THE RELATIONSHIP BETWEEN THE EXECUTIVE GOVERNMENT AND PARLIAMENT IN AUSTRALIA:
ACCOMMODATING RESPONSIBLE GOVERNMENT WITH THE SEPARATION OF POWERS

Peter Gerangelos*

Abstract: The Australian Constitution has been interpreted by the High Court of Australia as implying a legal separation of powers. However, although it has been possible to apply this doctrine rigorously to maintain a separation of judicial power from the political branches, it sits uneasily within a constitutional framework which also provides for responsible government and a parliamentary executive pursuant to the Westminster model, especially as regards the separation of legislative and executive power inter se. So long as the general executive power of the Commonwealth was limited in ambit by the non-statutory executive powers recognised by the common law, generally referred to as the prerogative, an accommodation could be reached between those underlying constitutional principles. This has now been upset by the recent recognition by the High Court of an inherent executive power residing in s.61 of the Constitution defined rather imprecisely by “national” considerations. This article examines and discusses these developments in attempting to understand the extent to which it is possible to maintain a legal separation between executive and legislative power in Australia.

Keywords: separation of powers; responsible government; parliamentary supremacy; common law executive powers; inherent executive power; “nationhood” executive power; executive prerogatives and capacities

I. Introduction

The Australian Constitution has been interpreted by the High Court as implying a legal separation of powers. However, although it has been possible to apply this doctrine rigorously to maintain a separation of judicial power from the political branches, it sits uneasily within a constitutional framework which also provides for responsible government and a parliamentary executive pursuant to the Westminster model — especially as regards the separation of legislative and executive power inter se. Whereas responsible government tends to the unification of the branches of government subject to parliamentary supremacy,
the separation of powers tends to both a separation and an equality of the branches. This tension is a reflection of Australia’s dual constitutional inheritance which melds the essentially American doctrine of the separation of powers — in its legal entrenchment if not its philosophical origins — with the principle of responsible government that it, along with Britain’s other constitutional progeny, derived from the United Kingdom as adapted to Australia’s federal structure. The difficulty in achieving a workable accommodation arises from the opposing tendencies of each doctrine.

The Commonwealth Constitution provides for a form of representative and responsible government under the Crown. Responsible government and its principles do not only constitute a fundamental aspect of the Constitution. Express provision is also made for a certain melding of legislative and executive power by its requirement that Ministers of the Crown also be members of Parliament to whom they are accountable and whose confidence (at least that of the lower house) they must hold and maintain. Australian courts have repeatedly interpreted the Constitution consistently with the more basic principles of responsible government: that the Governor-General must act on the advice of ministers or the ministry, that the government shall be chosen from those who have the confidence of the lower house of Parliament and that ministers are responsible individually, and the Cabinet collectively, to Parliament. Early judicial reference was made to responsible government “pervading the instrument [the Constitution].” Dixon CJ, the champion of a legal separation of powers, including with respect to legislative and executive power, nevertheless referred to responsible government as “the central feature of the Australian constitutional system.” This accords with other judicial statements to the effect that the “Constitution and Government could not function without the implications of federalism and responsible government.” Quick and Garran, in their oft-relied upon commentaries, stated that “for better or worse, the system of Responsible Government as known to the British Constitution

\[\text{\(2\)}\] While not expressly provided for in the Constitution, it can be implied from a number of constitutional provisions. One such example is s.62, which provides for a “Federal Executive Council” to advise the Governor-General. When read with s.64, the members of this Council are required to be both Ministers of the Crown and members of the House of the Representatives or Senators. See \textit{New South Wales v Commonwealth} (1975) 133 CLR 337, 364–365 (HC) (\textit{Seas and Submerged Lands} case); \textit{Lange v Australian Broadcasting Corp} (1997) 189 CLR 520 (HC).

\[\text{\(3\)}\] See ss.62 and 64 of the Commonwealth Constitution, which is contained in s.9 of the Commonwealth of Australia Constitution Act 1900 (Imp) 63 and 64 Vict, c.12 (The Constitution).


\[\text{\(5\)}\] \textit{Amalgamated Society of Engineers v Adelaide Steamship Co Ltd} (1920) 28 CLR 129, 146 (HC).


\[\text{\(8\)}\] \textit{Uebergang v Australian Wheat Board} (1980) 32 ALR 1, 32 (HC) (Murphy J).
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has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment to the instrument.”

The implication of the separation of powers has been said to derive from the separate vesting, of the legislative, executive and judicial power of the Commonwealth in distinct chapters. These are, respectively: in the Parliament, the Executive Government and the federal courts provided for in Ch.III of the Constitution (Ch.III courts). The last-mentioned include the High Court, federal courts created by Parliament and also State courts in which Parliament vests federal jurisdiction (the autochthonous expedient).

When interpreting the doctrine in order to identify and define principles governing inter-branch relationships, two related factors must be taken into account: first, the peculiarities of the particular branch power being considered; second, the extent to which other constitutional principles override, interfere with or affect the principles which may otherwise derive from the separation of powers. The latter was the very first point made by Professor Winterton in the leading Australian treatise on executive power, Parliament, the Executive and the Governor-General:

“The Australian Constitution embodies four great constitutional principles: representative government, federalism, the separation of powers and responsible government under the Crown. Representative government is common to all democratic polities, but the other three are not and, indeed, coexist in Australia in a state of uneasy equilibrium.”

This “uneasy equilibrium” stems from the fact that while the Framers were familiar with, and generally adopted, Westminster principles of responsible government — which had already been applied in their respective colonies — they were also concerned with establishing a federal commonwealth pursuant to the model of the United States. The Australian version provides for a central “Commonwealth” government and legislature with enumerated powers, the States allowed concurrent legislative power over most of these — primacy given to the Commonwealth in situations of inconsistent laws — and the balance to the States, together with a legal separation of powers; although with less obvious, and oft-implied, “checks and balances”. While parliamentary supremacy was tempered by its subjection to the Constitution — and hence, virtually axiomatically, to judicial review — responsible government could not be so easily accommodated with the separation of powers, creating a number of difficult issues which will form the main focus of

11 See ss.71 and 77(iii) of the Constitution (n.3).
13 The Constitution (n.3) s.109.
this article. These add a layer of complexity to the determination of the relevantly applicable separation of powers principles. How rigorously is a court able to enforce the separation of powers where responsible government is similarly entrenched? As Professor Winterton noted, “much of the uncertainty surrounding federal executive power in Australia stems from the contradictions inherent in the simultaneous operation of the British and American principles.”

There are fewer difficulties with the separation of judicial power, which has been enforced rather more rigorously to maintain judicial independence from interference and usurpation by the political branches, standing as it does outside the relationship between the political branches inter se.

The status of the separation of powers as a constitutionally entrenched legal rule was not inevitable in Australia. It came about more by judicial interpretation of the structure of the Constitution than by any clear intention of the Framers — which was either lacking or, at best, ambivalent — or express words in the text to that effect. Its emulation of the Constitution of the United States of America was also influential. For instance, the High Court in the Boilermakers case (endorsed by the Privy Council) implied a legal separation of powers which it applied with particular rigour to the separation of judicial power. In addition to prohibiting the vesting of “the judicial power of the Commonwealth” (or power incidental thereto) in any body other than the courts for which Ch.III provides, it limited the power of these Ch.III courts to the exercise of this power alone: the exercise of other powers, such as arbitral or administrative, was (and still is) constitutionally prohibited to them. If the reasoning in this case was applied more universally to separation of powers issues, then the separation of legislative and executive power, despite the countervailing influence of responsible government, must similarly be applied with rigour.

Yet, this strict application of the doctrine has been limited to judicial power by the purist isolation of Ch.III courts from the potentially contaminating influences of the exercise of non-judicial power. Even this has not been without its critics. In addition to the ambivalence of the Framers and the countervailing influence of responsible government, previous High Court jurisprudence would suggest that the separation of powers ought to apply more according to the flexible British approach. Sensitivities relating to administrative efficiency were previously

14 Ibid.
17 See the Wheat case (n.7): the first limb of the separation of judicial power thus ensures that federal judicial power is exercised only by those judges who enjoy the constitutional protections of tenure and salary.
18 See Winterton, Parliament, the Executive and the Governor-General (n.12) Ch.4 Pt.5 and Ch.5.
invoked to suggest a less rigorous approach: one which accommodated a fusion of legislative and executive power, albeit with the former supreme, and with a more rigorous separation of judicial power to ensure the courts’ institutional independence — though not to the extent in the Boilermakers’ case. The high formalism of Boilermakers, impugned by its critics, is attributed to the strong influence of Sir Owen Dixon, both as puisne justice and Chief Justice, in his judicial and extrajudicial writings. Even in Boilermakers itself, Williams J, referring to the Constitution’s structure, stated in a most compelling dissent:

“But the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the Constitution of the United States as a guide, its authors were almost bound to frame it in this way. But the persons elected or appointed to exercise the legislative and executive powers are not kept separate or distinct. The position is exactly the contrary.”

Nevertheless, the assertion by Sir Owen Dixon that he could “discover no reason in the form or text of the Australian constitution why the legal implications of the separation of powers should have been as full as they have been in the United States” has not resulted in any High Court decisions which have given clear expression to such an assertion. On the contrary, the Court had affirmed the subjection of the executive to legislative control — although query now the extent to which this needs to be qualified by the more recent recognition of some inherent executive power in s.61 in the Pape case discussed below — and otherwise adopted a liberal, functional approach to issues relating to their separation.

One of the principal consequences, if not quite the specific aim, of responsible government is the supremacy of Parliament over the Executive Government, submitting the latter in all things to the regulation of the former, thus to prevent pockets of executive immunity from legislative control. As Harrison Moore put it, writing a few years after the enactment of the Constitution, “we are not encouraged

23 See, for example, the majority’s reasoning in Brown v West (1990) 169 CLR 195, 202 (HC) and cases referred to therein.
25 See, for example, Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73 (HC) on delegated legislation and accompanying text.
to believe that the executive can make good an independent sphere of its own, free from legislative interference and control.\footnote{William Harrison Moore, The Constitution of the Commonwealth of Australia (Maxwell, 2nd ed., 1910) 98.} But if the separation of powers is constitutionally entrenched as a legal rule, if it is then interpreted quite rigorously and formally and if recognition is given to certain substantive aspects of executive power as being inherent to it, or otherwise constitutionally defined as belonging to it, might this not mean that these aspects may tend to become immune to some extent from legislative control? To the extent that this becomes the case, how can the separation of powers then be reconciled with responsible government and parliamentary supremacy over the executive — all of which are similarly entrenched in the Constitution? In a nutshell, this is the issue which has had to be confronted in Australian constitutional jurisprudence — one made more urgent by recent milestone decisions of the High Court of Australia which shall be discussed below.

II. The Separation of Judicial Power

As responsible government defines the relationship between the political branches, it does not conflict with a rigorous application of the separation of powers to judicial power as has occurred in Australia.\footnote{For a more detailed examination of the principles which derive from the separation of judicial power in Australia, see James Stellios, Zines's The HC and the Constitution (Federation Press, 6th ed., 2015) Chs.9 and 10; Aroney et al., The Constitution of the Commonwealth of Australia: History, Principles and Interpretation (n.16) Ch 9.} In relation to the latter, and in addition to the principles already identified above which ensure the institutional independence of the federal courts, other principles identified by the High Court include the following: An Act of Attainder, or of Pains and Penalties, would constitute an impermissible exercise of judicial power by the legislature.\footnote{Polyukhovich v Commonwealth (1991) 172 CLR 510, 539, 612, 686, 706–707 and 721 (HC); Lim v Minister for Immigration (1992) 176 CLR 1, 70 (HC).} Further, it would be beyond the legislative competence of Parliament to invest the Executive Government with an arbitrary power to detain citizens in custody “notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.”\footnote{Ibid., 28.} Recognised exceptions were those which related to, for example, an accused’s custody pending trial, the involuntary detention of persons afflicted by infectious disease or mental illness, the traditional powers of Parliament to punish for contempt and the imprisonment by military tribunal for breach of military discipline.\footnote{Ibid., (n.28) 27.} In cases of the detention of aliens arriving illegally in Australia, legislation which authorises their detention will not breach the separation of judicial power, subject to outstanding legal claims for asylum, if the detention is authorised only to the extent necessary to make effective their expulsion and
exercise of the prerogative within the area of the prerogative attached to the government of Australia, may be the subject of legislation by the Australian Parliament.118

Take, for example, the well-established power to enter into treaties pursuant to the “foreign relations” prerogative. Parliament might lawfully regulate its exercise by requiring that the terms of the treaty be tabled in Parliament before it is entered into by the Executive Government, or to require some more detailed form of parliamentary scrutiny. However, Parliament’s power over treaty-making is not merely regulatory in nature. There is nothing to prevent, except perhaps expedience and policy, Parliament legislating to remove the power to enter into treaties from the executive and vesting it in itself, the power to make treaties being a common law power.119 The same could even be said about the “war” prerogative, the Constitution of the United States of America presenting a most compelling precedent in this regard,120 although arguable defending the nation from external attack may derive from s.61 independently of the prerogative. Herein lies the difference with any inherent “nationhood power”: Parliament’s control over it would be, at best, regulatory, and the degree of permissible regulation is by no means certain.121 This presently constitutes one of the most pressing issues in Australian constitutional law. At least, if this power is to resemble Locke’s “prerogative”, the very high threshold envisaged by Locke for its valid invocation will, it is hoped, be adopted.

IV. Conclusion

It is clear that a degree of asymmetry is created by the Australian Constitution’s entrenchment of the separation of powers together with a system of parliamentary responsible government. This is manifested in the different approaches which have been taken to the separation of judicial power from the political branches, on the one hand, and that of the separation of the executive and legislative powers inter se, on the other. While the former can be maintained with some degree of certainty, and in relation to which US legal decisions can be persuasive, the latter remains rather uncertain. If a notion of inherent executive power based on “national” considerations is adopted, as appears to have occurred, the problem of definition arises: how can one separate a power whose contours are so uncertain? Some degree of separation can only be maintained if there is a more certain basis for definition beyond purely abstract conceptual reasoning such as could be

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118 The AAP case (n.93), 406 (Jacobs J).
119 For an interesting examination of this question in more detail, see Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (n.65) pp.38–39.
120 Constitution of the United States of America 1787 art.1 s.8.
provided by the common law (as presently developed by Australian courts). But if the common law is the source, how can separation be maintained given that it is inherently subject to legislation? If some degree of precise content is given to “the executive power of the Commonwealth” incrementally as a consequence of legal decisions responding to particular exercise of such power in emergency or exceptional situations — not by abstract conceptual reasoning — then it may be possible to say that s.61 executive power has some contours which can be protected by separation. But how could this be reconciled with responsible government and the supremacy of Parliament. Even so, such separation is limited because the High Court insists on the subjection of all executive power, whatever its source, to parliamentary control at least, if not abrogation. Thus, it would mean that the power cannot be removed from the hands of the executive (like the power to tax has been, and as other common law powers may be); but it can probably be regulated. The point is that it is not so much the separation of powers which defines the cross-roads of executive and legislative power: it is rather the nature of these powers per se which intersect with the demands of responsible government, parliamentary supremacy and the imperatives of the textual basis of these powers. It is here that the historical English element in the Constitution is more dominant than the influence which flows from the United States, thus relegating the separation of powers to lesser prominence. But it is better to say that these historical influences must be accommodated to achieve a uniquely Australian, autochthonous resolution. Such resolution can only be achieved when the Court again must squarely confront these issues.