The Australian Defence Force (ADF) has considerable power at its disposal. It is physically more powerful than any other organisation in Australia. This is hardly surprising when it has the task of defending the country,\(^1\) conducting warlike and peacebuilding operations overseas,\(^2\) enforcing maritime legislation,\(^3\) and providing a degree of internal security.\(^4\) Yet only a minor proportion of this activity is authorised by an Act of Parliament.

In fact, some of the more extreme powers currently exercised by the ADF, such as the offensive use of lethal force, deliberate destruction of property, interception of shipping and detention of civilians, are actually contrary to some Acts of Parliament. The authority for such activity lies elsewhere. The scant literature on this topic in Australia would identify the executive power of the Commonwealth as the source of this extraordinary authority\(^5\)—whether it is to invade Iraq in 2003, to conduct warlike operations in Afghanistan since 2001, to bomb Syria since 2015, to board shipping in the Arabian Gulf since 1990, to counter piracy off Somalia since 2009, to fly combat air patrols to protect visiting dignitaries in 2002 and 2003 or to occupy East Timor in 1999.\(^6\) In some senses, executive power as a source of authority for ADF operations is a new question. Australia did not lead an international military operation itself until the

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2. Ibid.
3. Ibid 30.
4. Ibid.
6. These operations are discussed and referenced in more detail in subsequent chapters.
East Timor intervention in 1999. Questions of executive power and internal security have really only come to the fore since the MV *Tampa* crisis and the terrorist attacks on the United States in 2001.

More often than not, any discussion of the legal basis for or limits upon ADF operations concerns international law; where there is ample consideration of the law of armed conflict, the law of peace operations, international human rights law, the international law relating to armed intervention and the law of the sea. The basis in Australian law is not as commonly challenged or discussed. Yet international law does not automatically form part of Australian law; it does not directly define the legal basis for, and limits upon, ADF operations. Within Australia, statute is the usual source of authority under which the ADF conducts fisheries or migration law enforcement, or provides security for major events such as the Commonwealth Games, G20 Leaders’ Meeting or an Asia-Pacific Economic Cooperation (APEC) meeting. This is only a limited part of what the ADF does though, and does not account for virtually all of its overseas operations.

To state executive power as the legal basis for an ADF operation does little to explain the limits on that power, or even its character. Citing executive power broadly identifies the constitutional setting of the power. It does not necessarily identify who may exercise the power, where an action is beyond power, whether such an action prevails over an Act of Parliament or whether the exercise of the power is reviewable by a court. Executive power, in itself, is a poorly understood concept even though it extends to the full range of the concerns of government. The most recent High Court cases on the subject of executive power have concerned spending and the tax power, as well as spending on school chaplains. Understanding

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8 *Ruddock v Vadalis* (2001) 110 FCR 491 (‘*Tampa Case*’).

9 Department of Defence, Submission to Senate Legal and Constitutional Committee Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill (2005) 3.

10 Subsequent chapters will address this literature.


12 See, eg, *Maritime Powers Act 2013* (Cth); *Fisheries Management Act 1991* (Cth); *Migration Act 1958* (Cth); *Defence Act 1903* (Cth) pt IIIAA.

13 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (‘Pape’).

14 *Williams v Commonwealth* (2012) 248 CLR 156 (‘Williams’).
the lawful extent of executive power exercisable by the ADF then requires some examination of the nature and extent of executive power generally before considering its specific application to the activities of the ADF.

The aim of this book is to identify the sources of and limits upon the exercise of executive power by the ADF. Even if the limits are not known or defined, they must exist because it is not possible to have limitless power in a system of constitutional government. In any event, the ADF has never exercised executive power as if it were limitless. Any discussion of these limits must be at least partly theoretical because no Australian or English court has ever sought to elaborate a complete doctrinal statement on executive power. Nor is there an exhaustive definition of executive power and its limits, even though there have been some High Court cases on executive power. In fact, there has been a marked reluctance to provide one.\(^{15}\) Still less has there been any settled doctrinal position on executive power as it relates to the ADF—there have simply not been relevant cases before the courts. This is significant in itself and is the subject of discussion in Chapter 1. The approach of this book, therefore, is to develop a theoretical position on the character and limits of executive power generally before considering the specific powers that relate to the ADF.

The term ‘prerogative power’ is significant. Contemporary Australian jurisprudence identifies s 61 of the Constitution as the source of Commonwealth executive power.\(^{16}\) This jurisprudence is cautious of the term prerogative power as an English law concept, which informs the content of s 61 but does not provide its limits.\(^{17}\) This is a debate upon which Chapter 1 will elaborate. For the purpose of this book, however, s 61 in itself provides virtually no guidance as to the limits of executive power exercisable by the ADF. Most case authorities and literature refer to distinct prerogative powers rather than executive power generally. As poorly understood and elusive as the prerogatives are in themselves, at least they are, to some extent, identifiable.

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15 Williams (2012) 248 CLR 156, 226–7 (Gummow and Bell JJ); Davis v Commonwealth (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); Pape (2009) 238 CLR 1, 24 (French CJ).
16 See Pape (2009) 238 CLR 1, 83 (Gummow, Crennan and Bell JJ), Williams (2012) 248 CLR 156, 184–5 (French CJ) and 342 (Crennan J) together with express constitutional provisions such as s 68 concerning command-in-chief of the naval and military forces of the Commonwealth.
For this reason, following Chapter 1, the structure of this book will then be to address, in turn, each of the main prerogatives which relate to the ADF. Chapter 2 will address the prerogative with respect to control and disposition of the forces. This is necessary in order to understand how executive power flows to the ADF, and the principle of military subordination to the civilian government, before considering how the ADF exercises executive power. Chapter 3 will then consider martial law as perhaps the most extreme manifestation of prerogative power as exercised by a military force. Chapter 4 considers internal security, which is distinct from martial law, as troops on the street are a chilling prospect in a modern Australian political culture which almost supposes a constitutional bar to using the ADF for internal security. Chapter 5 discusses war, the most destructive and perhaps best-recognised prerogative, while its substance is one of the least considered in both case law and literature. Finally, Chapter 6 will turn to the external affairs prerogative, which has been the basis for the most extensive ADF operations in recent decades. At the same time, as this prerogative relies significantly upon Act of State doctrine, it is perhaps the most unsettled in Australian case law.

The nature of the prerogatives having some identity and historical context also makes them preferable to a broad invocation of s 61. These prerogative powers are extraordinary and capable of authorising extreme exercises of power. There are more likely to be identifiable limits where there is some content to the power, and this is more likely to be consistent with the rule of law. Even so, Australia’s distinct constitutional structure means that it might be necessary to rely upon s 61 alone—particularly the aspect of it known as the nationhood power—in very limited circumstances. This could be the case in respect of internal security where the prerogative with respect to public order rests with the States but the Commonwealth retains significant responsibilities, such as for protecting visiting dignitaries, which might require use of the ADF.

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18 China Navigation Company Ltd v Attorney-General [1932] 2 KB 197, 207 (‘China Navigation’).
19 Marais v General Officer Commanding the Lines of Communication [1902] AC 109 (‘Marais’).
20 R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority [1989] 1 QB 26 (‘Northumbria Police Case’); Republic of Fiji v Prasad (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) (‘Prasad’).
This book will argue that it is possible to identify sources and limits to the exercise of executive power by the ADF. There cannot be precise limits however because executive power is meant to deal with the unpredictable and the external. It would never be possible to define precisely in advance what circumstances might require of the ADF. Even so, the principle of legality applies to the ADF and those who wish to wield executive power through it must keep this in mind. As Starke J stated in the case which established the doctrine of combat immunity, *Shaw Savill and Albion Co Ltd v Commonwealth* (‘*Shaw Savill and 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.\(^{23}\)

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\(^{23}\) *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, (‘*Shaw Savill & Albion Co Ltd*’) 353 citing *Raleigh v Goschen* (1898) 1 Ch 73, 77.
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