Conclusion: What are the Limits?

Is it possible to limit the indefinable? The uncertainty of executive power combined with its great potential depth and breadth has a spectral quality which begs caution. Executive power can preserve an order based upon the rule of law or destroy it. To underscore that this tension remains an enduring aspect of constitutional law, which requires a conservative approach, this book has referred a number of times to the following statement of French CJ in *Pape v Commissioner of Taxation*:

> 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and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power.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.’

The meaning within these words are amplified when placed in the context of the military power of the ADF.

The aim of this book has been to find the sources of, and limits upon, the exercise of executive power by the ADF. This is a difficult exercise because of the tension between the need to have a power which can respond to *Fortuna* and yet remain subject to the principle of legality. This tension is at the heart of the judgments of Dixon J and Starke J in *Shaw Savill & Albion Co Ltd v Commonwealth*. How does the law reconcile the need to respond to the fortunes of war, as in that case, with the need to keep the

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2 (1940) 66 CLR 344.
executive power subject to the law? Theories of executive power recognise
that it is designed to respond to contingencies, the unpredictable, or
Fortuna. There are only identifiable powers, which in this book relate to
martial law, war, internal security and external operations, but it is not
possible to have a case authority for every possible eventuality to which
they might apply. Given the lack of litigation on some of these powers,
there is little authority at all.

Instead, the limits of executive power within Australia turn on two key
concepts, the written Constitution and necessity. As to necessity, the
circumstances of the case dictate the limits of the power, which can
temporarily displace the written law, as with martial law, or provide
a standing exception to it, as with war. This is not the common law doctrine
of necessity available to any citizen. Within the realm, this is a concept of
necessity which operates upon those identifiable powers which only the
Crown can exercise. In this book, they are the prerogative powers with
respect to martial law, internal security and war, or nationhood power
insofar as it relates to protection of Commonwealth interests in the States.
As discussed below, necessity is not such an important aspect of operations
outside the realm.

Additionally, the prerogative as to the control and disposition of the forces
provides the conduit for executive power to flow to the ADF and on to the
exercise of command within it. It provides the authority to organise, arm,
equip, move or deploy the ADF as required. The fundamental principle
which limits this prerogative is the subordination of the military to the
civilian government.

As to the Constitution, the exercise of these various executive powers is
also limited by the broader constraints on Commonwealth executive
power. Within the realm, executive power can never effect an enduring
change to the Constitution, alter the constitutional offices such as those of
the Queen and the Governor-General, or otherwise exceed the limits of
Commonwealth legislative power. Executive power can only derive from
one of the sources identified in Williams v Commonwealth; those most
relevant to this book being prerogative power, nationhood power and the
powers ADF members may exercise by virtue of being citizens, in addition
to statutory power.3

Further, executive power is subject to the requirements of the separation of powers and federalism. Arguably it also should not operate where Parliament has provided power in statute law which ‘covers the field’. The exceptions to these requirements arise where necessity would justify relying upon executive power because the extreme circumstances are present to which the recognised prerogative powers relate, such as the collapse of civilian government, a serious threat to internal security which threatens life, or war. In the examples of such situations in this book, necessity often arises because the alternative to executive power is no law at all. A resort to executive power supports the rule of law rather than undermines it because, as quoted from Blackstone in Chapter 1, these are circumstances 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 ...’

Beyond the realm, the exercise of executive power by the ADF in external security operations is less constrained because it does not normally intrude directly upon the principle of military subordination to civilian government or the jurisdiction of the States or Parliament. The main limits are those statutes which apply extraterritorially, although this requires arguing that prerogative power should operate where it has not been expressly curtailed or extinguished, and local law. Act of State as a defence could operate to cover any action by the ADF sufficiently connected to the purpose of its mission. The law is unsettled in this area, however, and this is only an arguable view of it. International law may be an essential guide here, although it is not necessarily a limitation in itself.

It is possible, therefore, to identify sources and limits to the exercise of executive power by the ADF. There cannot always be precise limitations because it would never be possible to define precisely in advance what circumstances might require of the ADF. Fortuna would never permit this. As stated at the beginning of Chapter 1, in the 1988 case of Davis v Commonwealth, Mason J said of the executive power that it is potentially very broad yet ‘its scope [is not] amenable to exhaustive definition’. Even so, immutable aspects of the Constitution provide a means to limit any action by the ADF. Blackstone’s previously quoted conviction that the

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4 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 (1803, Hein Online reproduction) 251.
political constraints embedded within it will limit the power of the Crown, manifest through the principle of responsible government, therefore still has resonance:

["T"]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.\(^6\)

This constraint may have done more than anything to limit executive power and create a political and military culture that does not accept that executive power is limitless. As much as this culture values the qualities of ‘unanimity, strength, and dispatch’ in order to respond to Fortuna,\(^7\) it also values constitutionalism, legality and military subordination to the civilian government and resists arbitrariness and despotism. The tension between these values is an enduring feature of executive power, which is as much a political issue as a legal one. Therefore, provided that the Parliament retains its ability to call the executive to account, this political accountability should limit executive power.

Even so, the principle of legality applies to the ADF as well, and those who wish to wield executive power through it must keep this in mind. Before and quite apart from any political accountability through the principle of responsible government, those who exercise executive power remain subject to the law. Executive power provides only limited and uncertain authority to depart from the ordinary laws of the land. This demands a requirement to make the justification to rely upon executive power, as quoted from Entick v Carrington throughout this book, as ‘clear in proportion as the power is exorbitant’.\(^8\) This means that justifications to exercise a prerogative or other executive power based upon necessity, rather than positive authority, must be clear and strong. This book has discussed many examples of where this has occurred, but if an ADF

\(^6\) Blackstone’s Commentaries with Notes, above n 4, 252.
\(^7\) Ibid 250.
\(^8\) (1765) 19 St Tr 1030, 1066.
member exceeds that justification, even in the performance of duty, that ADF member bears liability for that breach personally. To repeat Starke J’s statement in *Shaw Savill & Albion Co Ltd* in 1940:

If any person commits … a wrongful act or one not justifiable, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the Executive Government or any officer of State.9

Even where this limitation might not be foremost in the minds of the elected members of the civilian government, it should always remain foremost in the minds of those in the ADF who execute its will.

From the point of view of protection from prosecution and suit for ADF members it might be better to have some sort of defence of superior orders provided in the *Defence Act 1903* (Cth) for all purposes, like that provided in s 14 of the *Defence Force Discipline Act 1982* (Cth) for disciplinary purposes:

A person is not liable to be convicted of a service offence by reason of an act or omission that:

(a) was in execution of the law; or

(b) was in obedience to:

(i) a lawful order; or

(ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.

The wording of the provision would need to expand to include protection from criminal liability and civil suit. This would shift the burden of any legal liability to the Commonwealth, any minister who gave an unlawful direction or any ADF member who gave an unlawful order, and away from ADF members acting in obedience to apparently lawful orders. Although statutory reform is another debate and the aim of this book is to find the limits of executive power as exercised by the ADF, it is a logical next step to consider.

The tension between the need to respond to *Fortuna* and the principle of legality is inherent in the exercise of executive power. This tension is at its most profound in the case of the more extreme potential exercises of executive power by the ADF. There are limits on the exercise of this power

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9 *Shaw Savill & Albion Co Ltd* (1940) 66 CLR 344, 353 citing *Raleigh v Goschen* (1898) 1 Ch 73, 77.
and it might be desirable to be certain as to what they are in every case. Apart from those limits in the *Constitution* which it cannot exceed, such limits are inherently and unavoidably uncertain. The exercise of executive power by the ADF is limited by law yet remains indefinable.
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