspects of the Royal Prerogative* Doctoral Thesis University of Sydney; published as *The Royal Prerogative*, 1987 at 25.

limit of s 61 invites the suggestion that establishing its boundaries is in its nature more a political or legislative act than a judicial function.

Given that Australia's *Constitution*, unlike that of Britain, mandates a strict requirement for the separation of powers it prompts the query as to whether a Ch III court can lawfully undertake that task? It may be asked: What right has the judicial arm of government to legislate its view of which powers the Executive should or should not exercise 'for the protection and advancement of the Australian nation'?

In *Pape*, Heydon J apprehended the difficulty of dealing with such questions as a reason for rejecting all such claims⁸⁰.

Modern linguistic usage suggests that the present age is one of 'emergencies', 'crises', 'dangers', and 'intense difficulties', of 'scourges' and other problems...The public is continually told that it is facing 'decisive' junctures, 'crucial' turning points and 'critical' decisions...Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use...it is far from clear what, for constitutional purposes, the meaning of the words 'crises' and 'emergencies' would be. It would be regrettable if the field were one in which the courts deferred to, and declined to substitute their judgment for, the opinion of the executive or the legislature. That would be to give an 'unexaminable' power to the executive, and history has shown, as Dixon J said, that it is often the executive which engages in the unconstitutional suppression of democratic institutions. On the other hand, if the courts do not defer to the executive or the legislature, it would be difficult to assess what would be within and what is beyond power.

However, despite the reservations expressed by Heydon J in his dissent, given that the High Court has decided that s 61 does include additional discretionary powers beyond those included within the prerogative, any suggestion that the extent of such powers is non-justiciable would conflict both with the text of s 75(v) and with firmly established doctrine⁸¹.

⁸⁰ Passages extracted from [551]-[552]

⁸¹ In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 the High Court reaffirmed its support for the doctrine expressed in *Marbury v Madison* 5 US (1 Cranch) 137 (1803) that "It is emphatically the province and duty of the judicial department to say what the law is:" Gaudron, McHugh, Gummow, Kirby and Hayne JJ stating, "In any written constitution where there are disputes over such matters, there must be a decision maker. Under the *Constitution* of the Commonwealth the ultimate decision maker in all matters where there is a contest is this court. The court must be obedient to its constitutional function. In the end, pursuant to s 75 of the *Constitution*, this limits the power of the parliament or the executive to avoid, or confine, judicial review." [474].

Vadarlis and *Pape* therefore present the courts with an interesting conundrum: absent a new limiting doctrine to constrain the bounds of the executive power conferred by s 61 the High Court will need to make case by case judgments; each requiring policy or political choices, thereby straying close to, or over, the boundary of the separation of powers imposed by Ch III; yet for the Court to decline to undertake that task would be unthinkable.

Professors Evans and Gerangelos who follow, each engage in different ways with the challenge of matching the High Court's recent approach to executive power with a modern theory of limits.

A failure to set limits on otherwise unbounded claims for the exercise of arbitrary Executive powers would be heedless of the supervisory jurisdiction explicitly conferred by s.75 (v) of the *Constitution* and destructive of any meaningful commitment to the rule of law.

Conclusion

This review of executive power has not even scratched the surface of some other issues that are yet to be finally worked through by our courts.

It has not touched on state executive powers. Much litigation may flow as a result of the High Court's recent decision, *Kirk v Industrial Relations Commission (NSW)*⁸², which held that, by force of the Commonwealth *Constitution*, there is an entrenched minimum of judicial review vested in state Supreme Courts, such that the actions and decisions of state officials are now similarly subject to review in a like manner as the and decisions and actions of officers of the Commonwealth in the original jurisdiction of the High Court.

Nor have I referred to powerful criticism, including that of the former Chief Justice of the High Court, Sir Anthony Mason, that the requirement to show jurisdictional error has unnecessarily restricted the grounds for judicial review available in Australian courts to examine executive conduct⁸³. Whether, as its composition alters, the High Court might consider expanding the already recognized grounds for review to meet such criticism is an interesting speculation.

Nor has attention been given to the increasingly pressing question, given the trend to outsource many formerly exclusive governmental functions, of whether the doctrine in *R v Panel on Take-overs and Mergers; Ex parte Datafin P/c* [1987]

⁸²(2010) 239 CLR 476

⁸³ In a speech delivered at the 2010 Australian Institute of Administrative Law Forum Conference, Sir Anthony stated:

Australian exceptionalism has been driven very largely by separation of powers considerations.... The impact of this influence is to be seen in the marginalization of *Wednesbury* unreasonableness, the rejection of proportionality as a ground of review and a pre-occupation with 'jurisdictional error'. In other jurisdictions where emphasis on the rule of law prevails, the correction of errors receives more attention. (2010) 64 *AIAL Forum* 4 at 6.

QB 815 should apply in Australia to extend judicial review to private bodies exercising regulatory functions of government⁸⁴.

Nor, and finally, has this paper touched on whether the Parliament might yet once more seek some means of excluding judicial review of refugee claims, again fruitlessly attempted and again struck down by the High Court in *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 (11 November 2010).

But I trust enough has been pointed to suggest that the High Court of the early 21st century may be as engaged in thinking about in Ch II of the Constitution and the nature and scope of executive power as was it regarding Ch III, and the nature and scope of judicial power, during the past two decades.

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⁸⁴ See, concluding the position remains unresolved: Basten JA in *Chase Oyster v Hamo* 2011 272 ALR 750 at [64]-[81].