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

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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.¹ 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,

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¹ Most famously in R v Kirby, ex p Boilermakers’ Society of Australia (1956) 94 CLR 254 (HC) (the Boilermakers’ case).
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.2 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 Parliament3 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.4 Early judicial reference was made to responsible government “pervading the instrument [the Constitution].”5 Dixon CJ, the champion of a legal separation of powers, including with respect to legislative and executive power,6 nevertheless referred to responsible government as “the central feature of the Australian constitutional system.”7 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.”8 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

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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 New South Wales v Commonwealth (1975) 133 CLR 337, 364–365 (HC) (Seas and Submerged Lands case); Lange v Australian Broadcasting Corp (1997) 189 CLR 520 (HC).

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).


5 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 146 (HC).


7 The Boilermakers’ case (n.1), 275. See also New South Wales v Commonwealth (1915) 20 CLR 54, 89 (HC) (the Wheat case); Owen Dixon, Jesting Pilate (Sydney: Law Book Co, 1965) p.101.

8 Uebergang v Australian Wheat Board (1980) 32 ALR 1, 32 (HC) (Murphy J).
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

10 The *Boilermakers’ case* (n.1), affirmed sub nom A-G for Australia v R [1957] AC 288 (PC).
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.”14 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, ambivalent15 — or express words in the text to that effect. Its emulsion 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.17 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 jurisprudence18 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 \textit{Boilermakers}’ case.\footnote{See Peter Gerangelos, “Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate” (2005) 8 Constitutional Law and Policy Review 1.} The high formalism of \textit{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.\footnote{See Winterton, \textit{Parliament, the Executive and the Governor-General} (n.12) pp.57–58; Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” (n.6) p.187.} Even in \textit{Boilermakers} itself, Williams J, referring to the Constitution’s structure, stated in a most compelling dissent:

\begin{quote}
\textit{“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.”\footnote{The \textit{Boilermakers}’ case (n.1) (emphasis added). See also John M Finnis, “Separation of Powers in the Australian Constitution” (1968) 3 Adel L Rev 159, 161.}
\end{quote}

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”\footnote{Owen Dixon, \textit{The Separation of Powers in the Australian Constitution} (New York: American Foreign Law Association, 1942) p.5, as cited in Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” (n.6) p.187.} 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\footnote{See, for example, the majority’s reasoning in \textit{Brown v West} (1990) 169 CLR 195, 202 (HC) and cases referred to therein.} — 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 \textit{Pape} case discussed below\footnote{\textit{Pape v Federal Commissioner of Taxation} (2009) 238 CLR 1 (HC) (the \textit{Pape} case).} — and otherwise adopted a liberal, functional approach to issues relating to their separation.\footnote{See, for example, \textit{Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan} (1931) 46 CLR 73 (HC) on delegated legislation and accompanying text.}

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
to believe that the executive can make good an independent sphere of its own, free from legislative interference and control. But if the separation of powers is constitutionally entrenched as a legal rule, if it is then interpreted quite rigorously and formalistically 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. 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. 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.” 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. 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

27 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.
29 Lim v Minister for Immigration, (n.28) 27.
30 Ibid., 28.
deportation. Further, it has been held that there can be no executive or legislative direction to the court as to the outcome of any particular case, or aspects thereof, whether the case is pending or finally decided.

Thus, the separation of judicial power has yielded a body of principles maintaining fairly strictly the separation of the judicial branch from the non-judicial branches. This is not quite the case with the separation of the executive and legislative branches inter se which constitutes the main focus of this article.

III. The Separation of Legislative and Executive Power

In addition to the fusion of branch power implied by responsible government, the difficulty in maintaining a separation of executive and judicial power is also a consequence of the extreme difficulty, if not impossibility, of defining “executive power” purely conceptually, in the abstract, in order to endow it with inherent substantive content. This is not resolved by reference to its purely functional aspect: that power to execute the laws and to carry out those functions which it is constitutionally authorised to carry out. For this provides no criterion determinative of substantive content beyond that provided by the very laws which are being executed. Moreover, it is not very helpful to suggest that executive power is the residue of power beyond legislative or judicial power. How is it possible then to enforce a legal separation of a power which cannot be defined, or defined precisely?

A. Delegated legislation

The difficulty in maintaining a strict separation of legislative and executive power first became apparent in the High Court’s treatment of delegated legislation.

32 Lim v Minister for Immigration (n.28), 53. See also R v Humby, ex p Rooney (1973) 129 CLR 231, 250 (HC) (Mason J), affirmed by the majority in Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth (1986) 161 CLR 88, 96 (HC); Liyanage v R [1967] 1 AC 259 (PC).
33 Lim v Minister for Immigration (n.28); R v Humby, ex p Rooney (n.32); Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth (n.32). See also Robertson v Seattle Audubon Society 503 US 429 (1992). For other Australian and US examples, see Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” (n.6) p.194ff. For a detailed and comparative consideration of this issue, see Peter Gerangelos, The Separation of Powers and Legislative Interference with Judicial Process (Oxford: Hart Publishing, 2009).
34 For a more detailed discussion on this point, including a historical overview, see Aroney et al., The Constitution of the Commonwealth of Australia: History, Principles and Interpretation (n.14) pp.382–392.
It was thus held permissible, subject only to narrow limitations, for the legislature to delegate its law-making power to the executive. It could hardly have been held otherwise given the increasing reliance on delegated legislation by modern government. Writing extrajudicially, Dixon J stated: “[I]egal symmetry gave way to common sense.”36 In the leading case, Dignan,37 it was acknowledged, even by that champion of the separation of powers, that the existence of the power to delegate “may be ascribed to a conception of the legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.”38 Of course, the delegation can only be authorised by primary legislation and its exercise must remain subject to legislation. And a delegation may not be so broad or uncertain as to render it a law which could not be said to be with respect to one of the Commonwealth’s legislative heads of power.39 Nor can it be so broad as to amount to a law about legislative power per se as opposed to delegation; for example, legislation which simply authorised the making of regulations “[on] the subject of trade and commerce with other countries and amongst the States”, being the precise subject matter of s.51(i) of the Constitution. This would be an impermissible abdication of legislative power, not a delegation.40 And if the delegation was to the Executive Government, which remains responsible to Parliament as opposed to a body which is not, this certainly remains a relevant factor supporting validity.41

That the limits suggested are only of partial efficacy is evidenced by the argument that the legislation in Dignan should probably have been held invalid. Dignan concerned a very broad delegation of power to the Governor-General to make regulations “with respect to the employment of transport workers, and in particular for regulating the engagement, service or discharge of transport workers”. Any regulations thus made were to have the force of law irrespective of “anything in any other Act”.42 It is sufficient for present purposes to note that a very liberal approach was taken, with policy considerations playing a significant role. This stands in contrast to the more rigorous approach taken towards judicial power. It is also similar to the liberal approach adopted in the United States despite the latter’s absence of the principle of responsible government. As Congress is the delegate of the sovereign people, it should not be able to delegate its legislative power. Yet, it has been allowed to do so where there is the “limitation of a prescribed standard”,43 and as long as there are “intelligible principles” to govern the exercise of any discretion by the delegate.44 As Professor Stellios has pointed out, however,

37 Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (n.25).
38 Ibid., 101–102.
39 Ibid., 101 (Dixon J).
41 Ibid.
42 For an excellent discussion of these questions in this and subsequent cases, see Ibid., 202ff.
even these requirements have been interpreted extraordinarily liberally so that in substance it is “difficult to discern any limits on the power.”

B. Non-statutory executive power

The difficulties continue. There are a number of factors intrinsic to the very notion of “executive power” which hinder its separation from the legislative branch — at least where there is no further express constitutional definition of the power attributed to the executive and no express constitutional statement as to the exclusivity of its exercise by the government. The Australian Constitution only partially assists in this regard. Some powers are expressly vested in the Governor-General by the Constitution, such as issuing writs for lower house elections (ss.32 and 33); appointment of civil servants (s.67); acting as commander-in-chief of the armed forces (s.68); and appointing federal judges (s.72). These are powers which must be exercised on advice. The Governor-General also has certain “reserve powers” which may be exercised without advice, or even contrary to it. These are provided for expressly, and relate to: appointment of Ministers of State, the Prime Minister (s.64); dissolving the lower house (ss.5 and 28); dissolving both houses (s.57); and dismissing Ministers, including the Prime Minister (s.64).

These specific constitutional grants of power to the Governor-General are not, however, exhaustive of the content of the Commonwealth’s executive power. Beyond these, the Constitution in s.61 provides for the general executive power of the Commonwealth. In certain respects, s.61 resembles the specific grants of power to the Governor-General, but is in other respects quite different as will be seen below. Section 61 does not define this power beyond stating that it “is vested” in the Queen, “is exercisable by the Governor-General” and “extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.” The vesting of the power in “the Queen” intimates the existence of those non-statutory executive powers recognised by the common law, which are commonly referred to as the prerogative powers of the Crown. Further substantive content may be discerned from the text of the “execution” and “maintenance” limbs of the section. If these constituted the sum of s.61 power, albeit at times difficult to discern, it would be relatively straightforward to determine the ambit of the power. This is no longer the case in light of the identification of inherent executive power based on national considerations, as will be examined in more detail below.

Few problems are caused by the “execution” limb of s.61. The relationship between the Commonwealth’s executive and legislative power is most straightforward when the Executive Government is exercising a power conferred

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45 See Stellios, Zines’s *The HC and the Constitution* (n.27) p.200.
46 Some of these powers are granted to the Governor-General alone and others to “the Governor-General in Council”. But this makes no practical difference because of the entrenchment of responsible government, all such powers being exercisable on advice, excepting the reserve powers. See *Ibid.* 373; Winterton, *Parliament, the Executive and the Governor-General* (n.12) pp.149–160.
upon it by statute, executing Commonwealth laws or meeting the obligations
imposed upon it by specific provisions of the Constitution. In relation to the
last-mentioned, this would include ensuring that the essential institutions of the
Commonwealth are adequately funded and resourced, that the functioning of
Parliament, the departments of State and the armed forces and the administration
of justice — including the payment of civil servants and federal judges — is being
facilitated and provided for. It is also responsible, for example, for the collection
of customs and excise duties. With respect to the execution of laws made under
the Constitution, the Executive Government can only act within the boundaries of
the law which it is executing. Executing Commonwealth laws, however, merely
ascribes a functional role to the Government. And where these laws authorise the
Government to act in certain ways, the content of executive power is defined by
the law itself. In these circumstances, the tenets of responsible government and
parliamentary supremacy can apply unambiguously without clashing with the
separation of powers. The executive may only exercise those powers, or execute
those laws, which the Parliament has provided and in relation to which it is subject
to judicial review. Since Parliament can amend or abrogate such powers by
legislation, these executive powers remain under legislative control.

That the Executive Government, “the Crown”, is bound by statute is
axiomatic. This is admittedly subject to certain specific exceptions arising from the
Constitution itself; the most obvious exception being the inability of the legislature
to remove from the Governor-General express powers granted by the Constitution,
even though it may be able to regulate them as will be discussed below. These
exceptions aside, the only issue is whether Parliament intends to “bind the Crown”
by any particular statute. This is resolved by simple statutory interpretation assisted
by an assumption that legislation expressed in very general terms does not bind the
Crown. It is also aided by taking into account the factors set out in the Bropho
case: that is, in addition to the text of the statute, its subject matter and “disclosed
purpose and policy”. Further, the High Court has stated that, in addition, relevant
factors are the nature of the mischief the statute is seeking to address, the general
purpose and effect of the statute and the nature of the activities of the Executive
Government which would be affected if the Crown were bound.

The issue of legislative control over powers vested by the Constitution in the
Executive Government, as distinct from statutorily vested powers, is a slightly
more complex issue. The extent to which the separation of powers applies to limit
legislative control of such powers may differ depending on whether these powers

47 The Constitution (n.3) s.86.
48 Brown v West (n.23), 202.
49 Plaintiff M68/2015 v Minister for Immigration and Border Protection (n.31), 95–96 (Gageler J).
50 Commonwealth v Western Australia (1999) 196 CLR 392, 410 (HC).
51 Bropho v Western Australia (1990) 171 CLR 1 (HC), approved in ACCC v Baxter Healthcare Pty Ltd
52 ACCC v Baxter Healthcare Pty Ltd (n.51), 37.
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derive from the express grants of power in the Constitution, or from the general executive power of the Commonwealth in s.61. Each will be examined in turn.

C. Legislative control of express constitutional grants of executive power

Consistent with both responsible government and the separation of powers, it is likely that powers expressly conferred by the Constitution upon the Governor-General may be regulated by Parliament as to the manner in which they may be exercised; although this can be a vexed issue.\textsuperscript{53} Thus, for example, while Parliament cannot authorise a judicial commission to appoint federal judges under s.72 (that power being expressly vested in the Governor-General in Council instead), their appointment may probably be made conditional upon the consideration of recommendations made by a judicial commission, if not its approval.\textsuperscript{54} Such an interpretation of these express powers is founded upon the principle of parliamentary supremacy that is basic to the Constitution. The contrary view contends that because these express grants of power confer a statutory discretion upon the Governor-General “in unfettered form” by the Constitution itself, it would be unconstitutional to permit their limitation “in any way” by legislation.\textsuperscript{55}

Professor Winterton has pressed for the former view, emphasising the import of parliamentary supremacy and responsible government in the Constitution,\textsuperscript{56} and, although not entirely unambiguous, it would appear that Professors Zines and Stellios tend to Winterton’s view. In the current (6th) edition of \textit{The High Court and the Constitution}, reference is apparently approvingly made to the \textit{dicta} of Jacobs J that supports Professor Winterton’s view.\textsuperscript{57} Although the precise extent to which such expressly granted powers are subject to legislative regulation or fetter has not been settled, the view of Winterton, Zines and Stellios is most consistent with parliamentary supremacy and responsible government. In the view of the present writer, it is also the preferable one.

\textsuperscript{53} See Stellios, \textit{Zines’s The HC and the Constitution} (n.27) pp.401–410, 413–416.
\textsuperscript{54} See Winterton, \textit{Parliament, the Executive and the Governor-General} (n.12) pp.100–101; the concurring view in Stellios, \textit{Zines’s The HC and the Constitution} (n.27) p.414. See also Aroney \textit{et al.}, \textit{The Constitution of the Commonwealth of Australia} (n.16) pp.490–495.
\textsuperscript{56} See Winterton, \textit{Parliament, the Executive and the Governor-General} (n.12) p.99.
\textsuperscript{57} See Stellios, \textit{Zines’s The HC and the Constitution} (n.27) p.404, quoting Jacobs J in \textit{The AAP} (1975) 134 CLR 338, 406 (HC). See also George Winterton, \textit{Parliament, the Executive and the Governor-General} (n.12) n.47, 287 in which Professor Winterton argues that Professor Zines is generally supportive of his view, or at least tends to prefer it.
To the extent that this is the case, any attempt to maintain a strict separation of executive and legislative power would have to give way to parliamentary supremacy and responsible government. However, the separation of powers would apply to support an express constitutional grant of power to the Governor-General remaining with him. Parliament would be prohibited from conferring that power onto another person, including itself, or otherwise abrogating the power; this at least remains uncontroversial.58

D. **Legislative control of the general executive power of the commonwealth in s.61**

When one turns to examine the non-statutory powers of the Executive Government in s.61, the issue of the separation of legislative and executive power becomes considerably more complex and layered. The focus here is not the “execution” limb, but rather the meaning of the “maintenance” limb — the power to maintain the Constitution and the laws of the Commonwealth. This is a far more elusive concept than “execution”.

Williams J in the Communist Party case interpreted “maintenance” to mean “the protection and safeguarding of something immediately prescribed or authorised” by the Constitution.59 From this, it is possible to derive some content to executive power from the text of s.61 alone. Protecting Australia from invasion or subversion would be permitted, which power in any event would come within the prerogative powers of the Crown relating to war, defence and foreign relations which the Commonwealth Government inherited as a government of the Queen.60

The Commonwealth is also required by s.119 to protect every State from invasion, as well as domestic violence when a State has applied. Absent State consent, the Commonwealth’s power to address domestic violence is limited. It has also been argued that under the “maintenance” limb, the Commonwealth may protect its particular interests — defined generally by subject matters over which it has legislative competence — from domestic violence, such as the protection of the mail and interstate commerce and the right of an elector to vote in federal elections.61

This would also extend to safeguard financial and trading corporations; banks and insurance companies; federal legislative, executive, judicial, administrative

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58 See *Ibid.*, 287; Stellios, Zines’s *The HC and the Constitution* (n.27) p.404.
59 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 230 (HC) (the Communist Party case).
and military institutions; as well as public authorities and statutory bodies.62 In a statement cited with apparent approval by Dixon J in *R v Sharkey*,63 Quick and Garran remarked:

“If … domestic violence within a State is of such a character as to interfere with the operation of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. … [T]he Executive Government [may] interfere to suppress by force a rebellion which cripples its powers.”

Beyond this, however, definitional clarity with respect to the “maintenance” of the Constitution and Commonwealth laws becomes elusive. Even in relation to matters of defence and national security, the precise ambit of permissible non-statutory executive action remains cloudy; cloudier still when one considers “emergency” situations. Thus, while the Commonwealth has power to take whatever action is necessary — in a military sense and to repel the enemy in war — the ambit of what ancillary measures are necessary for national security is not clear.65 Complications arise from unconventional circumstances, such as those arising from terrorist activity.66 To what extent can the Government take action, including the use of coercion, forced detention, the destruction of property, in emergencies short of war or insurrection? Is it the case that the criterion is not “war” or “insurrection” *per se*, but rather the existence of that type of emergency which threatens the very existence of the Commonwealth, its Constitution and its system of government? Dixon J invoked these kinds of considerations, albeit in the context of examining the Commonwealth’s legislative competence, in the *Communist Party* case when he referred to “that power … which forms part of a paramount authority to preserve both its own existence and the supremacy of its laws necessarily implied in the erection of a national government”.67

The “maintenance” aspect of the executive power thus raises numerous problems of interpretation which are not resolved by reference alone to textual interpretation, as undertaken above, nor to the common law executive prerogatives, to which greater reference will be made below. The concept of an overarching “prerogative” in the hands of the government to preserve the polity tends to linger

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62 See Zines, “The Inherent Executive Power of the Commonwealth” (n.60) p.289. These are all subject matters over which the Constitution grants the Commonwealth Parliament legislative power.
63 (1949) 79 CLR 121, 151 (HC), which is discussed in Quick and Garran, The Annotated Constitution of the Australian Commonwealth (n.9) Ch.3 Pt.IV.3, in relation to the “legislative” aspect of the implied “nationhood” power.
64 See Quick and Garran, The Annotated Constitution of the Australian Commonwealth (n.9) p.964.
67 The *Communist Party* case (n.59).
and is usually invoked in an extreme emergency with reference being made to notions of “necessity”.\(^{68}\) Necessity is clearly a nebulous notion open to self-definition by a government seeking to invoke it and to purely subjective considerations of policy, or otherwise, by any judge who may be called upon to determine the validity of its exercise. Writing in the late seventeenth century, though pertinent to a modern age, John Locke observed that it is in the very nature of the prerogative “to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it”. He remarked that there is often “a latitude left to the executive power, to do many things … which the laws do not prescribe … to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it”.\(^{69}\) When the safeguarding of the polity itself is at stake, this will constitute an abiding issue.\(^{70}\) As Locke argued, unless definite legal limits are placed on the executive powers of the Crown, it is doubtful if these powers will necessarily be exercised beneficially and appropriately. The problem posed especially by the maintenance limb, at least to the extent that “Locke’s prerogative” is incorporated in it, is precisely how these limitations are to be identified.

Without closing the door completely on such a notion, it is submitted that reference should only be made to such a notion as an absolute last resort, if at all. To the extent that there is uncertainty as to the legality of the government’s action in such circumstances, or even if it is clear that it is acting extra-constitutionally, is it not better (especially if acting purely domestically) that it be acknowledged as such — in the hope of subsequent legislative or constitutional validation — as opposed to fancifully conceiving of some exaggerated constitutional authority just so that the government’s legal virtue may be preserved?\(^{71}\) After all, there is ample power which can be derived from existing constitutional arrangements to deal with emergencies. In addition to those limited powers derived by textual interpretation of “maintenance” in the context of the Constitution as indicated above, reference should thence principally be made first to the common law prerogatives\(^{72}\) in the narrow sense of powers unique to the Crown. These are prerogatives relating to war, foreign relations, the entering into of treaties, the conferring of honours, those relating to emergencies short of war, etc; and, second, to the non-statutory,


\(^{71}\) In this regard, see the very thoughtful and insightful article by George Winterton, “The Concept of Extra-Constitutional Power in Domestic Affairs” (1979) 7 Hastings Const L Q 1. Classic illustrations are the actions of President Lincoln during the American Civil War, such as his suspension of *habeas corpus* without statutory authorisation.

\(^{72}\) These include the power to conduct foreign relations, execute treaties, declare war, make peace, coin money, pardon offenders and confer honours. For a recent detailed discussion, see Aroney *et al.*, *The Constitution of the Commonwealth of Australia* (n.16) pp.445–451.
non-prerogative capacities\textsuperscript{73} (contracting, disposing of property, incorporating a company and conducting litigation) of the Crown which reside in the Commonwealth by virtue of legal personality. (According to the Diceyan usage, these capacities, being non-statutory, together with the prerogatives are generically referred to as “the prerogative”. Blackstone’s usage is adopted here.) These have been stated to be impliedly incorporated into s.61 either through its terms or simply by the fact that the Commonwealth Government is a government of the Queen.\textsuperscript{74}

Accommodating both the separation of powers and responsible government causes the least difficulties when the ambit of s.61 power is determined by reference to these common law powers. For, being common law, they are at least \textit{prima facie} inherently subject to statute — and accordingly to regulation, limitation or even complete abrogation by Parliament. In other words, it is the common law from which the substantive content of these powers is indirectly derived, not by direct derivation from s.61. They are thus, on this view, distinguishable from the express grants of power to the Governor-General which cannot be abrogated by statute or removed from the Governor-General.

However, if they are held to be incorporated in s.61, why are they not endowed with “statutory” status, rather than being treated as common law powers inherently subject to legislation? To the extent that the latter is the case, are they not to be treated like the specific grants of power to the Governor-General found elsewhere in the Constitution, and which, being specific constitutional grants of power, cannot be abrogated by legislation and only regulated in a limited way, if at all? How is it possible to reconcile the statement that s.61 “includes the prerogative powers of the Crown, that is the powers accorded to the Crown by the common law”\textsuperscript{75} — which renders them “statutory” powers — with the statement that “it is of the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament”?\textsuperscript{76} If these common law powers were rendered “statutory”, the separation of powers could then, in addition, be applied rigorously to hinder legislative control and regulation, indeed interference and usurpation, of such powers.

Professor Leslie Zines attempted a reconciliation by reference to what he called the “special nature of s.61”.\textsuperscript{77} As Professor Stellios explains in the 6th edition of Zines’s \textit{The High Court and the Constitution},\textsuperscript{78} s.61 was “unnecessary”

\textsuperscript{73} Those capacities which it shares with other legal persons: eg, entering into contracts, forming companies and trusts, disposing of property, etc.
\textsuperscript{74} See Aroney et al., \textit{The Constitution of the Commonwealth of Australia: History, Principles and Interpretation} (n.16) pp.437–438. That the common law continues to inform the content of non-statutory executive power is maintained in most recent cases dealing with executive power as indicated above in notes 72–74 and accompanying text.
\textsuperscript{75} \textit{Barton v Commonwealth} (n.60).
\textsuperscript{76} \textit{Re Residential Tenancies Tribunal (NSW), ex p Defence Housing Authority} (1997) 190 CLR 410, 441 (HC).
\textsuperscript{77} See Stellios, Zines’s \textit{The HC and the Constitution} (n.27) p.405.
\textsuperscript{78} \textit{Ibid.}
or superfluous “from the standpoint of the Crown”. The purposes of s.61 were not to incorporate the Crown’s prerogatives. Instead, it was the common law which provided the prerogative and executive powers “which have since been deemed to be included in that section.” Moreover, “it is clear that the common law privileges and immunities of the Crown would attach to the Crown in right of the Commonwealth by virtue of common law in the absence of s.61.”

Hence, to the extent that the Commonwealth’s executive power derives from the common law albeit incorporated in s.61, this power is inherently subject to both legislative control and indeed abnegation in the way of the common law.

That is not to say that these common law powers do not give rise to complex issues. But these relate more to the determination of the intention of Parliament to oust or abridge the prerogative (in the broad sense) in any particular statute in the absence of express words to that effect — the line of cases which flow from Attorney-General v De Keyser’s Royal Hotel. There is little doubt that Parliament can do so in both the United Kingdom and Australia. Therefore, to the extent that the content of these non-statutory executive powers in s.61 derives from the common law, the question simply does not arise as to whether there is a pocket of executive power immune from legislative control. There is no room for an argument that such a power is protected by the doctrine of the separation of powers.

It became the accepted view in Australia that the common law not only defined the content of Commonwealth executive power beyond the “execution” limb in s.61 but was also fundamental to the interpretation of the “maintenance” limb of s.61. It was regarded as the principal source of the content of the power as well as the determinant of its ambit in its “depth” dimension — that is, the precise actions which the Commonwealth could undertake within its sphere of competence. This sphere of competence (breadth) was traditionally determinable by reference to the Commonwealth’s legislative competence in light of federal limitations imposed upon it by the definition of the subject matters over which the Commonwealth Parliament could legislate as set out in ss.51, 52 and 122 of the Constitution. In the depth dimension, being defined in content and ambit by the common law, the non-statutory executive powers were always thus subject to legislation, as indicated. In the breadth dimension, because the subject matter of such action was limited to the sphere of Commonwealth legislative competence, the powers were always within reach of Commonwealth legislation. In other words, consistently with responsible government and indeed with the whole trend of Anglo-Australian constitutional

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79 These are set out at Ibid.
80 Ibid.
81 [1920] AC 508 (HL).
82 For an excellent examination of the Australian position, see Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (n.65).
83 This “depth” and “breadth” analysis, which has provided invaluable analytical perspective, was originally developed by Professor George Winterton in Parliament, the Executive and the Governor-General (n.12) Chs.2 and 3.
evolution since at least 1688, and not inconsistently with an entrenched separation of powers, the legislative led the executive power which it could control.

Moreover, this interpretation of s.61 ensured that even an expansive or creative interpretation of the “maintenance” limb of s.61 could not be used to extend non-statutory executive power beyond the limits permitted by the common law. This was very important for civil liberties concerns in that it ensured that there could be no self-defining power “to maintain” the Constitution and the potential abuse of such a power in an “emergency” — potentially also defined by an overweening executive — and that no executive power could exist which was beyond legislative control. Additionally, the common law itself is quite solicitous of civil liberties and does not generally support the use of coercion excepting in emergencies such as war, invasion and other extreme events. Thus, the courts have tended to avoid recognising a prerogative power which may interfere with the life, liberty or property of the subject.84 And, moreover, the Commonwealth’s non-prerogative capacities are exercisable subject to the general law.85

Further limiting executive power, there abides in the common law prerogatives a certain quality which distinguishes them “as being out of the ordinary course of the common law”.86 The relevant historical antecedents in the English constitutional conflicts of the seventeenth century, especially the Settlement of 1689, has meant that not only is the prerogative always subject to Parliament but it also constitutes a mere residue87 which cannot be expanded upon. It may only be made applicable, if possible, to novel circumstances.88 This further ensures that non-statutory executive power is limited and that ultimately Parliament is supreme, subject to the Constitution.

While the precise content of the common law prerogatives may remain difficult to discern in certain circumstances, many prerogatives and executive capacities are well settled and continue to be relevant today. As Professor Winterton observed, “the prerogative constitutes a substantial body of principles, rules and precedents, established over hundreds of years, the subject of considerable literature and heritage shared with comparable nations such as the United Kingdom, Canada and New Zealand.”89 The common law thus constitutes a source of legally discernible principles to determine the validity of executive action in circumstances where there is no relevant statute.

84 A v Hayden (1984) 156 CLR 532 (HC).
85 See Stellios, Zines’s The HC and the Constitution (n.27) pp.374–375, 405.
86 Cadia Holdings Pty Ltd v New South Wales (n.60), 226.
88 See Winterton, Parliament, the Executive and the Governor-General (n.12) pp.120–122.
89 See Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (n.65) p.35.
Given the extraordinary nature of executive power, the potential for its abuse and its expansive capacity especially in emergencies, it is reassuring that courts are able to rely on legally discernible criteria to ascertain the validity of its purported exercise. Even though at times the common law may be difficult to determine on any precise issue, it is more certain and provides greater guidance than reliance upon subjective notions of what is appropriate or necessary for a modern government. They will thus be able to stare down an executive determined to exercise a power if its legal basis is questionable. It is likewise reassuring that the power is inherently subject to legislation, its exercise being but an interim measure pending legislation.

E. The discovery of “inherent” executive power in s.61

The symmetry between responsible government, the separation of powers and federalism achieved by what has been referred to as the “common law view” has been lost to a certain degree with the discovery by the High Court of inherent non-statutory executive power in s.61. The content of this power is (generally) derived from the status of the Commonwealth Government as an independent national government in a federation and enables it to undertake action for the benefit of the nation in circumstances where only a national government can do so efficaciously. This power has been referred to loosely, though not by the High Court, as an executive “nationhood” power and given express recognition in 2009 by the High Court in Pape v Commissioner of Taxation and in subsequent High Court cases. It currently replaces the common law as the ultimate ambit of non-statutory executive power. The defining criteria for its valid exercise are highly influenced by the words of Mason J in the AAP case:

“There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss.51 (xxxix) [the incidental legislative power] and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.”

The recognition of such an inherent executive power in s.61 has not been without its critics, including the present author. While it is beyond the scope of this article

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91 The Pape case (n.24).
92 Cadia Holdings Pty Ltd v New South Wales (n.60); Williams v Commonwealth of Australia (No 1) (n.60); Williams v Commonwealth of Australia (No 2) (2014) 252 CLR 416 (HC).
93 Victoria v Commonwealth and Hayden (1975) 134 CLR 338, 397 (HC) (the AAP case). These criteria resonated in the reasoning of the majority in the Pape case (n.24), 23–24 (French CJ) and 99 (Gummow, Crennan and Bell JJ).
to examine these criticisms in detail, those which relate to the separation of powers will be mentioned. The principal criticism is the inability to give content to this power by which its separation can be enforced, albeit the majority in *Pape* preferred a deductive approach based on the facts of each case and eschewed an exhaustive definition beyond the influence of Mason J’s criteria. Thus, in *Pape*, French CJ held that s.61 validated the Commonwealth’s fiscal stimulus — essentially a payment of money directly to individual tax payers whose income was below a certain tax threshold — in response to the “Global Financial Crisis” in 2008. This was on the grounds that it was within the scope of s.61 for the Government to spend money “to support a short term fiscal stimulus strategy to offset the adverse effects of a global financial crisis on the national economy”.

The other justices in the majority stated similarly, though more expansively, that “the Executive Government is the arm of government capable of and empowered to respond to a crisis, be it war, natural disaster or financial crisis on the scale here.”

Of course, the difficulty which immediately presents itself is the subjectivity of such a determination. The majority judgments were able to rely on the fact that it was not contested that the financial crisis was very exceptional in its global seriousness. But if this had been contested, on what basis would they have been able to decide on the exceptional nature of the crisis, and whether the national government alone was able to take efficacious action for the benefit of the nation? Indeed, was there in fact a “crisis” at all? The relevant constitutional fact — the sufficiency of the financial crisis to invoke a successful application of the implied national power — is rendered extremely difficult for judicial determination in the absence of more precise legally discernible criteria. Indeed, even on these apparently agreed facts, the minority of three justices were not able to accept that the magnitude of the crisis warranted executive action pursuant to the nationhood power.

The novelty of this approach lies in the recognition of inherent content to executive power, yet without providing clearly defined criteria in its determination beyond “nationhood” considerations. If there is such inherent content to s.61 beyond the common law, and which is not *per se* subject to legislation, it becomes an issue whether such inherent content is immune from parliamentary control, being sourced directly in the constitutional text and vested exclusively in the Executive Government. Given its *direct* constitutional source and its exclusive vesting in the Executive Government, will not the separation of powers intervene to protect such executive power from legislative regulation, control, interference or usurpation?

The answer to this question depends, first, on how successfully the position can be maintained that “executive power” can be defined meaningfully, at a purely conceptual abstract level, either alone or at least by reference to the Anglo-Australian historical and constitutional context. The efficacy of such an undertaking

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95 *The Pape* case (n.24).
is a prerequisite to any meaningful discussion of inherent executive power. Second, if it can, then to what extent do the principles of responsible government and Anglo-Australian constitutional history since 1688, which require parliamentary supremacy over the executive, override the demands of a legal separation of powers between the political branches?

Turning to the first, it has never been the case that an inherent content to executive power has been recognised, at least since 1688. Moreover, leading constitutional lawyers have maintained that it is not possible to understand executive power at a purely abstract conceptual level, or to attribute inherent content to it.98 It is for this reason that these commentators believed that the balance between efficacious government and ordered liberty was best served, at least in common law jurisdictions, if both the ambit and substantive content of the Commonwealth’s general executive power in the “maintenance” limb of s.61 was determined by the common law with its legally discernible principles. Professor Zines thus stated:

“The principle that the executive government has no power at common law to levy a tax is not derived from contemplating the concept of executive power. It is because of the English historical development, particularly the struggles of the 17th century. If the executive power in Britain and Australia includes the declaration of war, it is because the English Parliament was prepared to leave this power with the King, content with the control it had of the standing army and the appropriation of money to conduct the war.”99

As has been set out in ample detail elsewhere,100 it is not possible to give substantive content to “executive power” purely conceptually, in the abstract, unless contemplating an ideal state of affairs or in positing a theory of political philosophy. I will not rehearse again the chorus of references in this context to “mystery”, to the “futility” of attempting definition by “allusion to abstract notions”;

98 See Zines, The HC and the Constitution (n.35) p.359; Zines, “The Inherent Executive Power of the Commonwealth” (n.60); George Winterton, Parliament, the Executive and the Governor-General (n.12) pp.66–68.


100 In Aroney et al., The Constitution of the Commonwealth of Australia (n.16) pp.382–392, the seminal work of Maurice Vile amply illustrates this point from both a contemporary and historical perspective: MJC Vile, Constitutionalism and the Separation of Powers (Liberty Fund, 2nd ed., 1998). In this regard, the universality of this principle is also discussed by Jenny S Martinez, “Inherent Executive Power: A Comparative Perspective” (2006) 115 Yale LJ 2480, 2483:

“These comparative examples [UK, Germany, France, Mexico and South Korea] suggest that there is nothing inherent or fixed about the scope of executive power; instead, executive power is highly contingent, shaped by political context and the path-dependent evolution of particular legal systems.”
to the “barren ground” and “trackless waste” of conceptual analysis.\textsuperscript{101} When the initial express denial of this position occurred in a decision of the Federal Court of Australia, and where express recognition was given to an executive “nationhood” power, Professor Zines opined — in vain as it turned out — that it “should not be followed.”\textsuperscript{102}

The case in point, \textit{Ruddock v Vadarlis},\textsuperscript{103} recognised a non-statutory executive power in the government to authorise Commonwealth authorities and the armed forces, absent statutory authorisation, to use coercion to maintain Australian borders against “friendly aliens”; that is, in a context not involving armed invasion. The common law either did not permit, or at the very least was too uncertain to permit, such coercive action as was exercised in that case. Professor Zines and others drew attention to the “highly subjective” nature of this determination,\textsuperscript{104} a viewpoint which had already been expressed by Professor Winterton in relation to previous and milder manifestations of this phenomenon based on the use of Mason J’s criteria in the \textit{AAP} case, above-mentioned: “First, what is the criterion for determining what executive power flows from the ‘character and status of the Commonwealth as a national government?’”\textsuperscript{105} When it was suggested that scientific research and investigation are examples of government undertakings thus permitted, themselves unobjectionable, Winterton’s response was that this was a mere assertion “not derived by legal reasoning from its premise”.\textsuperscript{106} Moreover, determining which power(s) may derive from the mere fact that certain powers are peculiarly adapted to a nation “are political questions unsuited to judicial determination”.\textsuperscript{107} As the author has written elsewhere:

“There is little to be gained … by speculating in the abstract as to which powers are inherently ‘executive’ in nature and thence proceed to determine that such powers must be exercised by the body which constitutes ‘the executive’ in any polity; that is of course, unless one is speculating as to an ideal state of affairs. … That ‘the executive’ … exercises a particular power in any particular polity from time to time is purely a function of the constitution, laws, conventions and usages of that polity which pertain at the time the power is being exercised.”\textsuperscript{108}

\begin{itemize}
  \item \textsuperscript{101} See the various references in this regard in Aroney \textit{et al.}, \textit{The Constitution of the Commonwealth of Australia: History, Principles and Interpretation} (n.16) p.385.
  \item \textsuperscript{102} See Zines, “The Inherent Executive Power of the Commonwealth” (n.60) p.281.
  \item \textsuperscript{103} \textit{Ruddock v Vadarlis} (n.87).
  \item \textsuperscript{105} See Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (n.65) p.27.
  \item \textsuperscript{106} Ibid.
  \item \textsuperscript{107} Ibid.
  \item \textsuperscript{108} See Aroney \textit{et al.}, \textit{The Constitution of the Commonwealth of Australia} (n.16) p.384.
\end{itemize}
If sole reliance is increasingly being placed on a “nationhood” power, rather than the common law and its legally discernible criteria, it will be increasingly difficult for the courts to skirt political controversy. Moreover, unlike the prerogative, which is a mere residue, the nationhood power permits of an ever-pregnant executive power whose limits cannot easily be discerned. These concerns are not entirely overcome by French CJ’s conservative approach to this question in Pape in which he expressly referred to\textsuperscript{109} the earlier warning of Dixon J that:

\begin{quote}
\textquote{“[h]istory 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 the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.”}\textsuperscript{110}
\end{quote}

Yet, despite the fact that judicial dicta and academic commentary have noted the difficulties in defining “executive power” in the abstract\textsuperscript{111} and the dangers inherent to such an approach — an ever-expanding and self-defining power — this is the situation which must now be faced. Fortunately, in Australia at least, and if High Court maintains this position, such a power can only ever be an interim one until Parliament acts to regulate or abrogate it: The High Court has stated unambiguously that s.61 executive power cannot be immune from legislative control despite the existence of the separation of powers and despite its direct source in the constitutional text. As the majority of the High Court stated in \textit{Brown v West}:

\begin{quote}
\textquote{“[w]hatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope.”}\textsuperscript{112}
\end{quote}

This position was expressly reaffirmed post-Pape in \textit{Plaintiff M68/2015 v Minister for Immigration and Border Protection}\textsuperscript{113} by Gageler J, who was the only one among the justices in that case to examine s.61 in detail.\textsuperscript{114} This would strongly indicate that any suggestions to the contrary by certain academic commentators in

\begin{itemize}
\item \textsuperscript{109} The \textit{Pape} case (n.24), 24.
\item \textsuperscript{110} The \textit{Communist Party} case (n.59).
\item \textsuperscript{111} See Aroney et al., \textit{The Constitution of the Commonwealth of Australia} (n.16) pp.430–431 for judicial dicta and 384–385 for the extensive academic chorus.
\item \textsuperscript{112} \textit{Browne v West} (n.23) (emphasis added).
\item \textsuperscript{113} \textit{Plaintiff M68/2015 v Minister for Immigration and Border Protection} (n.31).
\item \textsuperscript{114} \textit{Browne v West} (n.23), [121]–[122].
\end{itemize}
the past, albeit in a minority, will not be accepted by the High Court and that the position so unambiguously stated in *Brown v West* will be maintained.

Nevertheless, merely asserting, without further explanation, that “whatever the scope of executive power” it will be subject to legislative control, impliedly establishing the priority of responsible government over the separation of powers, may not answer and thus put to rest the contending view. The argument that any inherent power in s.61 is not subject to legislative control can be summarised thus: first, this power, to the extent that it is no longer exclusively derived from the common law, is derived directly from a constitutional provision, that is, s.61. This cannot be treated as a “special case” in the same way that the Crown’s common law powers held to be incorporated in that section can be, as suggested above. Second, this constitutional provision vests the power exclusively into the hands of the Executive Government. Third, being derived expressly from the text, it thus overrides any contrary rule which may derive from an implication of either responsible government or the separation of powers in the Constitution.

Given that the recognition of inherent executive power invokes the spectre of Locke’s “prerogative” in order to safeguard the very existence of the polity, its system of government and its power to function as such — “[t]his power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it” — that such power may be beyond the reach of Parliament to control is worrying. However, unlike those powers which derive from the common law prerogative, this new “nationhood” executive power, being derived directly from a constitutional provision, cannot be abrogated entirely (or indeed at all) or removed into the hands of Parliament; and the extent to which it may be regulated is uncertain. Moreover, could it ever be invoked as a “reserve power” in the hands of the Governor-General? This would not only be an inaccurate interpretation of s.61 as alluded to above but also particularly undesirable; and yet, even before *Pape*, suggestions had been made that the “maintenance” limb of s.61 may, in certain emergency circumstances, could be relied on as a “reserve power” by the Governor-General.

Thus, while it may be true to say even with respect to this “nationhood” power that “it is susceptible of control by statute”, the control may be limited only to an uncertain regulation. This is to be contrasted with the common law prerogative which can not only be regulated but also entirely abrogated by Parliament; and entirely consistently with the separation of powers:

“[T]he Parliament is sovereign over the executive and whatever is within the competence of the executive under s.61, including or as well as the

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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.”

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. 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, 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. 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

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 crossroads 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.