DEBATING THE NATURE AND AMBIT OF THE COMMONWEALTH'S NON-STATUTORY EXECUTIVE POWER

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The nature and ambit of the Commonwealth's non-statutory executive power under s 61 of the Constitution *is now the subject of heavy debate. The contest is between those who argue that s 61 should be interpreted consistently with Australia's character and status as a modern and federal nation ('the inherent view'), and those who give greater emphasis to Australia's common law heritage and the role of the royal prerogative ('the common law view'). This article critically analyses both these viewpoints, and considers whether there is scope for reconciling their core propositions. Drawing on the broader notion of the symbiotic relationship between the* Constitution *and the common law, and its application to the dynamic between s 61 and the prerogative, it is contended that a more balanced conception of the Commonwealth's non-statutory executive power is achievable. It is argued that, if the supporters of the common law view accept that the Commonwealth's non-statutory executive power may be released from the traditional limitations placed on the English Crown and thereby adapted to suit a modern and federal context, an indigenous version of the prerogative may be retained as the measure of the ambit of this power. An indigenous prerogative reconciles the core propositions of the inherent view and the common law view and therefore supports the principal contention of this article.*

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I Introduction

Section 61 of the *Commonwealth Constitution* states that '[t]he executive power of the Commonwealth is vested in the Queen', is 'exercisable by the Governor-General', and 'extends to the execution and maintenance of [the] *Constitution*, and of the laws of the Commonwealth'. From this last expression, two types of power may be deduced. The first is 'statutory executive power' due to the Commonwealth's ability to act in 'execution' of the *Constitution* and federal laws.[1] This power presents few interpretational difficulties, as recourse may be had to the constitutional or legislative provision which the Commonwealth is administering to measure the lawfulness of the impugned action.[2]

The second derives from the Commonwealth's ability to 'maintain' the *Constitution*, which has been interpreted to mean a power to act without legislative authorisation.[3] While this power is also 'statutory' in the sense that it derives from the *Constitution*, it is often referred to as 'non-statutory

[1] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 431–2 (Knox CJ and Gavan Duffy J) ('*Wool Tops Case*').

[2] *Brown v West* (1990) 169 CLR 195, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[3] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J).

executive power',[4] reflecting the absence of parliamentary approval. This power is considerably more difficult to interpret.[5] This is because, when the Commonwealth acts without legislation, there is no 'measuring-rod' in s 61 against which the constitutionality of such action may be tested.[6] Thus, the provision leaves this great power 'described but not defined'[7] and therefore 'shrouded in mystery'.[8]

Due to this textual ambiguity, the nature and ambit of the Commonwealth's non-statutory executive power has always been debateable.[9] There are now two competing views.[10] The first view, principally developed by the High Court of Australia, argues that the power is to be sourced directly in s 61 and given content by interpreting the provision consistently with the Commonwealth's character and status as a national government ('the inherent view').[11] This view first emerged in the latter half of the 20th century, when the High Court began to consider whether s 61 might contain a form of non-statutory executive power that was not derived from, or recognised by, the common law.[12]

The second view, advanced by some of Australia's leading constitutional scholars, posits that the non-statutory aspect of s 61 can only be given sufficient meaning by reference to the Crown's prerogative powers ('the common law view').[13] The lineage of this view is more complicated. While it crystallised in academic writings as a response to the rise of an inherent form

[4] See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, 37 [141] (Hayne and Bell JJ).

[5] George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 26.

[6] *Wool Tops Case* (1922) 31 CLR 421, 442 (Isaacs J).

[7] See ibid 440.

[8] Michael Crommelin, 'The Executive' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 127, 147.

[9] *R v Hughes* (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[10] Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the *Commonwealth Constitution*, "Nationhood" and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97, 97.

[11] See ibid.

[12] See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–8 (Dixon J), 230–2 (Williams J).

[13] See Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 97.

of non-statutory executive power, commencing with Professor George Winterton's text *Parliament, the Executive and the Governor-General*,[14] it may also be understood as defending the once orthodox position on the issue.[15]

The debate is now at a stage where both viewpoints are becoming increasingly sophisticated, with each position developing its own core propositions. The inherent view is currently preferred by the High Court, and is evolving on a case-by-case basis. By contrast, the common law view still prevails in the literature,[16] as its contemporary proponents continue to advance the argument originally developed by Professor Winterton.[17]

In the recent decisions of *Pape v Commissioner of Taxation* ('*Pape*'),[18] *Williams v Commonwealth* ('*Williams [No 1]*')[19] and *Williams v Commonwealth [No 2]* ('*Williams [No 2]*'),[20] the High Court has left the taxonomy of the non-statutory aspect of s 61 in some confusion.[21] Before these three cases, the anatomy of the power centred on the Crown's royal prerogative; that is, under A V Dicey's broader definition, 'the residue of discretionary or arbitrary authority … legally left in the hands of the Crown'.[22] This included the Crown's

[14] George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983).

[15] See Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 97.

[16] Cf Cheryl Saunders, 'The Scope of Executive Power' (Speech delivered at the Senate Occasional Lecture Series, Parliament House, Canberra, 28 September 2012). See also J E Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 50.

[17] See, eg, Peter Gerangelos, 'Executive Power' in Nicholas Aroney et al (eds), *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 427.

[18] (2009) 238 CLR 1.

[19] (2012) 248 CLR 156.

[20] (2014) 252 CLR 416.

[21] Gerangelos, 'Executive Power', above n 17, 502.

[22] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 354. Sir William Blackstone preferred a narrower definition of the prerogative, limiting it to those non-statutory powers exclusive to the Crown: Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* (Cavendish Publishing, first published 1765, 2001 ed) vol 1, 182–3. Some scholars favour Dicey's definition: George Winterton, 'Parliamentary Supremacy and the Judiciary' (1981) 97 *Law Quarterly Review* 265, 269; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26 n 40, 27 n 43; Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 87 n 1. Others favour Blackstone's: Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) 60–2; Leslie Zines, 'The Inherent Executive Power of the Commonwealth'

unique powers, varying from the mundane ability to coin money, to more extensive powers such as the ability to declare war.[23] It also included the Crown's ordinary powers, such as the capacity to make contracts or convey land.[24] Alongside the prerogative existed an inherent (or 'nationhood') power, which the High Court began to develop in the mid-1970s.[25] In its infancy, this power allowed the Commonwealth to perform limited functions for the benefit of the nation, and was narrow in its application.[26]

After *Pape*, *Williams [No 1]* and *Williams [No 2]*, however, it seems that this inherent power is threatening to become the key source of the Commonwealth's ability to act without legislation.[27] In turn, the 'preponderant drift' away from the prerogative towards this inherent form of non-statutory executive power,[28] has perpetuated the assumption that the inherent view and the common law view are 'contending for ascendancy' and are therefore mutually exclusive.[29]

This article seeks to challenge that assumption. The principal contention that will be advanced is that s 61 may be approached in a more balanced way that draws on the core propositions of both the inherent view and the common law view. This contention will be supported by an evaluation of an article written by Professor William Gummow (as he now is), namely, 'The

(2005) 10 *Public Law Review* 279, 279–80; Peter W Hogg, *Constitutional Law of Canada* (Carswell Thomson, 3rd ed, 1992) 700 n 13.

23 Gerangelos, 'Executive Power', above n 17, 445–6. See, eg, Geoffrey Lindell, 'The Constitutional Authority to Deploy Military Forces in the Coalition War against Iraq' (2002) 5 *Constitutional Law and Policy Review* 46.

24 Sir H W R Wade, 'Procedure and Prerogative in Public Law' (1985) 101 *Law Quarterly Review* 180, 191. See generally B V Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 *Law Quarterly Review* 225.

25 See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J); *Barton v Commonwealth* (1974) 131 CLR 477, 491 (McTiernan and Menzies JJ), 498 (Mason J).

26 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 40–4.

27 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 178–9; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 272, 281.

28 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 33, citing Geoffrey Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government' (Speech delivered at the Octagon Lecture, The University of Western Australia, 1976) 10.

29 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 97.

Constitution: Ultimate Foundation of Australian Law?',[30] regarding the 'symbiotic relationship' between the *Constitution* and the common law. As Professor Gummow explains, there are terms in the *Constitution* that rely on the common law for conceptual guidance, and conversely, there are aspects of the common law that depend on the *Constitution* to adapt outmoded English legal concepts to the federal context in which they now operate.[31]

It will be argued that this 'symbiotic relationship' is applicable to the dynamic between s 61 and the prerogative, and this should be seen as the analytical middle ground between the inherent view and the common law view. Through this lens, both positions become relevant when establishing how s 61 relies on the prerogative for interpretational clarity,[32] and conversely, how the prerogative, as recognised under the English common law, is not suited to the legal realities of an independent, modern and federal polity.[33] It will be proposed that, if the supporters of the common law view accept that the Commonwealth's non-statutory executive power may be released from the traditional limitations placed on the English Crown and thereby *adapted* to suit a modern and federal context, an indigenous version of the prerogative, as developed by the *Australian* common law, may be retained as the measure of the ambit of this power. An indigenous prerogative reconciles the core propositions of the inherent view and the common law view, and therefore supports the contention that a more balanced conception of the Commonwealth's non-statutory executive power is achievable.

This argument will be developed in three parts. Part II will explain the current debate concerning the Commonwealth's non-statutory executive power. This will be achieved by providing an elucidation of the emergence of the inherent view and the common law view in the case law and literature respectively, and then articulating the core propositions underpinning each viewpoint.

Part III will establish that there is an assumption that these two viewpoints are mutually exclusive, and then explore whether this assumption is rebuttable. This will be achieved by identifying the premise from which the core

[30] W M C Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167.

[31] Ibid 172–3, 177–81.

[32] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 27–8, 50–1, 70.

[33] *Williams [No 2]* (2014) 252 CLR 416, 468–9 [79]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

propositions of each viewpoint derive, and comparing each premise to identify the critical point at which these two positions diverge, to see if a middle ground may be reasoned on this issue. The tentative conclusion will be drawn, based on one reading of Professor Gummow's article, that the common law view proceeds from the false premise that there is a continuum between Australia's common law heritage and its postcolonial constitutional framework, with the resultant triumph of the inherent view.

In Part IV, this article will enter the debate by arguing against this conclusion, and demonstrate how a more subtle reading of Professor Gummow's article suggests that a middle ground does exist between both viewpoints. This will be achieved by exploring the symbiotic relationship between the *Constitution* and the common law, and the way this idea of mutual dependence has been developed in other contexts outside of executive power. This notion will then be applied to the relationship between s 61 and the prerogative, showing how an indigenous prerogative appeases the core concerns of both viewpoints. The logic behind this argument will then be tested against the facts of the recent High Court case *CPCF v Minister for Immigration and Border Protection* ('*CPCF*'),[34] which raised questions concerning the interpretation of s 61. The principal contention of this article will be confirmed: that the inherent view and the common law view are not mutually exclusive positions, and may be analytically united to devise a more balanced conception of the Commonwealth's non-statutory executive power.

II Explaining the Debate: The Emergence of Two Competing Views

A *The Inherent View*

1 *Emergence in the Case Law*

The inherent view of the Commonwealth's non-statutory executive power began to emerge in the latter half of the 20th century. Previously, there was only an assumption that the prerogative formed the predominant basis of the Commonwealth's ability to act without legislation. Australia was not yet legally independent from the United Kingdom, and this reality affected the

[34] (2015) 316 ALR 1.

nature of the non-statutory aspect of s 61.[35] Thus, due to the contextual circumstances of the period, the High Court simply accepted — subject to the division between the federal and state governments and a limited external affairs prerogative[36] — that the Commonwealth's non-statutory executive power did not differ from that of the United Kingdom.[37]

Evidence of this assumption is prevalent throughout the High Court's early s 61 jurisprudence,[38] and apart from *R v Kidman*, where Griffith CJ and Isaacs J hinted at an alternative functional power lurking directly in s 61,[39] this approach appeared to prevail until the Second World War.[40] It was only in the 1951 decision of *Australian Communist Party v Commonwealth* ('*Communist Party Case*') that the High Court began to explore the possibility that s 61 might contain some inherent form of non-statutory executive power.[41] However, this power, if it did exist, was confined literally to 'maintaining' the *Constitution*, extended only to activities of a 'special kind' such as acting against sedition or subversion,[42] and was not too dissimilar to John Locke's idea of a prerogative to preserve the polity.[43] Yet, well into the latter half of the

35 See Leslie Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 1, 1–14, 22–5.

36 Ibid 42–3. See also Richardson, above n 16, 58.

37 H P Lee, *Emergency Powers* (Lawbook, 1984) 39, citing John Goldring, 'The Impact of Statutes on the Royal Prerogative; Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel Ltd*' (1974) 48 *Australian Law Journal* 434, 435. See also H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 463; Justice Bradley Selway, 'All at Sea — Constitutional Assumptions and "the Executive Power of the Commonwealth"' (2003) 31 *Federal Law Review* 495, 501–4.

38 See, eg, *Clough v Leahy* (1904) 2 CLR 139, 155–7 (Griffith CJ); *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J); *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32, 45–8 (Isaacs, Powers and Rich JJ), 52 (Higgins J), 55 (Gavan Duffy J); *Wool Tops Case* (1922) 31 CLR 421, 433, 437–41 (Isaacs J), 453–4 (Higgins J), 459–61 (Starke J). See also *Theodore v Duncan* (1919) 26 CLR 276, 282 (Viscount Haldane).

39 (1915) 20 CLR 425, 438 (Griffith CJ), 440 (Isaacs J).

40 See, eg, *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 320–1 (Evatt J); *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 83–4 (Latham CJ), 90 (Starke J), 101–2 (Dixon J); *New South Wales v Bardolph* (1934) 52 CLR 455, 474–5 (Evatt J). Cf *R* v *Burgess; Ex parte Henry* (1936) 55 CLR 608, 643–4 (Latham CJ).

41 (1951) 83 CLR 1, 187–8 (Dixon J), 232 (Williams J). See also *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J).

42 See *Davis v Commonwealth* (1988) 166 CLR 79, 102 (Wilson and Dawson JJ).

43 John Locke, *The Second Treatise of Government* (Basil Blackwell, revised ed, 1956) 86.

20th century, the High Court still had a tendency to rely on the prerogative to test the constitutionality of executive action. This is shown by the 1974 decision of *Johnson v Kent*, where Barwick CJ held that the broader prerogative formed the basis of the Commonwealth's non-statutory ability to build on Crown land.[44]

However, despite the continuation of this assumption, there was also a 'preponderant drift' in the High Court's s 61 jurisprudence — discernible in *Barton v Commonwealth*[45] and intensified in *Victoria v Commonwealth* ('*AAP Case*')[46] — towards an 'inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of modern national government'.[47] Although Professor Winterton would later question this view of the case law (even as late as 2004),[48] there is no doubt that by the 1988 decision in *Davis v Commonwealth* ('*Davis*'), the High Court was at least willing to further develop a form of non-statutory executive power that was based on this inherent view of s 61, and informed by the Commonwealth's character and status as a national government.[49]

This was reinforced by Gummow J's dictum in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* ('*Re Ditfort*') (also a 1988 decision),[50] and the majority judgments of Beaumont J and French J in the 2001 decision of *Ruddock v Vadarlis* ('*Vadarlis*'), who held that the Commonwealth's non-statutory executive power extended to the expulsion of friendly aliens from Australian territory based on 'nationhood' considerations (as opposed to a

44 (1975) 132 CLR 164, 168–70.

45 (1974) 131 CLR 477, 491 (McTiernan and Menzies JJ), 498 (Mason J).

46 (1975) 134 CLR 338, 397 (Mason J). See also *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 252 (Deane J).

47 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 110, citing Sawer, above n 28, 10. See also Chief Justice Robert French, 'The Executive Power' (Speech delivered at the inaugural George Winterton Lecture, The University of Sydney, 18 February 2010) 22.

48 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 33. See also Peter Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 189, 196.

49 (1988) 166 CLR 79, 92–4 (Mason CJ, Deane and Gaudron JJ). See also *Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 458–9 (McHugh J).

50 (1988) 19 FCR 347, 369.

power derived from the common law).[51] Critically, in these two cases, albeit from the Federal Court of Australia, express doubt was placed over the ongoing role of the prerogative as the basis of the Commonwealth's ability to act without legislation.[52] Thus, the case law before *Pape*, *Williams [No 1]* and *Williams [No 2]* appeared to support the emergence of some form of non-statutory inherent power in s 61, but it was still an open question whether this power existed *alongside* the broader prerogative (as a limited 'nationhood power'), or was intended to actually *replace* it.[53]

2 *Core Propositions*

It was not until the High Court's decisions in *Pape*, *Williams [No 1]* and *Williams [No 2]* that the inherent view began to mature, developing its own core propositions. In *Pape*, the relevant question was whether the Rudd government's attempt to stimulate the economy after the global financial crisis ('GFC'), by providing a tax bonus to certain 'working Australians' under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('*Tax Bonus Act*'), could be supported by a constitutional source of power. Although ss 81 and 83 could not be used as substantive spending powers,[54] a 4:3 majority held that the Commonwealth had the power under s 61 to respond to the GFC, and s 51(xxxix) could be used, as being incidental to this power, to support the passing of the *Tax Bonus Act*.[55]

There was a slight divergence between the reasoning of French CJ, who seemed to give a narrower articulation of this power, compared to the plurality judgment of Gummow, Crennan and Bell JJ, who used more expansive language.[56] However, the broad ratio that emerges from these two judgments is that the power to respond to the GFC resided *directly* in s 61, and was not, on that occasion, informed by the common law prerogative, but

[51] (2001) 110 FCR 491, 514 [95] (Beaumont J), 542–3 [191]–[193] (French J).

[52] Ibid 542 [191] (French J); *Re Ditfort* (1988) 19 FCR 347, 369 (Gummow J).

[53] See Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 33, 35–6.

[54] *Pape* (2009) 238 CLR 1, 44–5 [80], 55–6 [112]–[113] (French CJ), 78 [197], 82–3 [210] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 213 [607] (Heydon J).

[55] Ibid 63–4 [133], [136] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).

[56] Andrew McLeod, 'The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*' (2010) 32 *Sydney Law Review* 123, 134–5.

rather the Commonwealth's character and status as a national government.[57] The Chief Justice went to the extent of stating that the Commonwealth's non-statutory executive power is not locked away 'in a constitutional museum' and, as such, 'is not limited to statutory powers and the prerogative'.[58] Similarly, the plurality opined that 'the phrase "maintenance of this *Constitution*" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory'.[59]

The position in *Pape* was further supplemented by *Williams [No 1]* and *Williams [No 2]*. Both these cases concerned a challenge to the Commonwealth's attempt to fund a national chaplaincy program in public schools; and in both cases, the High Court found that the funding agreements were not supported by s 61.[60] In *Williams [No 1]*, where there was no legislation supporting the relevant agreements, the majority gave considerable emphasis to the federal structure of the *Constitution*, and how the Commonwealth's capacity to contract and spend needed to be reconciled with the principle of federalism and the fiscal mechanisms in ch IV (such as s 96).[61] Critically, the High Court concluded that, despite the Crown's unlimited ability to contract at common law (indeed, the common law never regarded the 'King … as being less powerful to enter into contracts than one of his subjects'),[62] the *Constitution* limits the broader prerogative in this respect.[63] In *Williams [No 2]*, where legislation had been passed,[64] the joint judgment relevantly held

[57] *Pape* (2009) 238 CLR 1, 63–4 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).

[58] Ibid 60 [127] (French CJ).

[59] Ibid 83 [215] (Gummow, Crennan and Bell JJ).

[60] *Williams [No 1]* (2012) 248 CLR 156, 217 [84] (French CJ), 239 [163] (Gummow and Bell JJ), 359 [547] (Crennan J); *Williams [No 2]* (2014) 252 CLR 416, 471 [92] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

[61] *Williams [No 1]* (2012) 248 CLR 156, 192–3 [37], 205–6 [60]–[61] (French CJ), 235–6 [146]–[148] (Gummow and Bell JJ), 347–8 [501]–[503] (Crennan J). See also Appleby and McDonald, above n 27, 263–4.

[62] *New South Wales v Bardolph* (1934) 52 CLR 455, 475 (Evatt J).

[63] *Williams [No 1]* (2012) 248 CLR 156, 203–6 [58]–[61] (French CJ), 232–3 [134]–[137], 236–9 [150]–[159] (Gummow and Bell JJ), 253–4 [204]–[206], 258–9 [215]–[216] (Hayne J), 347–8 [501]–[503] (Crennan J), 368–9 [577], 370 [581], 373–4 [594]–[595] (Kiefel J).

[64] *Financial Management and Accountability Act 1997* (Cth) s 32B, as inserted by *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) sch 1 item 2 s 32B(1); *Financial Management and Accountability Regulations 1997* (Cth) sch 1AA pt 4 item 407.013, as inserted by *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) s 3(1), sch 2.

that the Commonwealth's non-statutory executive power, as sourced in a written and federally structured constitution, could not be identical to that of the United Kingdom, a unitary state with an unwritten constitution.[65]

Accordingly, the propositions that emerge from *Pape*, *Williams [No 1]* and *Williams [No 2]*, and which lie at the heart of the inherent view, may be articulated as follows: first, the Commonwealth's non-statutory executive power is to be sourced directly in s 61 and is to be defined consistently with the Commonwealth's character and status as a national government;[66] secondly, in some situations, reliance on the common law prerogative will not be a suitable means of ascertaining the executive power of an independent and modern polity;[67] thirdly, this power, whether sourced directly in s 61 or informed by the common law, must be consistent with the *Constitution* (principally, federalism and ch IV);[68] and finally, the Commonwealth's non-statutory executive power is not the same as the United Kingdom's.[69]

To date, the High Court has not rejected the relevance of the prerogative when interpreting s 61, and even unanimously recognised it in the 2010 decision of *Cadia Holdings Pty Ltd v New South Wales*.[70] However, although still an open question, these above propositions suggest a limited role for the prerogative, and instead give greater emphasis to the legal consequences that flow from Australia's status as an independent, modern and federal polity.[71]

[65] *Williams [No 2]* (2014) 252 CLR 416, 467–9 [76]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[66] *Pape* (2009) 238 CLR 1, 63–4 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).

[67] Ibid 60 [127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ).

[68] *Williams [No 1]* (2012) 248 CLR 156, 192–3 [37], 205–6 [60]–[61] (French CJ), 235–6 [146]–[148] (Gummow and Bell JJ), 347–8 [501]–[503] (Crennan J); *Williams [No 2]* (2014) 252 CLR 416, 468–9 [80]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[69] *Williams [No 2]* (2014) 252 CLR 416, 467–9 [76]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[70] (2010) 242 CLR 195, 210–11 [30]–[34] (French CJ), 225–7 [85]–[90] (Gummow, Hayne, Heydon and Crennan JJ). See also *CPCF* (2015) 316 ALR 1, 17 [42] (French CJ), 58 [246], 60–1 [259]–[260] (Kiefel J).

[71] Gerangelos, 'Executive Power', above n 17, 459.

B *The Common Law View*

1 *Emergence in the Literature*

The development of the common law view may be divided into three broad periods. In the first period, between federation and the mid-1970s, the topic of executive power received 'scant attention' in comparison with other areas of Australian constitutional law.[72] Sir John Quick and Sir Robert Garran provided only a brief, two-page analysis of s 61,[73] which may have reflected the fact that the Commonwealth's executive power raised 'fewer justiciable controversies than [its] legislative and judicial power'.[74] Sir William Harrison Moore, in the first generalist constitutional text published in 1902, went into greater depth in his chapter on executive power, stating that 'the Executive may, without any further statutory authority, take whatever measures are ordinarily allowed to the Executive by the common law'.[75]

However, it was not until 1924 that a more specialist work on the topic was produced, when Dr H V Evatt wrote his doctoral thesis, *Certain Aspects of the Royal Prerogative*,[76] although this was not published until 1987.[77] While Dr Evatt's analysis of executive power was consistent with the common law view, as was Moore's,[78] this was more so because scholarship during this period proceeded on the same assumption of the High Court as to the ubiquity of the prerogative throughout the British Empire.[79]

It was in the second phase of development, between 1975 and 2009, that there was a more critical engagement in the literature with the topic of executive power, and there started to emerge a responsive view to develop-

[72] Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 21.

[73] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed) 701–2.

[74] Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 21.

[75] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Harsten Partridge, 2nd ed, 1910) 88.

[76] H V Evatt, *Certain Aspects of the Royal Prerogative: A Study in Constitutional Law* (LLD Thesis, The University of Sydney, 1924).

[77] H V Evatt, *The Royal Prerogative* (Lawbook, 1987).

[78] See, eg, Moore, above n 75, 299–300.

[79] See, eg, Evatt, *The Royal Prerogative*, above n 77, 26–8, 35–7. See also W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 2nd ed, 1956) 513–14.

ments in the High Court's s 61 jurisprudence. In this period Professor Winterton published his book, *Parliament, the Executive and the Governor-General*, which was the first argumentative text on executive power,[80] distinguishable from Dr Evatt's thesis, which was more of a research-based treatise on the prerogative.[81] On its original dust jacket, Professor Geoffrey Sawer described the book as 'the most thorough examination of the question yet written',[82] and arguably this assessment still holds true today.[83]

Professor Winterton saw the question as being divided into two issues: one of 'depth' (ie consistent with the theory of separation of powers, there needs to be a source of non-statutory executive power) and one of 'breadth' (ie consistent with the structure of the *Constitution*, this power needs to be federally distributed).[84] In his Honour's dissenting judgment in *Williams [No 1]*, Heydon J noted that this distinction was 'not only neat but illuminating',[85] and it has now become part of the s 61 parlance in the literature.[86] Professor Winterton saw the role of the prerogative as being relevant at the depth stage,[87] and believed s 61 indicated this by vesting the power 'in the

[80] Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 21 n 8.

[81] See, eg, Evatt, *The Royal Prerogative*, above n 77, 10.

[82] James A Thomson, 'Executive Power, Scope and Limitations: Some Notes From a Comparative Perspective', Book Review: *Parliament, the Executive and the Governor-General* by George Winterton (1983) 62 *Texas Law Review* 559, 561 n 7.

[83] See Peter Gerangelos, 'Eulogy for Professor George Winterton' (2008) 30 *Sydney Law Review* 567, 569; French, 'The Executive Power', above n 47, 1–2; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 339 n 1.

[84] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 29–30; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 29.

[85] *Williams [No 1]* (2012) 248 CLR 156, 312–13 n 578.

[86] See, eg, Gerangelos, 'Executive Power', above n 17, 443; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 103–5; Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic', above n 48, 193; Saunders, *The Constitution of Australia*, above n 27, 177–81; Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 261–2; Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 320 n 56; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 281.

[87] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 48–52; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 33.

Queen'.[88] He favoured Dicey's understanding of the prerogative over Sir William Blackstone's,[89] and therefore saw the depth of the Commonwealth's non-statutory executive power as informed by the discretionary power retained by the Crown as recognised by the English common law.[90]

It was here that Professor Winterton placed decisions such as the *AAP Case* and *Davis* (and later *Vadarlis*, preferring North J's judgment at first instance,[91] and Black CJ's dissent),[92] which he heavily criticised as being contrary to the orthodox approach to s 61, and not supported by the case law.[93] He therefore read down these cases as recognising no more than a limited 'nationhood power', which, in his view, was still only exercisable within the limits of the prerogative.[94] As to the breadth issue, he argued that the Commonwealth's non-statutory executive power followed the contours of legislative power,[95] which was supported by Sir Samuel Griffith's draft version of s 61,[96] Sir Alfred Deakin's 'Vondel Opinion',[97] the decision in *Johnson v Kent*,[98] and various dicta in the *AAP Case*.[99]

88 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50.

89 Dicey, above n 22, 354. Cf Morrison, above n 22, 182–3.

90 Winterton, 'Parliamentary Supremacy and the Judiciary', above n 22, 269; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26 n 40, 27 n 43. Cf Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 45.

91 *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

92 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 30–1, 46.

93 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 31; Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 40–4.

94 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 44; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 30–3.

95 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 30, 38.

96 See *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 777–8.

97 Alfred Deakin, 'Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901–14* (Australian Government Publishing Service, 1981) 129, 131–2.

98 (1975) 132 CLR 164, 168–70 (Barwick CJ), 172 (McTiernan J), 172 (Stephen J), 174 (Jacobs J).

99 (1975) 134 CLR 338, 362 (Barwick CJ), 379 (Gibbs J), 396–7 (Mason J), 405–6 (Jacobs J).

Moreover, into the early 21st century, the common law view matured further, as constitutional scholars responded to the decision in *Vadarlis*. Justice Bradley Selway, writing extra-curially, criticised the judgment of French J, arguing that his Honour erroneously adopted an 'American-style' interpretational approach to s 61 by essentially deriving the power from the necessary functions to be performed by the executive branch of government.[100] Professor Zines also entered the debate in response to *Vadarlis*. He, too, criticised French J's judgment, preferring the dissent of Black CJ, and argued that '[i]t is difficult to accept that the framers of the *Constitution* … conferred inherent coercive power on the Commonwealth government that was denied to the Imperial government'.[101]

Finally, in the third period, commencing around 2009 and proceeding to the present day, there has emerged a body of literature that fundamentally disagrees with the High Court's decisions in *Pape* and *Williams [No 1]*. It is from this body of literature that the core propositions of the common law view may be derived.

2 *Core Propositions*

The key contention of the common law view is that the orthodox approach to s 61 should have been left undisturbed.[102] In support of this contention, its modern proponents make four positive claims: first, the prerogative as recognised by the common law establishes legally discernible criteria against which the courts can test the constitutionality of executive action and, by its very nature, is amenable to legislative abrogation;[103] secondly, the text of s 61

[100] Selway, 'All at Sea', above n 37, 500–1.

[101] Zines, *The High Court and the Constitution*, above n 83, 359. See also Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 281.

[102] See Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic', above n 48, 196–8; Peter Gerangelos, '*Williams* and the Demise of the "Common Assumption": A New Template for Executive Capacities?' (Speech delivered at the Attorney-General's Department Constitutional Law Symposium, Canberra, 15 April 2014) 1 [1], 2 [5].

[103] Gerangelos, 'Executive Power', above n 17, 449–50; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 99, 103–12; Twomey, 'Pushing the Boundaries of Executive Power', above n 86, 319, 325–6; Duncan Kerr, 'Executive Power and the Theory of Its Limits: Still Evolving or Finally Settled?' (Speech delivered at the Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, The University of New South Wales, 18 February 2011) 4–5, 12–13, 17–18. See also Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 70; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 35–6; Selway, 'All at Sea', above n 37, 505–6.

was drafted on the assumption that the prerogative formed the essence of non-statutory executive power, and to interpret its meagre text inherently, literally or functionally will lead to unpredictable and legally erroneous results;[104] thirdly, with the Commonwealth's non-statutory executive power being informed by the common law, it cannot be expanded beyond the traditional limits imposed on the Crown's prerogative powers;[105] and finally, the difficulty created by separate executive governments in a federal state may be overcome by reference to the division of legislative power (ie Professor Winterton's 'breadth' argument).[106]

These four claims form the core propositions underpinning the common law view, and it is important that their articulation as positive claims be maintained. However, the post-2009 literature does have a markedly critical tone due to the way the High Court's decisions in *Pape* and *Williams [No 1]* seem to ignore and even reject the core propositions of the common law view. Dealing first with *Pape*, three key objections have emerged, each related to the first, second and third positive claims respectively.

The first objection, advanced by Professor Peter Gerangelos[107] and Professor Anne Twomey,[108] is that the Court accepted in *Pape* an inherent form of non-statutory executive power derived directly from s 61 without determining whether this power can be controlled by legislation.[109] Instead, both

[104] Gerangelos, 'Executive Power', above n 17, 460–2; Kerr, above n 103, 3, 13, 17–18. See also Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 27–8, 50–1, 70; Selway, 'All at Sea', above n 37, 501–6. See also Enid Campbell, 'Parliament and the Executive' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 88, 88–90; L J M Cooray, *Conventions, the Australian Constitution and the Future* (Legal Books, 1979) 8–9; Crommelin, above n 8, 131, 147–8.

[105] Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 108, quoting Zines, *The High Court and the Constitution*, above n 83, 359. See also Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 281.

[106] See Gerangelos, 'Executive Power', above n 17, 443–4, 463–4, 502; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 103–5, 115. See also Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 29–30; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 29–30, 38; Zines, *The High Court and the Constitution*, above n 83, 359.

[107] Gerangelos, 'Executive Power', above n 17, 490–3; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 99–100.

[108] Twomey, 'Pushing the Boundaries of Executive Power', above n 86, 338.

[109] See, eg, French, 'The Executive Power', above n 47, 26.

these scholars favour — as did Professor Winterton,[110] Professor Zines[111] and Justice Selway[112] — the prerogative due to the legally discernible criteria it provides, and the fact that it is susceptible to legislative abrogation,[113] which is consistent with the now constitutionalised principle of responsible government.[114]

The second objection, principally developed by Professor Gerangelos and Duncan Kerr, although it was also central to Professor Winterton's criticism of the *AAP Case*, *Davis* and *Vadarlis*,[115] is that the approach adopted in *Pape* has a logical flaw in placing emphasis on the text of s 61. They agree up to a point with the primacy of s 61, as did Professor Winterton,[116] but argue that its language is too mundane to give content to the power.[117] This is why the common law is so useful; it has volumes of learning and precedent that may be imported into 'the Delphic terms of s 61',[118] an approach which is consistent with the incorporation of the prerogative under that provision.[119]

The final objection to *Pape* builds on Professor Zines's 'compelling' criticism of *Vadarlis*.[120] Here, it is suggested that if the Court is sourcing the power *directly* in s 61, then the Commonwealth may possess more power than the Imperial government in 1901; a perverse consequence unlikely to have been intended by the framers.[121]

110 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 95.

111 Zines, 'The Inherent Power of the Commonwealth', above n 22, 279–81.

112 Selway, 'All at Sea', above n 37, 505–6.

113 See also Kerr, above n 103, 3, 5 n 19, 12–13, 17–18.

114 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

115 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 40–4; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 30–1.

116 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50.

117 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 116–19; Kerr, above n 103, 3, 12–13, 17–18.

118 Kerr, above n 103, 12.

119 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Gerangelos, 'Executive Power', above n 17, 451.

120 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 108.

121 Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279–81.

Moreover, with regard to *Williams [No 1]*, the decision traverses a lot of constitutional questions, and is 'very difficult to interpret'.[122] It has been analysed in relation to other issues that do not immediately concern s 61,[123] and is not criticised by all scholars.[124] The most recent example is Sebastian Hartford Davis's DPhil thesis which examines how the decision affects the Commonwealth's juristic personality;[125] he draws the distinction between the Commonwealth's 'capacity to contract' and its executive 'power to spend', and argues that *Williams [No 1]* confirms the former and limits the latter.[126]

However, the relevant criticism that the proponents of the common law view make is that the rejection of the 'common assumption' — which was the application of the fourth positive claim above (ie 'breadth') to the Commonwealth's capacity to contract and spend — was not supported by precedent, and creates more problems than it solves.[127] One important question raised in the most recent work of Professor Gerangelos is whether, on the basis of the majority's reasoning, the requirement of prior statutory authorisation extends to the other capacities in s 61, and even further, to the narrow prerogative and even the nationhood power;[128] a query also raised by Professor Geoffrey Lindell[129] and Professor Nicholas Aroney.[130]

[122] Anne Twomey, 'Post-*Williams* Expenditure — When Can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?' (2014) 33 *University of Queensland Law Journal* 9, 27.

[123] See, eg, Andrew Hemming, '*Williams v Commonwealth*: Much Ado about Nothing' (2014) 33 *University of Queensland Law Journal* 233; Suri Ratnapala, 'Fiscal Federalism in Australia: Will *Williams v Commonwealth* Be a Pyrrhic Victory?' (2014) 33 *University of Queensland Law Journal* 63; Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37 *Melbourne University Law Review* 255, 292–5.

[124] See, eg, Saunders, 'The Scope of Executive Power', above n 16; Appleby and McDonald, above n 27.

[125] S H Hartford Davis, *The Legal Personality of the Commonwealth of Australia* (DPhil Thesis, The University of Oxford, 2014).

[126] Ibid 281–2.

[127] See, eg, Gerangelos, '*Williams* and the Demise of the "Common Assumption"', above n 102, 1–2 [1]–[5]; Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5th ed, 2013) 71 [2.7].

[128] Gerangelos, 'Executive Power', above n 17, 485.

[129] Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2012) 39 *Monash University Law Review* 348, 384.

[130] Nicholas Aroney, 'A Power "Singular and Eccentrical": Royal Commissions and Executive Power after *Williams*' (2014) 25 *Public Law Review* 99, 101, 110.

Thus, proponents of the common law view are critical of the reasoning in *Pape* and *Williams [No 1]* as these two cases contradict the core propositions intrinsic to their viewpoint. And as the High Court proceeds on its 'preponderant drift' away from the prerogative and continues to prefer this inherent form of power,[131] the role of the common law is being increasingly marginalised.[132] Supporters of the common law view used to respond by arguing that '[d]espite this "preponderant drift", there has been no *decision* contrary to the view that the *depth* of federal executive power … should be limited to the Crown's prerogative powers'.[133] Clearly, after *Pape*, *Williams [No 1]* and *Williams [No 2]*, this response may need to be revised.[134]

III Examining the Debate: Two Irreconcilable Positions?

A *The Assumption of Mutual Exclusion*

The above analysis has charted the emergence of both the inherent view and the common law view, and attempted to accurately represent their core propositions. However, the analysis has proceeded on the unstated assumption that both positions are 'contending for ascendancy' and are therefore mutually exclusive.[135]

The assumption is a strong one, as both viewpoints share different origins: the inherent view has been principally developed by the High Court, whereas the common law view owes its development to the responsive writings of some of Australia's leading constitutional scholars. The assumption is further supported by the sharp disagreement between each viewpoint on various issues. For example, their comparative core propositions create a division between key dicta in the *AAP Case*,[136] *Davis*,[137] *Re Ditfort*,[138] *Vadarlis*[139] and

131 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 10.

132 Gerangelos, 'Executive Power', above n 17, 459.

133 Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic', above n 48, 196 (emphasis in original). See also Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 33.

134 See especially *Williams [No 2]* (2014) 252 CLR 416, 469 [82]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

135 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 97.

136 (1975) 134 CLR 338, 397 (Mason J), 406 (Jacobs J).

137 (1988) 166 CLR 79, 92–4 (Mason CJ, Deane and Gaudron JJ).

Pape[140] in sourcing the Commonwealth's non-statutory executive power *directly* in s 61, and the responsive disbelief of scholars such as Professor Winterton,[141] Justice Selway,[142] Professor Zines,[143] Professor Gerangelos[144] and Kerr[145] that s 61's terse text alone can support such an important power. Nonetheless, the 'competition' between the inherent view and the common law view remains merely an assumption. This is because there has been almost no consideration — neither in the case law nor in the literature — of whether these two viewpoints may actually be reconciled, or at least brought closer together.

Proponents on either side of the debate have only hinted at this possibility. Chief Justice Robert French, speaking at the inaugural Winterton Memorial Lecture in 2010, suggested that '[t]here is room … for further academic discussion and suggestions for a principled approach to appropriate limits upon executive power', and said that he suggested to Professor Winterton that he 'write about limiting principles in relation to an executive power'.[146]

Later that year, Chief Justice James Spigelman, delivering the Garran Oration, appeared to commend the decision in *Pape*, but indicated that '[t]he delineation of the permissible scope of the executive power of the Commonwealth will develop on a case by case basis, *albeit with reference to the traditional categories of the prerogative*'.[147] He called for a change in the nomenclature '[i]n the same way as the "prerogative writs" have been replaced with

138 (1988) 19 FCR 347, 369 (Gummow J).

139 (2001) 110 FCR 491, 542–3 [191]–[193] (French J).

140 (2009) 238 CLR 1, 63 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).

141 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 27–8, 50–1, 70; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 22, 25–6, 33.

142 Selway, 'All at Sea', above n 37, 500–1, 505–6.

143 Zines, *The High Court and the Constitution*, above n 83, 359; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279–81.

144 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 116–19.

145 Kerr, above n 103, 3–5, 12–13, 17–18.

146 French, 'The Executive Power', above n 47, 27.

147 Chief Justice J J Spigelman, 'Public Law and the Executive' (2010) 69 *Australian Journal of Public Administration* 345, 351 (emphasis added).

"constitutional writs"', suggesting that '"prerogative power" will be replaced by the terminology of "executive power"'.[148]

In 2012, Professor Gerangelos doubted whether a change in the nomenclature was necessary, but did accept that it may be time to consider a 'native form of the prerogative'.[149] In his concluding remarks, he thought the answer could lie — consistent with French CJ's notion of s 61's 'organic evolution' in *Pape*[150] — in the idea of the prerogative's 'evolutionary' character, and the possibility that it could be adapted to meet the exigencies of modern government.[151] He was drawing on the argument Professor Winterton made in 1975,[152] a view also supported by Dr Evatt,[153] that while the prerogative could never be *expanded*,[154] it was capable of being *adapted* to 'new situations'.[155] In his most recent work, Professor Gerangelos reiterated this argument.[156]

These murmurs situated in the background of the debate are interesting, and give cause to wonder why exploration of a more balanced conception of the Commonwealth's non-statutory executive power, drawing on the core propositions of both viewpoints, has not yet taken place. One way that this may be achieved is by addressing the critical point at which the inherent view and the common law view diverge. If this juncture can be identified, and a well-reasoned middle ground can be supported on this issue, then it may be possible to bring the two positions closer together, and perhaps even form a more balanced conception of the Commonwealth's non-statutory executive power. The remainder of this article will explore this line of inquiry, and develop a way in which the assumption of mutual exclusion may be rebutted.

148 Ibid.

149 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

150 (2009) 238 CLR 1, 60 [127].

151 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 126.

152 Ibid 108 n 67.

153 Evatt, *The Royal Prerogative*, above n 77, 16–17.

154 *Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ), quoting *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

155 George Winterton, 'The Prerogative in Novel Situations' (1983) 99 *Law Quarterly Review* 407, 408.

156 Gerangelos, 'Executive Power', above n 17, 450–1.

B *The Critical Point of Divergence*

1 *The Premise of the Inherent View*

The most accurate way to answer this question is to identify the premise from which the core propositions of each viewpoint derive. The premise of each position could then be compared, so as to examine precisely why each viewpoint draws different conclusions as to the correct interpretation of s 61.

The core propositions of the inherent view may be linked to a *Constitution*-centric analysis of the Commonwealth's non-statutory executive power. This is not to say that the common law view does not also respect the authority of the written instrument, or that the inherent view completely ignores the prerogative, only that, as will be explained, there are differing degrees of emphasis. Indeed, the High Court currently proceeds on the basis that the power, both legally and conceptually, must be derived from the terms of the *Constitution*, rather than from the common law.

This is shown by the approach in *Pape* to delimit the role of the prerogative, and instead rely *directly* on the text of s 61.[157] This is clear from the Chief Justice's reasoning, where his Honour begins from the premise that 'section 61 is an *important element of a written constitution* for the government of an *independent* nation', and thus recognises the provision as the critical source of authority behind the Commonwealth's ability to act without legislation.[158] The idea of an inherent power to respond to the GFC flowing from the Commonwealth's character and status as a national government is perhaps his Honour's way of respecting the authority of s 61, while trying to give meaning to its sparse text.[159] This is also apparent in the plurality's reasoning, where their Honours focus on the type of power the Commonwealth may possess as 'a polity *created* by the *Constitution*', and from this premise, proceed to interpret s 61 as conveying 'the idea of the protection of the body politic or nation of Australia'.[160] Evident throughout both majority judgments is a noticeable reluctance to rely on the common law and seek guidance from the prerogative.[161] Intuitively, this may be explained as an unwillingness of the Court to

[157] (2009) 238 CLR 1, 60 [127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ).

[158] Ibid 60 [127] (French CJ) (emphasis added).

[159] Ibid 63–4 [133].

[160] Ibid 83 [214]–[215] (Gummow, Crennan and Bell JJ) (emphasis added).

[161] Ibid 60 [127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ).

undermine the authority of the written constitution of a modern polity by invoking arcane common law concepts.

If this is a fair assessment of the majority's ratio in *Pape*, then it may also explain Mason J's approach in the *AAP Case*, where his Honour — building on key statements from the *Communist Party Case*[162] — 'deduced' an inherent power from the mere '*existence* of ss 51(xxxix) and 61', and gave content to the power by deriving meaning from the Commonwealth's 'character … as a national government', rather than from the common law.[163] It could also explain the reasoning in *Davis*, where the plurality acknowledged how 'the scope of the executive power of the Commonwealth has often been discussed but never defined', but then overcame this ambiguity by going directly to s 61 and working backwards from its text.[164] Their Honours ultimately concluded that the power to establish a body to regulate the bicentenary celebrations derived from the Commonwealth's 'capacity as the national and federal government', rather than the Crown's ability to simply form a company.[165]

Likewise, this aversion towards the prerogative is discernible in *Re Ditfort*, where Gummow J held that the question whether the Commonwealth could extradite an Australian citizen from Germany was a justiciable one, based on his Honour's belief that '[i]n Australia … one looks *not to the content of the prerogative in Britain*, but rather to s 61 of the *Constitution*, by which the executive power of the Commonwealth was vested'.[166] These sentiments were further echoed in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*, where McHugh J stated: 'Under our *Constitution*, the executive power of the Commonwealth conferred by s 61 involves *much more* than the common law prerogatives of the Crown'.[167] As was the case in *Vadarlis*, where French J, essentially responding to the proposition that 'the Crown has no power, by its prerogative alone, to send any one, whether he be

[162] (1951) 83 CLR 1, 187–8 (Dixon J).

[163] *AAP Case* (1975) 134 CLR 338, 397 (Mason J) (emphasis added). See also Twomey, 'Pushing the Boundaries of Executive Power', above n 86, 332–4.

[164] (1988) 166 CLR 79, 92–3 (Mason CJ, Deane and Gaudron JJ).

[165] Ibid 94.

[166] (1988) 19 FCR 347, 369 (emphasis added).

[167] (1997) 190 CLR 410, 459 (emphasis added).

a subject or an alien, compulsorily out of the realm',[168] reasoned that the power 'conferred by s 61 of the *Constitution* is to be measured by reference to Australia's status as a sovereign nation and by reference to the *terms* of the *Constitution* itself'.[169]

It seems that in all these decisions, from the *AAP Case* through to *Pape*, the High Court and the Federal Court are awake to this relationship between the *Constitution* and the common law, and are favouring the authority of the written instrument over outdated common law concepts such as the prerogative. It is to this premise that the core propositions of the inherent view may be ultimately linked. This conclusion is further supported by *Williams [No 2]*, where the High Court accepted that '[t]he history of British constitutional practice is *important* to a proper understanding of the executive power of the Commonwealth',[170] but then qualified this by stating that Australia was 'not a polity organised and operating under a unitary system or under a flexible constitution where *the Parliament is supreme*'.[171] It may be inferred from these dicta that the Court considers that, in Australia, the *Constitution* is paramount, and that the role of the prerogative, as with all prior English constitutional and political history, however prominent it was once assumed to be, is now only an 'important' consideration when interpreting s 61.[172] Hence, the inherent view's friction with the common law view begins to emerge, with the latter taking a different stance on the relationship between the *Constitution* and the common law.

2 *The Premise of the Common Law View*

By contrast, the core propositions of the common law view are aligned to a 'common law-centric' analysis of the Commonwealth's non-statutory executive power. That is, as between the common law and the *Constitution*, Professor Winterton and contemporary proponents of the common law view see the

[168] William Forsyth, *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (Stevens & Haynes, 1869) 181, cited in *Vadarlis* (2001) 110 FCR 491, 541 [187] (French J).

[169] (2001) 110 FCR 491, 542 [191] (emphasis added).

[170] (2014) 252 CLR 416, 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

[171] Ibid 469 [83] (emphasis added).

[172] Ibid 468–9 [80].

two sources of law on a more equal footing.[173] These scholars still begin with the text of s 61, but give greater interpretational emphasis to the fact that '[t]he executive power of the Commonwealth is vested *in the Queen*',[174] and use this as a textual indication that the common law is needed to ascertain the ambit of the non-statutory aspect of the power.[175] Professor Winterton argued that this approach to s 61 was imperative, as the *Constitution*, being a statute of British Parliament, '*must* be read against a background of the common law, including the common law rights and powers of the Crown'.[176]

In order to understand why Professor Winterton was of this view, it must be appreciated that he was influenced by, or at least sought the support of, the extra-curial writings of Sir Owen Dixon. On two occasions (once in each of his key texts) he cites Dixon's 1957 article, 'The Common Law as an Ultimate Constitutional Foundation',[177] both for the immediate proposition above[178] and for the idea that 'the Commonwealth was born into a common law environment'.[179]

In this article Dixon made the argument that, in contrast to the *United States Constitution*, which derives its normative power from 'the will of the people', in Australia 'we begin with the common law'.[180] He saw the common law as 'a jurisprudence antecedently existing into which our system came and

[173] See, eg, Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26; Selway, 'All at Sea', above n 37, 503; Zines, *The High Court and the Constitution*, above n 83, 342–3; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279; Gerangelos, 'Executive Power', above n 17, 460; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 98, 102; Twomey, 'Pushing the Boundaries of Executive Power', above n 86, 325–6; Kerr, above n 103, 4–5.

[174] *Commonwealth Constitution* s 61 (emphasis added).

[175] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50.

[176] Ibid (emphasis added).

[177] Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in John Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 203.

[178] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 243–4 n 54.

[179] Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26 n 38.

[180] Dixon, 'The Common Law as an Ultimate Constitutional Foundation', above n 177, 203. See also Sir Owen Dixon, 'The Law and the *Constitution*' in John Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 38; Sir Owen Dixon, 'Sources of Legal Authority' in John Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 198.

in which it operates',[181] and argued that just because the *Constitution* exists does not necessarily mean that it is the ultimate source of juristic authority within the Commonwealth.[182] He accepted that federalism meant a written constitution, but contended that:

> It is easy to treat the written [constitution] as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.[183]

From here, Dixon argued that although the *Constitution* was a statute of British Parliament, its normative power derived from the common law.[184] This was because the source of the British Parliament's authority derived from the principle of parliamentary sovereignty, which was itself a common law principle.[185]

Although Professor Winterton disagreed with Dixon on this last point, preferring to see the British Parliament's powers as simply 'sui generis',[186] it seems that he otherwise embraced Dixon's central thesis, particularly this idea of an amorphous common law creating the legal environment into which the Commonwealth was born.[187] Subsequent proponents of the common law view have 'generally concur[red]' with Professor Winterton's reliance on Dixon's 1957 article and the importance of Australia's common law heritage when

[181] Dixon, 'The Common Law as an Ultimate Constitutional Foundation', above n 177, 204.

[182] Ibid 205.

[183] Ibid. Cf Justice W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 91; Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the *Constitution*' in Nye Perram and Rachel Pepper (eds), *The Byers Lectures 2000–2012* (Federation Press, 2012) 195, 202–3; Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law *Constitution* Revisited' (2001) 29 *Federal Law Review* 57, 61–3; Simon Evans, 'Why Is the *Constitution* Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103, 114.

[184] Dixon, 'The Common Law as an Ultimate Constitutional Foundation', above n 177, 206–7.

[185] Ibid 207–8; Dixon, 'Sources of Legal Authority', above n 180, 199. See also Sir Victor Windeyer, '"A Birthright and Inheritance" — The Establishment of the Rule of Law in Australia' (1962) 1 *Tasmanian University Law Review* 635, 653.

[186] George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *Law Quarterly Review* 591, 592.

[187] See, eg, Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26.

interpreting s 61.[188] As Professor Zines stated (although not directly citing Professor Winterton): 'the Commonwealth was born into a common law world where rules existed as to the powers and legal position of the Crown, which the Commonwealth inherited as a government of the Queen'.[189] This is why, properly traced, the premise of the common law view may be linked to the jurisprudential views of Dixon and this idea of the *Constitution* as being legally and conceptually dependent on the common law.

Accordingly, it is a small step in logic to understand why the advocates of the common law view are adamant that the prerogative should be the key basis of the Commonwealth's non-statutory executive power, with s 61's meagre text being almost unintelligible without reference to the common law.[190] As Professor Winterton stated:

> The futility of attempting to define the ambit of federal executive power by allusion to abstract notions of "executive power" and not by reference merely to … the prerogative is demonstrated by the poor result of endeavours to do so.[191]

These sentiments explain why the supporters of the common law view are critical of Mason J's approach in the *AAP Case*,[192] the plurality's reasoning in *Davis*,[193] Gummow J's dictum in *Re Ditfort*,[194] French J's judgment in *Vadarlis*,[195] and the 'preponderant drift' in the case law away from the prerogative,[196] culminating in *Pape*,[197] and affirmed by dicta in *Williams [No 1]* and *Williams [No 2]*.[198] These decisions were premised on the idea that

[188] Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 122. See also Gerangelos, 'Executive Power', above n 17, 460; Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic', above n 48, 197.

[189] Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 280.

[190] Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 116–17; Kerr, above n 103, 3–5, 12–13, 17–18; Selway, 'All at Sea', above n 37, 505–6.

[191] Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 70.

[192] (1975) 134 CLR 338, 397.

[193] (1988) 166 CLR 79, 92–4 (Mason CJ, Deane and Gaudron JJ).

[194] (1988) 19 FCR 347, 369.

[195] (2001) 110 FCR 491, 542 [191], 543 [193].

[196] Sawer, above n 28, 10.

[197] (2009) 238 CLR 1, 60 [127], 63–4 [133] (French CJ), 83 [214]–[215], 89 [232]–[233] (Gummow, Crennan and Bell JJ).

[198] See especially *Williams [No 2]* (2014) 252 CLR 416, 469 [82]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

the *Constitution* was the paramount source of law, superior to the common law, and thus the authority of s 61 needed to be respected at the virtual exclusion of outmoded English legal concepts.[199] This is why an acute disagreement emerges when the core propositions of the inherent view are compared with those of the common law view.

Ultimately, it would appear that the key moment at which the two views diverge is on this issue about the relationship between the *Constitution* and the common law, and the complicated dynamic between s 61 and the prerogative. And it is on this critical point that further analysis needs to be directed, if there is to be any chance of bringing these two views closer together.

C *Evaluation: The Triumph of the Inherent View?*

Exploring this critical point of divergence between the inherent view and the common law view requires consideration of an article written by Professor Gummow in 2005, namely, 'The *Constitution*: Ultimate Foundation of Australian Law?'[200] This article is of particular relevance as it not only addresses the relationship between the *Constitution* and the common law, but also directly responds to Dixon's 1957 article.[201]

Professor Gummow argues that Dixon invoked 'the common law in a temporal and institutional continuum', and therefore masked the change brought on 'by the establishment and operation of the Australian federal system'.[202] He posits that this continuum is no longer accepted by the High Court, and stands contrary to the important dictum of *Attorney-General (WA) v Marquet* ('*Marquet*') that 'constitutional norms, whatever may be their historical origins, are now to be traced to *Australian sources*'.[203] This leads Professor Gummow to conclude, in relation to Dixon's ideas about the 'anterior operation' of the common law, that '[t]he time is now past for the treatment of Australian constitutionalism as controlled by what seems the

[199] See especially *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

[200] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30.

[201] Ibid 167, 170–2.

[202] Ibid 171.

[203] (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (emphasis added). See also Saunders, *The Constitution of Australia*, above n 27, 178; Appleby and McDonald, above n 27, 272–3.

continuing intellectual agonies attending British constitutionalism'.[204] This conclusion shows the legal imprecision of viewing the common law as the ultimate source of juristic authority, and overstating the importance of Australia's common law heritage.[205]

It therefore follows that Professor Gummow's response to Dixon may also weaken the premise of the common law view. The argument may be put that the common law view proceeds from the false premise that there is a continuation of the Crown's common law powers into the Australian federal context.[206] Indeed, the prerogative is an English legal concept developed in a *unitary* environment and, as such, consistent with Professor Gummow's response to Dixon, the common law view perpetuates the illusion that it can operate under a rigid constitution.[207]

Proponents of the common law view may respond to this by arguing that Professor Winterton's notion of 'breadth' is sufficient to reconcile the Crown's powers as recognised by the English common law with the federal structure of the *Constitution*.[208] But, if the argument is understood correctly, the concept of 'breadth' merely connotes the subject matters over which the power may be exercised; it in no way modifies the content or nature of the power, nor does it alter its source.[209] This brings the common law view into conflict with the dictum from *Marquet*,[210] and may better explain the High Court's rejection of the common assumption in *Williams [No 1]*.[211] All parties in the case assumed that the Crown's common law powers were operative in the Australian context

[204] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 171 (citations omitted).

[205] See, eg, Evans, above n 183, 111–12.

[206] See, eg, Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50–1; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26; Gerangelos, 'Executive Power', above n 17, 460; Kerr, above n 103, 4–5; Selway, 'All at Sea', above n 37, 504–6; Zines, *The High Court and the Constitution*, above n 83, 342–3, 359; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279–81.

[207] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 171.

[208] See generally Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 29–30.

[209] See, eg, Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic', above n 48, 193.

[210] (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[211] (2012) 248 CLR 156, 187 [27], 192–3 [36]–[37], 205–6 [60]–[61] (French CJ), 228–33 [125]–[137] (Gummow and Bell JJ), 352–3 [518]–[524], 355–8 [535]–[544] (Crennan J).

without considering the legal basis for the assumption that the ability of a federal polity to contract was identical to the Crown's capacity to do so at common law.[212] This was the concern of the High Court, and neither the Commonwealth's legal team nor the invocation of Professor Winterton's writings could provide a satisfactory answer.[213]

Another chance arose in *Williams [No 2]*, but a similar mistake was made; the Commonwealth's legal team assumed that the Crown's power to contract at common law flowed into s 61, and conferred on the Commonwealth this very capacity.[214] Again, the High Court rejected this assumption because it derived from the false premise that the Commonwealth's non-statutory executive power was identical to that of the United Kingdom.[215] Clearly, that cannot be the case: the Commonwealth's non-statutory executive power must derive from an Australian source of law, and not the English common law.[216] And, as the High Court recognised in an important footnote, the extent of this power is still unsettled and being debated in the United Kingdom, and 'it is neither necessary nor appropriate to enter upon that subject'.[217]

Accordingly, Professor Gummow's article may be used, on one interpretation, to undermine the premise of the common law view. Once this occurs, the flaws in the core propositions that derive from this intellectual foundation begin to emerge. It is therefore analytically tempting to further develop this critique of the common law view; indeed, Professor Gummow's response to

[212] Ibid 187 [26] (French CJ). See, eg, Commonwealth, Minister for School Education, Early Childhood and Youth, and Minister for Finance and Deregulation, 'Submissions of First, Second and Third Defendants', Submission in *Williams [No 1]*, No S307/2010, 11 July 2011, [20], [41].

[213] Cf *Williams [No 1]* (2012) 248 CLR 156, 310 [379], 311 [383], 312–13 [385] (Heydon J).

[214] (2014) 252 CLR 416, 468 [79] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See, eg, Commonwealth and Minister for Education, 'Annotated Submissions of the First and Second Defendants', Submission in *Williams [No 2]*, No S154/2013, 4 April 2014, [119].

[215] *Williams [No 2]* (2014) 252 CLR 416, 469 [82]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[216] *Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[217] *Williams [No 2]* (2014) 252 CLR 416, 468 n 161 (French CJ, Hayne, Kiefel, Bell and Keane JJ), citing *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, 1695–6 [46]–[47] (Lord Hoffmann); *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358, 2371–2 [28] (Lord Sumption SCJ). Cf F W Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131; Harris, above n 24; John Howell, 'What the Crown May Do' (2010) 15 *Judicial Review* 36. See also Lindell, 'The Changed Landscape of the Executive Power', above n 129, 361 n 58.

Dixon invites this line of analysis. This would indicate that these two positions truly are mutually exclusive, with the resultant triumph of the inherent view.

IV Entering the Debate: The Analytical Middle Ground

A *The Symbiotic Relationship*

However, the conclusion intimated above may be challenged and overcome. This is because reading Professor Gummow's article in the suggested manner would misrepresent his argument. A more subtle interpretation of his article shows that he does not categorically reject Dixon's views, and even accepts that the common law is still an important source of law in Australia.[218]

This follows from his endorsement of the notion of a 'symbiotic relationship' between the *Constitution* and the common law,[219] as recognised by Brennan J in *Theophanous v Herald & Weekly Times Ltd*.[220] In interpreting Brennan J's judgment, he suggests that while '"the *Constitution* itself and laws enacted under the powers it confers may abrogate or alter the rules of the common law", it is the common law which "informs [the] text" of the *Constitution*'.[221] Professor Gummow gives Brennan J's notion considerable currency, and uses it to analyse the relationship between the *Constitution* and the common law as one of *mutual dependence*.[222] That is, there are situations where provisions of the *Constitution* are 'incomprehensible' without reference to the common law.[223] Conversely, there are situations where the common law, as developed in England, is not suited to the Australian federal context: in these cases, it is the *Constitution* that modifies the common law.[224]

By advancing this argument, Professor Gummow is not necessarily contradicting Dixon's position. Rather, he is merely illustrating how 'propounding absolute propositions admitting of no qualification' as to the ultimate source of juristic authority in Australia, like those seen throughout Dixon's extra-

[218] See, eg, Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172–3, 177–81.

[219] Ibid 172.

[220] (1994) 182 CLR 104, 141.

[221] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172.

[222] Ibid 172–3, 177–81.

[223] Ibid 172.

[224] Ibid 180–1.

curial writings,[225] can no longer occur in the 21st century.[226] As Professor Gummow explains, Dixon's extra-curial writings emerged in a period when the High Court always followed the decisions of the House of Lords and appeals could still be made to the Privy Council.[227] Due to these two procedural realities, it was 'appropriate to consider the common law applied in Australian cases as no different to the common law of England'.[228]

But this is no longer the case. After the passing of the *Australia Act 1986* (Cth), and several landmark High Court cases,[229] it is now legally incorrect to speak of the common law as one unified body.[230] Instead, it is appropriate to refer to the 'common law in Australia', as is now recognised under s 80 of the *Judiciary Act 1903* (Cth), as amended in 1988 to replace 'the common law of England'.[231]

Professor Gummow has gone into greater depth regarding Australia's post-colonial transition elsewhere,[232] drawing on the ideas of Sir Robert Menzies about the need to understand this transition both from a legal and political perspective.[233] Correctly perceived, these changes confirmed the effect of federation, and completed the process of separation between Australia and the United Kingdom, the legal consequences of which are those accepted in *Marquet*: constitutional norms within the Commonwealth now need to be linked to *Australian* sources of law.[234]

225 See, eg, Dixon, 'The Common Law as an Ultimate Constitutional Foundation', above n 177, 203–4, 207, 212–13; Dixon, 'The Law and the *Constitution*', above n 180, 56–60; Dixon, 'Sources of Legal Authority', above n 180, 199, 201.

226 Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 181.

227 Ibid 174–5.

228 Ibid 174.

229 *Sue v Hill* (1999) 199 CLR 462, 501–3 [90]–[94] (Gleeson CJ, Gummow and Hayne JJ), 525–6 [165]–[166] (Gaudron J); *Lipohar v The Queen* (1999) 200 CLR 485, 501 [26] (Gleeson CJ), 505–10 [43]–[59] (Gaudron, Gummow and Hayne JJ); *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ).

230 Cf Dixon, 'Sources of Legal Authority', above n 180, 199.

231 *Law and Justice Legislation Amendment Act 1988* (Cth) s 41(1).

232 William Gummow, 'The Australian *Constitution* and the End of Empire — A Century of Legal History' (Revised version of speech delivered at the Legal Seminar Series, Supreme Court of Queensland, 30 October 2012) 4; Gummow, *Change and Continuity*, above n 183, 71–93.

233 Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 7.

234 (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

This is why a more subtle reading of Professor Gummow's article shows that he is merely developing the idea that the relationship between the *Constitution* and the common law is more complicated now than it was when Dixon was writing. This is why his argument, properly understood, cannot accurately be used to challenge the premise of the common law view in the way demonstrated above, for he clearly accepts the ongoing utility of the common law in deciphering technical terms within the *Constitution*.[235] This not only shows the viability of the common law view, it also explains why the High Court still accepts the relevance of English constitutional history and practice when interpreting s 61.[236] In this sense, the inherent view and the common law view are not necessarily opposed, but rather, their mutual existence is further evidence of the complexity of the Commonwealth's non-statutory executive power in the 21st century, and why unqualified propositions cannot be made on this vexed constitutional question.

Thus, viewing *Pape*, *Williams [No 1]* and *Williams [No 2]* as endorsing a '*Constitution*-centric' analysis of s 61 and the common law view as founded on a 'common law-centric' premise, despite what the evidence suggests, may be too reductive. The better approach is to appreciate the complexity of the nature and ambit of the Commonwealth's non-statutory executive power, and understand *why* there are two views on this issue, and *what* their coexistence reveals about the nature of this complexity. The logical extension of Professor Gummow's argument is that s 61 and the prerogative may be symbiotically related. If this is the case, then this would make the core propositions of both the inherent view and the common law view relevant to understanding this intricate dynamic. In turn, this should be seen as the shared objective that brings these two positions closer together, and may even form the middle ground that analytically unites them.

B *Development in Other Contexts*

This conclusion rests on the contention that there is a symbiotic relationship between the *Constitution* and the common law, and that this may be applica-

[235] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172–3, 177–81.

[236] *Williams [No 2]* (2014) 252 CLR 416, 468–9 [80]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 210–11 [30]–[34] (French CJ), 225–7 [85]–[90] (Gummow, Hayne, Heydon and Crennan JJ).

ble to the dynamic between s 61 and the prerogative. Before exploring this possibility, the point needs to be made that this idea of a mutual dependence between the *Constitution* and the common law has been developed in other contexts outside of executive power.[237] This is illustrated by three examples.

The first concerns the interpretation of s 75(v) of the *Constitution*, which gives the High Court original jurisdiction to hear 'all matters' in which a 'writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. On its face, this provision reveals little about the nature of these writs.[238] For over a century, this did not present an issue because it was understood that s 75(v) was a reference to the 'prerogative writs' at common law.[239] Historically, the courts of King's Bench in England issued these writs, and the Supreme Courts of the Australian colonies adopted this function.[240] Section 75(v) was included in the *Constitution* to ensure that the jurisdiction of the High Court to issue these writs could not be removed by legislation.[241]

However, in the 2007 decision of *Bodruddaza v Minister for Immigration and Multicultural Affairs* ('*Bodruddaza*'),[242] the High Court, building on key dicta from several judges in *Re Refugee Review Tribunal; Ex parte Aala*,[243] recognised that there was an issue with the continued use of the expression 'prerogative writs' in Australia.[244] Indeed, this terminology connoted the role the writs played in the English common law, rather than their function in a federal state.[245] Thus, the Court explained that the writs performed a different role in the Australian context by protecting 'not only the rights of all natural

237 See generally Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172–3, 177–81.

238 Ibid 172.

239 Chief Justice Robert French, 'Constitutional Review of Executive Decisions — Australia's US Legacy' (Speech delivered at the Chicago Bar Association, John Marshall Law School, 25 and 28 January 2010) 6.

240 Ibid.

241 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511–12 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

242 (2007) 228 CLR 651.

243 (2000) 204 CLR 82, 92–4 [18]–[25] (Gaudron and Gummow JJ), 133–4 [138] (Kirby J), 140–1 [161]–[162] (Hayne J).

244 *Bodruddaza* (2007) 228 CLR 651, 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), 676 [79] (Callinan J).

245 Ibid 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

and corporate persons affected' (as they do under the English common law), but also 'the position of the States as parties to the federal compact'.[246] This last point is the additional function that is sui generis to Australia because, unlike in the United Kingdom, a 'jurisdictional error might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred'.[247] To clarify the ambiguity, the Court modified the nomenclature to 'constitutional writs', thus symbolising the indigenisation of the English legal concept.[248] This is an example of the *Constitution* and the common law working symbiotically: s 75(v) is 'incomprehensible' without reference to the common law, but the 'prerogative writs', without modification by the *Constitution*, are not suited to a federal context.[249]

The second example concerns the operation of the common law of defamation, and the way it interacts with the implied freedom of political communication. This issue was addressed in *Lange v Australian Broadcasting Corporation* ('*Lange*'), where the plaintiff sued the Australian Broadcasting Corporation ('ABC') over the publication of defamatory material.[250] The ABC argued that the defamatory material was published 'pursuant to a freedom guaranteed by the *Commonwealth Constitution* to publish material … in the course of discussion of government and political matters'.[251] In two earlier decisions, the High Court had indicated that the implied freedom operated as a positive immunity, preventing an action arising under the common law of defamation against individuals who were engaging in 'political discussion'.[252]

In *Lange*, however, the Court refined this approach by holding that the tort of defamation was still operative, even when the implied freedom was infringed, but that the common law defence of qualified privilege had to be

246 Ibid.

247 Ibid. See also French, 'Constitutional Review of Executive Decisions', above n 239, 6.

248 *Bodruddaza* (2007) 228 CLR 651, 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

249 See Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172–3.

250 (1997) 189 CLR 520.

251 Ibid 521.

252 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 140–1 (Mason CJ, Toohey and Gaudron JJ), 185 (Deane J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 234 (Mason CJ, Toohey and Gaudron JJ), 236 (Brennan J).

expanded to also protect the discussion of political issues.[253] Thus, *Lange* illustrates how ss 7 and 24 (the provisions to which the Court linked the implied freedom) of the *Constitution* indigenise the common law of defamation in this respect.[254]

Finally, the third example concerns the operation in a federal context of the common law choice of law in tort rules. The High Court addressed this issue in *John Pfeiffer Pty Ltd v Rogerson* ('*Pfeiffer*'), in considering whether the *Workers Compensation Act 1987* (NSW) limited the damages recoverable by the plaintiff who, although commencing proceedings in the Supreme Court of the Australian Capital Territory, suffered injury in New South Wales.[255] Under the common law at the time, the principle of double actionability applied,[256] as recognised in *Phillips v Eyre*.[257] This principle was a 'threshold' test that required foreign torts to: be actionable in the forum; and attract civil liability in the place where the tort was committed.[258] If these two requirements were satisfied, the *lex fori* would apply as the substantive law of the tort.[259]

In *Pfeiffer*, however, the High Court held that the choice of law in tort rules needed to be reconciled with federalism.[260] Thus, the Court reasoned that the strict application of the *lex loci delicti* for intranational torts was sufficient

253 (1997) 189 CLR 520, 568, 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

254 Ibid 568–75. See also Gummow, *Change and Continuity*, above n 183, 88–90; H P Lee, 'The Implied Freedom of Political Communication' in H P Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 399; F A Trindade, 'Defamation in the Course of Political Discussion — The New Common Law Defence' (1998) 114 *Law Quarterly Review* 1; Michael Chesterman, 'Privileges and Freedoms for Defamatory Political Speech' (1997) 19 *Adelaide Law Review* 155; Michael Chesterman, 'The Common Law Rules in Defamation — OK?' (1998) 6 *Tort Law Review* 9.

255 (2000) 203 CLR 503.

256 *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 38 (Brennan, Dawson, Toohey and McHugh JJ); *Breavington v Godleman* (1988) 169 CLR 41, 110–12 (Brennan J), 142 (Dawson J), 154–60 (Toohey J); *Koop v Bebb* (1951) 84 CLR 629, 642 (Dixon, Williams, Fullagar and Kitto JJ); *Musgrave v Commonwealth* (1937) 57 CLR 514, 532 (Latham CJ), 543 (Rich J).

257 (1870) LR 6 QB 1, 28–9 (Willes J).

258 *Pfeiffer* (2000) 203 CLR 503, 519–21 [20]–[26] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See, eg, *The Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Henry Benham* (1868) LR 2 PC 193, 202–3 (Selwyn LJ).

259 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 41–2 (Windeyer J).

260 (2000) 203 CLR 503, 526 [38] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

to give litigants certainty in the federal context, and also respected the 'authority' of the state legislature of the 'law area' in which the tort was suffered.[261] Considerations were also made for the s 118 'full faith and credit clause' in the *Constitution*, to prevent one state from refusing to apply the substantive law of another.[262] Similar to *Lange*, *Pfeiffer* demonstrates how the *Constitution* modifies the common law, adapting it to Australia's unique constitutional environment.[263]

There has since emerged a body of literature that attempts to organise the way in which the *Constitution* modifies the common law, drawing particularly on the approaches taken in *Lange* and *Pfeiffer*.[264] Although the issue is still being debated, this literature supports the existence of an Australian common law, and the rationale underpinning Professor Gummow's contention that the *Constitution* and the common law symbiotically interact in the 21st century.[265] The question thus becomes whether this notion is applicable to the dynamic between s 61 and the prerogative.

C *Applicability to s 61 and the Prerogative*

Although this possibility has never previously been raised in the case law or the literature, its logic is attractive. An analogy may be drawn between ss 61 and 75(v) based on their similarly terse language and the fact that both

[261] Ibid 540 [86].

[262] Ibid 532–4 [59]–[65]. See also *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 576–7 (Rich and Dixon JJ), 581 (Starke J), 587–8 (Evatt J), 589 (McTiernan J).

[263] *Pfeiffer* (2000) 203 CLR 503, 524 [34], 534–5 [66]–[71] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[264] See, eg, Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (Law and Policy Paper No 13, Centre for International and Public Law, The Australian National University, 1999) 10–14; Kathleen Foley, 'The *Australian Constitution*'s Influence on the Common Law' (2003) 31 *Federal Law Review* 131, 132–5; Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 253–7; Greg Taylor, 'Why the Common Law Should Be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone' (2002) 26 *Melbourne University Law Review* 623, 624–7; Adrienne Stone, 'The Common Law and the *Constitution*: A Reply' (2002) 26 *Melbourne University Law Review* 646, 648–51. See also *Aid-Watch v Federal Commissioner of Taxation* (2010) 241 CLR 539, 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 484–8 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[265] See especially Zines, 'The Common Law in Australia', above n 264, 9.

provisions were drafted on the assumption that the English common law would inform their interpretation.[266] Thus, the approach taken in *Bodruddaza*[267] may be applicable to the relationship between s 61 and the prerogative; and consistent with Chief Justice Spigelman's suggestion, there may be a need for a change in nomenclature.[268] The expression 'executive power' is sufficient; it is the phrase used in s 61, and the terminology of the *Constitution* is preferable to that of the common law.[269]

However, in light of what was said in *Lange*, that '[o]f necessity, the common law must conform with the *Constitution*',[270] the High Court needs to explain *how* the Commonwealth's 'executive power' differs from the Crown's powers at common law.[271] The answer may lie in seeing whether the prerogative can be adjusted to its new legal context. For as the Court stated in *Pfeiffer*: 'Ideally, [the common law] should also *adapt* so as to provide *practical solutions to particular legal problems which occur in the federal system*'.[272] In this sense, with it being almost a truism that the text of s 61 is incomprehensible without reference to the prerogative, the *Constitution* may be seen to rely on the common law for conceptual guidance.[273]

That being said, it is equally true that the prerogative, in its current form as recognised by the English common law, is not suited to Australia's unique constitutional landscape, and is therefore subject to being modified by the

266 Quick and Garran, above n 73, 780–1; Selway, 'All at Sea', above n 37, 501–6.

267 (2007) 228 CLR 651, 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

268 Spigelman, above n 147, 351. Cf Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

269 Spigelman, above n 147, 351.

270 (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

271 See, eg, ibid 568–75; *Bodruddaza* (2007) 228 CLR 651, 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Pfeiffer* (2000) 203 CLR 503, 529–32 [50]–[58] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

272 (2000) 203 CLR 503, 528 [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

273 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 27–8, 50–1, 70; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 25; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 116–17; Kerr, above n 103, 3–5, 12–13, 17–18; Selway, 'All at Sea', above n 37, 505–6; Campbell, above n 104, 88, 88–90; Cooray, above n 104, 8–9; Crommelin, above n 8, 130–1, 147–8.

Constitution and indigenised accordingly.[274] It therefore seems appropriate to look at this complexity through the lens of *Bodruddaza*, *Lange* and *Pfeiffer*. If this occurs, then Professor Gerangelos's suggestion of a 'native form of the prerogative', and its potential to be *adapted* to novel situations, should be considered.[275] He accepts that the answer may lie in the idea of the prerogative being recognised by 'the *Australian* common law',[276] and even cites Professor Gummow's article[277] in support of the proposition that the common law in Australia as it relates to executive prerogatives and capacities, 'where appropriate, continues to inform the interpretation of the written instrument'.[278]

Although Professor Gerangelos appears to be the only proponent of the common law view to make this suggestion (Professor Winterton appeared to give greater emphasis to the English common law when interpreting s 61),[279] it is a step in the right direction. It would refine the argument of the common law view in a way that meets the High Court's dictum in *Marquet*, and would account for the amendment that has taken place in s 80 of the *Judiciary Act 1903* (Cth).[280] It also shows the potential for the common law view to be reformulated in a way that makes it more reconcilable with the core propositions of the inherent view.

That is, if Professor Gerangelos's suggestion is taken to its logical conclusion, then the Commonwealth's non-statutory executive power should no longer be confined to the limitations recognised by the English common law.[281] Consistent with the divisibility of the Crown,[282] the Australian common law would be free to adapt, and therefore develop, the prerogative to the point where the Queen of Australia may have *more* power than the Queen of

274 See, eg, *Williams [No 2]* (2014) 252 CLR 416, 467–9 [76]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

275 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

276 Ibid 121 (emphasis added).

277 Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 178.

278 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 108 n 66.

279 See, eg, Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 26.

280 Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 174.

281 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

282 *Sue v Hill* (1999) 199 CLR 462, 501–3 [90]–[94] (Gleeson CJ, Gummow and Hayne JJ), 525–6 [165]–[166] (Gaudron J). Cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

the United Kingdom.[283] Textually this is possible; as the first clause in s 61 could be read as '[t]he executive power of the Commonwealth is vested in the Queen [in right of Australia]'.[284] This would mean that Professor Zines's critique of *Vadarlis* would no longer apply; even if the framers did not intend to confer coercive power to the Commonwealth which was denied to the Imperial government in 1901,[285] the Australian common law would be free to develop the constitutional concept of 'executive power' to meet the needs of a modern state.[286] This would overcome the reservation of French CJ in *Pape* regarding the prerogative's archaism,[287] as 'this native form of the prerogative is more amenable to development and application in novel situations than the prerogative may be in Britain'.[288]

Conversely, it would also follow that the Queen of Australia may have *less* power than the Queen of the United Kingdom in other respects; for example, the Commonwealth's capacity to contract and spend may be more limited due to federalism and ch IV considerations.[289] This may better explain the High Court's reasoning in *Williams [No 1]* when differentiating between the Commonwealth's 'executive power' to contract and spend and the analogous ability of the Crown at common law, and why there is a qualitative difference between the two.[290] At the very least, it would meet the High Court's dictum in *Williams [No 2]* regarding how the Commonwealth's executive power is not identical to that of the United Kingdom.[291]

Moreover, whether an indigenous prerogative would be susceptible to legislative abrogation is a complicated question. However, despite Australian authorities being less liberal by requiring a clear legislative intention to

283 Cf *Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ).

284 Renfree, above n 37, 471. See also *Royal Style and Titles Act 1973* (Cth) s 2(1).

285 Zines, *The High Court and the Constitution*, above n 83, 359; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 281.

286 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

287 (2009) 238 CLR 1, 60 [127].

288 Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 125.

289 See *Williams [No 2]* (2014) 252 CLR 416, 467–8 [76]–[79] (French CJ, Hayne, Kiefel, Bell and Keane JJ). Cf *New South Wales v Bardolph* (1934) 52 CLR 455, 475 (Evatt J).

290 (2012) 248 CLR 156, 203–6 [58]–[61] (French CJ), 232–3 [134]–[137], 236–9 [150]–[159] (Gummow and Bell JJ), 253–4 [204]–[206], 258–9 [215]–[216] (Hayne J), 347–8 [501]–[503] (Crennan J), 368–9 [577], 370 [581], 373–4 [594]–[595] (Kiefel J). See also Hartford Davis, above n 125, 281–2.

291 (2014) 252 CLR 416, 468 [79] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

abrogate,[292] there is no reason why the Australian common law (while free to do so) would deviate from this fundamental English principle.[293] This accords with the fact that the principle of responsible government has now been constitutionalised,[294] and the corollary that s 61 must be interpreted in a way that preserves Parliament's ability to control executive action.[295]

The more critical issue for the purposes of this article is the relationship between an indigenous prerogative and the so-called 'nationhood power'. The above analysis indicates that approaching the dynamic between s 61 and the prerogative through the lens of *Bodruddaza*, *Lange* and *Pfeiffer* refines the common law view, and potentially reconciles it with the core propositions of the inherent view. It may follow that the need for a nationhood power falls away. This is because an indigenous prerogative answers the core concerns of both positions: consistent with the common law view, it addresses the textual uncertainty created by s 61's terse language;[296] yet, consistent with the inherent view, it does so in a way that links the constitutional concept of 'executive power' to an Australian source of law.[297] This addresses the High Court's reluctance to rely on antiquated common law concepts,[298] and illustrates why recourse to nationhood reasoning — where there is a viable alternative in an indigenous prerogative — would be no longer be necessary.

A final reason may be ventured in support of an indigenous prerogative. In *British Broadcasting Corporation v Johns*, Diplock LJ stated that it is '350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[299]

[292] See, eg, *Vadarlis* (2001) 110 FCR 491, 501–4 [33]–[40] (Black CJ), 539–40 [181]–[182] (French J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 205 [14] (French CJ), 231 [94] (Gummow, Hayne, Heydon and Crennan JJ); *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ). See also Winterton, 'The Relationship between Commonwealth Legislative and Executive Power', above n 5, 45–6. See generally Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41 *Federal Law Review* 363.

[293] *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526, 528 (Lord Dunedin), 540 (Lord Atkinson), 554 (Lord Moulton), 561 (Lord Summer), 575 (Lord Parmoor).

[294] *Lange* (1997) 189 CLR 520, 557–9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[295] See Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 70–1.

[296] Ibid 50–1; Selway, 'All at Sea', above n 37, 505–6; Kerr, above n 103, 3, 12–13.

[297] *Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[298] *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

[299] [1965] Ch 32, 79.

Despite this important dictum, the nationhood power appears to do exactly this: it recognises a form of non-statutory executive power that goes beyond those non-statutory powers retained by the Crown in its 17th century settlement with Parliament.[300] By contrast, an indigenous prerogative is consistent with Diplock LJ's dictum. This is because it merely seeks to *adapt* the Crown's common law powers to meet novel situations that will inevitably arise in modern and federal polity. And while it may be conceded that, as Professor Winterton noted, 'the line between adaption of an existing prerogative and the creation of a new power may be a fine one', the distinction between 'adaption' and 'expansion' is a justiciable question that may be answered by a court.[301]

Accordingly, in light of the foregoing, it may be a propitious moment for the High Court to reconsider the existence of a so-called nationhood power, and in its place, give serious thought to an indigenous prerogative as a commendable alternative. This conclusion appears to be the logical extension of Professor Gummow's response to Dixon's article and, particularly, the idea that the *Constitution* and the common law share a symbiotic relationship.

D *Testing the Logic of This Argument: The Assumption Rebutted*

The recent case of *CPCF*, handed down on 28 January 2015, provides a unique opportunity to test the logic of the argument being advanced in this article. The case concerned the Commonwealth's interception of a vessel in Australia's contiguous zone and subsequent detention of the 157 asylum seekers on board.[302] These individuals (including the plaintiff) were transferred to an Australian border patrol vessel.[303] The National Security Committee of Cabinet decided on their removal, and the Australian vessel proceeded into international waters en route to India.[304] The Minister then redirected the vessel to the Cocos (Keeling) Islands, where the detainees were held under s 189(3) of the *Migration Act 1958* (Cth).[305] The plaintiff brought an action in

[300] Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 108, 127. See also Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 280–1.

[301] Winterton, 'The Prerogative in Novel Situations', above n 155, 408 (citations omitted).

[302] *CPCF* (2015) 316 ALR 1, 5–6 [1]–[2] (French CJ).

[303] Ibid 6 [2].

[304] Ibid.

[305] Ibid 6 [3].

false imprisonment in the High Court's original jurisdiction, arguing that his detention was without lawful justification.[306]

There were two possible legal bases negativing this claim: the *Maritime Powers Act 2013* (Cth) ('*Maritime Powers Act*'); or the Commonwealth's non-statutory executive power under s 61.[307] Although a 4:3 majority (French CJ, Crennan, Gageler and Keane JJ; Hayne, Bell and Kiefel JJ dissenting) ultimately decided the case under s 72(4) of the *Maritime Powers Act*, which permits a maritime officer to remove a person from Australia's migration zone,[308] five judges still provided some insight on the s 61 issue.[309] In obiter dictum, French CJ restated his aversion to the prerogative, arguing that it does not 'comprehensively [define] the limits of the aspects of executive power'.[310] Hayne and Bell JJ, in their joint judgment, thought that neither the prerogative nor the nationhood power were relevant to the given question;[311] their Honours instead preferred to narrow their analysis, and invoked dicta from *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[312] to reject the Commonwealth's submission.[313]

Most relevant, however, for the purposes of this article are the judgments of Keane J and Kiefel J, with each judge adopting an approach to s 61 that may accurately be categorised as inherent view and common law view reasoning respectively. Keane J took a functional approach to the Commonwealth's non-statutory executive power. His Honour directly cited French J's judgment in *Vadarlis*,[314] seemingly endorsing the proposition that it could not be contemplated 'that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not

306 Ibid 6–7 [4].

307 Ibid. See also Minister for Immigration and Border Protection and Commonwealth, 'Submissions of the Defendants', Submissions in *CPCF*, No S169/2014, 30 September 2014, [10], [66]–[81].

308 *CPCF* (2015) 316 ALR 1, 20–1 [54] (French CJ), 54–5 [229] (Crennan J), 87 [393] (Gageler J), 107–8 [513] (Keane J).

309 Ibid 16–17 [40]–[42] (French CJ), 37–40 [137]–[151] (Hayne and Bell JJ), 60–8 [258]–[286] (Kiefel J), 100–4 [476]–[495] (Keane J).

310 Ibid 17 [42].

311 Ibid 40 [150].

312 (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ).

313 *CPCF* (2015) 316 ALR 1, 39–40 [148]–[151].

314 (2001) 110 FCR 491, 543 [193].

part of the Australia community, from entering'.[315] This led his Honour to conclude that it could 'hardly be controversial' that the Commonwealth's executive power should also extend 'to the compulsory removal from Australia's contiguous zone of non-citizens who would otherwise enter Australia contrary to the *Migration Act*'.[316] Thus, with Keane J eschewing any consideration of the prerogative, emulating the approach taken by French J in *Vadarlis*, his Honour's reasoning is an example of the application of the inherent view.

By contrast, Kiefel J gave greater emphasis to the Crown's common law powers. Her Honour acknowledged the Commonwealth's submission that the scope of the power under s 61 is 'informed by the prerogative powers of the Crown',[317] and proceeded to determine the ambit of this power by examining whether the common law permitted the Crown to expel friendly aliens from its territory. Relying on the 'detailed analysis' undertaken by Black CJ in *Vadarlis*,[318] her Honour answered this question in the negative, ultimately concluding that legislation is required before the executive can detain friendly aliens for the purposes of expulsion.[319] Thus, with Kiefel J directly linking the construction of s 61 to the Crown's prerogative powers, emulating the approach taken by Black CJ in *Vadarlis*, her Honour's judgment may be characterised as an application of the common law view.

Accordingly, the contrast in reasoning between Keane J and Kiefel J not only reaffirms the existence of two competing approaches to s 61, it provides another instance where the two approaches have appeared in the same judgment (as occurred in *Vadarlis* between French J and Black CJ; and, more recently, in *Williams [No 1]* between the majority and Heydon J). As such, the logic of the argument advanced in this article may be illuminated by showing how the s 61 issue in *CPCF* could have been resolved through the application of a more balanced conception of the Commonwealth's non-statutory executive power (ie through the application of the 'indigenous prerogative').

The indigenous prerogative would apply to the facts of *CPCF* as follows. As with the inherent view and the common law view, the Commonwealth's

315 *CPCF* (2015) 316 ALR 1, 101 [482].

316 Ibid 102 [484].

317 Ibid 60–1 [259].

318 Ibid 62 [266], citing *Vadarlis* (2001) 110 FCR 491, 495–501 [4]–[29].

319 Ibid 63 [273].

'executive power' is to be sourced in s 61.[320] It is to be recognised that this power has a non-statutory aspect as it 'extends to the … maintenance of [the] *Constitution*'.[321] Equally important is that the power, although 'exercisable by the Governor-General', is 'vested in the Queen', and is therefore linked to the Crown's common law powers.[322] However, reading this reference to 'the Queen in right of Australia', it needs to be appreciated that the English common law no longer limits the Commonwealth's non-statutory executive power.[323] But, consistent with *Bodruddaza*, the English common law still remains the conceptual starting point when giving meaning to the abstract notion of 'executive power',[324] which in *CPCF* was the Crown's prerogative powers in relation to friendly aliens.[325] And, consistent with *Pfeiffer*, consideration should be given as to whether these powers may be applied 'so as to provide practical solutions to particular legal problems' arising on these facts.[326]

This is what Kiefel J failed to do; her Honour reasoned that if the common law does not recognise a broader power in the Crown to expel friendly aliens, then no such power could exist under s 61.[327] However, with respect, consideration should have also been given to whether the Australian common law should deviate from the English common law on this point. That is, Kiefel J could have sought to indigenise the prerogative, and attempt to *adapt* it to the novel circumstances presented by *CPCF*. Indeed, the English common law does recognise *some* non-statutory powers in the Crown in relation to friendly aliens, including the ability to refuse entry to its sovereign territory.[328]

320 *Re Ditfort* (1988) 19 FCR 347, 369 (Gummow J); Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Gerangelos, 'The Executive Power of the Commonwealth of Australia', above n 10, 124.

321 *Communist Party Case* (1951) 83 CLR 1, 230 (Williams J).

322 Winterton, *Parliament, the Executive and the Governor-General*, above n 14, 50; Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279–80.

323 Gerangelos, 'The Executive Power of the Commonwealth of Australia, above n 10, 119–23, 125.

324 (2007) 228 CLR 651, 665–8 [35]–[43] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

325 See Minister for Immigration and Border Protection and Commonwealth, 'Submissions of the Defendants', Submission in *CPCF*, No S169/2014, 30 September 2014, [71]–[72].

326 (2000) 203 CLR 503, 528 [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

327 See *CPCF* (2015) 316 ALR 1, 62–3 [266]–[270].

328 *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ).

Whether the power extends further is a matter of some controversy.[329] But, given Australia's geographical position, its accessibility by boat from neighbouring parts of Asia, and the fact that Australia is encountering a problem that the English common law did not have to address in the same frequency, then perhaps there is scope for the Australian common law to develop this prerogative to the point where the Commonwealth has the non-statutory power to remove friendly aliens from Australia's contiguous zone.[330] In other words, the recognition of an indigenous prerogative, in this narrow sense, would have allowed the same conclusion to be reached as Keane J, who put Australia's status as a modern and independent polity at the forefront of his Honour's reasoning,[331] while still drawing on the common law for useful interpretational guidance, in the manner demonstrated by Kiefel J.[332]

This conclusion suggests that there is scope for reconciling the core propositions of both the inherent view and the common law view, and that, at the very least, the assumption that these are two mutually exclusive positions may be rebutted. This is why future attempts to answer the Chief Justice's call 'for a principled approach to appropriate limits upon executive power' should be based on a more balanced conception of the Commonwealth's non-statutory executive power and on concepts that give due regard to the symbiotic relationship between s 61 and the prerogative.[333]

V Conclusion

The nature and ambit of the Commonwealth's non-statutory executive power will continue to be debated. It may be that the text of s 61 is 'barren ground

[329] See ibid 400–3, 407–14 (Barton J), 420–2 (O'Connor J); *Johnstone v Pedlar* [1921] 2 AC 262, 275 (Viscount Cave), 296 (Lord Philimore); *A-G (Canada) v Cain* [1906] AC 542, 546 (Lord Atkinson); *Musgrove v Toy* [1891] AC 272, 283 (Halsbury LC for the Court); *Re Adam* (1837) 1 Moo 460, 472–6; 12 ER 889, 893–5 (Chief Judge Erskine). See also *R v Carter; Ex parte Kisch* (1934) 52 CLR 221, 223 (Evatt J); *SS Afghan; Ex parte Lo Pak* (1888) 9 NSWR 221, 237 (Darley CJ); *Toy v Musgrove* (1888) 14 VLR 349, 423–5 (Holroyd J).

[330] Cf *CPCF* (2015) 316 ALR 1, 62–3 [266]–[270] (Kiefel J).

[331] Ibid 101–2 [482]–[484].

[332] Ibid 60–3 [259]–[270].

[333] French, 'The Executive Power', above n 47, 27.

for any analytical approach'.[334] But this should not deter attempts in the case law and literature from being made. Part II of this article detailed the histories of the two approaches that have emerged, and traced their respective origins to the ideas of many of Australia's leading constitutional lawyers. The division in origin between the inherent view and the common law view is an interesting facet of the debate, and it remains to be seen whether the disagreement between the judiciary and academia on this vexed question will endure. If this division is maintained, then there may be some utility in exploring ways to bring the two positions closer together. Until this occurs, the assumption as to their irreconcilable stances will continue untested.

In Part III, this article suggested a possible way in which this assumption may be challenged, and argued that, at its heart, this debate is about the pull between the *Constitution* and the common law, and how this tension informs the dynamic between s 61 and the Crown's common law powers. The inherent view continues to be premised on the need to favour the text of s 61 over archaic common law concepts such as the prerogative. The common law view, on the other hand, may still be linked to Professor Winterton's belief in the necessity of interpreting the *Constitution* as a statute of British Parliament, and respecting the anterior operation of the common law. As such, on one reading of Professor Gummow's article, it seems that the common law view proceeds from this outdated 'Dixonian starting point',[335] and it is analytically tempting to use this critique as a way of undermining its core propositions. This would suggest that the two positions are mutually exclusive, with the resultant triumph of the inherent view.

In Part IV, however, it was shown that Professor Gummow's article, on a closer reading, was consistent with a differently reasoned conclusion. His notion of a 'symbiotic relationship' between the *Constitution* and the common law revealed the ongoing utility of the common law in deciphering technical constitutional terms. Conversely, his article also showed the dependence of the common law on the *Constitution* in adapting outmoded English legal concepts to the new legal environment in which they now operate. Although this notion of mutual dependence has been developed in other contexts outside of executive power, the argument was put that the reasoning from

[334] Zines, 'The Inherent Executive Power of the Commonwealth', above n 22, 279, quoting David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, 1997) 272.

[335] Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?', above n 30, 172.

Bodruddaza, *Lange* and *Pfeiffer* is applicable to the dynamic between s 61 and the prerogative. Through this lens, it is apparent that, if the proponents of the common law view accept that the Commonwealth's non-statutory executive power may be released from the traditional limitations placed on the English Crown and thereby *adapted* to meet the realities of a modern and federal polity, then an indigenous prerogative may be retained as the measure of the ambit of this power. Accordingly, recourse to notions of 'nationhood' would no longer be necessary. The logic behind this argument was tested against the facts of *CPCF*, showing how the s 61 issue could have been decided on reasoning lying in the analytical middle ground between the judgments of Keane J and Kiefel J. This conclusion indicates that the assumption of mutual exclusion is open to being challenged, and therefore confirms the principal contention of this article: that s 61 may be approached in a more balanced way that draws on the core propositions of both the inherent view and the common law view.