What is Executive Power?

I Introduction

In the 1988 case of *Davis v Commonwealth*, Mason J said of executive power that it is potentially very broad yet ‘its scope [is not] amenable to exhaustive definition.’

Executive power is a power with significant content but ill-defined limits. It is not the particular power of lawmaking, or of determining disputes but, rather, the general power to carry out all the other functions of government. In the Westminster tradition, all governmental power derived originally from the Crown and independent legislative and judicial functions were a subsequent development. The *Coronation Charter* of Henry I, the immediate successor to William I and, therefore, the first postconquest king to have a coronation as such, illustrates the breadth of the original power of the Crown (the following excerpts indicating executive, judicial and legislative power respectively):

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3 *Bill of Rights 1688* (Imp).
4 *Act of Settlement 1701* (Imp).
11. To knights who hold their lands by military service \((\text{per loricas})\) I grant, of my own gift, the lands of the demesne ploughs … so that … they may the better provide themselves with arms and horses, to be fit and ready for my service and the defence of my kingdom.

12. I establish my firm peace throughout the whole kingdom and command that it henceforth be maintained.

13. I restore to you the law of King Edward …

In this respect, executive power might be thought of as the original and residual power of government. This could help to explain why it is potentially so broad and important and yet so ill-defined.

This chapter seeks to establish what the executive power of the Commonwealth of Australia is. It will address the theory, history and doctrine of the concept of executive power. It will then deal with its explicit basis in the Constitution, the relationship between executive and prerogative power, the critical relationship between prerogative power and statute, and the implicit concept of nationhood power. It will then put forward an argument on the limits of the executive power of the Commonwealth which is based upon this combination of theory, history and doctrine.

This chapter will rely primarily on case law and legal history because statutorily granted executive power, whilst extensive, ordinarily deals with particular aspects of the power rather than its general nature. This chapter will not draw the connection between executive power and the ADF directly, which will be the subject of Chapter 2.

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5 Henry I, Coronation Charter, (1100) in Carl Stephenson and Frederick George Marcham (eds and trans), Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present (Harper and Brothers, 1937) 46–8. Legal instruments issued under prerogative power, such as this charter, letters patent and orders in council, are so obscure that they do not even rate a mention in the Australian Guide to Legal Citation.


7 Likewise, despite frequent references to judicial power, statute does not define it either. As to the need to refer to legal history to understand executive power in Australia, it is because s 61 of the Constitution is ‘barren ground for any analytical approach’. See Leslie Zines, ‘The Inherent Executive Power of the Commonwealth’ (2005) 16 Public Law Review 279, 279, quoting D G Morgan discussing the equivalent position in the Irish Constitution, in The Separation of Powers in the Irish Constitution (Sweet & Maxwell, 1997) 272.
II A Theory of Executive Power?

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and executive power … If it were joined to executive power, the judge could have the force of an oppressor.8

What are the limits of executive power? There is no authoritative source that states this so it becomes a theoretical question.9 This is complicated by the character of executive power as derived from a number of sources so that, as discussed earlier, executive power is not a power in itself but rather a description of power which the Executive exercises.10 This may be a key to divining some sort of coherent theory of the limits of executive power.

As Gageler J stated in Plaintiff M68/2015 v Minister for Immigration and Border Protection (‘M68’):11

The nature of Commonwealth executive power can only be understood within that historical and structural constitutional context. It is described – not defined – in s 61 of the Constitution, in that it is extended – not confined – by that section to the ‘execution and maintenance’ of the Constitution and of laws of the Commonwealth. It is therefore ‘barren ground for any analytical approach’.12 Alfred Deakin said of it in a profound opinion which he gave as Attorney-General in 1902 that ‘it would be dangerous, if not impossible, to define’, emphasising that it ‘is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government’.13

10 See Pape v Commissioner of Taxation (2009) 238 CLR 1, 83 (‘Pape’), (Gummow, Crennan and Bell JJ); Williams v Commonwealth (2012) 248 CLR 156 (‘Williams’), 184–5 (French CJ), 342 (Crennan J) and 373–4 (Kiefel J).
11 [2016] HCA 1, [129].
The limits of executive power may be more a matter of the limits of executive functions rather than the limits of identifiable legal authority. This may be because executive functions are the residual functions of government left after the more identifiable legislative and judicial functions. As Gerangelos puts it:

Parliament left such traditional ‘executive’ powers as foreign relations, declaring war and peace, altering national boundaries, acts of state, conferring honours, pardoning offenders, etc. in the hands of the Crown for essentially pragmatic reasons.14

If a matter is not suitable for the legislative or judicial branches of government but it is a matter for government nonetheless, then it could only be a matter for the executive government.15 As a result, it is not possible to define in advance every matter upon which the Executive may act. This book will, therefore, argue for a theory of executive power which emphasises that it must be flexible and, at its extreme, may only be limited by the written Constitution and the doctrine of necessity, but is nonetheless subject to the principle of legality.

The resort to early theorists to explain aspects of the Australian Constitution is not novel. The High Court has done so with respect to responsible government, citing J S Mill in Egan v Willis,16 and the separation of powers, citing Blackstone in Polyukhovich v R,17 as well as Dicey and Blackstone with respect to executive power in Williams v Commonwealth (‘Williams’).18 This section will consider the early theorists before considering the modern debate on the theoretical limits of executive power.

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18 (2012) 248 CLR 156, 185–6 (French CJ).
1. WHAT IS EXECUTIVE POWER?

A The Nature of Executive Power—Early Theorists

Looking at early constitutional theorists does not, of itself, of course provide legal authority for the limits of executive power, but it does provide insight into the values which underlie contemporary constitutional arrangements. Dicey considers Montesquieu to be the origin and strongest theoretical influence on the development of the separation of powers. Montesquieu’s book *De L’Esprit Des Lois* of 1748 considered constitutional structures that favour liberty. However, given that Montesquieu receives credit for having the greatest influence on the development of the theory of the separation of powers, he has relatively little to say about executive power. He concentrated more on the balance of powers itself rather than analysing at length the character of each branch of government. As Montesquieu perhaps best explains himself: ‘[S]o that power cannot abuse power, power must check power by the arrangement of things’, and he continued, ‘among the Turks, where the three powers are united in the person of the Sultan, an atrocious despotism reigns’. On the character of executive power, and why it must be a separate power, Montesquieu did however state:

> The executive power should always be in the hands of a monarch, because the part of the government that almost always needs immediate action is better administered by the one than the many, whereas what depends on legislative power is better ordered by many than by one.

Blackstone had read Montesquieu and reflected something of this view in 1803 in his own *Commentaries* in the chapter ‘Of the King’s Prerogative’:

> We are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills:

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20 Montesquieu, above n 8.
21 Ibid 155.
22 Ibid 157.
23 Ibid 161.
24 Blackstone’s *Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (Hein Online reproduction, 1803) 260.
many wills, if disunited and drawing different ways, create weakness in a government; and to unite these several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.\textsuperscript{25}

Hume wrote in the 18\textsuperscript{th} century, at the time of the emergence of ministerial government. As much as Hume sought to reduce politics to science, he also wrote that no government ‘subsisted without the mixture of some arbitrary authority, committed to some magistrate’ and no society could support itself only with the control of ‘rigid maxims of law and equity’.\textsuperscript{26}

Between these influential writers there is a consistent picture of the qualities of coherence, alacrity and strength needing to reside in the executive branch of government, as opposed to the qualities of deliberation required of the legislature or impartiality in the judiciary. Indeed the inconsistency between these attributes is the reason for the separation of powers and an indication that executive power is meant to be an active function of government. It should be able to respond to requirements as they arise rather than having its function narrowly prescribed in advance.

Fatovic’s examination of the influence of these theorists on the American Founding Fathers’ conception of executive power also considers Machiavelli. He states that the idea of the need for executive power to deal with contingency began with Machiavelli,\textsuperscript{27} observing that:

Niccolo Machiavelli’s insight that contingency is the single constant in politics forms the backdrop for any serious investigation of executive power in modern political and constitutional thought … \textsuperscript{28}

Machiavelli himself stated in his advice to \textit{The Prince} in 1513:

I hold it to be true that Fortune is the arbiter of one half of our actions, but that she still leave us to direct the other half, or perhaps a little less … So it happens with Fortune, who shows her power where valour has not prepared to resist her, and thither she turns her forces where she knows that barriers and defences have not been raised to constrain her.\textsuperscript{29}

\begin{footnotes}
\footnotetext[25]{Ibid 250.}
\footnotetext[26]{Clement Fatovic, \textit{Outside the Law} (John Hopkins University Press, 2009) 83, quoting David Hume, \textit{The History of England from the Invasion of Julius Caesar to the Revolution of 1688 (Continued to the Death of George the Second by T Smollett M D)} (Joseph Ogle Robinson, 1833) 574.}
\footnotetext[27]{Ibid 282, n 22.}
\footnotetext[28]{Ibid 11.}
\footnotetext[29]{Niccolò Machiavelli, \textit{The Prince} (W K Marriott trans, Encyclopaedia Britannica, 1952 (first published in Italian in 1513 and in English 1640)) 35.}
\end{footnotes}
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This book is concerned with the capacity of the law to respond to *Fortuna* (Fortune) and argues that executive power provides the means to do so, but this must be within constraints. Montesquieu, Blackstone and Hume, in differing degrees, reflect this analysis of *Fortuna*—the capricious nature of fortune—in their own attempts to find a way to have an executive that could respond to contingency.30

Consistent with this, the influential commentator on the *Australian Constitution*, Harrison Moore, writing in 1910, emphasised the importance of executive power to the whole constitutional endeavour and, in doing so, reflected a view of executive power shared by the theorists discussed above:

> In the history of Australia the want of such an authority to speak and to act for the whole was as potent a factor in producing union as the absence of a common legislative power. The authority must be continuous, and not occasional; it must be capable of prompt and immediate action; it must possess knowledge and keep its secrets; it must know discipline. In a word, it must have qualities very different from those which belong to the large representative and popular bodies which in modern times exercise legislative power.31

Locke also grappled with *Fortuna*, even if he did not name the phenomenon of contingency. Locke wrote around the time of the Glorious Revolution of 1688 and, despite experiencing horrific excesses of executive power, stated:

> This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative; for since in some governments the law-making power is not always in being and is usually too numerous, and so too slow for the dispatch requisite to execution, and because, also it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm if they are executed with an inflexible rigour on all occasions, and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.32

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30  Fatovic, above n 26, 18–20.
Despite the idea of acting against the law, Gross and Aolain argue that Locke’s theory actually accommodates the ability for the executive to respond to contingency as part of the constitutional order, rather than being extraconstitutional. This is important because this book argues that, in an extreme situation, it may only be an exercise of executive power that can preserve constitutional government in the face of anarchy and chaos. If such action is necessary, the authority for it can be a part of the legal order, not contrary to it. This chapter will return to this point.

The consistent theme in these early theorists then is that there is a need for an executive power to be available continually, not only occasionally, and to respond to the unexpected, Fortuna, which may even be necessary to maintain the very existence of constitutional government. Legislative bodies are not suited to this task for various reasons, such as: being deliberative and, therefore, unable to respond to emerging situations quickly; being corruptible, if they have the power to make as well as to execute the laws; or being open and accommodating of different views. They do not, therefore, possess the qualities of discretion, secrecy and consistency or unity of purpose required for such functions as maintaining order, foreign relations and the conduct of war. For the most part, therefore, the theorists determined that there had to be a field of action left to executive authority. This could not be narrowly defined or precisely limited because it had to be able to respond to the unexpected, Fortuna. None of the theorists, therefore, describe a precise theoretical limit to executive authority but, rather, in one way or another, set up a structure to contain it in the form of the separation of powers.

B Early Theorists and the Limits of Executive Power?

Before turning to the separation of powers, it is important to acknowledge that the ancient maxims, inter armes silent leges, among the arms the laws are silent, and, salus populi est suprema lex, the welfare of the people is the highest law, represent recurring ideas in the writings, whether implicitly or explicitly. As can be seen above, Locke states that prerogative power

33 Gross and Ni Aolain, 121.  
34 Montesquieu, above n 8, 159.  
35 See Fatovic, above n 26, 36.  
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can authorise acting against the law. In his words: “This power to act … without the prescription of the law and sometimes even against it.” As the American Founding Father Thomas Jefferson put it:

Should we have ever gained our Revolution, if we had bound our hands by the manacles of the law, not only in the beginning, but in any part of the revolutionary conflict? There are extreme cases where the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law.

This is perhaps the point of greatest discomfort for all of the writers on this issue. If constitutional structures are meant to create the rule of law and protect liberty, how can the executive have authority to break the law? Excesses of executive power, indeed, led to the Glorious Revolution as well as the American Revolution.

It may be appropriate for the executive not to break the law but to have an authority to act, which creates exceptions from the ordinary application of the law in certain circumstances. In extreme situations, the executive may need to act to preserve the constitutional order. Montesquieu suggests that there are times when executive power might expand to encroach more upon liberty than is usual in order to take account of threats to the state itself. This is to be temporary only and for the purpose of preserving liberty in the longer term:

But if the legislative power believed itself endangered by some secret conspiracy against the state or by some correspondence with its enemies on the outside, it could, for a brief and limited time, permit the executive power to arrest suspected citizens who would lose their liberty for a time only so that it would be preserved forever.

This is an abstract and highly subjective measure of when the executive may act under an exception to the law but Blackstone provided some guide. He distinguished the ‘ordinary course of the law’ from

37 John Locke, Two Treatises of Government (Mobilereference.com, first published 1689, 2008) (Article 160) 118.
39 Montesquieu, above n 8, 159.
those extraordinary recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression.\textsuperscript{40}

These extraordinary recourses are limited however as:

\[T]\text{he king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr Locke has well defined it) in the prerogative power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.}\textsuperscript{41}

Blackstone raises two distinct but related limitations which are very significant for this book. The first is that the ministry, even if the king himself can do no wrong, is responsible to the Parliament for its actions in response to extraordinary events.\textsuperscript{42} The second limitation is that the exercise of prerogative power is bounded by the constitution. It is not open to use executive power to change the constitutional order itself, noting the imprecise and unwritten character of the English constitution in Blackstone's time. This is a more precise consideration with Australia's written constitution today, which is therefore arguably more amenable to Blackstone's limits. It comes now to consider how more modern theorists have addressed this issue before turning to Australian constitutional doctrine, then putting it together with this legal history and theory to propose limits on the executive power of the Commonwealth.

\section*{C The Nature of Executive Power—Modern Theorists}

It is important to place the early theorists against current writing on executive power, particularly that which emerged in the context of the heightened concerns over terrorism post-2001. Craig and Tomkins in

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\textsuperscript{40} Blackstone’s Commentaries, above n 24, 251.

\textsuperscript{41} Ibid 252.

\textsuperscript{42} For a rejection of the ‘grandiose claims about the “rule of law”’ which, instead, locates public law within ‘a wider body of political practices’ see Martin Loughlin, The Idea of Public Law (Oxford University Press, 2003) 156–7. This is consistent with Blackstone’s view, and that of this book, that the executive is limited through political accountability to Parliament, but the author of this book is not willing to reject the rule of law as a fundamental principle which should guide the use of executive power through the ADF.
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their introduction to *The Executive and Public Law*, a 2006 collection of essays on executive power in various Western liberal democracies, emphasised that the role of the executive is to *do*. It is also to fulfil all the other functions of government which the legislative and judicial branches do not perform. All of the essayists had difficulty defining and theorising the limits of executive power in the nations which they considered. The written constitutions they examined all said very little about executive power.

For example, Tomkins stated of the British executive that:

> Just as in Britain there is no constitutional definition of the executive, neither is there an authoritative list of executive functions … Perhaps the nearest that domestic British law gets to an understanding of what are executive functions is in its recognition of prerogative powers …

Having identified a number of prerogative powers Tomkins goes on to state:

> All that can be gleaned from such lists of powers is that the executive acts in a bewilderingly wide array of policy arenas and subject matters. No general or over-arching principle that is defining or determinative of executive functions can be distilled by listing the powers that are conferred upon the executive by either statute or prerogative.

This is consistent with the theorists discussed above in that executive power is a function rather than a clear set of powers. The interesting addition to this is that there is a general theme of executive power growing with respect to the power of the other branches. Alternatively, it may be that the power of the legislative and judicial branches has also grown because the role of government generally has grown. Therefore, as the role of the state has increased over the centuries since Machiavelli advised the Prince,
so it appears that the role of the executive has increased with it. This, perhaps, supports the view that the executive will act where there may be uncertainty as to whether the other branches can or should perform a governmental function.

Dyzenhaus wrote in 2006 on British and American failures to maintain the rule of law in response to terrorism. Drawing heavily on Dicey’s concept of the rule of law, he rejects the idea that there is ‘authority, within or without the law, to authorize the state to act outside the law’. Dyzenhaus explains that Dicey accepted that there were times when ‘the Ministry may break the law and trust for protection to an Act of Indemnity’ but it was essential for the ‘maintenance of law and the authority of the Houses’ that extra-legal action receive at least the retrospective authority of statute. Without this authority such action remains unlawful and subject to legal sanction. Dyzenhaus’s point appears to be that while retrospective acts of indemnity or prospective statutory equivalents are contrary to the rule of law in themselves, such statutes can bring executive action within the scrutiny of Parliament and the courts. This process can help to reassert the rule of law over action that is inherently against the rule of law. On this view, Dyzenhaus, together with Dicey, would reject any extended view of prerogative or executive power to preserve the constitutional order in times of emergency. This view would significantly constrain the lawful scope of executive power in an emergency and would be difficult to reconcile with views like those of Locke.

If the concern is to bring executive action within the scrutiny of the Parliament and the courts, then prospective legislation, with all the benefits of considered deliberation in calmer times, could achieve this more effectively than an act of indemnity. Even then, this book argues—particularly in Chapter 4—it is not possible to provide in advance for every contingency. There needs to be a mechanism within the law for the executive to act ‘for the public good, without the prescription of the law’. These mechanisms can be found within executive power and can

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49  Ibid 196, quoting Dicey, n 19, 412–13. Dicey gave no examples but an Australian one is the Martial Law Indemnity Act 1854 (Vic) which followed the Eureka Stockade incident, discussed in Chapter 3.
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operate within the Constitution. The view of Dicey and of Dyzenhaus is also unsatisfactory insofar as it requires the executive to break the law in response to a contingency. It does not adequately address the consequences of armed forces personnel breaking the law, both for the individual members of the armed forces that might face prosecution or suit nor the broader issue of armed forces being disciplined and obedient. As this book will argue in Chapter 2, this may undermine the duty of obedience of ADF members.

There is further scholarly debate on the question of whether the authority to deal with an exceptional situation exists inside or outside the law. For example, the 2008 book Emergencies and the Limits of Legality collects essays on this question from a range of authors, responding in many respects to the view of Nazi philosopher Carl Schmitt that the state cannot respond to violent emergencies and remain ‘faithful to the demands of legality’. In it, Gross argued for a limited capacity for public officials to break the law in emergencies, so as to preserve the legal order. However, Dyzenhaus continued to look to the judiciary or legislature to uphold the legal order after the event:

Following Dicey, I accept that as a matter of fact when individuals are faced with what they perceive to be necessitous circumstances, they will act as they see fit, which might result in illegality. But also with Dicey, I think there is no distinction here between public officials and private individuals and that those who so act should be subject afterwards to the tribunal of law and, if they are found not to have met the requirements of the defence of necessity, to the tribunal of politics ... A successful defence does not legalise a past illegality but finds it not to be illegal.

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By way of contrast, in the same book, Campbell does not see Gross or Dyzenhaus as offering an acceptable choice\(^{56}\) and argues that:

In principle, the emergency measures authorised in a state of emergency ought to be as formally correct as other laws specifying government powers and should be laid down in the particular piece of emergency legislation with justifiable precision, rather than expressed in the broad terms of indeterminate meaning.\(^{57}\)

Notably for this book, he cites Part IIIAAA of the *Defence Act 1903* (Cth), discussed in more detail in Chapter 4, as an example of such legislation. Campbell also accepts that there may be appropriate circumstances for ‘broad powers of executive legislation and wide discretion of minor officials being given power to issue particular binding commands’.\(^{58}\) ‘This is a more attractive position which seeks to provide positive authority for executive action in advance, whilst still acknowledging that it is not always possible to legislate for every eventuality.

Fatovic, although acknowledging Dyzenhaus, takes quite a different view. He concludes that, despite the growth of a range of statutory powers to deal with emergencies in the United States, such statutes still might not deal with the ‘sudden and unexpected’, which inherently defies definition but includes existential violent crises such as invasion.\(^{59}\) Prerogative, to Fatovic meaning extra-legal action, remains an ‘indispensable option’.\(^{60}\) As to the limits of extra-legal action, he does not define a time period but, drawing on Locke, suggests that such action could continue until it is possible to convene the legislature. Even then there are risks in a legislature hastily convening and passing poorly considered legislation. Indeed, legislation may unacceptably normalise what should be extraordinary.\(^{61}\) Fatovic’s view may be more consistent with some of the earlier theorists but still does not satisfactorily resolve the question that the resort to extra-

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\(^{57}\) Ibid 212.

\(^{58}\) Ibid 212–3.

\(^{59}\) Fatovic, above n 26, 255–6.

\(^{60}\) Ibid.

\(^{61}\) Ibid 261–4.
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legal powers begs: what are the limits? He seems to leave this point in
the same way that many other theorists do—in the need for virtuous
leaders. This is a question of politics rather than law.

Dyzenhaus reviewed Fatovic’s book along with two others on this question
in 2011 and disagreed with him on the basis that:

[A] liberal democratic state must adopt a liberal-legalist approach to
emergencies, one which requires not only that all executive action be
authorized by law, but also that all executive action is subject to the
control of the rule of law.

This is the position of this book as well. Consistent with this and from
an Australian perspective, Lee quoted Winterton to this effect:

Once the realm of extra-constitutional power has been entered, there is
no logical limit to its ambit; only the constitution can fix the boundaries
for the lawful exercise of power. Once the constitution is removed as the
frame of reference for the lawful exercise of authority, the only substitute is
the balance of political – and, ultimately, military – power in the nation.

Winterton was concerned to ensure that arguments in favour of necessity
justifying otherwise unlawful actions to prevent a breakdown in the legal
system do not then become ‘employed to legitimate a coup d’état’.
Lee places this quote in a discussion of ‘striking a balance’ between the
need to protect society as a whole while still preserving individual liberty.
Arguably, this balance is much more difficult to achieve through extra-
legal or extraconstitutional measures as power is no longer constrained
by law.

Management 1, 3.
63 David Dyzenhaus, ‘Review Essay: Emergency, Liberalism and the State: Outside the Law:
Emergency and Executive Power by Clement Fatovic’ (2011) 9(1) Perspectives on Politics 69, 70.
64 H P Lee, ‘Salus Populi Suprema Lex Esto: Constitutional Fidelity in Troubled Times’ in H P
Lee and Peter Gerangelos (eds), Constitutional Advancement in a Frozen Continent: Essays in Honour
of George Winterton (Federation Press, 2009), 54 quoting George Winterton, ‘Extra-constitutional
65 Winterton, ‘Extra-constitutional Notions in Australian Constitutional Law’, above n 64, 239.
As far as the High Court of Australia is concerned, the principle of legality, discussed below, assumes that the executive can only act in accordance with the law. For this reason the resort to extraordinary executive powers needs to be part of the law, and not outside of it. An executive power with identified limits, even if they are not precise, is better than no power at all. Campbell, discussed above, makes an attractive argument for seeking to put such powers on a statutory footing before they might be required, while still acknowledging that it is not possible to provide in advance for every contingency. While wide and flexible grants of statutory power can be desirable, the purpose of this book is to explore the authority for and limits upon the ADF being able to act where the Parliament has not provided such powers. It is to explore the extent to which limits on the exercise of executive power by the ADF in circumstances of martial law, internal security, war and external security operations can arguably be found in law. The question of some extra-legal authority for the ADF to act in such situations is a different question concerned more with political and social theory, which is not the subject of this book.

Modern theorists illustrate that the debates of the 17th and 18th centuries are alive today, and are no closer to settling the limits of executive power. Even so, both early and modern theorists do much to illustrate the character of executive power in a way that points to some limits, such as necessity, the separation of powers and the need to preserve the constitutional order. It comes now to consider these limits in more detail.

III The Nature of the Executive Power of the Commonwealth

Section 61 of the Constitution is titled ‘Executive Power’ and provides:

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.

Section 61, itself, does not describe what the executive power of the Commonwealth is. It merely states that the executive power ‘extends to the execution and maintenance’ of the Constitution and the laws of the Commonwealth, without limiting the executive power of the Commonwealth just to these functions. It clearly connects the executive
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Power of the Commonwealth to the Crown, by vesting it in the Queen, without necessarily stating that this power includes the powers of the Crown. Mason J found in Barton v Commonwealth in 1974 that the executive power of the Commonwealth does include those powers of the Crown exercisable without the authority of Parliament, known as the prerogative powers, relevant to the Commonwealth and capable of exercise in Australia. The majority of the High Court in Cadia Holdings Pty Ltd v NSW (‘Cadia’) stated that:

The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law.

It is important to note here the distinction between executive and prerogative power. As this chapter will elaborate below, executive power is a broader concept and may, at least arguably, derive from prerogative, statute, the existence of the Commonwealth as a polity or the capacities of the Commonwealth common to legal persons.

Other provisions of the Constitution grant specific executive powers to the Governor-General, such as command-in-chief of the naval and military forces (s 68), or to the Governor-General in Council, such as the appointment of ministers (s 64), justices (s 72) or civil servants (s 67). By convention, the Governor-General exercises these powers on the advice of relevant ministers. Whilst s 61 does not elaborate on the nature of the executive power of the Commonwealth for which it provides, it is significant because it makes executive power an explicit constitutional power rather than a power found only in common law and statute. The intention of the drafters appears to have been only to provide for who may exercise executive power, as well as to confine it

67 [1974] 131 CLR 477, 498. McTiernan and Menzies JJ agreed with Mason J, 491. Barwick CJ, 488, and Jacobs J, 508, appear to assume that the external affairs prerogative had passed to the Commonwealth, without referring to s 61. Prerogatives with regard to such subjects as the Church of England and Royal Swans are clearly not applicable.


to the sphere of Commonwealth responsibility within the federation,\textsuperscript{71} rather than to address the nature of executive power itself.\textsuperscript{72} Despite this, the explicit constitutional character of s 61 has had implications for its relationship with other structural elements of the Constitution such as federalism and judicial power, as well as ‘nationhood power’ which this chapter discusses below.

To place s 61 in the context of Australian constitutional commentary, Winterton analysed executive power in terms of breadth and depth:

$s 61$ having two components which may appropriately be termed ‘breadth’ and ‘depth’. It was argued [previously by Winterton] (following, inter alia, the views of Mason and Jacobs JJ in AAP) that the subjects in respect of which Commonwealth executive power can be exercised (breadth) are those on which it can legislate, including matters appropriate to a national government, which should be seen as falling within s 51(xxxix) in domestic matters and s 51(xxix) in foreign affairs. But the question then arises as to what activities the government can undertake with regard to those subjects (depth). It was argued that, apart from ‘executing’ the Constitution and laws of the Commonwealth, the government is limited to those powers falling within the Crown’s prerogative powers. In other words, the government can ‘maintain’ the Constitution and laws of the Commonwealth only to the extent allowed by the Crown’s prerogative powers.\textsuperscript{73}

\textsuperscript{71} On this point, French CJ in Williams (2012) 248 CLR 156, 188–9 referred approvingly to the following passage in AAP Case (1975) 134 CLR 338, 378–9, where Gibbs J stated, ‘According to s 61 of the Constitution, the executive power of the Commonwealth “extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth”. These words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.’ In the same paragraph French CJ also stated, ‘Barwick CJ said that the Executive “may only do that which has been or could be the subject of valid legislation” [at 362] … The content of executive power as Mason J explained it “does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution” [at 396]’; and to similar effect 229–32 (Gummow and Bell JJ), 271–2 (Hayne J), 302–308 (Heydon J), 364, 371 (Kiefel J).


Winterton’s approach separates the subject matter of Commonwealth and State executive power, that is, its breadth. This is important for a government of limited powers in a federal system. Breadth is distinct from the extent to which the Commonwealth can then exercise that power in respect of a particular subject, that is, its depth. This approach has merit but, as discussed below, it is not consistent with Williams, which does not neatly discern depth from breadth. It does not support a view which would see the breadth of Commonwealth executive power as coextensive with Commonwealth legislative power. This case postdates Winterton’s quote above of 2003. Another difficulty is that Winterton limits depth to prerogative power only. Williams also states that nationhood power is a source of executive power distinct from prerogative power. This is a point to which this chapter will return.

A The Founding Fathers and the Nature of Executive Power

It might be hoped that the Founding Fathers of the Australian Constitution, through their Convention Debates, would shed some light on what they thought they meant by executive power and its limits. There is not much to find in the debates though. The Founding Fathers did consider executive power but it was no new constitutional concept by then. There was no bloody upheaval at the time, such as the American Revolution or the Glorious Revolution, to prompt a deep questioning of the powers of the executive. While they did draw upon the example of the Constitution of the United States in addition to the Westminster tradition with which they were already familiar, the Founding Fathers did not adopt the American separation of powers slavishly or uncritically, or arguably even

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75 Williams (2012) 248 CLR 156. However Gageler J refers in approving terms to this concept in Plaintiff M68 v Minister for Immigration and Border Protection [2016] HCA 1 [M68] [130]–[131].
The intention and effect appears to have been to adapt the British traditions of parliamentary and responsible government to a federal system with a powerful judiciary. Their main concern appears not to have been to understand the theory underlying executive power but to fit it within the new constitutional structure.

The judgments in *Williams*, discussed below and which consider the Founding Fathers, bear this out. The drafting history of s 61 primarily concerns distinguishing between Commonwealth and State executive power and, to a lesser extent, between Commonwealth legislative and executive power. As French CJ put it:

There is little evidence to support the view that the delegates to the National Australasian Conventions of 1891 and 1897–1898, or even the leading lawyers at those Conventions, shared a clear common view of the working of executive power in a federation. The Constitution which they drafted incorporated aspects of the written Constitutions of the United States and Canada, and the concept of responsible government derived from the British tradition. The elements were mixed in the Constitution to meet the Founders’ perception of a uniquely Australian Federation. In respect of executive power, however, that perception was not finely resolved.

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Quick and Garran were participants in the creation of Australia’s Constitution and considered the separation of powers in their Annotated Constitution of the Australian Commonwealth.84 They described the ‘Tripartite Separation’ and primarily cite American judgments and commentaries to explain the concept, which in turn refer to Montesquieu.85 They also discuss the concern of the drafters with making a vague separation of powers operate with the system of responsible government.86 This suggests that the separation of powers—even if not executive power specifically—was a consideration in the development of the Constitution, but possibly not much of one. As Harrison Moore described, the prevailing conception was: ‘[E]xecutive power is so closely allied to the legislative that it may be impossible to draw any other line than that which expediency and practical good sense commend’.87

It appears then that the Founding Fathers’ concern was that the executive was responsible to the Parliament and they did not articulate a theory as to the limits of executive power beyond that. Any particular Australian understanding of executive power in the Constitution must then come from post-Federation jurisprudence and scholarship.88 It comes then to consider the cases.

B Doctrine

Two recent cases have together taken the jurisprudence on executive power further than the Founding Fathers might have envisaged. As will be discussed below, they have reasserted a more federal sense to constitutional interpretation in constraining executive power in relation to the States. These two cases have also firmly asserted parliamentary supremacy over the executive, particularly in relation to spending.

1 Pape v Commissioner of Taxation

Pape v Commissioner of Taxation (‘Pape’) concerned the validity of payments made to taxpayers under the Tax Bonus Act 2009 (Cth).89 The payments were part of a Commonwealth Government fiscal stimulus package designed to counter the effects of a global financial

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84 Quick and Garran, above n 72.
85 Ibid 380–2.
86 Ibid.
88 The value of practice in determining lawfulness is discussed further in Chapter 6.
89 (2009) 238 CLR 1, 51.
Mr Pape’s unsuccessful challenge concerned whether s 61 of the Constitution, in combination with the incidental power under s 51(xxxix), authorised the legislation. Although a topic well removed from the use of force by the ADF, Pape is very important to the concept of nationhood power, discussed further below. It also has significant implications for executive power more broadly, which it is important to discuss at this point. Gummow, Crennan and Bell JJ, in finding for the Commonwealth, commenced their consideration of the executive power of the Commonwealth by considering the place of s 61 within the text and structure of the Constitution. Their conclusions on executive power likewise emphasised interpreting s 61 in this way:

The content of the power provided by s 61 of the Constitution presents a question of interpretation of the Constitution. That power has at least the limitations discussed in these reasons, but it is unnecessary in the present case to attempt an exhaustive description. A question presented in a particular controversy as to the existence of power provided by s 61 may be determined under Ch III of the Constitution with appropriately framed declaratory and other relief.

Their Honours stated that the executive power of the Commonwealth could not be as extensive as the executive power of the United Kingdom because of the limits of federalism: ‘There could … be no doubt that the polity which the Constitution established and maintains is an independent nation state with a federal system of government’. The earlier thinking that the Commonwealth could spend ‘for the purposes of the Commonwealth’ by virtue of s 81 was mistaken as that section of the Constitution concerned parliamentary appropriation of funds for particular purposes, rather than a power for the executive to spend. It was also not the same as the power of the Crown in the United Kingdom to spend for the ‘public service’. Further, ‘[W]hile s 51(xxxix) authorises the Parliament to legislate in aid of the executive power, that does not mean that it may do so in aid of any subject which the Executive Government regards as of national interest and concern.’ There had to be a more specific basis for the exercise of executive power, in this case a ‘nationhood power’ enabled by legislation.

90 Ibid 83.
91 Ibid 89.
92 Ibid 84.
93 Ibid 78.
94 Ibid 81.
95 Ibid 87–8.
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In this particular case, their Honours drew upon a ‘formulation of criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth’ as stated by Brennan J in *Davis v Commonwealth*, which in turn drew from Mason J in *Victoria v Commonwealth and Hayden* (‘AAP Case’). This formulation saw executive power, in this case, as related to ‘activities peculiarly adapted to the government of the country and which cannot otherwise be carried on for the public benefit’. This judgment did not seek ‘to determine the outer limits of executive power’ but made clear that it involved the limits of federalism, as well as being subject to the parliamentary appropriation process and the supervision of courts established under Chapter III of the *Constitution*.

French CJ differed with Gummow, Crennan and Bell JJ on the character of s 81 of the *Constitution* concerning the Commonwealth’s power of appropriation. However, on the nature of executive power, his Honour stated:

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 museum. It has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of ‘national government’ cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the branches of government for which this *Constitution* provides, nor to abrogate constitutional prohibitions [emphasis added].

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96 Ibid 87.
98 (1975) 134 CLR 338, 397.
99 *Pape* (2009) 238 CLR 1, 92.
100 Ibid 87.
101 *Pape* (2009) 238 CLR 1. In brief terms, French CJ saw the text of s 81 as ‘words of constraint’, 45, as ‘“the purposes of the Commonwealth” are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*’, 56. Whereas Gummow, Crennan and Bell JJ stated that “there is no support … for the construction … treating the phrase in s 81 “for the purposes of the Commonwealth” as containing words of limitation of legislative power” as they relate only to appropriation, not a legislative power to spend, 75. Hayne and Kiefel JJ said that ‘asking whether a particular appropriation can be described as being for a purpose of the Commonwealth will seldom if ever yield an answer determinative of constitutional litigation in this Court’ as the issue would ‘turn upon the ambit of power … said to be engaged’, 112. Heydon J’s position was similar to that of French CJ in that he saw s 81 as limited by s 83 as the ‘words “by law”, limits the power of appropriation to what can be done by the enactment of a valid law’, 214. The majority position therefore would not see any real limitations on the function of appropriation, seeing the case more as a question of a limitation on the power to spend, as discussed further below.
102 *Pape* (2009) 238 CLR 1, 60.
This description is broadly consistent with that of Gummow, Crennan and Bell JJ in that ‘proper purposes of a national government’ appears to be quite similar to ‘activities peculiarly adapted to the government of the country and which cannot otherwise be carried on for the public benefit’.\textsuperscript{103} French CJ’s description is not put as an essential criterion for limiting executive power but his subsequent limitations of the federal structure, the separation of powers and constitutional prohibitions have a similar effect.

Hayne and Kiefel JJ did not seek to describe or limit executive power as their Honours found the impugned Act, as read down, to be a law with respect to taxation.\textsuperscript{104} They did not therefore draw firm conclusions on the limits of executive power other than to state that the ‘executive power to spend is not unlimited’\textsuperscript{105} and, as will be discussed in more detail below, to criticise the concept of nationhood power. Heydon J, in dissent, also criticised nationhood power as will be discussed below.

The reasoning in \textit{Pape} on limits to the power of the executive to spend together with concerns for the limitations of federalism and the separation of powers laid the foundations for the later judgments in \textit{Williams}.

\textbf{2 Williams v Commonwealth}

The 2012 case of \textit{Williams}\textsuperscript{106} is the High Court’s more recent consideration of the extent of Commonwealth executive power. The matter was a challenge by a parent to the funding of the chaplain at his children’s school by the Commonwealth.\textsuperscript{107} It is difficult to conceive of a matter more removed from the use of force by the ADF absent statutory authority. In this case though, not one of the judgments accepted the plaintiff’s apparent primary concern for the separation of church and state under s 116 of the \textit{Constitution}. Instead, the case turned essentially on whether the Commonwealth could fund the chaplaincy program by authority of executive power alone and with no more statutory authority than generally worded Appropriation Acts. The majority found against the

\textsuperscript{103} Ibid 92.
\textsuperscript{104} Ibid 133.
\textsuperscript{105} Ibid 121.
\textsuperscript{106} (2012) 248 CLR 156.
\textsuperscript{107} See the procedural history and factual background as set out in the judgment of French CJ in \textit{Williams} (2012) 248 CLR 156, 180–4.
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Commonwealth on this point and the plaintiff was therefore successful. Even though this case concerned a power to spend money, its reasoning applies to executive power more generally.108

Key questions most relevant to this book were whether s 61 extends to permit the Commonwealth executive, first, to do anything which any ordinary citizen could do and, second, to do anything which the Commonwealth legislature could have authorised the executive to do by an Act of Parliament but even without an actual authorising Act. None of the judgments accepted that the Commonwealth could do anything any natural person could do,109 (although some of the judgments, as discussed below, indicated that it could exercise the powers it has in common with legal persons in matters related to the exercise of its other properly construed executive powers). As Saunders put it:

In any event, the court denied that conclusions about the scope of Commonwealth power could satisfactorily be derived by analogy from the capacities of legal persons, given the public character of Commonwealth funds, its accountability obligations and the coercive mechanisms at its disposal.110

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109 Ibid 193 (French CJ), 238–9 (Gummow and Bell JJ), 253–4 (Hayne J) 320–1 (Heydon J, insofar as the ‘breadth’ of Commonwealth power was a limitation, although this involved a question of ‘depth’ which was not adequately considered), 352 (Crennan J), 373–4 (Kiefel J). Interestingly, Zines foreshadowed this position in ‘The Inherent Executive Power of the Commonwealth’, above n 7, 283–6, although this case does not refer to this article. French CJ does refer to Zines’s The High Court and the Constitution (Federation Press, 5th ed, 2008) 349–50 on a broadly similar point relating to the limits to the Commonwealth’s power to contract at 213, as does Heydon J in relation to whether the executive power of the Commonwealth extends as far as its legislative power, 308, referring to Zines 346–7, and 310, in Zines (2008) 347 (as well as earlier editions of Zines’s book). Heydon J also refers to Zines’s ‘Commentary’ to H V Evatt, The Royal Prerogative (Law Book Co, first presented as a doctoral thesis 1924, with commentary by Leslie Zines, 1987), C12, to support the same point, 310–11.
As to Commonwealth executive power extending to doing anything which the Commonwealth legislature could have authorised it to do, the plurality essentially found that it did not.\textsuperscript{111} French CJ decided this on the basis that the authorities, particularly in the \textit{AAP Case},\textsuperscript{112} did not go that far,\textsuperscript{113} but also because it offended principles concerning the Parliament’s control over spending by the executive, an aspect of the central constitutional consideration of responsible government.\textsuperscript{114} Consistent with this, Gummow and Bell JJ stated that ‘such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom’.\textsuperscript{115} Crennan J stated:

If the fact that the Parliament could pass valid Commonwealth legislation were sufficient authorisation for any expenditure by the Commonwealth Executive … the Commonwealth’s capacities to contract and to spend would operate, in practice, indistinguishably from the Commonwealth Executive’s exercise of a prerogative power. Such a view … disregards the constitutional relationship between the Executive and Parliament affecting spending.\textsuperscript{116}

Hayne J decided this point on a different basis. His Honour could not find a hypothetical law which would have supported the school chaplaincy scheme.\textsuperscript{117} He saw it as desirable that ‘programs of the kind in issue in this case’ have a legislative basis but did not wish to conclude that the executive could never spend money without legislative authority.\textsuperscript{118} Kiefel J also declined to decide on whether an unexercised legislative power was sufficient because the Commonwealth’s legislative power would not have

\begin{footnotesize}
\begin{enumerate}
\item See discussion in Geoffrey Lindell, ‘\textit{Williams v Commonwealth} – The shrinking scope of the Executive Power of the Commonwealth and the increased role of the Australian Parliament in authorising its exercise’ (Parliamentary Briefing Paper No 1, Commonwealth Parliament, 6 December 2012) 21; Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power Through the High Court’s New Spectacles’ (2013) 35(2) \textit{Sydney Law Review} 253, 281. In an article which French CJ cites with apparent approval, but not on this point, at 180 of \textit{Williams v Commonwealth}, Saunders appears to have foreshadowed that Commonwealth spending under authority of s 61 alone was ‘a generous construction’ and ‘would have implications not only for the federal character of the Australian system of government, but also for the traditional mechanism for the accountability of government that regulatory legislation represents’ in Cheryl Saunders, ‘Intergovernmental Agreements and the Executive Power’ (2005) 16(4) \textit{Public Law Review} 294, 295.
\item (1975) 134 CLR 338.
\item Ibid 205–206.
\item Ibid 232–3.
\item Ibid 358.
\item Ibid 274–81.
\item Ibid 281.
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extended to funding the chaplaincy scheme in this case and therefore the Commonwealth’s executive power did not extend to funding the chaplaincy scheme. 119

A majority in Williams confirmed that, since Pape, the power for the executive to spend is limited and is not to be derived from ss 81 and 83 of the Constitution. 120 As put by Gummow and Bell JJ, ‘[T]he following passage in the reasons of French CJ, Gummow and Crennan JJ in ICM Agriculture Pty Ltd v The Commonwealth 121 should be noted. With reference to Pape, their Honours said:

[I]t is now settled that the provisions … in s 81 of the Constitution for establishment of the Consolidated Revenue Fund and in s 83 for Parliamentary appropriation, do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth. 122

This reflects a clear concern to ensure that the executive remains subordinate to the Parliament, which is a fundamental principle underlying the relationship between executive and statutory power. Unlike the House of Lords in the United Kingdom, the Senate is able to reject appropriation or tax bills originating from the lower house 123 and therefore deny the government a supply of funds on a particular matter or even generally. 124 This is potentially an important check on the executive government, which may not command a majority in the Senate, and a reason to ensure that spending by the executive government remains under the scrutiny of Parliament. Spending based upon exercising the powers of a natural person or unexercised legislative powers is not consistent with parliamentary scrutiny. By extension, executive power cannot simply derive from these sources (although the extent of the Commonwealth’s power held in common with legal persons, such as to contract, is not clear). 125 On this view, the executive must be accountable to Parliament even if for no reason other than to secure funding. It is consistent with Blackstone’s view that making the Crown’s advisers answerable to Parliament is a check

120 Ibid 248, 179 (French CJ), 252 (Hayne J), 341 (Heydon J), 356–7 (Crennan J), 362 (Kiefel J).
122 Williams (2012) 248 CLR 156, 224.
123 Constitution ss 53, 57.
124 Williams (2012) 248 CLR 156, 184, 205–206 (French CJ), 235 (Gummow and Bell JJ), 260 (Hayne J), Appleby and Macdonald, above n 111, 264–5, do not see this as necessitating a conclusion that executive power to spend must normally find authority in legislation.
125 As noted by Appleby and Macdonald, above n 111, 258, 275.
on the potential of the Crown to abuse its power. To limit the potential for abuse of executive power then, this book will argue that where the ADF could rely upon either statutory or nonstatutory executive power to do the same thing, it should prefer the statutory power unless necessity clearly dictates otherwise.

Only Heydon J dissented, on the point that the executive power of the Commonwealth under s 61 does extend to doing anything which the Commonwealth legislature could authorise it to do (which he described as the ‘Common Assumption’). Echoing Winterton, his Honour said that this was a question of breadth and expressed concern that the Court had not heard full argument on the question of depth, which might include power to contract using properly appropriated funds. He stated, “The lack of full argument about the “depth” element in this case is a further illustration of how the circumstances of this case do not make it one in which it is appropriate to narrow the executive power of the Commonwealth.”

For this reason it is difficult to assess the wider implications of Heydon J’s broader view of executive power. For the purposes of this book, concerned as it is with more violent and extreme exercises of executive power than government contracting and spending, the view of the majority is preferable for its more constrained view of executive power, particularly in its ‘assumption of legislative predominance’.

As much as the case turned upon the executive power to spend, its reasoning is applicable to executive power more broadly because some of the judgments directly considered the sources of executive power more broadly. Also, if a matter is something upon which the executive cannot spend, a relatively benign power, then it would seem less likely that it is a matter upon which the ADF could use coercive powers. As Gageler J put it in M68, “There is, of course, a difference between spending and doing: “The power to make a present to a man is not the power to give him orders”.”

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126 Blackstone's Commentaries, above n 24, 252.
129 Ibid 321.
130 Ibid 322–3 (Gummow and Bell JJ).
Although none of the judgments went so far as to state what the actual limits of executive power might be, some of the judgments did make clear what the sources of executive power were and, in so doing, where its limits might be found.

French CJ said:

Nevertheless, it can be said that the executive power referred to in s 61 extends to:

- powers necessary or incidental to the execution and maintenance of a law of the Commonwealth;
- powers conferred by statute;
- powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;
- powers defined by the capacities of the Commonwealth common to legal persons [referred to in this book as the ‘common capacities’];
- inherent authority derived from the character and status of the Commonwealth as the national government.\(^1\)

French CJ’s judgment suggests that an analysis of any exercise of power under s 61 must find a basis in the list of sources above. It is not enough to find an unexercised legislative power of the Commonwealth.\(^3\) It is particularly important to note the ‘powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth’,\(^4\) as such power is central to this book.

Crennan J stated that ‘despite the establishment of some limits, s 61 is not amenable to exhaustive definition in any single case.’\(^5\) Her Honour also identified sources of executive power as including statute, prerogative power such as ‘the power to enter a treaty or wage war’ and:

Powers which derive from the capacities of the Commonwealth as a juristic person, such as the capacities to enter a contract and to spend money when exercised in the ordinary course of administering a recognised part of the Commonwealth government.\(^6\)

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\(^1\) Ibid 184–5 (French CJ).
\(^3\) Ibid.
\(^4\) Ibid.
\(^5\) Ibid 342.
\(^6\) Ibid.
Consistent with this, her Honour later stated that moneys appropriated under s 81 of the Constitution must be for some governmental purpose, as distinct from contracts entered into by private parties. Her Honour also added, citing Mason J in the AAP Case, ‘[T]hat s 61 is the source of the Commonwealth Executive’s capacity to “to engage in enterprises and activities peculiarly adapted to the government of a nation … which cannot otherwise be carried on for the benefit of the nation”’. This reference is to nationhood power, which is further discussed below.

Kiefel J made clear that executive power extended to ‘its prerogative powers, to subject matters of express grants of legislative power in ss 51, 52 and 122 and to matters which are peculiarly adapted to the government of a nation’. Her Honour also stated, consistent with the principle of legality cases discussed below, that:

> The question is not one of the Executive’s juristic capacity to contract, but its power to act. Actions of the Executive must necessarily fall within the confines of some power derived from the Constitution … An activity not authorised by the Constitution could not fall within the power of the Executive.

Notably, Kiefel J identified virtually the same sources of executive power as those stated by Crennan J but without explicitly identifying ‘common capacities’ such as the power to contract. Kiefel J’s statement that ‘the question is not one of the Executive’s juristic capacity to contract, but its power to act’ would suggest that such powers are not separate but follow implicitly from the sources of executive power which her Honour explicitly identifies. The only powers which French CJ identifies separately but which Crennan J and Kiefel J do not are ‘powers necessary or incidental to the execution and maintenance of a law of the Commonwealth’, which relates directly to the wording of s 61. Arguably such powers are also implicit in those other powers explicitly identified in all three of their judgments.

In Williams, Gummow and Bell JJ did not really add to their consideration in Pape of the limits on or sources of executive power other than to reject an argument for ‘the assimilation of the executive branch to a natural

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137 Ibid 352.
138 Ibid 342.
139 Ibid 373.
140 Ibid 373–4.
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person and other entities with legal personality’. Hayne J usefully cited with approval the judgment of Gummow, Crennan and Bell JJ in *Pape*, discussed above, as to when an activity lies within the executive power of the Commonwealth. His judgment was primarily concerned with ‘the cardinal principle of parliamentary control’, as expressed in his joint judgment with Kiefel J in *Pape*, over raising and expenditure of revenue established through Chapters I and IV of the Constitution. His Honour looked particularly to the point arising from *Pape* that ‘federal considerations limit the scope of executive power’, as well as rejecting the notion of the Commonwealth having the same powers as a natural person. Hayne J did however mention that officials might exercise their own powers as a natural person in the course of their duty. This is a point to which Chapter 4 will return.

As to the *Williams* case as a whole, when considered with *Pape*, the effect is to make s 61 the starting point for any consideration of executive power, as part of a distinctly Australian constitutional structure which restrains executive power through federalism and judicial supervision of the written text. As Hayne J put it:

> Significantly for the present case, all members of the Court in *Pape* held that considerations of text and structure, akin to those alluded to or elucidated in earlier decisions, limit the executive power of the Commonwealth, at least in so far as it enables the Commonwealth to spend public moneys.

This structure also includes the supremacy of a Parliament with a Senate which, although relatively weak in respect of appropriations, is powerful in respect of general legislation and in which the government may not command a majority. English authorities and legal history are important to understanding executive power but within a context in which the Commonwealth has more limited powers than the Crown in England.

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142 Ibid 272, although he did not support the reliance upon nationhood power in that case, *Pape* (2009) 238 CLR 1, 121.
144 Ibid 252.
146 Ibid.
147 Ibid 251. Appleby and Macdonald, above n 111, 273, put it that in Australia now responsible government ‘means responsibility both nationally and federally [emphasis in original]’.
148 As discussed with respect to *Williams* (2012) 248 CLR 156, 179 (French CJ), 224, 252 (Hayne J), 341 (Heydon J), 356–7 (Crennan J), 362 (Kiefel J), 365–6; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169; *Constitution* ss 53, 57.
(a) Post Williams Cases and Executive Power

(i) Williams v Commonwealth [No 2]

In 2014, Williams v Commonwealth [No 2] continued the litigation but primarily concerned the legislative power of the Commonwealth to support the school chaplaincy scheme. The majority of French CJ, Hayne J, Kiefel J, Bell J and Keane J, in finding against the Commonwealth, essentially affirmed the majority views on executive power stated in the first Williams case:

This assumption, which underpinned the arguments advanced by the Commonwealth parties about executive power, denies the ‘basal consideration’\(^{149}\) that the Constitution effects a distribution of powers and functions between the Commonwealth and the States. The polity which, as the Commonwealth parties rightly submitted, must ‘possess all the powers that it needs in order to function as a polity’\(^{150}\) is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties’ submissions about executive power is not right and should be rejected.\(^{151}\)

As Chordia, Lynch and Williams suggested, ‘[I]t may simply have been an opportunity for the Court to reiterate the authority of Williams [No 1] … with the weight of a joint opinion’.\(^{152}\)

(ii) CPCF v Minister for Immigration and Border Protection

In 2015, CPCF v Minister for Immigration and Border Protection (‘CPCF’)\(^{153}\) turned on statutory powers under the Maritime Powers Act 2013 (Cth) but also provided some valuable obiter dicta on executive power. As French CJ put it, the central question in the case was whether maritime powers under the Act, or nonstatutory executive power, authorised the detention and taking of the plaintiff from Australia’s contiguous zone to India.\(^{154}\)


\(^{150}\) R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254, 267-268.


\(^{153}\) [2015] HCA 1.

\(^{154}\) Ibid [4].
The plaintiff was a Tamil asylum seeker originally from Sri Lanka who had attempted to enter Australia by sea, having commenced the voyage in India.\textsuperscript{155}

In separate judgments, French CJ, Crennan J, Kiefel J, Gageler J and Keane J found that the Act authorised the detention and taking of the plaintiff. It was not necessary therefore to decide the question of whether executive power would also have authorised this action. Such comments on executive power as there were in these judgments were therefore obiter dicta but nonetheless significant. Notably, French CJ did not take the opportunity to address the issue of an executive power to expel aliens and its relationship with equivalent statutory power which,\textsuperscript{156} as discussed later in this chapter, had been a matter of controversy since he first did so in the Federal Court in \textit{Ruddock v Vadarlis} (the ‘\textit{Tampa Case}’)\textsuperscript{157} in 2001. Kiefel J effectively approved the reasoning of Black CJ in dissent in that case and rejected the existence of an executive power to expel aliens.\textsuperscript{158} Ironically, Keane J took the position that French CJ had taken in the \textit{Tampa Case},\textsuperscript{159} even though French CJ did not in this case.\textsuperscript{160} Crennan J did not address executive power at all\textsuperscript{161} and Gageler J agreed with French CJ on the question of executive power.\textsuperscript{162} These judgments did not disturb the position on executive power generally taken in \textit{Williams}, although they did address issues of the relationship between prerogative power and statute, prerogative power as an aspect of executive power and an executive power to expel aliens, which arise later in this chapter.

Hayne and Bell JJ in dissent found that neither the Act nor any executive power authorised the action. They provided a strong statement of the need for any exercise of executive power to have a clear source of authority, which is consistent with \textit{Williams} as well as the cases discussed below on the principle of legality:

To adopt and adapt what was said in \textit{Chu Kheng Lim}, why should an Australian court hold that an officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of an alien

\begin{thebibliography}{99}
\bibitem{155} Ibid [1]–[4].
\bibitem{156} Ibid [40]–[42].
\bibitem{157} (2001) 110 FCR 491.
\bibitem{158} \textit{CPCF} [2015] HCA 1 [266]–[268], [283]–[286].
\bibitem{159} (2001) 110 FCR 491.
\bibitem{160} \textit{CPCF} [2015] HCA 1 [482]–[483], [489].
\bibitem{161} Ibid [228].
\bibitem{162} Ibid [393].
\end{thebibliography}
without judicial mandate can do so outside the territorial boundaries of Australia without any statutory authority? Reference to the so-called non-statutory executive power of the Commonwealth provides no answer to that question. Reference to the royal prerogative provides no answer. Reference to ‘the defence and protection of the nation’ is irrelevant, especially if it is intended to evoke echoes of the power to declare war and engage in war-like operations. Reference to an implied executive ‘nationhood power’ to respond to national emergencies is likewise irrelevant. Powers of those kinds are not engaged in this case. To hold that the Executive can act outside Australia’s borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.

This statement has significance for the discussion in Chapter 6 of the exercise of coercive powers by the ADF outside Australia in external security operations, which is also the case for the next High Court consideration of executive power.

(iii) Plaintiff M68/2015 v Minister for Immigration and Border Protection

In 2016, M68 also concerned the exercise of coercive powers by the Commonwealth outside Australia. Again, the case turned on the exercise of statutory powers but provided useful obiter dicta on executive power which essentially affirmed the approach taken in Williams. The plaintiff in this case was a Bangladeshi national who sought to enter Australia by sea and became a detainee in the Australian-funded immigration detention centre in Nauru under the Migration Act 1958 (Cth). Commonwealth officials brought her to Australia to undergo medical treatment. The plaintiff sought an injunction and a writ of prohibition to restrain the Commonwealth and relevant officials from returning her to the immigration detention centre in Nauru, as well as orders prohibiting payments by the Commonwealth to a contractor providing services to run the detention centre.

French CJ, Kiefel and Nettle JJ decided that Nauru, and not the Commonwealth, detained the plaintiff and that statutory power authorised the Commonwealth’s participation in that detention.

163 Citing Entick v Carrington (1765) 19 St Tr 1030, (1765) 2 Wils KB 275, 291 [95 ER 807, 817].
165 [2016] HCA 1 [129].
166 Ibid [1].
167 Ibid [14].
168 Ibid [16].
169 Ibid [54].
Their Honours therefore did not see it as necessary to decide whether Commonwealth executive power authorised the detention. Bell J agreed with the answers to the questions of law provided by French CJ, Kiefel J and Nettle J and did not directly address executive power at all. Keane J separately found that the Commonwealth did not detain the plaintiff, statutory power authorised such action as the Commonwealth took to procure the detention and it was not therefore necessary to consider executive power. The judgments of French CJ, Kiefel and Nettle JJ, and also Keane J however stated that the Commonwealth could enter into the memorandum of understanding with Nauru which procured the detention on the basis of ‘non-statutory executive power’ (rather than prerogative power) to enter into external relations derived from s 61 of the Constitution. This point will become significant in Chapter 6 in respect to the exercise of coercive powers by the ADF outside Australia.

Gageler J and Gordon J, however, did squarely address the question of whether executive power could authorise the detention of the plaintiff and made clear that it did not. Gageler J provided a lengthy consideration of executive power, its Australian constitutional history and its limitations. His Honour emphasised a view, consistent with Williams, of Commonwealth power under the Constitution restrained by considerations of federalism:

The purpose of s 75(v), as Dixon J put it, was ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power’. … The purpose was to supplement s 75(iii) so as to ensure that any officer of the Commonwealth acted, and acted only, within the scope of the authority conferred on that officer by the Constitution or by legislation.

Notably, Gageler J saw that Australia entering into a memorandum of understanding with Nauru was an exercise ‘of its non-statutory prerogative capacity to conduct relations with other countries [emphasis added]’, rather than simply as an exercise of nonstatutory power under s 61. He made a clear distinction in nonstatutory executive power between prerogative executive power, being uniquely governmental power ‘which

170 Ibid [24]–[28], [41].
171 Ibid [102]–[103].
172 Ibid [239]–[242], [265].
173 Ibid [54], [201].
174 Bank of New South Wales v The Commonwealth (1948) 76 CLR 1, 363.
175 M68 [2016] HCA 1 [126], [145].
176 Ibid [178].
is capable of interfering with legal rights of others’, and nonprerogative executive capacities, which are nothing more than the utilisation of a bare capacity or permission, which are subject to ‘the same substantive law as would be applicable in respect of the act had it been done by any other actor’. 177 This point will be significant in respect of ADF internal security operations as discussed in Chapter 4. Gageler J also saw that there was no prerogative to detain, as there might be in respect of an enemy alien in war or in preventing an alien from entering Australia, which would have authorised the detention of the plaintiff in Nauru. 178 This point will become significant in Chapter 6 in respect of security detention by the ADF in external security operations which are not war.

Gordon J only briefly addressed executive power and, consistently with Williams, found that there was no authority to detain the plaintiff under executive power: 179

> The executive power of the Commonwealth does not itself provide legal authority for an officer of the Commonwealth to detain a person and commit a trespass. 180 Absent statutory authority, the Executive does not have power to detain. 181

This simpler position would create difficulties in respect of taking prisoners of war, as Chapter 5 will consider, or security detainees, as Chapter 6 will consider.

The significance of CPCF 182 in terms of broader doctrine on the executive power of the Commonwealth is essentially to affirm the position in Williams. It raises more specific questions in respect of the exercise of the foreign affairs prerogative and the conduct of coercive external security operations by the ADF which Chapter 6 will address.

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177 Ibid [134]–[135].
178 Ibid [164].
179 Ibid [372].
(b) Conclusions on Williams and Subsequent Cases

Williams and the subsequent cases together indicate that the sources of executive power include statutory power, prerogative power and nationhood power. Powers common to the capacities of legal persons are arguably implicit in the first listed powers. It is from these sources that some limits might be derived, because, consistent with the principle of legality discussed below, for a federal government of limited powers it is necessary to find a source of authority for the exercise of a Commonwealth executive power. It is not enough to argue that the Commonwealth executive has the powers of a natural person or can rely upon an unexercised equivalent legislative power. The principle of parliamentary supremacy over the executive will also be significant in arguing when it is, or is not, appropriate for the executive to act without the authority of an Act of Parliament. This leads to a consideration of the principle of legality.

3 Principle of Legality

The question of the scope of executive power immediately confronts the principle of legality. This presents a profound challenge in any analysis of executive power. The principle that any exercise of governmental power must have an authority in law does not sit easily with a source of authority that is so imprecise and difficult to determine. That the principle of legality derives from cases on excesses of executive power only serves to emphasise the point. In referring to A v Hayden183 and Entick v Carrington,184 which subsequent paragraphs address, Zines stated that ‘the courts have leaned against finding a prerogative power to interfere with the life, liberty or property of subjects. Coercion by the executive must be justified by law’.185 He goes on to state that there is an exception ‘to the principle that prerogatives are non-coercive’ in respect of war and other

184 (1765) 19 St Tr 1030.
emergencies.\textsuperscript{186} This book argues that the prerogatives with respect to war, martial law, internal security and external operations can be coercive but are nonetheless subject to the principle of legality. Also, it is only such prerogatives which can justify action based upon necessity in extreme circumstances.

At this stage it is important to note that this book will refer more often to the principle of legality rather than the more general concept of the rule of law. Whilst not rejecting the rule of law as a constitutional value by any means, the inherent difficulty in defining it and its aspirational quality make it preferable to refer to the principle of legality. The rule of law suggests an absence of arbitrariness, despotism and political violence, or even violence in society generally, as well as government limited by law, which might also be described as constitutionalism.\textsuperscript{187} These are worthy aims to aspire to but not necessarily easy points upon which to assess the lawful limits upon the use of force by the ADF in war or other extreme situations. This book, therefore, will usually refer to the loss or potential loss of the rule of law as a justification for the ADF to act rather than the rule of law being a limit upon its action. It will consider examples of the collapse of civilian government in places like Somalia in 1993, East Timor in 1999, Fiji in 2000 or Darwin in 1942. The rule of law, therefore, is more easily invoked in its absence than its presence. The more specific nature of the principle of legality on the other hand, with more precise authority with which to give it content, makes it a better yardstick by which to measure the limits to ADF action under executive power.\textsuperscript{188}

As to the principle of legality itself, \textit{Entick v Carrington}\textsuperscript{189} is the case traditionally cited, from Dicey\textsuperscript{190} to today,\textsuperscript{191} to support the idea that official action must have legal justification. With respect to the execution of a warrant which the court found to be issued unlawfully, Lord Camden

\begin{footnotesize}
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\item \textsuperscript{186} Zines, ‘The Inherent Executive Power of the Commonwealth’, above n 7, 287.
\item \textsuperscript{187} In supporting the rule of law, Evans discusses the debate over the definitional difficulties, aspirational qualities and value of the concept in Simon Evans, ‘The Rule of Law, Constitutionalism and the MV Tampa’ (2002) 13(2) Public Law Review (The Tampa Issue) 94, 94–6.
\item \textsuperscript{188} This position reflects Loughlin’s criticisms of the rule of law as a concept, but without accepting his conclusions because of the value of the rule of law as an aspiration, in Martin Loughlin, \textit{Foundations of Public Law} (Oxford University Press, 2010) 312–13.
\item \textsuperscript{189} (1765) 19 St Tr 1030.
\item \textsuperscript{190} Dicey, above n 19, 193.
\item \textsuperscript{191} CPCF HCA [2015] 1, [150] (Hayne and Bell JJ); David Clark, \textit{Principles of Australian Public Law} (Lexis Nexis Butterworths, 2\textsuperscript{nd} ed, 2007), 73.
\end{itemize}
\end{footnotesize}
CJ said ‘one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books. If it is not to be found there, it is not law’.  

A key case for this book in respect of the principle of legality and the war prerogative, discussed in Chapter 5, is the 1940 High Court case of *Shaw Savill & Albion Co Ltd*. The facts of the case were that the British flagged merchant vessel MV *Coptic* was sailing from Brisbane to Sydney on a route determined by naval instructions and without lights, also as required by naval instructions. HMAS *Adelaide* was sailing at high speed on a reciprocal course and was without lights as well. The two ships collided, causing considerable damage. The owners of the *Coptic* sued the Commonwealth in negligence for the damage. The Commonwealth pleaded as part of its defence that the matter was not justiciable as the incident occurred in the course of operations against the enemy.

Both Starke J and Dixon J went to some lengths to outline an immunity for the Commonwealth from tortious liability for actions during combat operations, more easily described as a ‘combat immunity doctrine’. Starke J referred to the case of *Marais*, and some of the Irish cases discussed in Chapter 3 on martial law, and made clear that matters of war are nonjusticiable, *durante bello*. His Honour also pointedly referred to *Entick v Carrington* and strongly affirmed the principle that, outside of combat with the enemy, the armed forces are as much subject to the law as anyone else:

192 *Entick v Carrington* (1765) 19 St Tr 1030, 1066.
193 (1940) 66 CLR 344. Surprisingly, an extensive search revealed very little in the way of Australian journal articles relevant to this book on this case, which perhaps reflects that the principle of legality in relation to the ADF and the combat immunity doctrine has received little attention in Australia. Beasley discusses it in the context of the Commando Court Martial (Transcript of Proceedings, Sergeant J and Lance-Corporal D, Australian Defence Force General Court Martial Pre-trial Directions Hearing, Brigadier Westwood, Chief Judge Advocate, 20 May 2011) but that is all. He agreed with both the combat immunity doctrine and its application in the Command Court Martial. Richard Beasley, ‘Duty of Care on the Battlefield’, *Bar News* (Summer 2011–2012) 53, 56–8. A recent British report considers the application of combat immunity doctrine in the United Kingdom Supreme Court case of *Smith v Ministry of Defence* [2013] UKSC 41 (‘Smith’). It argues that this case unacceptably narrows the doctrine because it will make military ‘leaders focus on the duty of care rather than adaptability and mission success’. See Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange, 2013) 31–2. This is discussed further in Chapters 5 and 6.
194 *Shaw Savill & Albion Co Ltd* (1940) 66 CLR 344, 357–8.
195 Ibid 366.
197 *Shaw Savill & Albion Co Ltd* (1940) 66 CLR 344, 356.
If it be established that the matters complained of were done or omitted in the conduct of war in the sense indicated, the courts cannot and will not interfere: such matters are not justiciable. War cannot be controlled or conducted by judicial tribunals: what is necessary or reasonable in its conduct must necessarily rest with those charged with the responsibility of the operations in whatever theatre of war they take place. But there is authority for the proposition that though the courts of law cannot interfere with the conduct of war, *durante bello*, yet after the cessation of hostilities or the restoration of peace the courts have jurisdiction to inquire and determine whether matters done or occurring during its continuance affecting the rights or properties of the King's subjects were justifiable.199

The Court left it for the trial court below to determine whether the facts of the collision between HMAS *Adelaide* and the MV *Coptic* attracted the combat immunity doctrine.200

Although it did not refer to either *Entick v Carrington* or *Shaw Savill & Albion Co Ltd*, the High Court of Australia again made a clear statement in favour of the principle of legality in the later case of *A v Hayden*.201 It concerned an Australian Security Intelligence Service exercise in the Sheraton Hotel in Melbourne in 1983 in the course of which personnel allegedly committed a number of criminal offences. The Victorian Police sought the names of the personnel concerned in order to investigate the incident. The Commonwealth refused to divulge the names on the basis that it had a contract of confidentiality with those concerned.202 Mason J said:

> It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth’s view – superior orders are not and never have been a defence in our law – though it is conceivable that the plaintiffs may have had some such belief.203

199  Ibid 356–7, Dixon J, 361, Williams J, 366, focused on the narrower question of the application of the duty to take care, rather than the application of the law generally, although the two views are consistent. Rich ACJ, 351 and McTiernan J, 364, agreed with Dixon J.
200  Ibid 357.
202  Ibid 533.
203  Ibid 550.
Murphy J memorably stated:

The executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land. If necessary, constitutional and other writs are available to restrain apprehended violations and to remedy past violations. I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads.204

This statement quite emphatically asserts the principle of legality, even if not using that term, and underlines the key values in question; constitutional government and the rule of law. His Honour followed this by elevating the proper response to unlawful orders as being a duty to disobey, ‘Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders’.205 In 2010 in Habib v Commonwealth, a civil claim by an Australian citizen alleging that Commonwealth officials were complicit in his torture and detention in various places including Guantanamo Bay, Perram J cited this part of Murphy J’s judgment, inter alia, in stating: ‘[Section 61] was conferred for the express purpose of maintaining the laws of the Commonwealth and could not, therefore, be the source of any authority to commit Commonwealth offences’.206

Gageler J also referred to A v Hayden in M68 as follows:

That inherent character of non-prerogative executive capacity is given emphasis by the absence of any prerogative power to dispense with the operation of the general law: a principle which Brennan J noted in A v Hayden207 ‘is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies’.208

204 Ibid 562.
205 Ibid.
208 [2016] HCA 1 [136].
As simple and clear as these propositions sound, as Chapter 2 will discuss, members of the ADF have obligations to obey lawful orders that are greater than those of civilians, and the ADF has a long heritage of obedience. When executive power is so hard to define, it will not always be clear whether an order is lawful or not. Nonetheless, this does not change the legal obligation of the ADF member. This highlights the tension between executive power and the principle of legality with which this book is concerned, and supports an approach which errs on the side of the principle of legality.

As with *Entick v Carrington*, the order of an executive official in *A v Hayden* was not a legal authority in itself and makes clear that legal authority for executive action must be found elsewhere. This is a problem when legal authority for executive action can be so hard to determine. It underlines the need to find some content, or depth, to the powers under consideration. This requires a closer examination of prerogative power, being the primary source of nonstatutory authority for most uses of force by the ADF.

**IV What is Prerogative Power?**

Five of the justices in *Williams* noted the significance of the prerogative as a source of executive power. The wisdom received from Dicey is that prerogative power is ‘a residue of discretionary power’ left to the Crown which is not exercisable by Parliament or the courts. Winterton made the point that when the Crown exercises the attributes of having legal personality, such as the power to own property, sue, contract, incorporate and so on, it cannot be like any other legal person exercising such powers. The position of the Crown is such that any of its acts are

209 (1765) 19 St Tr 1030.
211 (2012) 248 CLR 156, 184–5 (French CJ), 227–8 (Gummow and Bell JJ), 342 (Crennan J), 373 (Kiefel J); French CJ affirms this in *CPCF* HCA [2015] 1, [42]; Gageler J also notes the significance of prerogative power in *M68* [2016] HCA 1 [133]–[136].
212 Dicey, above n 19, xcix–c, 424; *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser).
1. WHAT IS EXECUTIVE POWER?

inherently governmental. Another view, attributed first to Blackstone and which Wheeler prefers, is that the prerogative power is that residual power which only the Crown can exercise. This would appear to be the better view as the majority of the High Court in Cadia stated in 2010:

Blackstone described the prerogative as part of the common law of England but, given its nature, as being out of the ordinary course of the common law. The ‘prerogative’ in the context of the present case concerns the enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen.

Even if this observation might be limited to preferences and immunities rather than powers, Crennan J also addressed this point directly in Williams in 2012 in stating:

The Commonwealth defendants’ primary contention was that the Commonwealth Executive’s power to spend is sourced in the Commonwealth’s legal capacity as a juristic person to spend moneys lawfully appropriated to be spent, and to enter into contracts (‘the wider submission’). In Davis, preferring Blackstone to Dicey, Brennan J distinguished between the Crown’s unique governmental prerogative rights and powers once enjoyed by ‘the King … alone’ and the Crown’s ordinary rights and powers in its private capacity, described by his Honour as ‘mere capacities’, which were no different from the capacities of ordinary persons to enter into contracts or to spend money. This restrained approach to the prerogative is consistent with Australia’s legal independence from Britain, the constraints of federalism and the

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214 A view which might support this position is that of Zines, which is essentially that the Commonwealth can only exercise those attributes of legal personality related to governmental purposes, and not all the attributes of legal personality which any person could exercise, therefore the exercise of those attributes of legal personality is inherently governmental. Citing Attorney-General (Vic) v Commonwealth (1935) 52 CLR 533 (the ‘Clothing Factory Case’), he argued, before Williams, that the Commonwealth executive may be limited to exercising only those powers incidental to the Commonwealth’s legislative power, Leslie Zines, The High Court and the Constitution, above n 109, 349–58. French CJ noted this in Williams (2012) 248 CLR 156, 213.


216 See discussion in Fiona Wheeler, ‘Judicial Review of Prerogative Power in Australia: Issues and Prospects’ (1992) 14 Sydney Law Review 432, 447–8. It is worth noting that if a power is not unique to the Crown, that is that it concerns a power which it shares in common with other legal persons, such as an employment relationship rather than a governmental power, it may indicate that it is a subject more amenable to judicial review, Council of the Civil Service Unions v Minister for the Civil Service [1985] AC 374, 399 (Lord Fraser).


paramountcy of the Commonwealth Parliament, and respect under our democratic system of government for the common law rights of individuals.\textsuperscript{219}

The powers which the Commonwealth has in common with any other legal person are not necessarily prerogative powers but are, on this view, ordinary executive capacities. What is important is that, since \textit{Williams}, it is apparent that any Commonwealth executive powers which it shares in common with any legal person are not as extensive as that of any legal person and may be confined to being exercisable only when incidental to its other properly construed executive powers.\textsuperscript{220} It is a potentially significant point for ADF internal security operations, which, absent a request from a State government, would normally need to relate to a Commonwealth power. Chapter 4 will discuss this point.

**A Relationship to Common Law**

Most executive powers not found in statute or the \textit{Constitution} relate to a prerogative identifiable through the common law. There is a question though as to whether prerogative power derives from the common law or is simply recognised by common law. High Court cases often refer to the common-law powers of the Crown when discussing prerogative power. As quoted above, the majority in \textit{Cadia} described the prerogative ‘as part of the common law of England but, given its nature, as being out of the ordinary course of the common law’.\textsuperscript{221} In \textit{NSW v Commonwealth} (the ‘Seas and Submerged Lands Case’) there was a question as to whether the common law could only extend to the low water line given that the

\textsuperscript{219} \textit{Williams} (2012) 248 CLR 156, 343–4. Gageler J elaborates on this point in \textit{M68} [2016] HCA 1, [133]–[136], exploring Brennan J’s distinction between a prerogative executive power and a nonprerogative executive capacity.

\textsuperscript{220} (2012) 248 CLR 156, 192–4 (French CJ), limited discussion of ‘ordinary and well recognised functions of government’, 234 (Gummow and Bell JJ), s 61 grants a power to spend where authorised by statute or the \textit{Constitution}, 249, recognised power of Commonwealth to inquire which is held in common with every other citizen, 206 (Hayne J), Commonwealth may exercise the capacities of a juristic person ‘in the ordinary course of administering a recognised part of the Commonwealth government’, 342 (Crennan J), ‘an activity not authorised by the \textit{Constitution} could not fall within the power of the Executive’, 373–4 (Kiefel J). Other than the reference to French CJ, these references are indirect at best in support of this point but they indicate views which are at least not inconsistent with it.

\textsuperscript{221} (2010) 242 CLR 195, 223.
power of the Crown extended beyond that. Jacobs J made clear in that case that the prerogative does not necessarily rely upon the common law to exist but the common law may recognise a previously existing prerogative. The common law existed of its own force only within England yet the prerogative power of the Crown extended as far as the Crown was able to assert it. This is consistent with the historical origin of the powers of the Crown in William I and the development of the common law subsequent to his conquest of England. This is a conceptually significant point for this book because, as Jacobs J noted of the King's prerogative power beyond the realm:

The breadth or width of his [the King's] assertion from time to time depended on high politics and it varied from time to time depending on considerations of power and of expediency. The history of its changes lies not in legal history but in political history.

This indicates that political power and expediency can be as important, if not more important, to prerogative power than legal authority. This leads to the issue of executive power more generally being a description of function rather more than of authority. It is hard to say what executive power is because sometimes it is whatever it needs to be. It is not always possible to ascertain the extent of executive power by an assessment of legal authority. There simply is not an identifiable authority in law for everything the executive does, particularly the ADF. As Locke stated, ‘[F]or prerogative is nothing but the power of doing public good without a rule.’ Nevertheless, despite questions over the legal source of prerogative power, particular prerogatives, such as those relevant to this book concerning martial law, internal security, war and external affairs, are still identified by reference to the common law.

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222 (1975) 135 CLR 337, 487–91 (Jacobs J). This question is perhaps not as significant now as there have been decisions of the High Court which have accepted that the common law operates beyond the low water line, Commonwealth v Yarmirr (2001) 208 CLR 1; Blanden v Commonwealth (2003) 218 CLR 330, 335–6.
223 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 489.
224 Baker, above n 2, 11–32 and above n 2 and above n 5 generally.
225 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 489.
B Subject Matter

What are the prerogatives then? This chapter does not seek to provide an exhaustive list of all the prerogatives, even if that were possible. Evatt J was of the view in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in Liq)* that ‘the royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects’. In that case, his Honour referred to his own doctoral thesis in which he had described three broad categories of prerogatives. The first was that of the ‘executive prerogatives’, which included making peace and war. The second category was that of ‘immunities and preferences’, which included such things as priority of debts owed to the Crown over other creditors and immunity from court processes. The third category was that of ‘property rights’, involving rights to royal metals, escheats (usually meaning deceased estates with no beneficiary) and the foreshore and seabed. For Australia, the executive power of each Commonwealth, State and Territory government includes those prerogatives applicable to the functions of that particular government in the federal system. His Honour stated that the more significant prerogatives relevant to the Commonwealth include those with respect to defence and foreign affairs. Prerogatives such as those concerning priority in debts could be exercised at the Commonwealth or State level as applicable. By virtue of the federal division of responsibilities, the States and Territories would more likely exercise such prerogatives as those with respect to metals, escheats, treasure trove and the foreshore.

228 See Evatt, above n 109.
230 *Commonwealth v Colonial Combing, Spinning and Weaving Co* (1922) 31 CLR 421, 432; Constitution s 70.
231 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in Liq)* (1940) 63 CLR 278, 320. To this might be added acquisition of territory, particularly in the maritime domain in more recent years, *Seas and Submerged Lands Case* (1975) 135 CLR 337, 487–91, which Jacobs J said was a prerogative which did not ever pass to the States.
233 Ibid 321. In *Cadia* Gummow, Hayne, Heydon and Crennan JJ questioned whether this division was appropriate for royal metals, given that the rationale for the prerogative was to finance the defence of the realm, but did not consider the matter further, (2010) 242 CLR 195, 225–7.
C Relationship to Statute

A consequence of a power being a prerogative power is that it may be exercised without the authority of an Act of Parliament. The legal authority is found in the prerogative itself, which common law may recognise. While the prerogative can adapt to new circumstances, such as developments in warfare, as a result of the Glorious Revolution in 1688 it is no longer possible to create a new prerogative: ‘[I]t is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative’.\(^{234}\) As Jacobs J made clear in the *AAP Case*, the executive is subordinate to the legislature:

> The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to Australia, may be the subject of legislation of the Australian Parliament.\(^{235}\)

French CJ endorsed this view explicitly in *Pape*.\(^{236}\) Statute may regulate or extinguish prerogative power by express words or necessary implication. It may control the exercise of the power without interfering with its source or actually remove the source of a prerogative power and either replace it with a statutory power or abolish it altogether.\(^{237}\) Either way, as Gummow and Bell JJ stated in *Williams* that ‘when a prerogative power is directly regulated by statute, the Executive Government must act in accordance with the statutory regime’.\(^{238}\) The *Defence Force Discipline Act 1982* (Cth) is a good example of a field in which statute has replaced regulation by prerogative virtually completely.\(^{239}\)

This preserves the supremacy of Parliament over the executive. The inability to create new prerogatives limits prerogative power to a fixed field of subject matter, even if the limits of the prerogatives themselves are unclear. In some way this acts as a check on potential abuse of prerogative power for despotic purposes. It supports constitutional order and the rule of law. It is also fundamentally democratic in making the actions of the

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236 (2009) 238 CLR 1, 51.
237 M68 [2016] HCA 1 [121]–[122], (Gageler J); See also *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 (‘De Keyser’s Royal Hotel’).
Crown subject to the will of the people as expressed through Parliament, as opposed to the people being subject to the will of the Crown. The effect of this is to have those who exercise prerogative power do so, ultimately, for public purposes rather than in their own self-interest or risk having Parliament extinguish the power.

D Statutory Interpretation

Statutory interpretation, then, is very important because of its rules with respect to discerning the extent to which statute prevails over prerogative power. There is some debate as to how this occurs and the Tampa Case exemplified the differences of view on this point. The dissenting judgment of Black CJ was that the Migration Act 1958 (Cth) by necessary implication extinguished any prerogative with respect to preventing the entry of aliens because it dealt comprehensively with this subject. The leading judgment of French J in that case found no express words or necessary implication in the legislation to extinguish the relevant executive power, as informed by prerogative power, so executive power remained available. (Notably, the prerogative was not the basis of the power to expel aliens without statutory authority. This was found in s 61 alone, being a form of nationhood power, which is discussed below.)

Winterton has argued that the ‘covering the field’ test, which is relevant to inconsistencies between State and Commonwealth legislation under s 109 of the Constitution, should be applicable to questions of whether legislation has extinguished a prerogative power:

In determining whether legislation impliedly intends to alter, regulate or abolish a prerogative power … There should, at most, be a mild presumption against such intention, especially when the prerogative power is well established and clearly important to government … The courts should also draw on the extensive jurisprudence relating to a broadly analogous question – inconsistency of Commonwealth and State legislation under s 109 of the Constitution.

242 Ibid 540.
244 Winterton, ‘The Limits and Use of Executive Power by Government’, above n 73, 421 n 59).
Evans, in arguing for a ‘covering the field’ test, criticises French J’s view in the *Tampa Case* on the basis that ‘the history of the executive power since the 17th century demonstrates progressive constitutionalism, moderation and republicanisation, all values which support a presumption of the kind rejected by French J’.

Evans goes on to say that:

> The argument is even stronger if one adopts a version of democratic constitutionalism as a standard. Notwithstanding the dominance of the executive in Parliament, enacting legislation requires greater openness, scrutiny and democratic deliberation than the exercise of prerogative powers [emphasis in original] …

A number of the judgments in *Attorney-General v De Keyser’s Royal Hotel Ltd* (*’De Keyser’s Royal Hotel’*), would also support this view. Black CJ quoted them at length as follows:

> It is uncontentious that the relationship between a statute and the prerogative is that where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, the exercise of the power or right is governed by the provisions of the statute, which are to prevail in that respect: *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508. The principle is one of parliamentary sovereignty. The question is, what is the test to determine whether a prerogative power has been displaced by statute? The accepted test is whether the legislation has the same area of operation as the prerogative.

In *De Keyser’s*, Lord Dunedin said (at 526):

> It is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: ‘What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?’

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249 [1920] AC 508.
Lord Moulton said (at 554):

the statutory powers … are wider and more comprehensive than those of the prerogative itself. [The Parliament] has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute.

Lord Sumner said (at 561):

It seems also to be obvious that enactments may [abrogate the prerogative], provided they directly deal with the subject-matter, even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative.

Lord Parmoor said (at 576):

[w]here a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

See also per Lord Atkinson (at 538).250

The High Court has not yet explicitly applied a ‘covering the field’ test to such a question. In 2010, *Cadia* restated the position that stood in the *Tampa Case*:

Despite subsequent development of responsible and representative government in Britain, and the exercise of prerogative authority only on advice, it remains an orthodox approach by the courts to statutory construction to say that the prerogative of the Crown is not displaced except by express words or by necessary implication.251

Nonetheless, French CJ also stated in *CPCF* that explicit preservation of executive power in s 5 of the *Maritime Powers Act* (MPA) could not ‘be taken as preserving unconstrained an executive power the exercise of which is constrained by the MPA’.252 Hayne and Bell JJ as well as Kiefel J came to a similar conclusion.253 This would appear to amount

252 *CPCF* HCA [2015] 1, [41].
253 Ibid [141] (Hayne and Bell JJ); [277]–[286] (Kiefel J).
to a ‘covering the field’ test, even if not by that name. Keane J however adhered to the view that executive power continues to exist where it is not abrogated, presumably explicitly, by statute.254

As Black CJ notes, this is a question of the principle of parliamentary supremacy over the executive. The approach to this aspect of statutory interpretation is a critical point for this book as it argues that the primacy of the legislature over the executive, deriving from the Glorious Revolution and informed by principles of democracy and the rule of law, should determine this question. As stated above, to counter the potential risk of arbitrariness and despotism, executive action should rely on statutory power before executive power on the same subject unless necessity demands otherwise.

E An Extra Step in the Statutory Interpretation Process

Therefore, where the Parliament has provided statutory authority for the executive to carry out its functions,255 then the executive should rely upon that statutory authority. It is only in extreme circumstances where necessity could justify that the executive should resort to the authority of executive power alone. These are the situations which Blackstone described, as quoted above, which require ‘those extraordinary recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence’.256 Even then, it should only be where the prerogative in question (or even possibly nationhood power, as discussed below) actually envisages extraordinary circumstances such as the collapse of constitutional government, war or serious threats to life. This book argues that there is some recognised content to these powers which can assist in determining when to rely upon them instead of statutory power. This means that a statute ‘covering the field’ should not, without express words, automatically extinguish executive power on the same subject. Executive power should remain available because it may be, in an extreme situation, statutory power is not available and executive power is better than no power at all. This book argues for a position, then, that is different to that of French J. A further

254 Ibid [2015] 1, [488]–[492].
256 Blackstone’s Commentaries, above n 24, 251.
step of analysis is required to determine whether, in the circumstances of a particular case, the existence of statutory power should preclude reliance upon executive power.

By way of example, in the *Tampa Case*, the issue should not just have been, as in the view of French J, whether the prerogative or broader executive power to expel aliens survived the enactment of the relevant provisions of the *Migration Act 1958* (Cth). It should, instead, have been if the *Migration Act* expressly ‘covered the field’ in empowering the executive to protect Australia’s borders from unlawful arrivals whether it was then necessary to resort to executive power. The authorities on the history and the actual character of the prerogatives themselves recognise the circumstances where necessity would justify relying upon them instead of on a statute which covered the same field. These circumstances did not exist and the prerogative (or nationhood power) to exclude aliens is nothing like the prerogatives with respect to war, martial law or internal security. French J described the power to exclude aliens as follows:

> 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 leave.\(^{258}\)

This describes the essentially routine function of border control. French J nonetheless described it in the following terms:

> The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*.\(^{259}\)

His Honour did not cite any authority which supported this statement nor any particular reason why, even if border control was so central to sovereignty, that it justified the use of executive power instead of statutory power. There is no suggestion that other matters just as central to sovereignty, such as taxation or citizenship, should rely upon executive

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\(^{257}\) (2001) 110 FCR 491, 541–4. As discussed further below, in addition, the prerogative should have been the first point of reference, before referring to the broader ‘nationhood power’. Evans’s discussion of prerogative power and statutory interpretation in this case generally, and criticism of French J’s approach, is above n 187, 96–9.

\(^{258}\) *Tampa Case* (2001) 110 FCR 491, 544.

\(^{259}\) Ibid 543.
rather than statutory power just because they are central to sovereignty. This argument could undermine the relationship of subordination of the executive to the Parliament. However, martial law, war and internal unrest threatening life are exceptional situations which can threaten the very existence of constitutional order. They are far from routine. An executive power to exclude aliens is not concerned with such extraordinary situations which could justify action based upon necessity. There was, therefore, arguably no basis to resort to executive power when Parliament intended to cover the field in the *Migration Act*. This approach is more consistent with the theory of the separation of powers between the executive and the legislature, as argued by Black CJ, but with the additional consideration of whether it is necessary for the executive to act without statutory authority.

Black CJ doubted that there was a prerogative. In his view, the legislation empowered the ADF to act but was not properly complied with. If there was no power to be found in these sources, then the executive action was ultra vires. This is in accordance with the principle of legality, the majority in *CPCF* as well as the judgments of Gageler J and Gordon J in *M68*, as discussed above. His Honour could also have considered necessity arising from extreme circumstances but this did not appear on the facts of this case and his conclusion would have been no different.

This book will argue, then, that necessity, in relation to the exercise of particular executive powers, is an important extra limiting factor or justification in determining whether to rely upon executive power where statute already expressly ‘covers the field’. Necessity is not necessity in general terms, however; its meaning relates to particular prerogative powers and possibly nationhood power. The circumstances in which necessity might justify reliance upon the prerogatives with respect to martial law, war, internal security and, possibly, nationhood power, are the subject of the rest of this book.

This leads to the issue of the different sources of authority within the executive power of the Commonwealth, particularly as between prerogative and nationhood power. If statutory power is not available and there is no prerogative power on the same subject, recourse may possibly be had to ‘nationhood power’, although still limited by necessity.

261 Ibid 508, 514.
V Nationhood Power

This book does not reject ‘nationhood’ power completely but argues that it should not be relied upon where there are existing prerogatives, particularly in the case of the extreme exercises of power relevant to the ADF. It comes now to address the issue of nationhood power directly.

The High Court has confirmed, in Pape and Williams, that some nonstatutory executive powers derive from s 61 of the Constitution itself rather than relying on prerogative or common-law authority. On this view, section 61 can be informed by prerogative power but is itself the source of authority. The aspect of nonstatutory governmental executive power under s 61 that is additional to the prerogative powers is known as nationhood power. French J put this view strongly in the Tampa Case, seeing the executive power of the Commonwealth as ‘measured by reference to Australia’s status as a sovereign nation’. As Chief Justice of the High Court, he confirmed his views in Pape stating that the short-term fiscal measures to respond to the global financial crisis in that case were ‘peculiarly within the capacity and resources of the Commonwealth Government’, a view consistent with that of Gummow, Crennan and Bell JJ. There is considerable uncertainty however over the nature and extent of nationhood power which does not relate to any prerogative. It is important to this book overall, because potentially there is considerable scope within it to authorise action by the ADF, but without reference to the venerable prerogatives which traditionally have authorised military action. For this reason it is worth elaborating on the provenance of nationhood power.

262 (2009) 238 CLR 1, 60 (French CJ), 87–8 (Gummow, Bell and Crennan JJ).
263 (2012) 248 CLR 156, 184–5 (French CJ), 235 (Gummow and Bell JJ), 342 (Crennan J), 373 (Kiefel J).
267 (2009) 238 CLR 1, 63.
268 Ibid 87–8.
1. WHAT IS EXECUTIVE POWER?

A Origins and Development

There were a number of forerunner cases which suggested or described, but did not use the term, ‘nationhood power’. They varied as to whether it was an executive or legislative power or both. In the war powers case of *R v Kidman*, Isaacs J held that there was implied executive power for the Commonwealth to carry out its functions. His Honour said it has ‘an inherent right of self-protection … [which] … carries with it – except where expressly prohibited – all necessary powers to protect itself and punish those who endeavour to obstruct it’.269 In another war powers case, *Commonwealth v Colonial Combing, Spinning and Weaving Co* (the ‘Wooltops Case’), Isaacs J also hinted at the protective function of the Commonwealth executive power.270 It is not clear that Isaacs J saw this as something more than prerogative power or to counter a view that relevant prerogative power might not be available to the Commonwealth via s 61 at that time, resting instead with the King.271

In *Attorney-General (Vic) ex rel Dale v Commonwealth* (the ‘Pharmaceutical Benefits Case’),272 which concerned the Commonwealth’s spending power, the whole scheme for the Commonwealth to subsidise the sale of pharmaceuticals failed but, in a passage which Mason CJ, Deane and Gaudron JJ later referred to with approval in *Davis v Commonwealth*,273 Dixon J stated:

> In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and … to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States.274

This view appears to have developed Isaacs J’s view of the Commonwealth as a national, not just a federal, government.

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269 (1915) 20 CLR 425, 444–5.
270 (1922) 31 CLR 421, 442.
272 (1945) 71 CLR 237.
274 (1945) 71 CLR 237, 271–2.
Dixon J carried this further in obiter dicta in the sedition case of *R v Sharkey*, quoting with approval this statement from Quick and Garran in order to distinguish the spheres of Commonwealth and State power:

If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.\(^{275}\)

This quote goes more to the point of nationhood power with which this book is concerned, the use of force. It is useful in making a distinction between the respective power of the Commonwealth and the States because, as Chapter 4 will discuss, it is not one which traditional English jurisprudence on the prerogative recognises.

In obiter dicta in *Australian Communist Party v Commonwealth* (‘Communist Party Case’), Dixon J also referred to the two sedition cases of *R v Sharkey*\(^{276}\) and *Burns v Ransley*,\(^{277}\) and stated:

As appears from *Burns v Ransley* (1949) 79 CLR, at p 116 and *R v Sharkey* (1949) 79 CLR, at pp 148, 149, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51 (xxxxix) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in Black’s *American Constitutional Law* (1910), 2nd ed, s 153, p 210, as follows: ‘it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government’.\(^{278}\)

\(^{275}\) *R v Sharkey* (1949) 79 CLR 121, 151 quoting Quick and Garran’s *Annotated Constitution of the Australian Commonwealth*, above n 72, 194.

\(^{276}\) (1949) 79 CLR 121.

\(^{277}\) (1949) 79 CLR 101.

\(^{278}\) *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188 (‘Communist Party Case’).
In the same case, Fullagar J also said with regard to the inherent right of self-protection:

But I think that, if it ever becomes necessary to examine it closely, it may well be found to depend really on an essential and inescapable implication which must be involved in the legal constitution of any polity. The validity of the Act, however, if it could be supported by the power, would not be affected by the fact that its framers had taken too narrow a view of the source of the power.279

This is where the jurisprudence takes a more concerning turn as, even though focused upon legislative power, it takes quite forceful ideas, such as suppression of subversion, and bases them upon textual assumptions and implications. It goes against the idea that exercises of executive ‘power should be clear in proportion as the power is exorbitant’ which underpins the principle of legality.280 It is one thing to attribute a power to the Commonwealth as opposed to the States but it is another to make it potentially extreme and at the same time merely implied and therefore potentially unlimited.

By way of contrast, in the Seas and Submerged Lands Case, Barwick CJ characterised Commonwealth jurisdiction over Australia’s maritime zones as a ‘consequence of the creation of the Commonwealth under the Constitution’.281 This is a more benign application of the nationhood power concept as it concerns the respective power of the Commonwealth as opposed to the States and is in essence facultative rather than coercive.

These cases demonstrate that even before the term ‘nationhood power’ entered High Court jurisprudence, there were significant references to a power of this nature, whether legislative or executive. While the context of the words quoted relate to the division of power between the States and the Commonwealth, as can be seen above, they could also apply readily to a view about Commonwealth executive power more broadly and particularly the use of force. They will be directly relevant to the discussion of internal security in Chapter 4.

279 Ibid 260.
280 Entick v Carrington (1765) 19 St Tr 1030, 1066.
281 (1975) 135 CLR 337, 373.
B Nationhood Power Cases

As to the cases which identify nationhood power more directly, in the AAP Case Mason J stated that executive powers could be ‘deduced from the existence and character of the Commonwealth as a national government’. This appears to be the start of the line of authority to support nationhood power, as such, as a source of executive power with the key words being ‘the Commonwealth as a national government’.

Although not a case, the Hope Protective Security Review 1979 is also relevant because it is the only consideration by judicial writers of the Bowral call-out of 1978, which actually involved an ADF intervention in a State under what appeared to be nationhood power. In his extracurial report, Justice Hope annexed an extracurial opinion of retired High Court Justice Sir Victor Windeyer. Sir Victor stated that the constitutional authority of the Commonwealth to intervene with force in a State to protect its own interests, in this case to protect visiting Commonwealth Heads of Government, was an incident of nationhood:

The power of the Commonwealth Government to use the Armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the Constitution created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.

This example is important because it illustrates that nationhood power is not an abstract concept confined to reports of constitutional cases. It can actually be an authority for military intervention in the most sensitive of contexts, internal security. This book argues in subsequent chapters that it might be necessary to rely upon nationhood power to provide authority for Commonwealth action, as opposed to State action, but the risks in having such an extreme yet imprecise power are such that it should only occur in very limited circumstances.

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282 AAP Case (1975) 134 CLR 338, 397.
283 Discussed in Chapter 4.
It is important, therefore, to illustrate that the provenance of nationhood power is contentious. *Commonwealth v Tasmania* (the ‘Tasmanian Dam Case’)\(^{285}\) was equivocal about nationhood power as it had the potential to increase the power of the Commonwealth at the expense of the States. In this case, Wilson J, in dissent, did not see nationhood power as relevant to coercive powers to protect ‘a heritage distinctive of the Australian nation’, and saw no basis for an inherent legislative power ‘independent of any express legislative power conferred by the *Constitution*’.\(^{286}\) Deane J, in the majority, had a similar view, reviewing the ‘nationhood power’ cases and confining them to ‘areas in which there is no real competition with the States’.\(^{287}\) He accepted that the Commonwealth, using powers ‘not included in any express grant of legislative power’ to ‘assist what are truly national endeavours’, could appropriate money to spend in an area of State activity but did not accept ‘drastic’ coercive measures which ousted State powers on the basis of an unexpressed nationhood type power.\(^{288}\) Gibbs CJ,\(^{289}\) Murphy J\(^{290}\) and Dawson J\(^{291}\) did not reject the power but saw it as having no application to the case. Mason J did not address nationhood power.\(^{292}\)

*Davis v Commonwealth*,\(^{293}\) drawing on the *AAP Case*,\(^{294}\) is a defining case on nationhood power. Mason CJ, Deane and Gaudron JJ saw nationhood power as a power to legislate with respect to the Bicentennial, including power to incorporate a company in the Australian Capital Territory for the purpose,\(^{295}\) and coercive power to protect the name and symbols of the Bicentennial Authority.\(^{296}\) Importantly, their Honours saw this power as possibly being an inherent legislative power, operating independently of a combination of s 61, the executive power, and s 51(xxxix), the incidental

\(^{286}\) Ibid 203.
\(^{287}\) Ibid 252.
\(^{288}\) Ibid 252–3.
\(^{289}\) Ibid 109.
\(^{290}\) Ibid 182.
\(^{291}\) Ibid 322–3.
\(^{292}\) Even so, in the same year in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, Mason J took a more expansive view of nationhood power. He said that it extended to authorise agreements between the Commonwealth and the States on matters of joint interest, including joint legislative action, as long as they did ‘not contravene the *Constitution*’, (1983) 158 CLR 535, 560. Notably, this position was not followed in *R v Hughes* (2000) 202 CLR 535, 583, discussed below.
\(^{293}\) *Davis v Commonwealth* (1988) 166 CLR 79.
\(^{294}\) (1975) 134 CLR 338.
\(^{295}\) *Davis v Commonwealth* (1988) 166 CLR 79, 94.
\(^{296}\) Ibid 97.
power, which had been the more accepted position until then. Wilson and Dawson JJ did not support this expanded view of an inherent legislative power and saw it as only deriving from s 51(xxxix). Brennan J did take a broad view of nationhood power as an executive power though. He stated:

‘The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood – a flag or anthem, for example – or the benefit of many national initiatives in science, literature and the arts.’

Even with an expansive view of nationhood power, Mason CJ, Deane and Gaudron JJ invalidated aspects of the legislation under challenge on the basis of it being disproportional to the end sought. Protection of words such as ‘1788’, ‘1988’, ‘200 years’ and ‘Sydney’ with criminal sanction was an ‘extraordinary intrusion into freedom of expression … not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power’. Proportionality in this case then was the limit on nationhood power. It has something in common with waxing and waning in the war power cases, which Chapter 5 will address. Davis v Commonwealth again favours a facultative approach to nationhood power but takes a constrained view to a coercive aspect to the power, which is consistent with the approach of this book.

The coercive aspect of the power was at its highest in the Tampa Case. As mentioned above, French J decided that the executive power to prevent unlawful entry of aliens into Australia was effectively an incident of nationhood. As quoted above, he stated:

297 Ibid 93, the inherent and independent power is consistent with Dixon J in the Communist Party Case (1951) 83 CLR 1, and Fullagar J in the same case, 260.
299 Ibid 111.
300 Ibid 99.
The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution.\(^{303}\)

In a view which this author shares and elaborates upon below, Zines wrote of this statement that:

> It is to be hoped that the court does not find any other coercive powers of the executive that are essential to sovereignty and which may be exercised free of any limitations or safeguards in legislation.\(^{304}\)

Black CJ on the other hand, stated that: ‘The Australian cases in which the executive power has had an “interest of the nation” ingredient can be contrasted with those in which such power has been asserted for coercive purposes’.\(^{305}\)

He then listed a number of examples where nationhood power has not supported a coercive power, stating that it

has been held not to be available to sustain deportation (\textit{Ex parte Walsh; Re Yates} (1925) 37 CLR 36 at 79); detention or extradition of a fugitive (\textit{Barton} at 477, 483, 494); the arrest of a person believed to have committed a felony abroad (\textit{Brown}); the arbitrary denial of mail and telephone services (\textit{Bradley v Commonwealth} (1973) 128 CLR 557); or compulsion to attend to give evidence or to produce documents in an inquiry (\textit{McGuiness v Attorney-General (Vic)} (1940) 83 CLR 73) \ldots \(^{306}\)

Black CJ saw that the executive power to expel aliens must come from a prerogative and stated that the continued existence of any such prerogative ‘is entirely uncertain’ and excluded by the \textit{Migration Act 1958}.\(^{307}\) As much as the \textit{Tampa Case} stands for a coercive use of nationhood power, as this chapter will discuss further below, it is not widely supported in the case law or the literature and must be treated with some caution.

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\(^{303}\) Ibid 543.


\(^{305}\) \textit{Tampa Case} (2001) 110 FCR 491, 501.

\(^{306}\) Ibid.

\(^{307}\) Ibid.
1 A Narrowing of Nationhood Power?

Two High Court cases which saw a limiting of nationhood power would appear to support this view. In *Re Wakim; Ex parte McNally* (the ‘Cross-vesting Case’), Kirby J suggested that a cross vesting scheme between State and Commonwealth courts might also find support in nationhood power. Gummow and Hayne JJ, however, explicitly rejected this view as based on ‘perceived convenience’ instead of ‘legal analysis’ and ‘constitutional doctrine’. In *R v Hughes*, Kirby J rejected the use of nationhood power to support a coercive Commonwealth and State corporations law prosecutions arrangement. Proportionality was an issue and such a scheme could not rely on constitutional implications as ‘convenience and desirability are not enough if the constitutional foundation is missing’. Together, these cases suggested a trend in High Court jurisprudence away from nationhood power as a legislative power, reflecting continuing concerns in the earlier cases with respect to interference with the States and the lack of an explicit textual basis for it. Despite this, *Pape* appears to have affirmed nationhood power, even if not in its coercive aspect.

C Pape

In 2009 *Pape* confirmed nationhood power as a source of executive power. The majority judgments strongly confirmed the existence of a nationhood power. Gummow, Crennan and Bell JJ went so far as to say that the fiscal response to the global financial crisis was ‘somewhat analogous to determining a state of emergency in circumstances of a natural disaster’, for which only the national government had the means to respond. French CJ did not go this far but stated, as quoted above:

> While history and the common law inform its content, [s 61] is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.

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308 (1999) 198 CLR 511, 615.
309 Ibid 581.
311 Ibid 583.
313 Ibid 89.
314 Ibid 60.
These statements affirmed that nationhood power was by then clearly part of the High Court’s jurisprudence on s 61 but it was limited by its description as ‘peculiarly adapted to the government of the country and which cannot otherwise be carried on for the public benefit’. It is this imprecision with which the other judgments, as well commentators, had concern, and which underlines the concern this book has with nationhood power as an authority for ADF action.

Hayne and Keifel JJ found that the fiscal stimulus package could find support in part under the taxation power in s 51 (ii) of the Constitution but did not find any support for it, as mentioned above, in an exercise of executive power identified as derived from the character and status of the Commonwealth as a national polity or as deduced from the existence and character of the Commonwealth as a national government.

They went on to state that ‘words like “crisis” or “emergency” do not readily yield criteria of constitutional validity’.

Heydon J in dissent was forceful in his criticism of the majority approach. It is worth quoting from his judgment at length because he illustrates how an ill-defined power may at the same time grow and yet become more difficult for the courts to review. His Honour described the potential for abuse of nationhood power in this way:

_No constitutional warrant._ Secondly, there is no constitutional warrant for the supposed power to deal with a national fiscal emergency. There is no express warrant for it. The claim that it exists is entirely novel. Its existence is doubtful because of its potential for abuse. Let it be assumed that, whatever conclusions historians writing in the future may come to, the current economic crisis is as severe as the special case says … the present age is one of ‘emergencies’, ‘crises’, ‘dangers’ and ‘intense difficulties’, of ‘scourges’ and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, ‘wars’ must be waged, ‘campaigns’ conducted, ‘strategies’ devised and ‘battles’ fought. Often these problems are said to arise suddenly and unexpectedly … Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis

315 Ibid 92.
316 Ibid 121.
317 Ibid 122.
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. The great maxim of governments seeking to widen their constitutional powers would be: ‘Never allow a crisis to go to waste’.

*Definitional difficulties.* Thirdly, it is far from clear what, for constitutional purposes, the meanings 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 supersedion of democratic institutions. On the other hand, if the courts do not defer to the Executive or the legislature, it would be difficult for the courts to assess what is within and what is beyond power. It is a difficulty which suggests that the power to deal with national fiscal emergencies does not exist.318

If one puts the lack of precise basis for nationhood power in the context of the use of force by the ADF, then Heydon J’s concern for unconstitutionality becomes more telling. It is confronting to think that members of the ADF might be asked to take to the streets with the potential to use lethal force on the basis of a power that is so open to question, as occurred with young soldiers with high-powered automatic weapons on the streets in Bowral in 1978.319 It is very difficult to reconcile with the principle of legality that the ‘power should be clear in proportion as the power is exorbitant’.320

Twomey shared Heydon J’s concern in criticising *Pape* in this way:

The major problem with the *Pape* case is that the majority relied on an implied executive nationhood power without giving adequate justification for that reliance and without clearly explaining how that power is to be implied from the text and structure of the *Constitution*, and what limits necessarily apply to it. There is little more in the judgments than bald assertions and references back to prior judgments that themselves fail adequately to ground such an implied power in the *Constitution*.321

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318 Ibid 193.
320 *Entick v Carrington* (1765) 19 St Tr 1030, 1066.
She went on to note ‘the inherent dangers involved in vague, undefined executive powers’. Kerr echoed these sentiments in respect of both the *Tampa Case* and *Pape* in this way:

If the *Tampa Case* and *Pape* are correct, the Governor-General has undefined arbitrary and discretionary non-statutory powers not known to the prerogative. Taken to their logical conclusion, such cases challenge an aspect of the premise of secure constitutionalism. That aspect is the subjection of the executive to limits imposed by law.

Gerangelos was also critical, asking:

How is one to determine such a vague and amorphous power in the abstract, without essential resort to the prerogative and historical experience? … [A]n ‘inherent content’ view of s 61 cannot be sustained. If one relies on criteria based on ‘national’ imperatives alone, and without reference to the common law, resort will invariably be had to purely policy considerations.

It is for this reason that this book argues for a very limited scope for nationhood power. Although not a nationhood power case, it may also be that these concerns led to the more conservative approach to executive power in *Williams*.

**D Characteristics of Nationhood Power**

This survey of the cases suggests a few key characteristics of nationhood power.

**1 An Inherent Executive and Legislative Power?**

Nationhood power appears clearly to be an inherent executive power. It is cast as being inherent in the existence of Australia as a nation, and in the Commonwealth as the government for the nation. Virtually any

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322 Ibid.
327 (2012) 248 CLR 156. As discussed above, ironically, Heydon J advocated a more expansive view of executive power there, but, apparently, on the basis that the authorities supported such a view in respect of Commonwealth executive power being as extensive as Commonwealth legislative power, at 319.
executive power has to be inherent or implied as s 61 does not describe the executive power of the Commonwealth, rather it only states its existence. Nationhood power goes beyond prerogative power though, in that it does not derive from historical prerogative powers but from the nature of the Constitution itself. There appears to be less concern, surprisingly, with nationhood power as an executive power than there does with it as a legislative power. This may be because the nationhood power cases in the High Court have primarily focused upon legislative power. The Tampa Case\textsuperscript{328} is exceptional as an executive power case but it did not reach the High Court. Even Pape\textsuperscript{329} dealt with the Tax Bonus Act and not executive power alone.

As to the future of nationhood power, the legislative aspect may now be more contained, being confined to a combination of s 61 and s 51(xxxix) rather than being inherent. Gummow, Crennan and Bell JJ in Pape appeared to describe the relationship between the two heads of power as it now stands:

In determining whether the Bonus Act is supported by s 61 and s 51(xxxix) of the Constitution, it is necessary to ask whether determining that there is the need [which] falls within executive power and then to ascertain whether s 51(xxxix) of the Constitution supports the impugned legislation as a law which is incidental to that exercise of executive power.\textsuperscript{330}

The executive power of the Commonwealth is still quite imprecise though, and, for this reason, concerning. If the High Court had a purely executive power case before it, particularly one that was more coercive than facultative, it might be more concerned with the implications of nationhood power as executive power. This would be consistent with its more constrained approach to executive power generally in Williams.\textsuperscript{331}

### 2 A Facultative Power

Nationhood power finds strongest support as a facultative power; that is, a power to promote, encourage or enable certain activities of a national character. This is usually linked to a spending power so that there is virtually no regulatory function or intrusion into the affairs of the States. This first
appears most clearly in the *AAP Case*,\(^{332}\) where the various judgments of Barwick CJ, Mason J and Jacobs J gave examples of such things as the CSIRO and exploration as possible activities which nationhood power would support.\(^{333}\) Brennan J took this further in *Davis v Commonwealth* to not just spending powers but matters such as a flag and an anthem. This facultative aspect of the power is less concerning.

3 A Coercive, Purposive Power

The High Court has expressed most concern with regard to the coercive aspect of nationhood power. In the *Tasmanian Dam Case*\(^{334}\) Wilson J\(^{335}\) and Deane J\(^{336}\) rejected a coercive aspect to the power. Mason CJ, Deane and Gaudron JJ did accept a limited coercive aspect to the power in *Davis v Commonwealth*,\(^{337}\) but made it clear that nationhood power was a purposive power subject to the requirements of proportionality. Even in *Pape*, French CJ stated, as partly quoted above:

> Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws, absent authority supplied 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 holding executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected’.\(^{338}\)

It is the coercive power which creates the most concern for this book as well, and is a theme to which it will return.

E The Approach of this Book to Nationhood Power

It may be attractive for reasons of national sentiment to locate the source of executive power in s 61; which does not rely upon the prerogative powers of the Crown even if it can be informed by them. Independent

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332 (1975) 134 CLR 338.
335 Ibid 203.
336 Ibid 252.
nationhood as a broad concept appears to be the frame of reference for the current majority of the High Court in understanding s 61. As Gummow, Crennan and Bell JJ put it in Pape:

The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity.\textsuperscript{339}

The difficulty is that such an approach may suit nonviolent issues such as the Bicentennial\textsuperscript{340} or even the Global Financial Crisis,\textsuperscript{341} but the use of armed force in British history has profoundly shaped Westminster constitutionalism itself.\textsuperscript{342} It is hard to understand why this weight of legal history should not fully be brought to bear on such profound constitutional questions as raised by the use of the ADF under executive power. This is especially so as the arguments in favour of relying upon s 61 alone rest primarily upon nationalism in a nation with so little history of independent military action. It is also difficult to embrace a s 61 approach when leading writers such as Winterton,\textsuperscript{343} Evans,\textsuperscript{344} Twomey\textsuperscript{345} and Kerr\textsuperscript{346} have criticised or questioned it; when Heydon J was so critical of it in Pape;\textsuperscript{347} and, in the same case, a leading proponent of this approach, French CJ, made his statement on future questions on nationhood power being ‘likely to be answered conservatively’. His invocation of Dixon J’s famous statement on threats from within the executive could not be more telling for this book. The use of military power on such a questionable basis, especially internally, seems contrary to the principle of legality and the very spirit of constitutional government. This book will argue, then, that ‘nationhood power’, relying upon s 61 alone and ‘absent authority

\textsuperscript{339} Ibid 89. See also CPCM [2015] HCA 1 [42] (French CJ); M68 [2016] HCA 1 [41] (French CJ, Kiefel and Nettle JJ), [201] (Keane J).

\textsuperscript{340} Davis v Commonwealth (1988) 166 CLR 79.

\textsuperscript{341} Pape (2009) 238 CLR 1.

\textsuperscript{342} Brennan and Toohey JJ describe this history and emphasise its importance in Re Tracey; Ex parte Ryan (1989) 166 CLR 518, 556–2 (‘Re Tracey’) where they consider the place of the military within the constitutional settlement in the 17\textsuperscript{th} century as central to understanding that settlement.

\textsuperscript{343} Winterton, ‘The Limits and Use of Executive Power by Government’, above n 73, 426–33.

\textsuperscript{344} Evans, ‘The Rule of Law, Constitutionalism and the MV Tampa’ above n 187, 98; Evans, ‘Continuity and Flexibility: Executive Power in Australia’, above n 45, 123.

\textsuperscript{345} Twomey, ‘Pushing the Boundaries of Executive Power’, above n 321, 339–43.

\textsuperscript{346} Kerr, above n 325, 177–8.

\textsuperscript{347} (2009) 238 CLR 1, 177–93.
1. WHAT IS EXECUTIVE POWER?

supplied by statute’, must only be a basis of last resort in authorising action by the ADF.\(^{348}\) Such action must first find its basis in one of the previously recognised prerogatives.

There may be a basis to use the ADF under nationhood power where there is no prerogative available, but this is likely to be only in circumstances where the English character of the prerogative cannot operate within Australia’s distinct constitutional arrangements. This is best illustrated by an example. If an earthquake and tsunami were to level Hobart and the Tasmanian State Government ceased to be effective, the Commonwealth Executive, in the form of the ADF, could arguably step in to restore its functioning. Commonwealth action might include maintaining public order and delivering essential services until the State services could do this again themselves.\(^{349}\) This is essentially what occurred in Darwin after Cyclone Tracy in 1974 but, as that was in a Territory, different constitutional considerations applied.\(^{350}\)

Prerogative would not readily provide for this because the prerogative did not develop in contemplation of a federal constitution. As Chapter 4 will discuss, under the federal division of executive power, the prerogative for a government to restore order must rest primarily with the States because there is no equivalent legislative power for the Commonwealth to restore order. The Commonwealth, arguably, may act to protect its own functions\(^{351}\) but this power does not extend to restoring State government functions. Yet, if a State government effectively collapsed, it would self-evidently be beyond its power to restore itself. It is likely that the ability to restore the Tasmanian State Government would then be ‘peculiarly within the capacity and resources of the Commonwealth Government’.\(^{352}\) A ‘nationhood power’ reading of s 61 authorising the ‘maintenance of the Constitution’\(^{353}\) would support this because having functioning States is fundamental to the Constitution, as well as having

\(\text{\textsuperscript{348}}\) Ibid 24.
\(\text{\textsuperscript{350}}\) Eburn, above n 349, 83, 90.
\(\text{\textsuperscript{352}}\) Pape (2009) 238 CLR 1, 63.
\(\text{\textsuperscript{353}}\) Williams (2012) 248 CLR 156, 184–5 (French CJ).
some basis in the text of the provision itself.\textsuperscript{354} Such an approach would also be consistent with a view that preserving the States is implicit in s 119, which obliges the Commonwealth to protect them from ‘invasion and violence’.\textsuperscript{355} Restoring a State government is also, arguably, a more facultative application of nationhood power, although it may possibly have a very limited coercive aspect to it which would be in proportion to the purpose of the intervention. This example should illustrate that there is a place for nationhood power to support ADF action but it should only be in an extreme case and where prerogative power cannot operate due to Australia’s distinct constitutional structure.

\section*{VI Conclusion}

The range of sources of executive power and their imprecision bear out Mason J’s view that executive power is not ‘amenable to exhaustive definition’,\textsuperscript{356} and also reflect the character of executive power as an original and residual element of governmental power. It also reflects the theoretical position that executive power is meant to respond to contingency, \textit{Fortuna}. It can address issues of governmental responsibility for which the judiciary and legislature are not suited. When this imprecise yet extensive power is the main authority for the control and exercise of military power, the implications are significant. Executive power,

\begin{thebibliography}{9}
\bibitem{Chordia} Chordia, Lynch and Williams appear to suggest that, based upon the judgments of Jacobs J and Mason J in the \textit{AAP Case} (1975) 134 CLR 338, this might be all nationhood power was meant to be, above n 152, 33–4. Twomey, above n 321, 332–4, argues that there is a prerogative power of self-protection relying upon \textit{Burmah Oil Co Ltd v Lord Advocate} [1965] AC 75 (‘\textit{Burmah Oil}’) and so there is no need for a nationhood power source of authority. She does not cite a pinpoint reference in the case, however, and it is difficult to see how it could be authority for a federal government to intervene in a State to protect its own functions. If there can have been no new prerogatives since 1689, when there was no contemplation of a federal Commonwealth of Australia, it is difficult to see how prerogative power could authorise Commonwealth intervention in a State to protect Commonwealth or State functions. For this reason it is, arguably, preferable to refer to the text of s 61 itself, a nationhood power approach, for the source of authority.
\bibitem{Constitution} As Chapter 4 will discuss, this is the quid pro quo for the State’s handing over their existing naval and military forces, and the power to raise them in the future, to the Commonwealth under Constitution ss 69, ‘Transfer of Certain Departments’, 51(vi) ‘Power to Make Laws … with Respect to the naval and military defence of the Commonwealth and of the several States …’ and s 114 ‘States may not raise forces’. Selway argues that ‘the Commonwealth Constitution is predicated upon, and requires the cooperation of, the States and the Commonwealth to a much greater degree than is the case in either Canada or the United States’, in Bradley Selway, ‘Horizontal and Vertical Assumptions within the Commonwealth Constitution’ (2001) 12 \textit{Public Law Review} 113, 114.
\bibitem{Davis} Davis \textit{v Commonwealth} (1988) 166 CLR 79, 93.
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Perhaps rather than being a source of power in itself, is actually a general description for power exercised by the executive branch of government, as it derives from several sources.

From this assessment of the sources of the executive power of the Commonwealth, and an appreciation of the theory of executive power as being able to respond to *Fortuna*, this book will argue that its limits are as follows:

1. The federal structure of the *Constitution*. Executive power cannot alter the federal character of the *Constitution*;
2. The separation of powers itself. Executive power cannot normally be the basis for an exercise of the powers of the legislature or judiciary;
3. Following point 2, relevant legislation (although statutory grants of power are mainly relevant to this book as a guide to the limit of executive power);
4. Military subordination to the civilian government (which Chapter 2 will consider but which follows from the principles considered in this chapter);
5. Necessity—the above limitations can temporarily be overcome by necessity. Where necessity requires, a particular executive power can provide power where no other power is available, but only for the period of time required to meet that need. Where Parliament has provided the same power—that is, ‘covered the field’—through legislation, then necessity would only justify action where the prerogative power (or possibly nationhood power) in question inherently concerned extraordinary circumstances. It would be necessary to look to the nature of such prerogative powers as those with respect to martial law, war or internal security, or possibly nationhood power as well in respect of internal security, to determine when to rely upon them instead of statutory power;
6. The written *Constitution*, including that:
   a. Executive power cannot effect an enduring change to the *Constitution*;\(^{357}\)

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\(^{357}\) See *Republic of Fiji Islands v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) (*Prasad*) discussed in Chapter 3.
b. The sphere of Commonwealth legislative responsibility and the limits of the Commonwealth’s power as a legal person. Executive power cannot exceed the legislative competence of the Commonwealth Parliament, and post Williams,358 does not simply extend to doing anything which the Commonwealth legislature could authorise it to do or any legal person could do;

c. The express constitutional office holders as applicable, for example, where power must be exercised by the Governor-General or the Queen as required. It is unlikely that necessity could ever justify altering these constitutional offices by executive power.

This book will proceed to analyse the exercise of specific prerogative powers by the ADF within this framework of limitations. It will elaborate on the concept of necessity in particular.

To assist the reader, the following definitions used for the purpose of this book may assist:

- Executive power—this will normally mean nonstatutory executive power unless the context indicates otherwise;
- Principle of legality—the principle that any exercise of governmental power must have an authority in law;
- Fortuna—the capricious nature of fortune, the unexpected or contingency;
- Necessity—is defined by the particular prerogative, nationhood or ordinary citizens’ power to which it relates.

358 (2012) 248 CLR 156.
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