The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law[1]

THE HON DUNCAN KERR SC MP*

Abstract

Implied or assumed notions of 'responsible government' and 'the rule of law' have influenced the way in which the High Court of Australia has conceptualised the scope and limits of the executive power conferred under s 61 of the *Constitution*. Those doctrines were central to the outcome of landmark cases such as the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

However the shift in rationale for the primacy of the *Constitution*, from its original roots in deference to the hierarchy of Imperial law to the more recent High Court approved theory of original adoption and subsequent maintenance of its provisions by the people has created tensions in regard to how such unwritten doctrines are received.

This article analyses two cases; *Ruddock v Vadarlis* [2001] 110 FCR 491, a decision of the Full Federal Court denying the availability of a writ of *habeas corpus* following the detention of asylum seekers aboard the *Tampa* and *Pape v Commissioner of Taxatio*n [2009] HCA 23 (7 July 2009), a recent decision of the High Court in which the executive power was held to authorise emergency stimulus spending in the face of the 2008-2009 global economic crisis, in order to provide context for an examination of yet unresolved issues.

* Adjunct Professor, Faculty of Law, Queensland University of Technology (QUT); Barrister, Tasmanian Independent Bar.

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Vadarlis reveals that as a, perhaps unintended, result of the shift in regarding the ultimate authority for the *Constitution* as founded in its original adoption and subsequent maintenance by the people, the discretionary or arbitrary component of the authority vested in the Governor General by s 61 extends beyond any inherited prerogative powers of the English Crown and is of wider scope than hitherto understood. Expanded discretionary power, whether sanctioned or unsanctioned by the Parliament, challenges the centrality of the notions of the rule of law and responsible government in Australian jurisprudence.

Pape confirms that the High Court remains unanimously committed to articulating an autochthonous rationale for the source of Australian executive power. However, both the majority and dissenting judgments in *Pape* illustrate that the court has begun to grapple with some of the complex underlying issues exposed by *Vadarlis*.

Introduction

Because Australian courts give primacy to a written *Constitution*[2] a gulf now exists between Australia's legal system and the British legal system. The Australian legal system sets out the basic rules about the composition, powers and methods of operation of the main organs of government in a single, difficult to amend document. The legal system of Britain utilises a flexible unwritten constitution that continues to be shaped by an ever evolving mix of common-law, statute, convention and, more recently, European Community law.

Yet, subject to the written document but influencing its interpretation, a parallel mix of unwritten practice, convention and the common law of Australia also plays an important part in the Australian system of government.

For example, the actual functions and the true constitutional role of the Governor-General cannot be discerned by a simple reading of the text of the *Constitution*. Section 68 of the *Australian Constitution* vests command of the naval and military forces of the Commonwealth in the Governor-General. That power of command is expressed in unqualified terms. However, settled Australian constitutional convention requires that the power conferred by s 68 can be exercised only on advice of ministers having the confidence of the Parliament.[3] Failure to abide by that restraint

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2 *Commonwealth of Australia Constitution Act* (1900) (Imp) 63 & 64 Victoria Ch 12, s 9.

3 For an analysis of the then applicable law and convention see George Winterton, *Parliament, the Executive and the Governor-General,* (1st ed, 1983) 124. Subsequently

would be ‘unconstitutional’ and, if other than minor and inadvertent, would almost certainly provoke a crisis which would result in either the removal of the office holder or the destruction of the office.

At her swearing in as Governor-General, Ms Quentin Bryce pledged to ‘perform [her] responsibilities according to law and convention’.[4] Her Excellency’s acceptance of the restraints imposed by unwritten norms on otherwise explicit powers conferred by the *Constitution* upon her office is unsurprising. Her undertaking is a good reminder of what Blackshield and Williams have pointed out, that ‘the symbolic façade of the Australian system can mask its substance.[5]

Notwithstanding the seemingly unrestricted terms of the legal power conferred by s 68, the assertion by the Governor-General of any personal power to command the military would not be an exercise of constitutional right but a manifestation of an attempted revolutionary transfer of power.

Constitutional assumptions and conventions

Two groups of assumptions, implications and unwritten conventions lie at the core of a more rounded understanding of the operation of the Australian system of government. They derive from the doctrine of responsible government and from the principle of the rule of law respectively. Both have been said to ‘form part of the fabric upon which the written words of the *Constitution* are superimposed’.[6] Thus, returning

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the duty of the Governor-General to act on advice was formally embodied in the Statement by the Prime Minister [Bob Hawke], ‘Letters Patent Relating to the Office of Governor-General’, House of Representatives Record 8692, Presented 24 August 1984.

4 Address by Her Excellency Ms Quentin Bryce AC; Swearing-In Ceremony as Governor-General on 5 September 2008, <http://www.gg.gov.au/spdf/2008/s2008905463.pdf> at 29 September 2008. Conventions differ from laws because the former cannot be directly enforced. See also George Winterton, The Relationship between Commonwealth Legislative and Executive Power, (2004) 25 *Adelaide Law Review* 21.

5 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, (4th ed, 2006) 1.

6 *Commonwealth v Kreglinger* (1926) 37 CLR 393, 413 (Isaacs J). In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135, Mason CJ, referring to this passage, drew a distinction between ‘implications’ and ‘unexpressed assumptions upon which the framers proceeded in drafting the Constitution’. His Honour applied Isaac J’s expression only to the former. The distinction is important, the former being regarded as part of the text whereas the latter’s significance might range from useful interpretive factors to assumptions that have become irrelevant with the passage of time; but in the present context such distinctions are immaterial. See Bradley M Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 234.

to the example above, it is the doctrine of responsible government and the conventions associated with it that provide the restraint on the exercise of personal power by the Governor General.[7]

To examine some contemporary aspects of the interplay between unwritten law and the *Constitution*, this paper will analyse two high profile cases *Ruddock v Vadarlis* [2001] 110 FCR 491 (*Vadarlis*) and *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009) (*Pape*) in order to reflect on whether their conclusions are consistent with the deference generally given to the notions of responsible government and the rule of law by the High Court of Australia.

Imperial edict to modern nationhood

An obvious starting point is to ask; where do the kind of unwritten assumptions and conventions that still influence our understanding of the *Constitution* come from and why should Australian courts, and the other organs of government, continue to apply them?

Any lawyer posed these questions during the first few decades following Australia's federation would have been quick to point out that all colonial institutions had a duty to apply the existing doctrines of interpretation appropriate to Imperial legislation, as the *Australian Constitution* was then conceived to be.

He or she would have observed that when the Commonwealth of Australia was formed in 1901, the primacy of the *Constitution* as law was axiomatic because the *Constitution* was an enactment of the Imperial Parliament and, hence, binding on all colonial institutions. This carried with it all the colonial understandings appropriate to that conception.

Isaacs J as member of the High Court expressed the then orthodox position as follows:

> I apprehend, therefore, that it is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in interpreting the *Australian Constitution* of every fundamental [British] constitutional doctrine existing and fully recognised at the time the *Constitution* was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature.[8]

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7 George Winterton, above n 3, 124-126.

8 *Commonwealth v Kreglinger* (1926) 37 CLR 393, 411-412.

Such reasoning sounds odd to modern ears. The usually unquestioned fundamental premise that the *Constitution* is 'the basic constitutional instrument of our legal system'[9] can no longer rest safely on the argument that it is the duty of Australian courts and other institutions to apply Imperial law.

The dismantling of Empire, the evolution of Australia from a colony to a Dominion, and, finally to an independent nation has required the High Court of Australia to abandon deference to the hierarchy of Imperial law as the true basis upon which the primacy of the *Constitution* rests.

More recently the *Constitution's* fundamental importance has been said to be grounded as an act of national choice, its force deriving 'exclusively in the original adoption and subsequent maintenance of its provisions by the people'.[10] Yet a number of cogent objections can be advanced to an argument of this kind.

Complexities arising from the repatriation of the Constitution

Sir Owen Dixon explicitly rejected the notion that the *Constitution* took its force from the democratic expression of the people's will to form a new nation. He wrote:

> [The *Constitution*] is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our *Constitution* this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we treat their powers simply as authorities belonging to them by law. American doctrine treats them as agents for the people who are the source of power.[11]

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9 Bradley M. Selway, above n 6, 234.

10 *Theophanous v Herald &Weekly Times Ltd* (1994) 182 CLR 102, 171 (Deane J).

11 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597. This can be contrasted with the remarks of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106:

> 'Despite its initial character as a statute of the Imperial Parliament, the *Constitution* brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people': at [138].

Other critics point to historical problems with any account of the *Australian Constitution* taking its force through adoption by the people. Most women, and all but a few indigenous Australians, were shut out of participating in the discussions and votes that led to the adoption of the *Constitution*.[12] Moreover, the logic of the argument is circular. The theory of legitimacy acquired through acquiescence, if sound, must apply equally to any legal regime other than one in the throes of revolution. It does not logically privilege the text of the *Constitution*.

Were he still alive today, Sir Owen Dixon might still want to query why 'original adoption and subsequent maintenance of its provisions by the people', rather than the superseded theory of hierarchy of law, obliges Australian courts to give legal primacy to a century old document which a merest few citizens have read and yet even fewer could fully understand. He might respond that if democratic assent is central to legitimacy, why not prefer the contemporary choices of legislators elected under a far more representative franchise?

Nonetheless, it is upon one form or another of the rationale of adoption and maintenance that Australia's modern jurisprudence has been rebuilt. Dixon's distinction, which he asserted carried with it 'many important consequences', including the consequence that the power of government was limited by law has, in consequence, been abandoned. Despite that abandonment, to date the shift in legal underpinning has occurred without significant disturbance to what Dixon would have regarded as the former doctrine's consequential elements.[13] However, as will be seen, such a significant alteration of fundamental premises is pregnant inherently with potential for wider implications.

Since a fully satisfying intellectual contemporary justification of the primacy of the *Australian Constitution* has yet to be articulated, the search for a modern rationale for importing and retaining the additional unwritten assumptions and conventions sourced originally in British practice tied up with the supremacy of Imperial Law is bound to be elusive. In most cases, nothing turns on these interesting speculations. In

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[12] George Williams, 'The High Court and the People' in Hugh Selby (1995) *Tomorrow's Law* 286-289.

[13] See Simon Evans, 'Continuity and Flexibility: Executive Power in Australia' in Craig and Tomkins (2006) *The Executive and Public Law* 89-123. If there are clashes of assumptions a 'wrong' decision can emerge – See Bradley Selway, 'All at Sea: Constitutional Assumptions and 'The Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495.

some cases the law ignoring theoretical neatness builds around anomalous islands of precedent that cannot logically be justified.

Yet unsurprisingly these deeper jurisprudential questions continue to seep to the surface periodically to influence outcomes.[14] The interface between historic and modern explanations of the source of fundamental constitutional legitimacy provides context for the discussion that follows.

The rule of law and judicial review

Exactly what is encompassed by the notion of the rule of law is not an easy question to answer. As Zimmermann perceptively noted, in the English speaking world:

> [The] contemporary debate over the meaning of the rule of law is carried out between advocates of its formal conception and those of its substantive conception. Those holding to a formal conception believe the rule of law encompasses only attributes concerning the form of laws, such as that they must as a rule be stable, publicised, clear and general, whereas proponents of a substantive conception go beyond such formal description so as to include in their analysis a broader discussion of the legal protection of moral rights. Both conceptions, however, are in common agreement that the rule of law acts as an important mechanism to minimise arbitrariness and so promote justice and personal freedom.[15]

Former Chief Justice Murray Gleeson has argued that in Australia rule of law principles are ‘not merely a formal concept’ but a ‘core value’. They are the ‘foundation of government’ and ‘the assumption that underlies the political process that makes our government work in practice’.[16] His

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[14] The influence of the notion of the separation of powers continues to transform our understanding of Ch III of the Constitution. A good example of this has been the collapse of the idea that military justice could stand out as an anomalous instance of Commonwealth judicial power being permitted to be exercised other than by a Ch III court in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518. However *Lane v Morrison* [2009] HCA 29 now requires the conclusion that judicial power is not exercised in traditional ‘courts martial’ and that military courts cannot be established save under Ch III.

[15] Augusto Zimmerman ‘The Rule of Law as a Culture of Legality: Legal and Extra-legal Elements for the Realisation of the Rule of Law in Society’, (2007) 14(1) *Murdoch University Electronic Journal of Law* (E-law) 10-31 11; <http//elaw. murdoch.edu.au/archives issues/2007/1/eLaw rule law culture legality.pdf> at 4 December 2009.

[16] The Honourable AC Gleeson, ‘A Core Value’ [Paper delivered at the Annual Colloquium of the Judicial Conference of Australia, 6 October 2006] (2007) *8 TJR* 329, 331.

Honour observed that the federal *Constitution* not only provides for independent and impartial judges to apply rules known in advance, but also 'divides, allocates and limits all power'.[17]

This constrained nature of both legislative and executive power has always been recognised as a feature of the system created by the *Australian Constitution*. In a celebrated passage Dixon J (as he then was) said,

> [The *Constitution*] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.[18]

Australian courts have rejected the approach of the Supreme Court of the United States of America that some deference should be accorded to the policy choices of the Executive. In *Corporation of the City of Enfield v Development Assessment Commission*[19] the High Court confirmed that the US *Chevron*[20] doctrine of limited deference does not apply in Australia.

The High Court has constitutionally explicit powers to review the lawfulness of the actions of the Executive. Section 75(v) provides that' in all matters in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth' the High Court 'shall have original jurisdiction.' Despite this seemingly clear language, it was not until 2003 that the High Court finally clarified that its s 75(v) jurisdiction to undertake judicial review of administrative conduct could not be displaced.

Plaintiff S157/2002 v Commonwealth[21] re-established[22] that it is beyond the power of Parliament to remove the High Court's power to undertake

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[17] Ibid.

[18] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

[19] (2000) 199 CLR 135, [40]-[48] (Gleeson CJ, Gummow, Kirby and Hayne JJ)

[20] *Chevron USA Inc v Natural Resources Defence Council Inc*, 467 US 837 (1984). For a recent discussion of the relevant Australian principles see *MIC v Yucesan* [2008] FCAFC 110, [13]-[15].

[21] (2003) 211 CLR 476.

[22] In the post federation period the availability of judicial review was unambiguously asserted by the High Court in circumstances in which the Parliament had sought to restrict it, see *The Tramways Case (No 1)* (1914) 18 CLR 54 but, following the decision of the High Court in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR

such review. A privative clause that removes the prospect of judicial review for jurisdictional error[23] is unconstitutional and invalid.[24]

The subordination of the other arms of government to the constitutional rulings made by the independent judges of our highest court continues to sit at the core of the Australian notion of the rule of law.[25] However the issue of how obedience to judicial rulings is to be enforced was left unexplored. The *Australian Constitution*, like that of the United States of America, provides no independent machinery for the enforcement of judicial determinations.[26]

The lack of enforcement machinery is well illustrated by *Worcester v Georgia* (1832) 31 US 51. The United States Supreme Court held in that case that the Cherokee Nation, which had entered into formal treaty arrangements with the United States, was entitled to federal protection from dispossession by the State of Georgia. However the US President Andrew Jackson infamously refused to enforce the decision.[27] President Jackson is reputed to have responded to the news of the outcome, '[Chief

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598, doubts became common. For a more detailed discussion of Hickman and *Plaintiff S157/2002* see Duncan Kerr and George Williams 'Review of executive action and the rule of law under the Australian Constitution' (2003) *14 Public Law Review* 219.

23 According to a unanimous decision of the High Court in *Craig v South Australia* (1995) 184 CLR 163, where an administrative tribunal 'falls into an error or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it': at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 (McHugh, Gummow and Hayne JJ). The possible wider availability of the injunction in the context of administrative review has yet to be fully addressed by the High Court.

24 For a more comprehensive discussion see Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' 14 *Public Law Review* 219 and William B Lane and Simon Young, *Administrative Law in Australia* (2007) 194-202.

25 Australian constitutional law has finally reached, albeit by a very different route, a similar outcome to that achieved three decades earlier by the English common law such that judicial review cannot be avoided; see *Anisminic Corporation v Foreign Compensation Commission* (1969) 2 AC 147.

26 The US Supreme Court has no power to issue *mandamus* against the United States Government: see *Marbury v Madison* [1803] 5 US (1 Cranch) 137. To remedy that omission, at the instigation of Andrew Inglis Clark, s 75(v) was inserted into the *Australian Constitution* during the federation convention debates. It can hardly be doubted that those drafting and enacting the *Constitution* assumed that orders of the High Court made accordingly would be complied with but they provided no specific provisions for their enforcement.

27 Tim Alan Garrison *Worcester v Georgia (1832)* (2004) The New Georgia Encyclopedia <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2720> at 22 September 2008.

Justice] John Marshall has made his decision; now let him enforce it'.[28] In1838 the US Army, ignoring the decision, force-marched the remnant population of the Cherokee Nation from Georgia to Oklahoma Many thousands of Native Americans died along the way; the survivors named the route they were forced to walk the Trail of Tears.

This exception to the more routine observance of judicial orders is so rare, and so discredited, as to prove the rule. Nevertheless, the existence of even a single instance brings into sharp focus the constitutional importance of the assumed and unwritten foundational element of the rule of law. It similarly illustrates the importance of the willingness of the other parts of the polity to submit to the judgment of the courts.[29]

There has been no instance of an Australian government so blatantly disregarding the pronouncements of the High Court. Nothing, other than a universally shared assumption of the axiomatic nature of the rule of law, explains this self-restraint.

Responsible government

Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen, to be 'exercisable by the Governor-General as [Her Majesty's] representative'. This statement obscures more than it reveals. In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, Mason CJ stated:

> Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people.[30]

Yet the text of the *Constitution* provides few pointers to the fact that out government has, from the outset, been based on this premise. The most important are that the Parliament must meet at least annually,[31] money cannot be appropriated without Parliamentary authority[32] and ministers

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[28] An alternative version of what Jackson said is the less colourful, but equally damning, 'The decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate'. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (1984) 212.

[29] For a broader discussion of the normative elements of the rule of law see Deena R. Zimmerman above n 15.

[30] Ibid 138.

[31] *Commonwealth of Australia Constitution* (*Constitution*) s 6.

[32] Ibid s 83.

must be elected members of Parliament.[33] They are hardly a compendium of the principles of responsible government. However, as Evans notes:

> The principles of responsible government that identify by whom executive power is exercised are not expressed in the *Constitution* but rest instead on conventions. According to those conventions, the Governor-General exercises the executive power of the Commonwealth on the advice of his or her ministers and those ministers hold office for only so long as they have the confidence of the lower house of Parliament. As a result, and notwithstanding the language of s 61, in all but exceptional circumstances the roles of the Queen and Governor General are purely formal.[34]

Unwritten conventions have continued to supplement the formal elements mandated by the text of the *Constitution*. Those conventions provide the basis for a number of largely unquestioned practices. One such practice is that, following an election, the Governor-General will call on the leader of a party commanding support in the House of Representatives to form a government. In all but the most exceptional of circumstances,[35] the Governor-General will exercise his or her constitutional powers, including the command of the military forces only on the advice of those ministers.

While unwritten, Australian courts have given direct legal recognition to a number of these assumed elements of the *Constitution*. Judges have recognised the centrality of modern government Cabinet deliberations for claims of public interest immunity and have acknowledged the right of the houses of Parliament to control their own proceedings and to discipline members, including members of the Executive.[36]

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33 Ibid s 64. Ministers may be appointed without holding a seat in the House or the Senate but they cease to hold office unless they have become a Member of Parliament within three months of their appointment.

34 See Simon Evans, 'Continuity and Flexibility: Executive Power in Australia' in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (2006) 90.

35 It is generally agreed that there are limited circumstances, such as following a no confidence motion or if necessary to resist persistent illegal or unconstitutional conduct by a government, when Governor-General may exercise independent 'reserve powers'. Codification of those circumstances has proved elusive. There are no insuperable constitutional or legal reasons to prevent codification. The problem has been finding high level political agreement. The dismissal of the Whitlam government for its failure to obtain supply remains controversial. For a good summary of the relevant considerations see Republic Advisory Committee, 'An Australian Republic: The Options' (1993) 2 *Australian Government Publishing Service* 256.

36 *Egan v Willis and Cahill* (1998) 158 ALR 527.

More significantly, recognising that the system of representative and responsible government implied by the *Constitution* would be undermined unless the right to freedom of expression was guaranteed, the High Court has concluded that the right to communicate about government or political matters is constitutionally entrenched. That implied democratic right can be restricted but only by a law 'that is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with' the maintenance of the constitutionally prescribed system of representative and responsible government.[37] The same notion of responsible government has also served as a foundation for the High Court's jurisprudence limiting common law defences to the tort of defamation.[38]

The prerogative unbound? Ruddock v Vadarlis

Section 61 of the Constitution is cryptic as to the content of the Executive power. Its terms are as follows:

> 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*.

Since federation it has never been questioned that this executive power includes aspects not conferred by statute. The non-statutory components were historically described as 'prerogative' powers.

The 'prerogative' was that bundle of rights possessed by the Crown quite distinct in law from the rights of common persons. What was to be recognised in English law as included within that bundle was fought over during Tudor and Stuart times. As responsible government displaced the rule of kings, the prerogative became seen to be less an aspect of individual Royal power as an aspect of government, 'in itself…a striking testimony to the manner in which accepted political doctrines become part of the law of the land through recognition by the Judges'.[39]

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37 *Coleman v Power* (2004) 220 CLR 1, [51] (McHugh J).

38 Although it was initially expressed as a separate constitutional defence in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, later High Court authority took the position that the common-law of Australia had developed conformably with the requirements of the *Constitution*; see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

39 Herbert Vere Evatt, '*Certain Aspects of the Royal Prerogative*' (Doctoral Thesis, University of Sydney, 1924) Republished as *The Royal Prerogative*, (1987) 25. While some personal prerogative rights of the British Crown survived in England several were so ancient as to have no application and others had no logical application in

The prerogative powers of the Crown possessed by British monarch at the time of the making of the *Constitution* were described by Dicey[40] as 'the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown'. Until recently the well understood jurisprudence of the High Court was to the effect that such prerogative powers, as were capable of application in Australia, had been conveyed to the Governor-General by s 61 and were exercisable by him or her as if he or she were a monarch.[41]

For example Isaacs J said of s 61:

> These provisions carry with them the royal war prerogative and all that the common law of England includes in that prerogative so far as it is applicable to Australia.[42]

More recently Mason CJ, Deane and Gaudron JJ held that s 61:

> [C]onfers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the *Constitution* itself.[43]

That understanding of the nature of the discretionary powers conferred by s 61 carried with it a number of legal consequences. Firstly, all prerogative powers were vestigial, leftovers from mediaeval times when English Kings ruled as absolute monarchs. Hence they could be lost by disuse or abolished by statute.[44] Furthermore, no new prerogative power could be created.[45]

Australia, for example those relating to the landing Royal Fish (sturgeon and whale) on the shores of England and Scotland.

40 A V Dicey *Law of the Constitution* (10th ed, 1959) 424.

41 By convention on advice – see above n 3. For a larger discussion and consideration of 'reserve powers' see George Winterton, *Parliament, the Executive and the Governor-General* (1983) 13-38.

42 *Farey v Burvett* (1916) 21 CLR 433, 452.

43 *Davis v Commonwealth* (1988) 166 CLR 79, 93.

44 George Winterton has persuasively dismissed the sometimes advanced argument that prerogative powers read into s 61 are not subject to parliamentary control: George Winterton, *Parliament, the Executive and the Governor-General* (1983) 33.

45 *Case of Proclamations* (1611) 77 ER 1352.

Secondly, the scope of the prerogative was justiciable.[46] Thirdly, what was included within the prerogative was knowable, with the result that all that was included within the prerogative, while not without considerable complexities, was capable of classification and identification.[47]

But if Isaacs J's view, that the High Court has the duty to take judicial notice of every fundamental British constitutional doctrine existing as at the time of the passage of the *Constitution*, no longer serves to illuminate and constrain how s 61 is to be understood, it opens up difficult questions as to whether Australian executive power remains subject to the same limits as the British Crown.

The process whereby intrinsic and autochthonous sources of legitimacy must replace what are now thought of as outdated Imperial notions, certainly influenced Gummow J (prior to his elevation to the High Court) in *Re Ditfort; Ex parte DCT*.[48] His Honour reasoned that:

> 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.

Perhaps those remarks were not intended to carry all the weight that was later placed upon them but this reformulation was replete with potential consequences and begged some difficult questions. If an Australian court can no longer look to the known and bounded terms of the prerogative to discern the scope of whatever discretionary or arbitrary authority resides in the hands of the Australian Executive how is the power to be constrained? If the content of the power that is vested is not a known quantity referable to the prerogative, what criteria can an Australian court apply to limit any claimed use of such power? Is it possible that the Australian Governor-General possess greater discretionary and arbitrary powers than the Queen he or she represents and in whose name those powers are exercised? Can this discretionary or arbitrary power be limited or abolished by legislation? Does the common-law doctrine applicable to the prerogative, that when the same subject matter is directly regulated by

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46 Ibid.

47 Identifying the precise limits of what was thought to be inherited by this means was the subject of considerable debate and scholarship. The most influential analysis of the prerogative as it applied to the Dominions was that of Herbert V Evatt, '*Certain Aspects of the Royal Prerogative*' above n39. Citing Baty, Evatt J referred to the 'difficulty of blazing a track through the complicated maze of British-Colonial Law' at 155.

48 (1988) 19 FCR 347 ('Re Ditfort'), 8.

statute the Crown can no longer rely upon it, equally apply to those aspects of discretionary and arbitrary power directly vested in the Governor-General by s 61? Is the scope of the power justiciable?[49]

The history of *Vadarlis*

The decision in *Vadarlis*, in which the leading judgment of a Full Court of the Federal Court of Australia was delivered by French J, elevated those questions from theoretical speculation to more practical importance. The *Vadarlis* case arose in controversial and politically charged circumstances.

The basic facts are well known. A Norwegian vessel, the *MV Tampa*, was boarded by Australian Defence Forces acting on instructions from the Government to prevent it from making port in Australia and discharging some 433 asylum seekers. The master of the *Tampa* had rescued them after their own vessel had sunk. If the power to undertake these actions existed, the source of that power had to be located outside of those conferred by statute. The *Migration Act 1958 (Cth)*, while comprehensively addressing the subject matter of non-citizens' entry and removal from Australia, conferred neither power to authorise the vessel's boarding nor the ongoing detention[50] of the asylum seekers. Mr. Vadarlis, a Victorian solicitor acting *pro bono*, sought orders in the nature of *habeas corpus* in the Federal Court seeking the release of the asylum seekers.

At first instance North J granted the application. His Honour dealt with the asserted entitlement of the Executive to detain and remove those aboard the *Tampa* in a manner consistent with traditional legal analysis. He stated that:

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[49] The availability of judicial review in relation to exercises of prerogative or executive power under s 61 of the *Constitution* was left open and described as uncertain in *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* [2008] FCAC 7, [66] (French, Weinberg and Greenwood JJ). But in principle it is available both as a common law remedy: *Council for Civil Service Unions v Minister for Civil Services* [1985] AC 374, and pursuant to s 75(v) of the *Constitution.* As McHugh Gummow and Hayne JJ noted in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44:

> '[The] proposition that an office-holder under the Crown might be dismissed in any case at will and without cause previously was supported in the United Kingdom by the view, since discredited there, that the manner of exercise of non-statutory powers of the executive government was never susceptible of judicial review. In Australia, as Windeyer J explained in Marks, the constitutional structure after federation rendered inapplicable any such general proposition': at [69].

[50] North J's finding of fact that the asylum seekers had been detained was not challenged on appeal.

> The *[Migration] Act* contains comprehensive provisions concerning the removal of aliens (ss. 198-9). In my view the Act was intended to regulate the whole area of removal of aliens. The long title of the Act is '[a]n Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons'. It leaves no room for the exercise of any prerogative power on the subject: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.[51]

The Minister appealed. Two critical questions fell for determination by the Full Court of the Federal Court of Australia. They were whether the Commonwealth Executive possessed any power independent of statute to prevent the entry of aliens and if so, whether such power had been displaced by the detailed provisions of the *Migration Act 1958 (Cth)* that regulated the identical subject matter.

A majority, (French J; Beaumont J concurring) upheld the Minister's appeal. Their Honours concluded that the power both existed and had not been displaced. Recalling the reasoning of Gummow J in *Re Ditfort*, French J rejected the proposition that the source of the Executive's power to exclude aliens was to be sourced as an aspect of the prerogative. His Honour also rejected the proposition that the power conferred under s 61 was the legal equivalent of the prerogative. A power conferred under s 61 is not displaced by statute unless more explicitly abrogated. His Honour stated that:

> As Gummow J said in *Re Ditfort*, 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.[52] … The executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative. While the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution. This written *Constitution* distributes powers between the three arms of government reflected in Chapters I, II and III of the *Constitution* and, as to legislative powers, between the polities that comprise the federation. The power is subject, not only to the limitations as to subject matter that flow directly from the *Constitution* but also to the laws of the Commonwealth made under it. There is no place then for any

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51 *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, [121]-[122].

52 Ibid [179].

> doctrine that a law made on a particular subject matter is presumed to displace or regulate the operation of the executive power in respect of that subject matter. The operation of the law upon the power is a matter of construction.[53]

It was thus immaterial whether or not a prerogative power to expel aliens had ever existed, still existed or had been lost through disuse. The prerogative did not constrain s 61's bounds.

> The reference to the common law of Australia in *Beane* and *Lim* and to the common law prerogative of the Crown in *Meyer* do not deal with the question whether, absent statutory authorisation, s 61 of the *Constitution* confers upon the Executive a power to exclude or prevent the entry of a non-citizen to Australia and powers incidental thereto.[54]

That which was included in the armoury of the Executive acting under s 61 was held to flow from the idea of Australia as a nation and the *Constitution's* assignment to the Executive of the role of promoting the nation's protection and advancement.

The problem the majority then faced was how to identify that content. This was only dealt with cursorily, French J stating that:

> The spheres of responsibility vested in the Crown by the *Constitution* and referred to by Mason J in *Barton* were described in *Davis* as …derived from the distribution of legislative powers effected by the *Constitution* itself and from the character and status of the Commonwealth as a national polity. In like vein Brennan J agreed generally with the observation of *Jacobs J in Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 ['AAP'] at 406 that the phrase "maintenance of the *Constitution*" imports the idea of Australia as a nation…Brennan J saw the phrase as assigning to the Executive government functions relating not only to the institutions of government but more generally to the protection and advancement of the Australian nation.[55]

Yet both *Davis v Commonwealth* (1988) 166 CLR 79 and the *AAP* cases were concerned with legislative, rather than executive power. The direct relevance of those cases was therefore contestable. There were persuasive

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53 *Ruddock v Vadarlis* (2001) 110 FCR 491, [183].

54 Ibid [197].

55 *Ruddock v Vadarlis* 110 FCR 491, [180].

reasons to reject an easy analogy between executive and legislative power.

In a recent essay, Stephen Gageler[56] has suggested that the High Court's approach has differed, and should differ depending on whether or not it is foreseeable that political accountability can be relied on to resolve contending views of the appropriate balance and constraint on governmental powers. Only where this is not the case, Gageler argues, is the High Court required to be a strict umpire, deciding for or against a particular challenged law or action.

This gives only a crude summary of a much refined argument but if this thesis is accepted,[57] there is a good and rational (if rarely articulated) explanation as to why many plausible arguments about the invalidity of enactments of the representative bi-cameral Commonwealth Parliament have been rejected by the High Court and their merits left for political rather than judicial determination – and an equally clear reason, given that the Executive has come to dominate the House of Representatives, such that there is little effective check through Parliamentary processes on that power, for strict judicial review to apply, to any claimed indeterminate Executive powers which would be otherwise uncoupled from all effective review.

There was also a risk of drawing too much from the passages from the authorities French J cited. Since *AAP* was a rare example of a case from which no clear ratio can be derived,[58] reliance on the conclusions of Jacobs and Brennan JJ in that case could only be a slender reed upon which to base any strong conclusions. Furthermore, although *Davis* may be authority for the proposition that the 'implied nationhood' power can support a range of legislative measures (in that case associated with appropriations for and the regulation of activities associated with the celebration of the Australian bicentennial), it is also authority for the

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56 Stephen Gageler, 'Beyond the text, A vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138-157. Gageler, recently appointed Solicitor General for the Commonwealth, suggests the *Constitution* is best understood as a framework designed to enlarge the powers of self government of the unified people of Australia through institutions of government, central and state, structured to be politically accountable to those people.

57 The thesis advanced by Gageler will be the subject of considerable debate and requires some refinement in light of the decision in *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009) in which the justices were unanimous in stating that the Commonwealth cannot expend money on matters for which legislative or executive power is absent.

58 Leslie Zines, *The High Court and the Constitution* (5th ed, 2008), 354.

proposition that such legislative power has only a narrow remit. In that case, the Court struck down aspects of Commonwealth legislation that purported to limit the private use of words and symbols extending beyond that which was reasonably required for the protection of the bicentennial celebrations.[59] Limits that *Davis* may be thought to have imposed on coercive action not authorised by legislation and supported only by executive fiat, were not explored in *Vadarlis*.

Instead the majority appears to have regarded it as self-evident that the executive power conferred by s 61 must include the power to order the military to board a vessel to prevent the entry to Australia of those aboard. Presumably, given his approving reference to Brennan J's views in *Davis*[60] (which in turn endorsed the observations of Jacobs J in the AAP case), French J took the view that the powers to board the *Tampa*, detain the asylum seekers and prevent their coming ashore on Australian territory were each part of the armoury of powers required by the Governor-General 'for the protection and advancement of the Australian nation'. But whatever was His Honour's rationale, no reasoning illuminating the conclusion beyond that set out below was provided:

> In my opinion, absent statutory authority, there is such a [s 61] power at least to prevent entry to Australia. It is not necessary, for present purposes, to consider its full extent. It may be that, like the power to make laws with respect to defence, it will vary according to circumstances. Absent statutory abrogation it would be sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result. Absent statutory authority, it would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave.[61]

In a strong dissent Black CJ identified the novel constitutional significance of the majority so holding:

> If it be accepted that the asserted executive power to exclude aliens in time of peace is at best doubtful at common law, the question arises whether s 61 of the *Constitution* provides some larger source of such a power. It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the *Constitution* by virtue of general conceptions of `the

[59] A point remarked on by Heydon J in *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009) [521].

[60] *Ruddock v Vadarlis* 110 FCR 491, [180].

[61] Ibid [197].

> national interest'. This is all the more so when according to English constitutional theory new prerogative powers cannot be created.[62]

His Honour observed that the conclusions of the majority left little or no scope for any underlying notions such as the rule of law and responsible government to operate.

Differences also emerged as to the effect of the detailed statutory provisions in the *Migration Act 1958 (Cth)*. While the majority accepted that laws made by the Parliament might cut back its scope, their Honours held that there was no presumption that a law on a particular subject matter displaced or regulated the operation of the executive power conferred by s 61. The absence of that presumption permitted the majority to elevate that which Black CJ regarded as a [disputed] 'prerogative' power to a constitutional grant under s 61 which could only be removed by unambiguous legislative language. Accordingly the executive's right to act independently of statute had not been limited or abrogated despite the *Migration Act's* very detailed terms. Acting under that power the government could authorise the military to seize the *Tampa* to prevent its master discharging on Australian soil passengers he had rescued on the high seas. The parallel power authorising that action was conferred directly by the *Constitution* and could be removed only by unambiguous text.[63]

> The question is whether the Act operates to abrogate the executive power under s 61 to prevent aliens from entering into Australia. There are no express words to that effect. It is necessary then to look to whether it has that effect by implication. It is not necessary for this purpose either to determine the full extent of the executive power or the full effect of the Act upon it. It is sufficient to ask whether the Act evinces a clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of a vessel carrying non-citizens apparently intending to land on Australian territory and the power to prevent

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62 *Ruddock v Vadarlis* 110 FCR 491, [30].

63 A similar approach to the continuing subsistence of the prerogative in the face of statutory (in that case constitutional) language which on its face appeared cover the field and thus exclude recourse to the powers claimed was taken Fiji High Court in the much criticised decision *Qarase and Ors v Bainimarama and* Ors Unreported 9 October 2008(Gates ACJ, Byrne and Pathik JJ). In that case, notwithstanding provisions in the Fiji constitution which required the President to act on advice, their Honours held at [132] 'the National Security prerogative could only be abrogated by express words or by words of necessary implication'. Their Honours accordingly concluded that the prerogative power of the President of Fiji permitted the President to lawfully ratify the overthrow of an elected government by the military and to appoint the military Commander as Interim Prime Minister.

> such a vessel from proceeding further towards Australian territory and to prevent non-citizens on it from landing upon Australian territory.[64]

Before turning to a broader discussion of the implications of *Vadarlis* with respect to the ambit of Executive power it is worth examining this narrower proposition more closely.

Abrogation by statute

There are few, if any, Commonwealth examples of the prerogative (or, to use language more consistent with *Vadarlis*, the unregulated s 61 powers of the Governor-General) having been expressly abolished. Hitherto when Parliament legislated in detail on a subject matter the assumption was that any formerly unregulated executive powers would be subsumed and abrogated by the statute and thus incapable of further use.[65]

Of course this assumption may have been mistaken. In *Oates v Attorney-General*,[66] a Full Court of the High Court referred with apparent approval to Mason J's views in *Barton v The Commonwealth*[67] that the Parliament is not to be supposed to abrogate a prerogative of the Crown unless it did so by express words or necessary intendment.[68]

But the authority of *Oates* is doubtful. In a subsequent case, *Jarratt v Commissioner of Police (NSW)*,[69] the NSW government sought to rely on the Crown's prerogative or common law right to dismiss its servants without cause. Rejecting that proposition McHugh, Gummow and Hayne JJ stated that:

> The applicant held, and was dismissed from, a statutory office, not one created under what appears to be the obsolete or at least obsolescent prerogative power recognised by s 47 of the *Constitution Act*. By necessary implication, the prerogative found in s 47, and which might have been employed to create the applicant's position as Deputy Commissioner as one at pleasure, was abrogated or displaced by the Act itself. Speaking in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing*

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64 *Ruddock v Vadarlis* 110 FCR 491, [201].

65 See for example *Brown v West* (1990) 169 CLR 195, [12] (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *White v Director of Military Prosecutions* (2007) 235 ALR 455.

66 (2003) 214 CLR 496 ('Oates'), [34] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

67 (1974) 131 CLR 477, 501; also referred to by French J in *Vadarlis.*

68 Followed in *Mokbel v Attorney General (Cth)* (2007) 162 FCR 278.

69 (2005) 224 CLR 44 ('*Jarrett*').

> *Authority* of the principle laid down in *Attorney-General v De Keyser's Royal Hotel*, McHugh J said that principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.[70]

In an even more recent decision, *Northern Territory v Arnhem Land Trust*[71] a strong High Court majority, including three justices who had participated in *Oates*, applied *Jarratt*. Gleeson CJ, Gummow, Hayne and Crennan JJ observed that:

> Just as 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament' the comprehensive statutory regulation of fishing in the Northern Territory provided for by the *Fisheries Act* has supplanted any public right to fish in tidal waters.[72]

From a 'rule of law' perspective, the approach taken by the High Court in the *Jarratt* and *Northern Territory* is preferable to *Oates* and *Vadarlis*. It can hardly be supposed that any Parliament would intend to allow unregulated executive powers to survive the statutory codification of an area of activity. *Jarrett* and *Northern Territory* express the most recent considered views of the High Court on this crucial issue of statutory construction. While neither *Jarrett* nor *Northern Territory* explicitly distinguish or overrule *Oates*, the High Court's rejection of the principle it stands for seems necessarily implicit.

Oates and *Vadarlis* also stand out as inconsistent with other recent decisions of the High Court in respect of statutory construction. The ancient and general presumption, that the Crown is not bound by legislation unless that intention was specifically manifested, is no longer the common law of Australia.[73] It would be a most odd result if, having reached that conclusion as a matter of general principle, a narrow aspect of that presumption continued to be recognised in a stronger form to protect the prerogative functions of the Crown.

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[70] Ibid [85].

[71] [2008] HCA 29 (30 July 2008).

[72] Ibid [27].

[73] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1; modifying *Bropho v State of Western Australia* (1990) 171 CLR 1.

It thus seems reasonable to conclude that at least the second limb of *Vadarlis* is no longer good law.

The paradox

In more recent times the High Court has repeatedly held that the *Australian Constitution* rests on autochthonous notions of the sovereignty of the people rather than upon the residual authority of an Imperial statute. Simultaneously, in other contexts, the Court has asserted the continuing high importance and relevance of constitutional implications derived from notions of responsible government and the rule of law.[74]

In respect of the scope of Executive power, reasoning of the kind expressed by the majority in *Vadarlis* upholds the first principle but at the cost of the second. If one begins from the premises expressed by Dixon J[75], whereby the *Constitution* must be understood as having been infused with the assumptions of the rule of law, the conclusions of the majority in *Vadarlis* are strikingly provocative.

Almost 50 years ago Lord Diplock famously dismissed argument in the United Kingdom seeking to widen the powers of the executive observing 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[76] It would be more than ironic if a shift to an autochthonous explanation of the source of Commonwealth executive power were to open the door for Australian courts to sanction executive claims to new discretionary and arbitrary powers long forsworn in other countries sharing the English legal inheritance.

This presents a paradox. To resolve that paradox it seems probable that some means of reconciling rule of law principles with an autochthonous reading of s 61 will be sought. There are already tentative signs that a more cautious approach to any claimed arbitrary or unregulated power will be forthcoming. The extent of Executive power conferred by s 61 recently came before the High Court in *Pape*[77] and the recently appointed Chief Justice, French CJ took the occasion to warn that:

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74 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Bodruddaza v MIMIA* [2007] HCA 14.

75 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

76 *British Broadcasting Corporation v Jones* [1965] Ch 32, 79.

77 [2009] HCA 23 (7 July 2009).

> Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive law, absent authority conferred by a statute made under some head of power other than s 51(xxxix) alone, are likely to be answered conservatively. They are likely to be answered bearing in mind the cautionary words of Dixon J in the *Communist Party Case*. History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.[78]

As a member of the Federal Court prior to his elevation, French CJ had authored the majority decision in *Vadarlis*. These later observations appear to suggest that arguments for the validity of non statutory coercive powers similar to those the executive exercised in the apprehension of the *Tampa* may receive a less favourable reception in the future.

Pape and Executive Power

The litigation in *Pape* challenged the appropriation and expenditure of funds which the Commonwealth Parliament intended to grant to the government to fund a stimulus program to prevent Australia falling into recession during the global economic crisis that had emerged in late 2008. As one of a number of measures *The Tax Bonus for Working Australians Act (No 2) 2009 (Cth)* was enacted. The Act commenced on 18 February 2009. It provided for lump sum payments of a minimum of $250 to be made to all persons with a tax liability of at least $1 in the then current tax year. The government argued that this expenditure was needed to create immediate increased demand in the economy. The plaintiff, a legal academic, issued a writ seeking a declaration that the *Tax Bonus* legislation was invalid. The case was given expedition. On 3 April 2009 the High Court by a majority of 4:3 delivered judgment in favour of the validity of the Act.

However it was not until 7 July 2009 that the Court's reasons for decision were published. All was not what had seemed when the decision was announced. The reasons revealed that the judges had unanimously rejected the Commonwealth's central arguments:

- Section 81 of the Constitution is a grant to the Parliament of the power to appropriate the Consolidated Revenue Fund for any purpose (save one explicitly prohibited) it thinks fit;

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[78] Ibid [10].

- The Executive necessarily has power to expend any money lawfully appropriated; and,
- The Parliament may enact a law requiring that payment, and regulating the conditions that are to be met before payment is made.[79]

Those issues having been resolved against the Commonwealth, the High Court was required to consider whether legislating to appropriate the Consolidated Revenue Fund to the executive so that it could be spent as part of a stimulus package might be incidental to the executive power of the Commonwealth conferred under s 61. A majority, French CJ and Gummow, Crennan and Bell JJ concluded that the executive power did extend to authorise the Commonwealth executive to undertake short term measures to meet adverse economic conditions affecting the nation as a whole.[80] Hayne and Kiefel JJ and Heydon J dissented.

The authors of the majority joint judgment, Gummow, Crennan and Bell JJ premised their conclusion on a factual assertion that only the national government had the resources to meet the emergency.

> It is not to the point to regret the aggregation of fiscal power in the hands of the Commonwealth over the last century. The point is that only the Commonwealth has the resources to meet the emergency which is presented to it as a nation state by responding on the scale of the *Bonus Act*.[81]

The dissentients contested that premise, observing that 'words like "crisis and 'emergency' do not readily yield criteria of constitutional validity'.[82] They suggested that a similarly effective response would have been possible by the Commonwealth using uncontroversial legislative powers and taking advantage of its financial entitlement to make conditional grants upon condition to the States.[83]

Gummow, Crennan and Bell JJ[84] took the occasion *Pape* offered to reaffirm the authority of earlier decisions of the High Court that had upheld the incapacity of the Executive Government to dispense with

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79 *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [287] (Hayne and Keifel JJ).

80 Ibid [133] (French CJ).

81 Ibid [242] (Gummow, Crennan and Bell JJ).

82 Ibid [347] (Hayne and Keifel JJ).

83 Ibid [343]-[357], (Hayne and Keifel JJ), [519]-[520] (Heydon J).

84 Ibid [227].

obedience to the law[85] and had imposed the need for statutory authority to support the extradition of fugitive offenders from Australia.[86] Their Honours also noted the statement by Latham CJ in the *Pharmaceutical Benefits Case*[87] that the executive government of the United Kingdom cannot create a new offence and appeared to approve His Honour's conclusion that a similar limitation also applies in Australia.

Acknowledging that these important markers appear intended to denote the limits of what cannot be conferred by s 61, a larger question remains. If the known ambit of the prerogative no longer expresses the unregulated content of executive power conferred by s 61 of the *Constitution*, how are future boundaries to be discerned? Is there any coherent modern rationale for the acceptance of the authority of earlier decisions of the High Court?

French CJ explained his understanding of the source of Commonwealth executive power as follows:

> Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.[88]

The two limits His Honour ascribed to the power were that it was neither available to set aside the distribution of powers between the Commonwealth and the States (or the distribution of powers between the three branches of the federal government) nor to abrogate any constitutional prohibitions.[89] Given French CJ's approving reference to Dixon J's statements in the *Communist Party Case* set out earlier in this paper,[90] His Honour may have intended at least some aspects of rule of law to be comprehended within the notion of 'constitutional prohibitions' but the relevant passage remains self confessedly Delphic.[91]

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85 *A v Hayden (No 2)* (1984) 156 CLR 614 and *White v Director of Military Prosecutions* (2007) 231 CLR 570.

86 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614.

87 *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 *(Pharmaceutical Benefits Case).*

88 *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [127].

89 Ibid.

90 See above n 75.

91 *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [127], (French CJ).

Pape thus confirms not only that there is there no prospect of retreating to older notions rooted in notions of the primacy of Imperial law to explain the content of s 61 but also that the boundaries of executive power conferred by s 61 remain unsettled.

Gummow, Crennan and Bell JJ agreed that s 61 conferred powers extending beyond those which had been historically identified as the prerogative.[92] Their Honours endorsed the formulation expressed by Brennan J in *Davis*[93] as to its scope, subject to a qualification with respect to the breadth of the incidental power to legislate in its aid.

> It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s. 61 does confer on the Executive Government power to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation, to repeat what Mason J said in the *AAP* case. In my respectful opinion, that is an appropriate formulation for a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth.[94]

It is pertinent to observe that the criterion commended by Brennan J inevitably leaves the choice of judicial policy to be contested. The difficulty of applying a criterion which picks up Mason J's test in the AAP Case was illustrated by the strong dissents of Hayne and Keifel JJ and Heydon J in Pape.

Accepting that there was a financial crisis requiring a national response, the dissentients remained of the opinion that the provision of financial stimulus was not, to recall Mason J, an activity 'which cannot otherwise be carried on for the benefit of the nation' and accordingly there was no occasion for any expansion of executive power.[95]

Circularity of reasoning

Most critical to the subject of this paper is the circularity inherent in the propositions assented to by the majority. It is to be recalled that the High Court unanimously held that ss 81 and 83 of the *Constitution* were not the

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92 Ibid, [214]-[215].

93 *Davis v Commonwealth* (1988) 166 CLR 79, 111.

94 *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [228].

95 Ibid [343]-[357] (Hayne and Keifel JJ), [519]-[520] (Heydon J).

source of an 'appropriation power' or a 'spending power'. Therefore, if the *Tax Bonus* legislation was to be upheld it could only be as a tax law[96] or as a law made incidental to other powers directly conferred by the *Constitution* on the Parliament or the Executive. However, hopes that the taxation power might be relied upon were dashed. Four judges found in favour of the plaintiff's contention that the *Tax Bonus for Working Australians Act (No 2) 2009* could not be upheld as a valid law 'with respect to' taxation.[97]

The legislation survived solely because a 4:3 majority of the High Court accepted that the power to legislate for an appropriation was incidental to the executive power conferred by s 61. The joint majority judgment emphasised that the Executive was the arm of government most capable and empowered to respond to any national crisis whether it is war, natural disaster or economic crisis.[98] Aspects of this notion are far from novel. Executive power, like legislative power, has always been permitted to expand when required in defence of the realm.[99] Extraordinary powers and discretions have been reposed in the Executive (and accepted by justices of the High Court) in times of war.[100]

As Hayne J noted:

> [T]he defence of the nation is peculiarly the concern of the Executive. The wartime cases like *Lloyd v Wallach*, *Ex parte Walsh*, *Little v The*

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[96] Heydon J held that the *Tax Bonus for Working Australians Act (No 2) 2009* was incapable of being characterised as a law with respect to taxation. Gummow, Crennan and Bell JJ held that the Tax Bonus would have been valid as a law with respect to taxation but for those aspects of the scheme which could not be severed where the bonus provided for exceeded the tax liability of the individual taxpayer. As reading down the provision was impossible, the whole scheme was deemed to be invalid. Interestingly the Commonwealth had conceded from the outset of argument in the High Court that the taxation power could not support a law providing for a payment to an individual of an amount greater than the tax paid by him or her. Whether that concession should have been made has been questioned by the former Commonwealth Solicitor General David Bennett QC during an Australian Association of Constitutional Law, NSW Chapter 'Forum on the *Pape* Case' 22 September 2009. Whatever the merit of that proposition, four of the justices concluded in the plaintiff's favour with respect to the tax law argument. Hayne and Kiefel JJ would have allowed the reading down and French CJ found it unnecessary to decide the point on that ground.

[97] *Constitution* s 51(ii); see discussion above n 96.

[98] *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [233] (Gummow, Crennan and Bell JJ).

[99] *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

[100] See the sweeping dicta of Issacs J in *Farey v Burvett* (1916) 21 CLR 433, 453 in which the limits of the defence power were said to be 'bounded only by the requirements of self-preservation'.

> *Commonwealth* and *Wishart v Fraser* recognise that in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which [the Executive] must exercise.[101]

But only anciently and faintly had it been suggested that such Commonwealth legislation in time of war, or in response to threats such as terrorism, could be supported otherwise than though having its constitutional roots in the defence power.[102]

Pape appears to require a different conclusion, and to the extent it does so, poses challenging conundrums. If a plausible claim that particular Executive powers are needed to respond to an emergency, to prepare for the defence of the realm or to address a national crisis can engage the incidental power to legislate in support of the claimed need, that prospect poses very difficult questions as to how such a newly discovered power can be limited. As Hayne and Keifel JJ's dissent perceptively noted, words like 'crisis' or 'emergency' do not readily yield criteria for constitutional validity.[103] A similar objection to 'making the conclusion of the legislature final and so the measure of the operation of its own power' underpinned Dixon J's reluctance to sanction legislation incidental to an implied power to protect the constitution in the *Communist Party Case*.[104] Hayne and Keifel JJ drew on this to reinforce their rejection of the approach that commended itself to the majority, noting that if the majority was correct 'the extensive litigation about the ambit of the defence power during World War II was beside the point'.[105]

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[101] *Thomas v Mowbray* (2007) 233 CLR 307, 505.

[102] See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, 2006) 854. Blackshield and Williams point out that in *Farey v Burvett* (1916) 21 CLR 433, Isaacs J appeared to envisage a separate executive power being available to respond to wartime emergencies independent of the defence power in s 51(vi). On His Honour's analysis the express incidental power, s 51(xxxix), would then operate to confer legislative competence on the Parliament. However, as Blackshield and Williams then note, 'although these suggestions have certain resonance in later decisions on the 'nationhood power,' they have never been tested'. [854] Recently in *Thomas v Mowbray* (2007) 233 CLR 307 the High Court referred only to the defence power in circumstances where, if it existed an implied power to protect the constitution form sedition or subversion might have been expected to have been discussed. On the other hand it may be objected that little should be read into that example, that given that the crucial point in *Thomas v Mowbray* was the High Court's ruling that the defence power *extended* to laws about domestic terrorism—a ruling that avoided the necessity to seek an alternative basis to support the validity of the impugned legislation.

[103] *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [347]-[352]

[104] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

[105] *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [347].

To be fair to the majority Justices, this critique of their reasoning may not be sufficiently sensitive to what they may have intended to be safeguards restricting the circumstances in which the executive can recite itself into power. For example Gummow, Crennan and Bell JJ refer,[106] with seeming approval, to Latham CJ's statements[107] as to the very limited extent to which s 51(xxxix) empowers the parliament to make laws not incidental to the execution of another head of legislative power. It may be that their Honours regarded those passages as conveying a more general point that, in respect of the executive power conferred under s 61, the incidental legislative power is available only to facilitate the kind of things the Crown can undertake in the same manner as could an ordinary citizen (such as entering into contracts, spending money etc) and cannot extend either to the creation of new offences or to the enactment of a substantive law creating rights and duties. Although it may be doubted that this was their Honours' intentions, even if that were the case, the position remains far from clear.

Moreover, as noted earlier,[108] French CJ was alert to warn that that in the future, questions about the application of the executive power to the control or regulation of conduct or activities under coercive law, absent authority conferred by a statute made under some head of power other than s 51(xxxix) alone, are likely to be answered conservatively.

However, unless care is taken, the reasoning of the majority in both *Vadarlis* and *Pape* carries some risk of extending the discretionary and arbitrary power of the Australian Governor-General far beyond the known bounds of the prerogative. It leaves the scope and plenitude of Commonwealth executive powers yet to be defined and inherently uncertain. The limits are to be discerned by interrogating the Delphic terms of s 61, subject of course to constitutional prohibitions.[109] There is as yet no coherent limiting doctrine. Case by case decisions on validity will need to be made.[110]

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[106] Ibid, [243]-[244].

[107] *Attorney-General (Vic) v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237, 256-60.

[108] *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [10]; see also above n 78.

[109] Ibid [127]. French CJ states that the exigencies of national government can be invoked neither to set aside the distribution of powers nor to abrogate constitutional prohibitions. But that gives little guidance. As His Honour himself observes:

> 'This important qualification may conjure the 'Delphic' spirit of Dixon J in the *Pharmaceutical Benefits Case.* But to say that is to say mo more than that there are broadly defined limits to the power that must be applied case by case'.

[110] Ibid.

Chapter III and Justiciability

But is it open to an Australian court to venture on that task?

Lord Birkenhead highlighted the blurred and overlapping boundaries of British law and the constitutional doctrines of the prerogative when he observed the latter represented 'not in truth the statement of a legal doctrine but the result of a constitutional struggle'.[111] Once the starting point of former justices Isaacs and Dixon as to the relevance of Imperial constitutional understandings to the interpretation of s 61 is discarded, the absence of any markers as to the boundaries of the power of the executive invites the suggestion that setting such boundaries must be at least as much a political or legislative, as it is a judicial function.

Given that Australia's *Constitution*, unlike that of Britain, mandates a strict requirement for the separation of powers, might it therefore be suggested that no Chapter III court can lawfully undertake that task? What right has the judicial arm of government to declare its view of what powers the Executive should or should not exercise? What right has an Australian court to judge and reject claims advanced by the Executive for novel non statutory powers[112] and claimed to be necessary 'for the protection and advancement of the Australian nation'? In *Pape*, Heydon J (dissenting) identified the problem:

> Modern linguistic usage suggests that the present age is one of 'emergencies', 'crises', 'dangers', and 'intense difficulties', of 'scourges' and other problems…The public is continually told that it is facing 'decisive' junctures, 'crucial' turning points and 'critical' decisions… Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use… it is far from clear what, for constitutional purposes, the meaning of the words 'crises' and 'emergencies' would be. It would be regrettable if the field were one in which the courts deferred to, and declined to substitute their judgment for, the opinion of the executive or the legislature. That would be to give a 'un-examinable' power to the executive, and history has shown, as Dixon J said, that it is often the executive which engages in the unconstitutional suppression of democratic institutions. On the other hand, if the courts do

[111] *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 353. See also Herbert V Evatt *'Certain Aspects of the Royal Prerogative'* Doctoral Thesis University of Sydney; published as *The Royal Prerogative,* 1987, 25.

[112] A power that has not been open to the British monarch to exercise for nearly 400 years; *Case of Proclamations* (1611) 77 ER 1352.

> not defer to the executive or the legislature, it would be difficult to assess what would be within and what is beyond power. [113]

However, the very idea that the arbitrary non statutory powers of the Executive can be non-justiciable runs against firmly established judicial doctrine.[114] As Dixon J and many other writers have observed, uncontrolled and arbitrary Executive power opens the door to tyranny.

Vadarlis and *Pape* present a conundrum. In order to undertake the task of defining the limits of the executive power conferred by s 61 Australian, courts have to make judgments requiring policy or political choices, thereby straying close to, or over, the boundary of the separation of powers imposed by Chapter III. On the other hand, to decline to undertake that task is unthinkable.

A failure to set limits on otherwise unbounded claims for the exercise of arbitrary Executive powers would be heedless of the supervisory jurisdiction explicitly conferred by s 75 (v) of the *Constitution* and destructive of any meaningful commitment to the rule of law.

Australian courts will hopefully, eventually find a way of resolving the conundrum by evolving some autochthonous criteria to limit s 61. For the moment however, a citizen concerned about the risks of broadening the Executive's unregulated powers could be forgiven for seeing the majority judgments in *Vadarlis* and *Pape* as opening the lid of a Pandora's Box.

It is difficult to see how the High Court could ever work its way back to the position asserted as recently as six years ago by the late Professor George Winterton that:

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[113] *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), [551]-[552].

[114] In Australia this position has been arrived as a consequence of the constitutional structure: *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, [69] (McHugh, Gummow and Hayne JJ):

> '[T]he proposition that an office-holder under the Crown might be dismissed in any case at will and without cause previously was supported in the United Kingdom by the view, since discredited there, that the manner of exercise of non-statutory powers of the executive government was never susceptible of judicial review. In Australia, as Windeyer J explained in *Marks*, the constitutional structure after federation rendered inapplicable any such general proposition.'

As their Honours noted, a similar result had obtained in Britain simply by the development of the common law; see, *Council for Civil Service Unions v Minister for Civil Services* [1985] AC 374. See also the discussion in William B. Lane and Simon Young, *Administrative Law in Australia* (ed, 2007) Ch 2.

> [T]he government is limited to those powers falling within the Crown's prerogative powers. In other words, the government can 'maintain' the *Constitution* and the laws of the Commonwealth, only to the extent allowed by the Crown's prerogative powers.[115]

Perhaps it is even too late for obiter dicta expressed by Kirby J in *White v Director of Military Prosecutions*.[116] His Honour proposed that the way forward was to preserve the new approach to legitimacy while at the same time treating the prerogative as a special instance of a contained and known group of exceptional powers conferred on the Governor-General, but not expanded, by the language of s 61.

In that case Kirby J noted that:

> [F]or Australia the *Constitution* itself regulates and replaces the Royal prerogative. It affords a new and sufficient national source for the governmental powers of the Commonwealth. Such powers are now ultimately derived from the people of the Commonwealth. In certain specific respects, the prerogative powers of the Crown are preserved by the *Constitution*. However, within the context of the constitutional arrangements expressed in Chapter I, including s 51, this is done subject to Chapter III of the Constitution. There is no lacuna.[117]

If we were to accept Kirby J's analysis that, by the assent of the Australian people the prerogative powers are 'preserved by' the *Constitution*, it would give us a reason to regard s 61 as containing those powers but as not having expanded their content.

One would still look to the prerogative, not to discover residual powers of the Crown but instead to identify the scope of a group of limited and exceptional powers that were preserved by the people of Australia as a limited grant to the Executive under s 61 of the *Constitution*.

Such a conclusion would meet the objective of reading the *Constitution* as informed by an assumption of the rule of law while respecting the modern expression of its source of legitimacy. The discretionary and arbitrary powers of the Governor-General would be contained to those 'preserved' and incorporated by s 61 of the *Constitution* as at federation.

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[115] George Winterton 'The Limits and Use of Executive Power by Government' (2003) 22 *Federal Law Review* 421, 428.

[116] (2007) 231 CLR 570.

[117] Ibid [142].

They would be finite, known and capable of being cut back by legislation as discussed above.

However, assuming Kirby J's approach is not adopted, some other coherent explanation, including a sound rationale for retaining the existing beachheads of the outer limits endorsed by the joint judgment in *Pape*, of the limits of s 61 will be needed.

Conclusion

Sir Owen Dixon stated there was 'no safer ground to judicial decisions in great conflict than strict and complete legalism'.[118] His Honour and most if not all of his predecessors and contemporaries on the High Court, held the view that the *Constitution* was, in its essence, 'a statute of the British Parliament enacted as in the exercise of its legal sovereignty over the law everywhere' in the Empire.[119] As a result it was doctrinally simple for them not only to posit this enactment as binding on all Australian institutions but also to infer into its terms the unwritten principles of responsible government and the rule of law which had evolved in British constitutional theory and practice, including a constrained prerogative.

This produced a rich and complex jurisprudence. It influenced the High Court's approach to the limits of legislative and executive powers. The High Court's reading of what assumptions and implications are conveyed by the *Constitution* was informed by British constitutional doctrines existing and recognised as at the time of its enactment.

As Dixon J remarked in the *Communist Party Case*:

> [The Constitution] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect… others of which are simply assumed.[120]

More recently, recognising that Australia has become a sovereign and independent nation and that it was no longer possible to explain the *Constitution's* continuing primacy on the assumption of the supremacy of Imperial law, the High Court began to evolve more contemporary explanations. The *Constitution's* primacy is now asserted on the basis of it having been adopted and maintained by the Australian people.

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118 Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi, xiv.

119 Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

120 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

That is entirely appropriate. Australia is now a multicultural society with its own history. British culture, once dominant, has become less central to Australian self identity. Australian schools no longer require students to have familiarity with the political evolution of England, Wales, Scotland and Ireland. This is a history that shaped the political and legal assumptions and conventions that Sir Owen Dixon would have taken for granted as part of the shared inheritance of all educated Australians of his age. But those times are behind us. Even graduates of Australian law schools can bypass a detailed study of the evolution of British constitutional law, a subject once thought to be essential. The clock cannot be turned back.

However for Australian courts this presents a dilemma. The initial exhilaration and boldness of the Mason Court, whose members took advantage of the *Constitution* having been freed of its British barnacles to develop indigenous implications and rights,[121] was tempered by the Gleeson Court with renewed caution. It will fall to the French Court to address the unresolved tensions.

On the one hand *Plaintiff S157/2002*[122] represents the strongest assertion by the High Court, in the fifty years since the *Communist Party Case*, of the primacy of rule of law principles. On the other, decisions such as *Vadarlis* and *Pape*, have the potential to undermine the substantive importance of those principles significantly.

Driven to seek meaning from the constitutional text uncoupled from the interpretive reference points that Isaacs J acknowledged in *Commonwealth v Kreglinger*[123] and that Sir Owen Dixon highlighted in his Quarterly Law Review essay,[124] Lindell argues that the current superior courts, sceptical of judicial creativity, have taken a minimalist approach[125] to the important but unwritten constitutional principles that bear on the task of defining the outer boundaries of the Executive's powers.

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[121] One example is the implied nationhood power; *Davis v Commonwealth (1988) 166 CLR 79*. Other examples are the Kable doctrine: *Kable v DPP (NSW)* (1996) 189 CLR 5, and the implied right of freedom of political communication; see above n 37, 38.

[122] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

[123] Commonwealth v Kreglinger (1926) 37 CLR 393, 413.

[124] Sir Owen Dixon, 'The Law and the Constitution' (1935) *51 Law Quarterly Review* 590, 597.

[125] Geoff Lindell, 'The *Combet* Case and the Appropriation of Taxpayers' Funds for Political Advertising—An Erosion of Fundamental Principles?' *66 The Australian Journal of Public Administration* 3, 307-328, 322.

If *Vadarlis* and *Pape* are correct, the Governor-General has undefined arbitrary and discretionary non statutory powers not known to the prerogative.

Taken to their logical conclusion, such cases challenge an aspect of the premise of secure constitutionalism. That aspect is the subjection of the executive to limits imposed by law.

Given, as Stephen J put it, that 'the Crown and the executive have come to represent the same forces that control a majority in the lower house',[126] it necessarily falls to the judicial arm to set limits on the reach of the powers conferred by s 61.

The High Court that French CJ has joined lacks the comfort allowed to Sir Owen Dixon and other past justices to apply Imperial doctrines, including those limiting the power of the Crown, as part of a paradigm of strict and complete legalism. Contemporary Australian courts must instead look to the will of the Australian people in adopting and maintaining the *Constitution* as the source of its legitimacy. It is from such premises that the rationale for doctrines such as responsible government and the rule of law must now evolve if there is to be a limit placed on arbitrary power.

In *Gerlach v Clifton Bricks*, Callinan J joined Kirby J to summarise why the *Constitution* requires Executive power to be limited. By inference their Honours also highlighted the heavy but inescapable burden that this places on the High Court to undertake that responsibility. The passage is disarmingly simple.

> All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No parliament of Australia could confer absolute power on anyone. Laws made by the federal and state parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this court, in accordance with the constitutional standard.[127]

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[126] *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, 384.

[127] *Gerlach v Clifton Bricks* (2002) 209 CLR 478, [69].

Articulating the constitutional standard that limits s 61 may require the High Court to press against the boundaries of the separation of powers imposed by Chapter III. Although this poses a conundrum, this task cannot be avoided without compromising the High Court's most fundamental constitutional responsibility which is its duty, as cases arise, of declaring what Australian law is, and of holding the Executive to its terms.