

## THE CONCEPT OF THE CROWN

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*This article deals with the weight that is borne by the concept of the Crown in the public law of common law jurisdictions in the absence of a developed theory of the state. I argue that the concept of the Crown has evolved differently in different jurisdictions, in the wake of independence, in the course of the divergence of common law legal systems, under a range of influences that include constitutional context. I seek to sustain the claim by particular reference to Australia, where the terms of the Constitution, as interpreted and applied by the High Court, have made the concept of the Crown progressively less relevant to legal analysis. The point was demonstrated most recently by the decisions in the ‘School Chaplains cases’, amplifying the meaning of the ‘executive power of the Commonwealth’ in s 61 of the Constitution. Elsewhere in the common law world, including the United Kingdom itself, the scope of executive power continues to be informed by the concept of the Crown. In Australia, however, shaped by the federal constitutional context, the scope of Commonwealth executive power relies on the Crown only to the extent that s 61 includes some power ‘in the nature of the prerogative’. The themes of the article are topical and significant in their own right. They have particular relevance, however, in a symposium to honour the life and work of Sir Zelman Cowen, who occupied the position of the representative of the Crown in Australia with extraordinary distinction.*

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## I INTRODUCTION

One application of comparative constitutional law is to examine how a particular constitutional phenomenon that has evolved in one context adapts when it is transferred, by whatever means, to others. Usually, the adaptation retains traces of the original that may endure for a long time, in an illustration of path dependency. Typically, however, the constitutional phenomenon in question also changes in multiple ways, inadvertently or through deliberate action, in response to the new context of which it is part.

The purpose of this paper is to carry out this exercise in relation to the concept of the Crown as it evolved in the United Kingdom and was disseminated throughout the British Empire, through imitation and imposition. For obvious reasons, the Crown featured in arrangements for the self-government of polities that were subject to the tutelage of the Empire. Familiarity, inertia and, sometimes, *realpolitik* gave it continuing influence in these polities, even after independence was achieved. It seems likely that, even now, long after decolonisation, the concept of the Crown has left its mark on the constitutional arrangements of most member states of the Commonwealth of Nations, including those that have since become republics.<sup>1</sup> There would be merit in teasing out the extent to which this is so in a larger, collaborative project.

The ambit of this paper is more limited, however. Its primary focus is the adaptation of the concept of the Crown in the context of Australia, with particular reference to the important contemporary constitutional question of the scope of executive power. While the paper also touches on some of the factors that caused the concept of the Crown to evolve in different ways throughout the Commonwealth once it left its original setting, it does so primarily to assist to explain the divergence of Australian experience. Despite this relatively limited framework, however, the study offers several insights that are useful for broader comparative purposes. First, it provides a case study on how and why there may be different understandings of an apparently similar constitutional concept in relatively similar states. Secondly, it demonstrates the practical utility of comparative constitutional law in assisting to analyse and resolve complex constitutional problems at a time of change.

I am honoured to be involved in this symposium to celebrate the life and work of Sir Zelman Cowen. Sir Zelman taught me constitutional law and was largely responsible for my early interest in it. He was unfailing in his guidance and support to me for the rest of his life. It is fitting that the subject matter of

<sup>1</sup> The Commonwealth of Nations, formerly known as the British Commonwealth, comprises 53 member states most of which have historical ties to the British Empire.

this paper touches upon several aspects of his extraordinary contributions to scholarship and public life. Most obviously, as Governor-General of Australia from 1977–82, Sir Zelman was, effectively, the ‘Crown’ on one understanding of the term. No less significantly, he was a leading authority on federal jurisdiction which, however improbably, has helped to shape the concept of the Crown in Australia.<sup>2</sup>

## II ORIGINS IN THE UNITED KINGDOM

The concept of the Crown is used in multiple ways in the British constitutional tradition. It may refer literally to the Monarch in her public or, less frequently, private capacity, insofar as the two can be distinguished.<sup>3</sup> Alternatively, as Lord Templeman pointed out in the decision of the House of Lords in *M v Home Office*, it may refer to the executive branch of government,<sup>4</sup> potentially including the Monarch, Ministers and at least parts of the administration.<sup>5</sup> These two usages are connected, insofar as the Monarch is the titular head of the executive branch and the historical source of at least some of the powers exercised by it. Not surprisingly, in these circumstances, there is a fine and sometimes imperceptible distinction between references to the Crown and to the Monarch as King, Queen or Sovereign.<sup>6</sup> Janet McLean has noted that usage of the terminology of the Crown to denote the executive branch became more prevalent from the 1860s.<sup>7</sup> Fifty years later, Maitland described references to the Crown as a ‘convenient cover for ignorance’ that ‘saves us from asking difficult questions’ about the identity of the actor and the kind of power that is in play.<sup>8</sup>

<sup>2</sup> See Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959); Sir Zelman Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (Oxford University Press, 2<sup>nd</sup> ed, 1978).

<sup>3</sup> John Howell, ‘What the Crown May Do’ [2010] *Judicial Review* 36 describes the emergence of the distinction between the public and private capacities of the Crown and explains how and why the separation is imperfect.

<sup>4</sup> [1994] 1 AC 377, 395.

<sup>5</sup> Janet McLean has traced the origins of the idea that there were elements of the public sphere outside the concept of the ‘Crown’: Janet McLean, *Searching for the State in British Legal Thought* (Cambridge University Press, 2012) 140–8.

<sup>6</sup> Martin Loughlin, ‘The State, the Crown and the Law’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 33, 57.

<sup>7</sup> McLean, above n 5, 140.

<sup>8</sup> F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 418.

The concept of the Crown has been useful in the United Kingdom to convey a more abstract and continuing understanding of executive government that is distinct from the current administration, even if it is not consistently used in that way and even if other devices have been used to the same end. The aura of the Crown is an additional asset to executive government conveying, however imprecisely, the notions of public service and good faith. Reliance on the concept in the United Kingdom has been made both possible and, arguably, necessary by the course of the long, evolutionary history of the British Constitution. There has been no abrupt, lasting revolutionary break with the past and no formal, lasting, written constitution. Instead, a process of transition from relatively authoritarian monarchical rule to a parliamentary democracy in which the Monarch plays a largely formal role has occurred gradually through political practice explicated by constitutional theories, only occasionally assisted by legal change or institutional redesign. Three critical steps along the way help to explain the current usage of the concept of the Crown in the United Kingdom. One was the acceptance of the legal personality of the Crown, whether justified by reference to the person of the Monarch or by characterisation of the Crown as a corporation sole (or, occasionally, aggregate).<sup>9</sup> A second was the progressive loss of royal power to adjudicate and legislate to the courts and Parliament respectively, leaving the Crown with a somewhat nebulous residue of 'executive' power. And a final step, also relevant for present purposes, was the progressive constitutionalisation of the monarchy, through acceptance that the powers held by the Crown would always, or almost always, be exercised on the advice of Ministers with the support of a majority in the House of Commons.

However convenient and explicable, reliance on the concept of the Crown to denote the executive branch of government has had consequences for the British Constitution, at least some of which have proved problematic and all of which continue to generate criticism and proposals for change. At their root is the absence of a developed legal notion of the state as a 'sovereign community', providing the fulcrum for theories about the exercise of public power.<sup>10</sup> Thus the long evolutionary progression towards constitutional democracy left in its train the potential for ambiguity about the source of

<sup>9</sup> See Sir William Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 23, 24; Loughlin, above n 6, 55.

<sup>10</sup> See Thomas Fleiner and Lidija R Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World* (Katy Le Roy trans, Springer, 2009) 18–25 [trans of: *Allgemeine Staatslehre* (3<sup>rd</sup> ed, 2004)].

authority for government, which never formally shifted from the sovereignty of the Crown, whether effectuated through Parliament or not, to the sovereignty of the people. The continued association of executive government and the Crown historically gave rise to a degree of doctrinal and practical immunity of the government from law manifested in, for example, a rebuttable presumption that statutes do not bind those parts of the executive that fall within the 'shield' of the Crown<sup>11</sup> and the difficulties of obtaining legal redress against public officials in the face of the principle that the Crown (in the narrow sense) can do no wrong.<sup>12</sup> In similar vein, implications flowing from the royal character of the courts and the monarchical origins of the prerogative remedies tended also to offer the executive government some protection against the application of law,<sup>13</sup> notwithstanding the apparent generality of claims for the rule of law.<sup>14</sup>

An additional set of difficulties is associated with the derivation of at least part of the inherent executive power from the powers originally held by the Monarch as sovereign. Until relatively recently courts were hesitant to review the lawfulness of the exercise of what continues to be called the 'prerogative' power of the Crown, even though it has long since passed effectively into the hands of Ministers.<sup>15</sup> There is considerable uncertainty about the nature and scope of the power that can be exercised by the executive branch without the authority of Parliament,<sup>16</sup> one dimension of which is a degree of obscurity about the precise relationship between legislative and executive power. To the extent that the prerogative has a legislative dimension, there is some overlap

<sup>11</sup> A summary of variations on this theme appears in the joint judgment of the High Court in *Bropho v Western Australia* (1990) 171 CLR 1, 18–19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>12</sup> On the uncertainty about the rationale for this principle, see Loughlin, above n 6, 60.

<sup>13</sup> An excellent exposition of these difficulties and the various measures adopted to meet them in the United Kingdom appears in Tom Cornford, 'Legal Remedies against the Crown and Its Officers before and after *M*' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 233.

<sup>14</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 193–5.

<sup>15</sup> The bar to judicial review of the lawfulness of executive action undertaken without legislative authority has now been overcome: *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

<sup>16</sup> From a multitude of sources: see Sebastian Payne, 'The Royal Prerogative' in Martin Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77; Howell, above n 3.

between the two which can be hard to defend as a matter of principle.<sup>17</sup> Further, while legislation can override executive power, a presumption of construction limits the circumstances in which it will be interpreted to do so.<sup>18</sup>

Each of these illustrations of the fallout of reliance on the concept of the Crown in the United Kingdom has implications for democratic and legal accountability. Each also has been substantially ameliorated over recent decades, significantly enhancing accountability, through statute, judicial decisions, political practice and developments in constitutional theory. Typically, however, the solutions are complex, partial, or both, prompting further controversy and debate. The most intractable so far are the interrelated questions about the source, nature and scope of inherent executive power. These are challenging contemporary questions in Australia as well, for reasons that relate partly to their British constitutional origins.

On any view, the revolution settlement of 1688 and subsequent legislation and case law has left the executive branch with some power that is exercisable without parliamentary authority, although subject to parliamentary override, at least in principle. At least a portion of this power is characterised as ‘prerogative’, reflecting its source and, on one account, its purpose.<sup>19</sup> Famously, however, there are two classic formulations of the scope of the prerogative which generally are taken to be different.<sup>20</sup> For Dicey, the prerogative was

the name for the residue of discretionary power left at any moment in the hands of the Crown ... Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.<sup>21</sup>

For Blackstone, on the other hand, the term could ‘only be applied to those rights and capacities which the king enjoys alone, in contradistinction to

<sup>17</sup> See in particular the controversy over the reliance on a ‘Royal Charter’ for ‘audited self-regulation’ of the Press: Adam Tucker, ‘Press Regulation and the Royal Prerogative’ [2014] *Public Law* 614.

<sup>18</sup> *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26.

<sup>19</sup> John Locke described the prerogative as ‘*nothing but the Power of doing publick [sic] good without a Rule*’: John Locke, *Two Treatises of Government* (Cambridge University Press, 1988) 378 (emphasis in original). Payne, above n 16, 95, notes that Locke’s account ‘though interesting, bears little relation to the historical or legal facts and is purely an exercise in persuasive political philosophy’.

<sup>20</sup> Cf Payne, above n 16, 110.

<sup>21</sup> Dicey, above n 14, 425.

others, and not to those which he enjoys in common with any of his subjects'.<sup>22</sup> Blackstone's usage is more narrow, but gives rise to the possible existence of an additional source of executive power to explain actions of the executive that are not specifically authorised by Parliament but which do not seem to be peculiar to a sovereign authority and which for that reason might be described in terms of powers exercisable by other 'persons'.<sup>23</sup> The possibility is significant in the face of the principle that the 'prerogative ... cannot today be enlarged'.<sup>24</sup>

The narrower range of prerogative powers that fall within Blackstone's understanding includes, for example, concluding treaties and committing troops to war. Even these have been controversial in recent years, as the heady combination of internationalisation and democratisation has raised doubts about whether either any longer is appropriate for exercise by the executive alone.<sup>25</sup> A succession of inquiries into the codification of the prerogative from the first decade of the 21<sup>st</sup> century<sup>26</sup> ultimately left the status quo largely intact, subject to some specific modifications,<sup>27</sup> but nevertheless heightened

<sup>22</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) bk 1, 232.

<sup>23</sup> B V Harris termed this type of power as a 'third source' of executive power: B V Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 *Law Quarterly Review* 225. On this view, the two other 'sources' are statute and the prerogative.

<sup>24</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453, 490 [69] (Lord Bingham), citing *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

<sup>25</sup> Howell, above n 3, 38. Howell notes, however, that Sir William Wade's superadded requirement that a prerogative power 'produce legal effects at common law' might have eliminated treaty-making from the prerogative: see Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) 58–62. Even if Wade's qualification is accepted, the exclusion of treaties now seems difficult to justify in the face of the effects of internationalisation. For another illustration of the problems of categorisation, see Adam Perry, 'The Crown's Administrative Powers' (Working Paper, 2014) <<http://ssrn.com/abstract=2493552>>. Perry discusses whether the power to issue passports is a legal or administrative power: at 13–14.

<sup>26</sup> House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, House of Commons Paper No 422, Session 2003–04 (2004); House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility*, House of Lords Paper No 236-I, Session 2005–06 (2006); Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, Cm 7170 (2007); Ministry of Justice, *The Governance of Britain — Constitutional Renewal*, Cm 7342-I (2008); Ministry of Justice, *The Governance of Britain — Review of the Executive Royal Prerogative Powers: Final Report* (2009); House of Lords Select Committee on the Constitution, *Constitutional Arrangements for the Use of Armed Force*, House of Lords Paper No 46, Session 2013–14 (2013).

<sup>27</sup> *Constitutional Reform and Governance Act 2010* (UK) c 25, providing a statutory basis for the management of the civil service (pt 1) and requiring treaties to be laid before Parliament before ratification (pt 2).

awareness of the issues involved. More dramatically, the progressive involvement of the House of Commons in decisions about whether to commit troops to foreign engagements, culminating in the Commons vote against action in Syria in 2013 and in favour of action against the Islamic State in Iraq in 2014, offers evidence of an emerging constitutional convention to this effect, although its precise parameters are unclear and it may be too early to claim lasting change.<sup>28</sup>

At least equal attention has been directed to the difficult questions presented by the possibility of an additional stream of executive power, equated to actions that might be taken by ordinary persons and encompassing, for example, powers to contract and spend, as long as funds are lawfully available. Broad claims for such powers are rationalised in different but connected ways:<sup>29</sup> by reliance on the personhood of the Monarch;<sup>30</sup> by reference to the ambiguous corporate personality of the Crown;<sup>31</sup> and on the basis that the Crown can do anything not prohibited by law<sup>32</sup> or, on the even more generous ‘Ram’ variation, anything not prohibited by statute law.<sup>33</sup> The limited case law on the question so far accepts that the executive has some authority that does not derive directly from either legislation or the prerogative but otherwise is inconclusive in relation to both its source and its scope. Thus, in 2013, in

<sup>28</sup> The votes on Syria and Iraq suggest that parliamentary ‘support’ may now be required and not merely ‘debate’: Claire Mills, ‘Parliamentary Approval for Deploying the Armed Forces: An Update’ (Standard Notes No SN05908, House of Commons Library, 2014). *The Cabinet Manual 2011* refers only to the latter: Cabinet Office (UK), *The Cabinet Manual 2011: A Guide to Laws, Conventions and Rules on the Operation of Government* (1<sup>st</sup> ed, 2011) 44 [5.38]. Both reserve the freedom of the executive to act without prior reference to Parliament in the event of an ‘emergency’.

<sup>29</sup> A helpful analysis and critique is in Howell, above n 3.

<sup>30</sup> Howell, above n 3, 47, citing *Verrault & Fils Ltée v A-G (Quebec)* [1977] 1 SCR 41, 47 (Pigeon J for Laskin CJ, Pigeon, Dickson, Beetz and de Grandpré JJ) and *A-G (Quebec) v Labrecque* [1980] 2 SCR 1057, 1082 (Beetz J for Laskin CJ, Martland, Ritchie, Beetz, Estey, McIntyre and Lamer JJ).

<sup>31</sup> Howell, above n 3, 43, citing *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627. See also *M v Home Office* [1994] 1 AC 377, 393 (Sydney Kentridge QC) (during argument).

<sup>32</sup> Howell, above n 3, 51, also noting the assumption that actions of the Crown can be justified on this basis only if viewed as ‘capacities’ rather than ‘powers’ that alter ‘rights, duties or status’ in law. The characterisation of power is taken from Wade, *Constitutional Fundamentals*, above n 25, 58.

<sup>33</sup> The original memorandum put forward by Sir Granville Ram in 1945 claimed that ‘a minister of the Crown ... may ... exercise any powers which the Crown has power to exercise, except in so far as he is precluded from doing so by statute’: House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament*, House of Lords Paper No 165, Session 2012–13 (2013) 16 [51]. By 2013, the ‘Ram doctrine’ was claimed to enable ministers to ‘do anything a natural person can do, unless limited by legislation’: at 17 [55].



*R (New London College Ltd) v Secretary of State for the Home Department* ('*New London College*'), the Supreme Court of the United Kingdom acknowledged that 'the Crown possesses some general administrative powers to carry on the ordinary business of government', which included powers 'ancillary and incidental' to the operation of legislation, but avoided the need to identify its 'controversial' rationale.<sup>34</sup>

The principal difficulty is that this category of executive power is conceptually incoherent, as it has evolved and is presently invoked. The borderline between powers of this kind and prerogative power is by no means clear; public inquiries might, for example, be consigned to either.<sup>35</sup> The actions that have been held or assumed to fall within this category of power are extraordinarily disparate: apart from forming contracts and conveying property, for example, they also include wiretapping telephones,<sup>36</sup> compiling lists of persons unsuitable to work with children,<sup>37</sup> consulting with local government officials, and adopting guidelines.<sup>38</sup> In one helpful recent intervention, Adam Perry has drawn attention to the distinction between 'legal' executive powers, such as contract, which are derived from the operation of the common law, and powers without legal effect including, for example, consultation, that 'stem from wide social recognition'.<sup>39</sup> Insofar as this distinction perpetuates the notion that the former can be equated to and therefore justified by the powers exercisable by ordinary persons at common law it does not entirely resolve the problem of the scope of inherent executive power, however. Realistically, powers to act either with or without legal effect are not comparable to those of an ordinary person when exercised by a government, both because of considerations that arise from their public nature and because of the resources at executive command. If this is right, it remains necessary to examine the scope of inherent executive power and to identify a plausible explanation for it.

<sup>34</sup> [2013] 1 WLR 2358, 2371–2 [28] (Lord Sumption JSC for Lord Hope DPSC, Lord Clarke, Lord Sumption and Lord Reed JJSC).

<sup>35</sup> Ministry of Justice, *The Governance of Britain — Review of the Executive Royal Prerogative Powers: Final Report*, above n 26, 32, attributes the power to convene public inquiries to the prerogative. In an early foray into the subject in the High Court of Australia, on the other hand, the 'power of ... asking questions' was characterised by Griffith CJ as a 'power which every individual citizen possesses': *Clough v Leahy* (1904) 2 CLR 139, 156.

<sup>36</sup> *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344.

<sup>37</sup> *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627.

<sup>38</sup> *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548.

<sup>39</sup> Perry, above n 25, 1.

## III ADAPTATION IN THE COMMONWEALTH

The concept of the Crown was a useful device for the governance of colonies. As recently reiterated in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]*, an extended conception of the prerogative enabled the Crown to act 'both executively and legislatively' in conquered or ceded colonies.<sup>40</sup> In institutional terms, a Governor-General or Governor, as the representative of the Crown in a colony, also provided a critical mechanism for continuing Imperial control as the colony moved towards self-government.<sup>41</sup>

The concept of the Crown, including the legal principles and political practices associated with it, typically was retained by colonies as they acquired greater measures of self-government, finally becoming independent. In some colonies, including Canada, New Zealand and Australia, the transition to independence was gradual, avoiding a rupture with the past. Even where independence was a clearly defined moment, however, the former Imperial power generally exerted some influence on new constitutional arrangements, directly or indirectly.<sup>42</sup> In any event, there was not necessarily resistance to the retention of the Crown, even as Head of State. The focus of self-determination, rather, was the source from which the Crown took advice.<sup>43</sup> Considered in a wider sense, the concept of the Crown thus was part of the assumed institutional fabric of government in the former colonies, shaping the powers of executive government and its relationship with the other branches. At least some of the legal principles involved were deeply embedded in the common law, which was almost invariably retained by newly independent states. These principles and assumptions survived not only transition to independence but, often, transition to a republic as well. By way of example, more than 30 years after South Africa became a republic, the framers of the new, post-apartheid constitution of 1996 grappled with the scope of executive power so as, finally, to eradicate the 'prerogative', which nevertheless clearly influenced parts of the formulation at which they arrived.<sup>44</sup>

<sup>40</sup> [2009] 1 AC 453, 482 [31] (Lord Hoffmann), citing Lord Mackay (ed), *Halsbury's Laws of England* (4<sup>th</sup> ed, 2003 reissue) vol 6, 479 [823].

<sup>41</sup> Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) chs 1, 5.

<sup>42</sup> See, eg, Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (Hart Publishing, 2014) 26–31.

<sup>43</sup> Twomey, above n 41, 3.

<sup>44</sup> *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 84–5.

But the concept of the Crown was no more static in the former colonies, now member states of the Commonwealth of Nations, than it was in the United Kingdom. The very fact of the diffusion of the Crown between independent states forced at least one major conceptual shift, from an understanding of the Crown as indivisible to acceptance of a personal union of a disaggregated Crown, reigning over multiple realms.<sup>45</sup> Other features of the various constitutional contexts in which the concept of the Crown now operated also were catalysts for change, either immediately or over time.

First, an absentee Monarch, represented by appointees for limited terms acting on local advice, shaped perceptions of the Crown in the narrower sense that differed from those in the United Kingdom, where the Monarch and her family were physically present and the future of the monarchy could be jeopardised by a misstep by the Crown. In Canada, the lesser 'aura, experience and independence' of the Governor-General, amongst other contextual factors, is claimed to have made the Crown progressively more 'efficient' and less 'dignified' than in the United Kingdom, to take advantage of Bagehot's dichotomy.<sup>46</sup> In New Zealand, the absence of the Monarch has been said to have encouraged treatment of the Crown as a 'concept of government quite distinct from the person of the sovereign'.<sup>47</sup>

Secondly, in the member states of the Commonwealth of Nations, the Crown sometimes encountered conditions that were not replicated within the United Kingdom and that required innovation and adaptation. One was the continuing evolution of relations with Indigenous peoples, where treaties had been made at the time of European settlement, as in Canada and New Zealand.<sup>48</sup> Another was the federalisation of the territory, raising new sets of questions for the divisibility of the Crown that in Canada, for example,

<sup>45</sup> Twomey, above n 41, 263–71.

<sup>46</sup> David E Smith, 'The Crown in Canada Today: How Dignified? How Efficient?' in D Michael Jackson and Philippe Lagassé (eds), *Canada and the Crown: Essays on Constitutional Monarchy* (McGill-Queen's University Press, 2013) 89, 95.

<sup>47</sup> Noel Cox, 'The Theory of Sovereignty and the Importance of the Crown in the Realms of the Queen' (2002) 2 *Oxford University Commonwealth Law Journal* 237, 242.

<sup>48</sup> For discussions of the nature and evolution of this relationship across the different jurisdictions, see *Guerin v The Queen* [1984] 2 SCR 335; Noel Cox, 'The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand' (2002) 28 *Brooklyn Journal of International Law* 123; Daryle Rigney, Steve Hemming and Shaun Berg, 'Letters Patent, Native Title and the Crown in South Australia' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2<sup>nd</sup> ed, 2008) 161.

led to the conception of a ‘compound monarchy’.<sup>49</sup> Ironically, both sets of conditions strengthened attachment to the Crown or, at least, to the Crown in right of the United Kingdom, as it now became. For some, the Crown represented the original treaty partner with Indigenous peoples, engaging the ‘honour of the Crown’ in dealings with pre-existing Indigenous societies.<sup>50</sup> For others, the Crown in right of the United Kingdom represented a less interested third party in struggles between the centre and constituent units.<sup>51</sup>

Thirdly, the concept of the Crown was embodied in written constitutions made on or before independence which ultimately provided a basis for the diversification of its meaning and significance between states. Typically, constitutional provisions dealing with the structure of the executive were sketchy, reflecting their unwritten status in the United Kingdom and an attachment to the benefits of flexibility. Nevertheless, written constitutions necessarily make some references to the allocation of legislative, executive and judicial power, which then fall to be interpreted over the course of constitutional history in response to particular, local controversies. At least for a period, constitutional ambiguity or silence on questions arising from the concept of the Crown could be resolved by recourse to the common law. But the common law itself was susceptible to change over time as national legal systems emerged in the wake of independence, with national courts developing the common law with an eye to local conditions and legislation overriding common law principles that no longer were deemed suitable.

For the remainder of the paper I show how these factors have played out in the particular context of Australia.

#### IV THE CROWN IN AUSTRALIA

The early history of the role of the Crown in Australia is familiar and can be briefly rehearsed. In 1770, the eastern part of Australia was claimed for the Crown by Captain James Cook.<sup>52</sup> The ‘Crown’ for this purpose referred to the Monarch in his public capacity acting on the advice of his Ministers, effectively as a surrogate for the United Kingdom as a whole. Over time, six Crown

<sup>49</sup> David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (University of Toronto Press, first published 1995, 2013 ed) ch 8.

<sup>50</sup> *Manitoba Metis Federation Inc v A-G (Canada)* [2013] 1 SCR 623, 658–65 [65]–[83] (McLachlin CJ and Karakatsanis J for McLachlin CJ, LeBel, Fish, Abella, Cromwell and Karakatsanis JJ).

<sup>51</sup> See Cox, ‘The Theory of Sovereignty’, above n 47, 253–4.

<sup>52</sup> Richard Hough, *Captain James Cook* (Hodder and Stoughton, 1994) 158.

colonies were settled around the perimeter of the Australian continent and on the island of Tasmania. Each colony had a Governor who represented the Monarch on the basis of instructions that framed his responsibilities, and who acted on the advice of the British government.<sup>53</sup> The colonies were treated as settled, rather than conquered or ceded; there were no recognised treaties between the Crown and Indigenous peoples.<sup>54</sup> In 1901 the colonies federated as the Commonwealth of Australia ‘under the Crown of the United Kingdom of Great Britain and Ireland’.<sup>55</sup> The new *Constitution* was drafted and approved in Australia but given effect as supreme law through an Act of the Imperial Crown in Parliament.<sup>56</sup>

Consistently with the dualistic design of the Australian federation, the *Constitution* provided for the legislative, executive and judicial institutions and powers of the new Commonwealth sphere of government, including a Governor-General representing the Monarch. It left in place, however, the pre-Federation constitutions of the states, which served as the primary foundation for state systems of government, including the institution of state Governors, also representing the Monarch. Independence was acquired gradually and in stages, initially and sequentially in respect of Commonwealth institutions and finally in relation to the state spheres of government. It was completed, at the latest, with the passage of the *Australia Acts* in 1986<sup>57</sup> although it was effectively secured much earlier, arguably with the passage of the *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4.<sup>58</sup> Relevant events included acceptance that the Monarch, the Governor-General and, later, the state Governors would act on relevant Australian, rather than British, advice;<sup>59</sup>

<sup>53</sup> Twomey, above n 41, ch 1.

<sup>54</sup> See Bain Attwood, *Possession: Batman’s Treaty and the Matter of History* (Miegunyah Press, 2009) 83–4.

<sup>55</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, preamble.

<sup>56</sup> The story is told in Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) ch 1.

<sup>57</sup> *Australia Act 1986* (Cth); *Australia Act 1986* (UK) c 2.

<sup>58</sup> George Winterton, ‘The Acquisition of Independence’ in Justice Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31, 42.

<sup>59</sup> ‘Report of Inter-Imperial Relations Committee Unanimously Adopted by the Imperial Conference, 1926’ in Colin Howard and Cheryl Saunders, *Cases and Materials on Constitutional Law* (Law Book, 1979) 30, 30–2.

removal of the sovereignty of the British Parliament in relation to Australia;<sup>60</sup> designation of the Monarch as ‘Queen of Australia’ in relation to Australian affairs;<sup>61</sup> the elevation of the Governor-General and state Governors as de facto heads of state, through a process begun by the dismissal of the Whitlam government in 1975 and culminating, again, in the *Australia Acts*;<sup>62</sup> and abolition of appeals to the Privy Council, leaving the High Court as the final court of appeal on all questions of Australian law.<sup>63</sup> This last development was a catalyst for the acknowledgement and development of a distinct Australian common law the principles of which might diverge from national systems of common law elsewhere.<sup>64</sup> Within a decade, it also became settled that the Australian common law was a single common law, applicable throughout Australia in the form in which it was developed and declared under the umbrella of the High Court of Australia.<sup>65</sup>

Much of the story of the evolution of the concept of the Crown in Australia is linked with the interpretation of the *Constitution* by the High Court. But some important developments have occurred in other ways as well. Thus, to take one example, the statutory removal of impediments to suits against the Crown occurred before the end of the 19<sup>th</sup> century in Australia, where the role of colonial governments in providing infrastructure reinforced ‘the need for legal equality between the Crown and citizen’.<sup>66</sup> In an example of another kind, the presumption that government entities are not bound by legislation was weakened by the decision of the High Court in *Bropho v Western Australia* (*‘Bropho’*), exercising its authority in relation to the Australian common law.<sup>67</sup> The decision in *Bropho* also was influenced by the wide-ranging

<sup>60</sup> *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4, ss 2, 4, adopted for Australia by the *Statute of Westminster Adoption Act 1942* (Cth); *Australia Act 1986* (Cth) s 1; *Australia Act 1986* (UK) c 2, s 1.

<sup>61</sup> *Royal Style and Titles Act 1953* (Cth) (now repealed); *Royal Style and Titles Act 1973* (Cth).

<sup>62</sup> *Australia Act 1986* (Cth) s 7; *Australia Act 1986* (UK) c 2, s 7.

<sup>63</sup> *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) c 2, s 11.

<sup>64</sup> Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13 *Monash University Law Review* 149, 149–51.

<sup>65</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Kable v DPP (NSW)* (1996) 189 CLR 51, 112 (McHugh J).

<sup>66</sup> Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Discussion Paper No 64 (2000) 290 [5.14].

<sup>67</sup> (1990) 171 CLR 1.

activities of governments in contemporary Australia.<sup>68</sup> The terms in which the revised presumption is framed has diminished the significance of the distinction between bodies within the ‘shield of the Crown’ and those outside it, making the ‘identity’ of the government entity a factor in determining the intention of the legislature in each case.

The constitutional decisions that contribute to the evolution of the concept of the Crown in Australia parallel and are responsive to the progressive acquisition of Australian independence and the concomitant emergence of Australian nationhood. In some instances, they are driven by the need to resolve particular problems that are presented by the text of a *Constitution* that predated independence and has its provenance in Imperial legislation. Thus, decisions of the Court have confirmed the existence of a distinct ‘Crown of Australia’ as a matter of law, repudiating arguments that sought to attach significance to references to what appeared to be a different Crown in the covering clauses to the *Constitution*.<sup>69</sup> Similarly, the Court has recognised that, in the Australian constitutional context, the United Kingdom is a ‘foreign power’,<sup>70</sup> notwithstanding the links between these two states through the person of the Monarch.<sup>71</sup> In resolving this latter question, in the case of *Sue v Hill*, the High Court took the opportunity to distinguish five different usages of the concept of the Crown, with conspicuous lack of enthusiasm in relation to their relevance in Australia.<sup>72</sup> The terminology of the Crown has rarely been used for analytical purposes in High Court decisions since.

One of the usages of the concept of the Crown identified in *Sue v Hill* was to ‘identify the body politic’.<sup>73</sup> This application was expressly rejected for Australia where, as the Court noted, the *Constitution* uses the terminology of the ‘Commonwealth’ for this purpose instead. And indeed, with the benefit of hindsight, it is possible to see that decisions of the Court about the meaning of the *Constitution* have gone some way towards developing the notion of a body politic or, in other words, of the ‘State as a juristic person’,<sup>74</sup> thus obviating the

<sup>68</sup> Ibid 18–19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>69</sup> See *Joose v Australian Securities and Investments Commission* (1998) 159 ALR 260; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1999) 166 ALR 302; *Sue v Hill* (1999) 199 CLR 462.

<sup>70</sup> See *Constitution* s 44(i).

<sup>71</sup> *Sue v Hill* (1999) 199 CLR 462.

<sup>72</sup> Ibid 497–503 [83]–[94] (Gleeson CJ, Gummow and Hayne JJ).

<sup>73</sup> Ibid 498 [84].

<sup>74</sup> Pitt Cobbett, “The Crown” as Representing “the State” (1903) 1 *Commonwealth Law Review* 23, 30, quoted in *Sue v Hill* (1999) 199 CLR 462, 498 [84].

need for reliance on the Crown and overcoming some of its drawbacks, identified earlier. Significant developments in this regard have included recognition by the Court that sovereignty lies with the people of Australia, notwithstanding the formal legal character of the *Constitution*<sup>75</sup> and the interpretation of s 75 of the *Constitution* as having removed the procedural immunity of the executive from suit in areas of federal jurisdiction.<sup>76</sup>

Most significant for present purposes has been the evolution of an understanding of the scope of the inherent executive power of the Commonwealth that relies on the text of s 61 of the *Constitution* and reduces, although without (yet) entirely eliminating, the dependence of federal executive power on the concept of the Crown. This development remains a work in progress. Section 61 provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

The bare reference to 'executive' power might have been taken merely to import the common law understanding of it and suggestions to that effect can sometimes be found in older decisions of the High Court.<sup>77</sup> Nevertheless, s 61 is a provision in a written constitution that falls to be interpreted by the Court. As with the companion references to 'legislative'<sup>78</sup> and 'judicial'<sup>79</sup> power, the meaning of 'executive' power in s 61 now is understood to be informed by history and the common law but ultimately is determined by reference to the text of s 61 itself and the constitutional context in which it is found. Inevitably, the course of judicial interpretation has been influenced to a degree by the serendipity of the types of matters that have come before the Court in which the meaning of executive power has been raised, and by the way in which the issues are presented by the parties in such cases. Timing has been a factor also, given the impact of the progressive acquisition of Australi-

<sup>75</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 172-3 (Deane J).

<sup>76</sup> *Commonwealth v Mewett* (1997) 191 CLR 471.

<sup>77</sup> See, eg, *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J).

<sup>78</sup> *Constitution* s 1. See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

<sup>79</sup> *Constitution* s 71. See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('Boilermakers').



an independence on both the scope of the executive power and the authority of the High Court. In particular, it is possible to detect a somewhat greater emphasis on s 61 as an integral part of the *Constitution* as a whole in the wake of the passage of the *Australia Acts* in 1986.

Even on the face of s 61, there is some potential for the concept of the Crown to continue to influence the meaning of executive power. The section describes executive power as ‘vested in the Queen’ in terms that suggest ‘a declaration of an existing fact’, in contrast to the prospective conferral of legislative and judicial power on the other branches in ss 1 and 71 respectively.<sup>80</sup> This might now be treated as a necessary incident of the decision to cast ch II of the *Constitution* in terms of the ‘dignified’ rather than ‘efficient’ institutions of executive government, with implications for institutional design but not necessarily for the substance of executive power.<sup>81</sup> In any event, however, the reference to ‘the Queen’ needs to be understood in the context of the rest of the section and of the *Constitution* as a whole, which offer other considerations that are in no way dependent on the concept of the Crown. In s 61 itself the power is characterised as the executive power ‘of the Commonwealth’. The final declaration that the executive power ‘extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth’ raises interpretive problems of its own,<sup>82</sup> but clearly has a bearing on the scope of the power. Turning to the broader canvas of the *Constitution* as a whole, s 61 plays a critical role in the Australian version of the separation of powers in the Commonwealth sphere,<sup>83</sup> which in turn is shaped by the demands of representative and responsible government in the particular form in which these arrangements operate in Australia, which makes allowance for the logic of bicameralism.<sup>84</sup> Last but by no means least, s 61 is the source of the executive power of the national sphere of government in a federation. Federalism, in a distinctively Australian form, permeates the *Constitution*. Relevantly for present purposes, the *Constitution* divides legislative power in some detail between the Commonwealth and the states;<sup>85</sup> assumes that each

<sup>80</sup> The quotation is from the reasons of French CJ in *Williams v Commonwealth* (2012) 248 CLR 156, 200 [50], citing Justice Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 64.

<sup>81</sup> See Walter Bagehot, *The English Constitution* (Chapman and Hall, 1867) 4–6.

<sup>82</sup> See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 231 (Williams J).

<sup>83</sup> See *Boilermakers* (1956) 94 CLR 254, 274–7 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>84</sup> See *Egan v Willis* (1998) 195 CLR 424.

<sup>85</sup> *Constitution* s 51. Most Commonwealth powers are held concurrently with the states, subject to Commonwealth paramountcy in the event of inconsistency.

sphere of government will administer its own legislation;<sup>86</sup> provides for the representation of the states in the national sphere of government, through a Senate that is powerful but not quite co-equal with the House of Representatives;<sup>87</sup> and expressly authorises conditional transfers from the Commonwealth to the states.<sup>88</sup>

Questions about the meaning of s 61 have been raised intermittently in litigation over the course of the long century since the *Constitution* came into effect. In the course of the last decade or so, however, a spate of challenges to the exercise of executive power give at least an anecdotal impression that such questions are arising more frequently. If so, the explanation may lie in increased use, or more unusual use, of executive power by Australian governments. The most significant recent decisions<sup>89</sup> include *Pape v Federal Commissioner of Taxation* ('Pape'),<sup>90</sup> *Williams v Commonwealth* ('Williams v Commonwealth [No 1]')<sup>91</sup> and its sequel *Williams v Commonwealth [No 2]*.<sup>92</sup> Whatever the catalyst for it, this body of recent case law has thrown considerable new light on the scope of executive power and the relationship between s 61 and the rest of the *Constitution*. In doing so, it has strengthened the Australian conception of the state and minimised reliance on a conception of the Crown to determine the scope of executive power. While much remains to be resolved, the parameters within which this is likely to occur are now sufficiently clear for some tentative conclusions to be drawn.

First, powers in the nature of the prerogative are now encompassed by s 61<sup>93</sup> and, on one view, are derived from the reference to the Queen.<sup>94</sup> In this

<sup>86</sup> Apart from the wording of s 61, this follows from the absence of provision to the contrary as in, for example, the *Constitution of India 1949* (India) ss 258–258A. Some support for the assumption now comes from case law: see especially *R v Hughes* (2000) 202 CLR 535, 553–4 [31]–[36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Austin v Commonwealth* (2003) 215 CLR 185, 268–9 [178]–[181] (Gaudron, Gummow and Hayne JJ).

<sup>87</sup> In particular, there are limits on the power of the Senate in relation to proposed laws imposing taxation and appropriating moneys, with more stringent limits on appropriations for the 'ordinary annual services of the Government': *Constitution* ss 53–5.

<sup>88</sup> *Ibid* s 96.

<sup>89</sup> Also relevant, however, are *Ruddock v Vadarlis* (2001) 110 FCR 491, *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 and *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.

<sup>90</sup> (2009) 238 CLR 1.

<sup>91</sup> (2012) 248 CLR 156.

<sup>92</sup> (2014) 252 CLR 416.

<sup>93</sup> The focus here is on power, rather than on other 'preferences, immunities and exceptions' associated with the prerogative that also derive from s 61: *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 228 [123] (Gummow and Bell JJ).

respect, at least, the continuing influence of a concept of the Crown is apparent. There is nothing new in this conclusion, which represents old law.<sup>95</sup> Powers in this category include, for example, the power to conclude treaties.<sup>96</sup> As this example shows, features of the debate over the precise definition of the prerogative in the United Kingdom are not replicated in Australia, where Sir William Wade's superadded requirement of legal effect has not been influential.<sup>97</sup> Recent observations by Justices of the High Court appear to confirm, however, that Blackstone's more narrow formulation of the prerogative is to be preferred in Australia over Dicey's more expansive view, limiting the range of the powers historically attributable to the Crown.<sup>98</sup> Equally significantly, recent decisions also make it clear that the prerogative-type powers available to the Commonwealth executive under s 61 are not coextensive with the prerogative in the United Kingdom, adherence to Blackstone notwithstanding. To some extent this was obvious. Given the fact of federalism, s 61 comprises only 'such of the prerogatives of the Crown as are properly attributable to the Commonwealth'.<sup>99</sup> In addition, aspects of the prerogative have been transformed into constitutional power through the explicit conferral of authority on the Governor-General to, for example, dissolve the House of Representatives.<sup>100</sup> The point has now been generalised, however, to deny as a matter of principle that the executive power of the Commonwealth can be 'treated as a species of the royal prerogative' even though it 'may derive some of its content by reference to the royal prerogative'.<sup>101</sup>

Secondly, s 61 empowers the government of the Commonwealth to engage in 'activities peculiarly adapted to the government of a nation ... which

<sup>94</sup> Ibid 185 [24] (French CJ).

<sup>95</sup> *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 304 (Dixon J).

<sup>96</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193 (Gibbs CJ), 215 (Stephen J), 237 (Murphy J), 249–50 (Wilson J).

<sup>97</sup> See above n 25.

<sup>98</sup> *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 186 [25] (French CJ), 343–4 [488] (Crennan J), both referring to earlier observations to this effect.

<sup>99</sup> Ibid 180 [22] (French CJ).

<sup>100</sup> *Constitution* s 5.

<sup>101</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 [183] (French J). This observation in turn echoed an earlier remark of Gummow J, also at that point a Justice of the Federal Court: 'In 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 in the Crown': *Re Ditfort; Ex parte Deputy Commissioner of Taxation (Cth)* (1988) 19 FCR 347, 369.

cannot otherwise be carried on for the benefit of the nation'.<sup>102</sup> This power has been held to support, for example, commemoration of the bicentenary of European settlement<sup>103</sup> and emergency measures to ease a pressing fiscal crisis through a scheme for bonus payments, supported by the enactment of legislation 'incidental' to the authority conferred by s 61.<sup>104</sup> The parameters of this aspect of the executive power necessarily are vague, although some guidance is provided by the need to consider the potential for action by the states, where the Commonwealth is acting beyond its explicit powers.<sup>105</sup> Relevantly for present purposes, this power is not attributable to the Crown, although in the United Kingdom it might be sourced in a Locke-inspired conception of the prerogative.<sup>106</sup> Rather, in Australia, it derives from the 'character and status of the Commonwealth as a national government'.<sup>107</sup> If textual foundation is required, it might be found in the extension of the executive power in s 61 to the 'maintenance' of the *Constitution*.

Thirdly, while the Commonwealth executive has some inherent authority of a more 'ordinary' kind, this is neither defined by nor sourced in a conception of the Crown. On the contrary, arguments by the Commonwealth to this effect were explicitly rejected in *Williams v Commonwealth [No 1]*,<sup>108</sup> in terms that drew attention to the qualitative distinctions between an exercise of public and private power, including the expenditure of public and private moneys, and to the dangers of 'anthropomorphism writ large'.<sup>109</sup> An attempt to reopen these questions failed in *Williams v Commonwealth [No 2]*.<sup>110</sup> In any event, the executive does not have legal personality for this purpose; rather, legal personality inheres in the polity of the 'Commonwealth', which acts through its various branches in the manner provided by the *Constitution*.<sup>111</sup>

<sup>102</sup> *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 342 [485] (Crennan J), 370 [583] (Kiefel J), quoting *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J) ('AAP Case').

<sup>103</sup> *Davis v Commonwealth* (1988) 166 CLR 79.

<sup>104</sup> *Pape* (2009) 238 CLR 1.

<sup>105</sup> *Ibid* 90 [239] (Gummow, Crennan and Bell JJ), quoting *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ).

<sup>106</sup> See above n 19.

<sup>107</sup> *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).

<sup>108</sup> (2012) 248 CLR 156, 236 [151] (Gummow and Bell JJ), 253–4 [204], 258–9 [216] (Hayne J), 352–3 [518]–[524] (Crennan J), 368–9 [577] (Kiefel J).

<sup>109</sup> *Ibid* 254 [204] (Hayne J).

<sup>110</sup> (2014) 252 CLR 416, 463–70 [57]–[87] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>111</sup> *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 184 [21] (French CJ), 237 [154] (Gummow and Bell JJ), 253 [204] (Hayne J), 342 [484], 343–4 [488] (Crennan J).

The consequences of this analysis so far have been explored only in relation to contracting and spending and only by reference to a highly distinctive executive scheme involving the provision of chaplains to schools run by a State through contracts between the Commonwealth and a service provider.<sup>112</sup> This was held to exceed the inherent executive power of the Commonwealth for reasons that related variously to the constitutional demands of both representative government and federalism. In the case of the latter, relevant considerations included the division of legislative power, the role of the Senate and the presence in the *Constitution* of s 96, which permits the Commonwealth Parliament to grant financial assistance to any state.<sup>113</sup> It is clear from the supporting reasoning of the several Justices, however, that some types of contract and, presumably, other forms of administrative action may be performed by the executive government without legislative support.<sup>114</sup> While these were not delineated, there is at least implicit support in *Williams v Commonwealth [No 1]* for a distinction developed around the ‘incidents of the ordinary and well-recognized functions of Government’ by the High Court in *New South Wales v Bardolph*<sup>115</sup> to which, again, competition with the states in areas not covered by the Commonwealth’s own allocated powers would be a guide. Insofar as this distinction can be justified by reference to the administration of the departments of state pursuant to s 64 of the *Constitution*,<sup>116</sup> this dimension of executive power might also be attributed to ‘maintenance of the *Constitution*’ within the meaning of s 61.

Finally, the executive power of the Commonwealth comprises powers derived in one way or another from statute. This is no mean conception, but includes powers ‘necessary or incidental to the execution and maintenance of a law of the Commonwealth’.<sup>117</sup> It would thus, almost certainly embrace the types of executive power considered by the Supreme Court of the United Kingdom in *New London College*.<sup>118</sup> It is consistent with the tendency of the

<sup>112</sup> *Williams v Commonwealth [No 1]* (2012) 248 CLR 156.

<sup>113</sup> *Ibid* 205 [60] (French CJ), 235–6 [146]–[148] (Gummow and Bell JJ), 251 [197], 267–70 [243]–[248], 270–1 [251] (Hayne J), 347 [500]–[501] (Crennan J).

<sup>114</sup> *Ibid* 211–12 [74] (French CJ), 355 [534] (Crennan J).

<sup>115</sup> (1934) 52 CLR 455, 496 (Rich J); see also at 474 (Evatt J). See also *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 211–12 [74] (French CJ); see also at 233 [139] (Gummow and Bell JJ), where the submissions of the plaintiff are summarised.

<sup>116</sup> *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 212 [74], 214–15 [79] (French CJ).

<sup>117</sup> *Ibid* 184 [22].

<sup>118</sup> [2013] 1 WLR 2358, which concerned the creation of ministerial guidelines to administer legislation.

High Court to explore possible statutory foundations for the exercise of executive power in order to test challenges to it.<sup>119</sup> It, also, derives no support from the concept of the Crown.

One of many outstanding questions in the wake of these decisions is the applicability of these developments to the scope of the executive power of the states. The Australian states have their own constitutions, which in origin predate Federation and tend to use the terminology of the Crown to a greater degree. *Pape, Williams v Commonwealth [No 1]* and *Williams v Commonwealth [No 2]* have been determined in a Commonwealth constitutional setting and attach considerable significance to features of the *Constitution*, not all of which are replicated in state constitutions. These include the role of the Senate as a federal institution, the logic that flows from the limited legislative powers of the Commonwealth, the capacity for the Commonwealth to spend in areas beyond the subjects of its legislative powers through grants to the states pursuant to s 96 and the potential of a formalised separation of powers.<sup>120</sup>

There are powerful countervailing considerations, however, which suggest that the scope of the executive power of the states is likely to be found to be much the same as the executive power of the Commonwealth in the longer term. There is no reason why the narrow, Blackstonian view of the prerogative should not apply equally at the state level. It is certain that any conception of the prerogative operating in the Australian states will differ from that of the United Kingdom, in consequence both of the federal constitutional structure and the unified Australian common law. The rationale for the rejection of reliance on the legal personality of the executive government in favour of the legal personality of the polity, to be exercised through its various branches, also applies to the states, which are recognised as the relevant 'polities' under the *Constitution*.<sup>121</sup> The objection to basing conclusions about the scope of public power on analogies to the exercise of private power has as much force in the state as in the Commonwealth sphere. State institutions are differently organised on matters of important detail but nevertheless give effect to the

<sup>119</sup> See generally Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10 *New Zealand Journal of Public and International Law* 143.

<sup>120</sup> The explicit constitutional provision for the administration of the departments of state in s 64 may be another point of distinction between the Commonwealth and state constitutions: *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 214–15 [79] (French CJ). On the other hand, authority to administer departments of state must at least be implicit in state constitutions.

<sup>121</sup> For example, and significantly, in prescribing the original jurisdiction of the High Court in s 75(iv).

same sets of principles that help shape the scope of Commonwealth executive power, including parliamentary responsible government, usually engaging bicameral legislatures.<sup>122</sup> The decision in *New South Wales v Bardolph* on which the plaintiff relied to some effect in *Williams v Commonwealth [No 1]* concerned the executive power of the States.<sup>123</sup> There is already a substantial body of case law that imposes limits on the scope of executive power that apply to both the Commonwealth and the States.

## V CONCLUSIONS

These developments notwithstanding, Australia has by no means replaced the concept of the Crown in its application to executive government with a developed theory of the state, although it has begun to move down that path.

The recognition of the Commonwealth as a polity with legal personality, which operates through the various organs of government established by the *Constitution*, is a significant development from the standpoint of a conceptualisation of the state that is not dependent on association with the Crown. Other components of this emerging picture include the otherwise disparate earlier findings that constitutional sovereignty lies with the Australian people<sup>124</sup> and that s 75 of the *Constitution* removes procedural impediments to legal action against the Commonwealth.<sup>125</sup> It remains to be seen whether the reflections in *Williams v Commonwealth [No 1]* about the distinction between public and private power are elaborated in future cases so as to further understanding of the responsibilities of the state and the manner in which it exercises its authority.

The Crown remains a significant influence on the substance of executive power in the nature of the prerogative, despite caveats about the implications of constitutional context. The origins of this aspect of executive power in the Crown also continue to affect incidents of its exercise. Clear words are required before legislation is understood to override power in the nature of the prerogative.<sup>126</sup> It is not yet finally established in Australia that an exercise of power in the nature of the prerogative is reviewable on administrative law grounds, although an affirmative answer is likely to be given when an appro-

<sup>122</sup> All states except Queensland have bicameral legislatures.

<sup>123</sup> *New South Wales v Bardolph* (1934) 52 CLR 455.

<sup>124</sup> See above n 75.

<sup>125</sup> *Commonwealth v Mewett* (1997) 191 CLR 471.

<sup>126</sup> *Barton v Commonwealth* (1974) 131 CLR 477, 484 (Barwick CJ), 501 (Mason J); *Ruddock v Vadarlis* (2001) 110 FCR 491, 504 [40] (Black CJ), 540–1 [185] (French J).

priate occasion arises.<sup>127</sup> The Crown has no continuing relevance in identifying the substance of other aspects of Commonwealth executive power, although the position in the state sphere remains unclear. Nevertheless, much remains to be done to determine the ambit of activities that may be undertaken by the executive without legislative support, using the constitutional context as the principal guide.

Australian developments have been driven by Australian circumstances, including the terms of the *Constitution*, the nature of the cases that have arisen before the Court and the legal and political culture within which the *Constitution* operates. As suggested at the outset, comparable factors are likely to have prompted a degree of divergence across member states of the Commonwealth of Nations as well. In Canada, for example, emphasis on the extent to which the constitution is unwritten appears to have preserved a concept of the Crown as a more vigorous constitutional principle, which nevertheless has been shaped by a variety of forces, including the relationship with Indigenous peoples<sup>128</sup> and recent adventurous usages of the prerogative power to prorogue.<sup>129</sup>

The divergence of Commonwealth legal systems in relation even to matters once held firmly in common, of which the concept of the Crown is an example, does not deny the relevance of transnational Commonwealth constitutional experience. On the contrary, reflection on different approaches offers a new source of insight into the rationale for existing principles and practices and new options for resolving similar problems. As the Australian debate unfolds, there should be considerable interest in what happens elsewhere in relation to such critical questions as the legal effect of appropriation statutes, the extent to which it is possible to quarantine 'ordinary' government contracts from those that require legislative support and the democratisation of executive powers in the nature of the prerogative. The implication of divergence, however, is that this exercise now demands application of the techniques of comparative law to a greater extent than has been recognised before.

<sup>127</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278 (Bowen CJ), 280 (Sheppard J), 302–4 (Wilcox J). Case law from the United Kingdom is also likely to be influential: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453; *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

<sup>128</sup> See *Guerin v The Queen* [1984] 2 SCR 335; *R v Sparrow* [1990] 1 SCR 1075.

<sup>129</sup> See Peter H Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009) pt 2.