George Winterton[*]

THE RELATIONSHIP BETWEEN COMMONWEALTH LEGISLATIVE AND EXECUTIVE POWER

The executive power of the Commonwealth has largely been neglected, both by the High Court and by commentators, receiving scant attention in comparison with the Commonwealth's legislative and judicial powers. The High Court has examined executive power on fewer than 10 occasions — principally three cases in the Whitlam era: *Barton v Commonwealth*,[1] the *AAP* case[2] and *Johnson v Kent*[3] — and, most recently, in the *Bicentennial Authority Act* case in 1988.[4] (The power has, of course, also arisen in several Federal Court cases, most notably the *Tampa* case in 2001.)[5] The relative neglect of this power is reflected in constitutional commentary, for which High Court cases represent primary 'authority'. The Commonwealth's legislative powers have, of course, received detailed examination in every major text since Quick and Garran in 1901.[6] But, while the first monograph on Commonwealth judicial power appeared as early as 1904,[7] almost 80 years were to elapse before publication of a book devoted to the executive power of the Commonwealth.[8] This disparate treatment reflects the fact that the exercise of executive power raises fewer justiciable controversies than legislative and judicial power (especially under a parliamentary executive,[9] although this is true also of the United States), but an additional factor is that executive power has always been something of a mystery, frequently being defined merely as the 'residue' of governmental powers after legislative and judicial

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1 (1974) 131 CLR 477.

2 *Victoria v Commonwealth and Hayden ('AAP')* (1975) 134 CLR 338.

3 (1975) 132 CLR 164.

4 *Davis v Commonwealth* (1988) 166 CLR 79.

5 *Ruddock v Vadarlis* (2001) 110 FCR 491 (FC) ('*Vadarlis*'), reversing *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. Special leave to appeal to the High Court refused: (2001) 205 CLR 694.

6 J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901).

7 J Quick and L E Groom, *The Judicial Power of the Commonwealth* (1904). The next major text was Z Cowen, *Federal Jurisdiction in Australia* (1959), now L Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002).

8 G Winterton, *Parliament, the Executive and the Governor-General* (1983). See also H E Renfree, *The Executive Power of the Commonwealth of Australia* (1984).

9 Thus an Irish commentator remarked that 'Constitutions which provide for an executive in parliament are rarely troubled about executive power': J Casey, *Constitutional Law in Ireland* (3rd ed, 2000) 231.

powers are excluded.[10] This is demonstrated well by Quick and Garran, whose scant two pages devoted to s 61 of the Constitution are uncharacteristically unhelpful - indeed positively misleading in irrelevantly noting a secondary meaning of 'the Commonwealth' as including both the Commonwealth (its acknowledged meaning in s 61) and the States.[11]

The executive power of the Commonwealth is conferred by s 61 of the Constitution which provides:

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

This section clearly includes three provisions. First, it vests 'the executive power' of the federal polity created by the Constitution — the Commonwealth — in the Queen; this, together with other provisions in the Constitution,[12] established Australia as a monarchy with the Queen of the United Kingdom as its Head of State. Secondly, the Commonwealth's executive power is 'exercisable' by the Governor-General, which meant that it was exercised on the advice of Commonwealth (and not British) Ministers, since it is the former who advise the Governor-General. Although s 61 vests executive power in the Queen and does not expressly require it to be exercisable *only* by the Governor-General, s 61 should be interpreted as impliedly so providing because its second clause, interpreted in the light of British constitutional principles, meant that Commonwealth executive power was to be exercisable on the advice of Commonwealth (not British) Ministers, who were unable directly to advise the monarch until 1931.[13] The third provision in s 61 is the most cryptic, stating to what subjects Commonwealth executive power 'extends'. This third provision has, naturally, been the most important and the only aspect of s 61 to raise justiciable controversy.

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10 See G Winterton, above n 8, 70, 264; A W Bradley and K D Ewing, *Constitutional and Administrative Law* (13th ed, 2003), 80; *Halsbury's Laws of England* (4th ed Re-issue, 1996), vol 8(2) [9] ('Executive functions are incapable of comprehensive definition, for they are merely the residue of functions of government after legislative and judicial functions have been taken away'); H Renfree, above n 8, 389; *Bishamber Dayal Chandra Mohan v Uttar Pradesh* AIR 1982 SC 33, 41 [20]; D D Basu, *Shorter Constitution of India* (10th ed, 1989), 281; J Casey, above n 9, 231.

11 See Quick and Garran, above n 6, 701.

12 See ss 1, 2, 64, 66, 68 and 126.

13 See G Winterton, above n 8, 23-6.

Notwithstanding its brevity,[14] s 61 is positively prolix by comparison with analogous constitutions, both antecedent and subsequent. The Canadian Constitution of 1867, for example, provided merely that '[t]he executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen'.[15] The South African Constitution of 1909 was a little more fulsome, providing, like the Canadian, that '[t]he executive government' of the Union was vested in the King, but adding that it 'shall be administered by His Majesty in person or by a governor-general as His representative'.[16] Subsequent republican constitutions in nations with a parliamentary executive have been equally 'laconic'.[17] The Irish Constitution of 1937 merely provides that '[t]he executive power of the State shall ... be exercised by or on the authority of the Government'.[18] Even the Indian Constitution, which is said to be the longest in the world and might have been expected to delimit federal executive power both from State executive power and federal legislative and judicial powers, simply states that

> [t]he Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.[19]

Section 61's reference to 'the execution and maintenance' of the Constitution and laws of the Commonwealth was, therefore, an exceptional innovation in constitutional drafting but, unfortunately, has not served the interest of clarity — indeed, quite the opposite. This clause can probably be attributed to the first two justices of the High Court (before their elevation to the Bench). The 'execution' provision is attributable to Sir Samuel Griffith who successfully moved its insertion at the 1891 Sydney Convention, assuring delegates that the clause was 'quite free from ambiguity',[20] which it might have been had it been left as it was. However, the words 'and maintenance', which added uncertainty, appear to have been added at the end of the 1898 Convention by the Drafting Committee, chaired by Edmund Barton, for the clause received no further consideration in the Convention after Griffith's 1891 intervention.[21]

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14 See, likewise, C Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 125, 128.

15 *Constitution Act 1867* (UK) s 9.

16 *South Africa Act 1909* (UK) s 8.

17 J Casey, above n 9, 231.

18 *Constitution of Ireland* Art 28.2. See also Art 29.4.

19 *Constitution of India* Art 53(1).

20 Convention Debates (Sydney, 1891), 778.

21 See M Crommelin, 'The Executive', in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (1986), 127, 131–2.

Section 61 raises at least three important issues which will be considered here. First, what meaning should be given to the section, especially its third clause? Secondly, to what extent does the Constitution legally separate the exercise of Commonwealth legislative and executive powers? And, finally, assuming that Commonwealth prerogative powers are subject to Commonwealth legislation, what considerations determine when the prerogative is ousted or superseded by legislation? The degree to which Commonwealth prerogatives are subject to State or Territory legislation is another important question, but it will not be examined here.

THE SCOPE OF COMMONWEALTH EXECUTIVE POWER

In stating to what s 61 'extends', the section itself virtually acknowledges that it is not defining Commonwealth executive power, which needs to be distinguished from State executive power and the Commonwealth's legislative and judicial powers. The High Court has acknowledged this, although it has generously suggested that the section 'describes' that power, surely an overstatement. Thus in the *Wooltops* case Isaacs J stated that Commonwealth executive power 'is described but not defined in sec. 61',[22] noting that its words alone were inadequate to serve as 'an invariable measuring rod of Commonwealth executive power'.[23] Starke J expressed a similar view.[24] Evatt J also overstated the prescriptive capacity of s 61's words in stating that the third declaration of the section

> only defines the general limits of the King's executive authority in respect of the Commonwealth and does not determine what the Executive may lawfully do upon any given occasion.[25]

More than half a century later, the High Court acknowledged that s 61 had never been defined;[26] indeed, its scope was not 'amenable to exhaustive definition'.[27] As recently as 2000, the Court stated that the scope of the power 'remains open to some debate'.[28]

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22 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 440 ('*Wooltops*'). See, likewise, 437 (Isaacs J).

23 Ibid 442. See, likewise, 446 (Isaacs J).

24 Ibid 461.

25 *R v Hush, Ex parte Devanny* (1932) 48 CLR 487, 511. See, likewise, *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 321 (Evatt J).

26 *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ).

27 Ibid 107 (Brennan J).

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

Since the interpretation of all constitutional provisions must commence from the text, s 61's 'meagre and highly abstract words'[29] must be defined, as they were by Williams J in the *Communist Party* case.[30] Adopting Knox CJ and Gavan Duffy J in *Wooltops*,[31] 'execution' means 'the doing of something immediately prescribed or authorised' by the Constitution or Commonwealth laws. As noted above, the 'execution' component of this clause (introduced at the instance of Sir Samuel Griffith) should cause few difficulties. Execution of the Constitution, or as Griffith phrased it, 'execution of the provisions of this Constitution'[32] clearly envisages executive action to comply with obligations which the Constitution imposed upon the Commonwealth — such as protecting States against invasion or (on the application of its Government) domestic violence[33] — or facilitating the exercise of power by another branch of government. Thus, the High Court has noted that s 61 'extends to the provision of what is necessary or convenient for the functioning of the Parliament provided that funds for that purpose are appropriated by the Parliament'.[34] Section 61 would likewise extend to providing administrative assistance to courts and executing their process, subject to Parliament having appropriated the necessary funds. The word 'laws' in s 61 (as in s 109) refers to statutes and subordinate legislation, and does not include the common law.[35] 'Execution' of the Constitution and Commonwealth laws must, of course, comply, or at least be consistent, with the terms of the Constitution or law. Thus s 61 would probably authorise the Commonwealth Government to establish the Inter-State Commission which s 101 of the Constitution requires ('There shall be an Inter-State Commission'), but which has not existed for all but a dozen years of the Commonwealth's existence. The *AAP* case suggests that Commission could be authorised under the executive power to conduct inquiries and research (like the CSIRO), subject to Parliament appropriating the necessary funds,[36] but s 101 implies that only the Commonwealth Parliament could empower the Commission to engage in 'adjudication and administration' of the provisions of the Constitution and laws relating to trade and commerce.

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29 L Zines, 'Commentary', in H V Evatt, *The Royal Prerogative* (1987), C 5.

30 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230, adopted in respect of 'execution and maintenance' of Commonwealth laws by Gummow J in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 ('*Residential Tenancies*').

31 (1922) 31 CLR 421, 432.

32 The 1891 Convention adopted Griffith's words. Their slight alteration in the final provision is, presumably, the work of the 1898 Drafting Committee.

33 *Commonwealth Constitution* s 119.

34 *Brown v West* (1990) 169 CLR 195, 201 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

35 See G Winterton, above n 8, 28.

36 See *AAP* (1975) 134 CLR 338, 397 (Mason J), 412–3 (Jacobs J), 424 (Murphy J). See also 370 (McTiernan J).

The 'maintenance' component of s 61 presents greater difficulty. What is meant by 'maintenance' of the Constitution and Commonwealth laws? Williams J defined the term to mean 'the protection and safeguarding of something immediately prescribed or authorised' by the Constitution or Commonwealth laws.[37] It clearly includes protecting Australia from invasion or subversion, but exactly what measures are authorised — in the absence, it must be noted, of Commonwealth legislation? Examination of this question requires reference to be made to the royal prerogative.

Since the Commonwealth's executive power is vested in the Queen and the Commonwealth was born into a common law environment,[38] the High Court has long acknowledged that the executive power of the Commonwealth includes the Crown's prerogative powers which are appropriate to the Commonwealth's constitutional sphere of activity.[39] There is a considerable debate among commentators as to the proper meaning of 'prerogative' powers, with three views vying in contention[40] but, at least for present purposes, it will suffice to define prerogative powers as the common law[41] or non-statutory[42] powers of the Crown.[43]

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37 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230.

38 See *Residential Tenancies* (1997) 190 CLR 410, 457 (McHugh J); *In re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ); O Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

39 See *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J) (Barwick CJ and Jacobs J impliedly agreeing); *Johnson v Kent* (1975) 132 CLR 164, 169 (Barwick CJ), 174 (Jacobs J); the *AAP* case (1975) 134 CLR 338, 405–6 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), 108 (Brennan J); *Residential Tenancies* (1997) 190 CLR 410, 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 464, 474 (Gummow J); G Winterton, above n 8, 31, 48–51. Pursuant to this interpretation of s 61, the Queen in December 1987 revoked the two current instruments (of 1954 and 1973) by which she had purported to assign powers to the Governor-General pursuant to s 2 of the Constitution: see *Commonwealth of Australia Gazette*, No S 270 (9 September 1988).

40 These range from the extremely narrow (Sir William Wade) through the view that prerogative powers are those unique to the Crown (Blackstone) to Dicey's view which would include all the Crown's non-statutory powers. Judicial and academic support can be found for both Blackstone's and Dicey's views, with academics preponderantly supporting the former. However, Dicey appears to have prevailed in the courts, as Wade acknowledged: H W R Wade, 'Procedure and Prerogative in Public Law' (1985) 101 *Law Quarterly Review* 180, 194 ('Dicey has triumphed once again'). Sir William Wade himself remarked that his comments on the proper meaning of the word 'were made purely for purposes of terminological accuracy, without any suggestion that they had legal consequences': W Wade, 'The Crown, Ministers and Officials: Legal Status and Liability', in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999), 23, 31.

41 See *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Commonwealth v Western Australia* (1999) 196 CLR 392 [106] (Gummow J). Cf. *R v Secretary of State*

As in Canada,[44] the Commonwealth's constitutional sphere of activity has been interpreted as essentially coincident with its legislative powers,[45] which is entirely appropriate under a system of responsible government and parliamentary supremacy over the executive. Hence, Mason J held that the ambit of Commonwealth executive power 'does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution'.[46] This field is defined by

> the distribution of legislative powers effected by the Constitution itself and the *character and status of the Commonwealth as a national government.*[47]

Consequently, his Honour held:

> [T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix.) and 61 a capacity to engage in enterprises and activities *peculiarly adapted* to the government of a nation and which *cannot otherwise be carried on for the benefit of the nation.*[48]

Mason J instanced scientific research (such as that carried out by the CSIRO) and 'inquiries, investigation and advocacy in relation to matters affecting public health' as matters falling within s 61.[49]

While (at least to the present writer) persuasive as a matter of policy, the latter holding merely states conclusions, the legal reasoning apparently being assumed. Mason J's view that, in following the contours of legislative power, s 61 includes executive power resulting from the 'character and status of the Commonwealth as a

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for the Home Department, Ex parte Fire Brigades Union [1995] 2 AC 513, 573 (Lord Nicholls) ('*Fire Brigades*'): 'the residue of discretionary power left at any moment in the hands of the Crown'. (Reflecting Dicey.)

42 *Commonwealth v Western Australia* (1999) 196 CLR 392, 430 [106] (Gummow J).

43 The widest (Dicey) view is preferable since it includes common law powers not unique to the Crown and supposedly shared by natural persons. However, it is doubtful whether these common powers of the Crown are truly analogous to those exercised by natural persons, bearing in mind the power and authority of the Government. Is a Crown contract truly analogous to one between private citizens? Is private snooping really analogous to official surveillance? See G Winterton, above n 8, 121–2.

44 See ibid 227 n 29.

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

46 Ibid 396.

47 Ibid. (Emphasis added.)

48 Ibid 397. (Emphasis added.)

49 Ibid.

national government'[50] is unexceptionable, since there is considerable support for the view that the Commonwealth's legislative powers include some power arising from the Commonwealth's status and function as a national government,[51] whether this be implied in s 51 or, preferably, be found in the express incidental power, s 51 (xxxix).[52] However it is Mason J's next step which raises concerns. First, what is the criterion for determining what executive power flows from 'the character and status of the Commonwealth as a national government'? Mason J gives no reason for deciding that research and investigation fall within the executive power derived from that source. It is not suggested that the conclusion is incorrect, only that it is merely asserted, not derived by legal reasoning from its premise. Secondly, the criteria of being 'peculiarly adapted to the government of a nation' and being unable 'otherwise to be carried on for the benefit of the nation'[53] are political questions unsuited to judicial determination. Opinions may justifiably differ as to whether a particular activity must be conducted by the Commonwealth if the nation is to derive benefit, and opinions will also differ on the question whether activities are to Australia's benefit or detriment. Does Australia really benefit more from research carried out by the CSIRO (a Commonwealth instrumentality) than (say) the University of Melbourne (a State instrumentality)? Mason J reasoned along similar lines in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* ('*Duncan*'), in which he referred to his remarks in the *AAP* case and, without stating any further reasons, concluded that it was 'beyond question' that s 61 authorised the Commonwealth to conclude agreements with the States.[54]

The reasoning of Jacobs J in the *AAP* case largely parallels that of Mason J, albeit with one possibly significant difference. Like Mason J, his Honour held that the subjects of Commonwealth executive power were those falling within Commonwealth legislative power, but with the addition (or including) 'all matters which are the concern of Australia as a nation'.[55] However, whereas Mason J reasoned without reference to the Crown's prerogative powers, thereby implying that his conclusion was derived directly from the words of s 61, Jacobs J based his conclusion on the prerogative, linking it to s 61 through its Constitution 'maintenance' component:

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50 See above, text at n 47.

51 See L Zines, *The High Court and the Constitution* (4th ed, 1997) 297–303.

52 See *Davis v Commonwealth* (1988) 166 CLR 79, 101, 102, 103 (Wilson and Dawson JJ), 118 (Toohey J).

53 See above, text at n 47.

54 *Duncan* (1983) 158 CLR 535, 560, apparently adopted in *R v Hughes* (2000) 202 CLR 535, 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

55 *AAP* (1975) 134 CLR 338, 406.

> The prerogative is now exercisable by the Queen through the Governor-General acting on the advice of the Executive Council on all matters which are the concern of Australia as a nation. Within the words 'maintenance of this Constitution' appearing in s. 61 lies the idea of Australia as a nation within itself and in its relationship with the external world.[56]

However, when concluding, like Mason J, that s 61 included the power to undertake research and exploration, Jacobs J reasoned (like Mason J) without reference to the prerogative:

> The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out. Moreover, the complexity of society ... requires co-ordination of services ... Research and exploration likewise have a national, rather than a local, flavour.[57]

As with the observations of Mason J, these remarks can be queried for merely stating conclusions without the reasoning from which they are derived. In particular, it is unclear how they relate to Jacobs J's earlier reference to the Crown's prerogative powers.

In determining the ambit of the 'maintenance' limb of s 61, the question therefore arises whether the Commonwealth Government is limited to powers derived from the prerogative, or whether it can undertake (without legislative authority other than appropriation of the necessary funds) any activity which is considered appropriate for a national government. The present writer has argued elsewhere that the former is the preferable interpretation, with s 61 having two components which may appropriately be termed 'breadth' and 'depth'. It was argued (following, inter alia, the views of Mason and Jacobs JJ in the *AAP* case)[58] that the subjects in respect of which Commonwealth executive power can be exercised (breadth) are those on which it can legislate, including matters appropriate to a national government, which should be seen as falling within s 51(xxxix) in domestic matters and s 51(xxix) in foreign affairs.[59] But the question then arises as to what activities the Government can undertake in regard to those subjects (depth).[60] It was argued that, apart from 'executing' the Constitution and laws of the Commonwealth, the Government is

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56 Ibid 405–6.

57 Ibid 412–3.

58 (1975) 134 CLR 338.

59 G Winterton, above n 8, 29–30, 40–4.

60 See, likewise, S Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94, 97, repeated 'Australia' (2003) 1 *I.CON* 123, 127-8.

limited to those powers falling within the Crown's prerogative powers.[61] In other words, the Government can 'maintain' the Constitution and laws of the Commonwealth only to the extent allowed by the Crown's prerogative powers.[62] This approach reflects that in *Johnson v Kent,*[63] in which the 'depth' component alone was in issue since the executive activity (constructing a tower on Canberra's Black Mountain) was to occur in the Australian Capital Territory, thus raising no breadth concerns since the subject fell with s 122 of the Constitution. The position was similar in *Barton v Commonwealth*,[64] a foreign affairs case concerned only with depth since the subject fell within the external affairs power (s 51(xxix)). Moreover, as Gibbs J noted,[65] the *AAP* case was principally concerned with breadth, making it unnecessary for many of the justices to consider the depth component.

However, it is questionable whether recent constitutional jurisprudence supports the interpretation of s 61 outlined above. Indeed, the opposing viewpoints are well represented in the recent *Tampa* litigation. In examining whether s 61 authorised the Commonwealth Government to prevent the entry of aliens, North J at first instance confined his analysis to the Crown's prerogative powers,[66] but reached no conclusion thereon except that any prerogative powers had been ousted by the *Migration Act* 1958 (Cth). On appeal, Black CJ reached the same conclusion, though he also held that s 61 did not authorise the exclusion of aliens. His Honour focussed principally on the prerogative powers, holding that they did not support the executive's actions;[67] nor did any non-prerogative powers in s 61.[68] On the question whether s 61 included such powers, Black CJ remarked:

> 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

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61 G Winterton, above n 8, 31–4.

62 Harrison Moore noted that '[i]n pursuance of its duty to maintain the Constitution and the law [sic] of the Commonwealth, the Executive may, without any further statutory authority, take whatever measures are ordinarily allowed to the Executive by the common law to protect every branch … of the Federal Government in the performance of its duties': W H Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 297-8. However, Moore does not state that the executive is confined to these powers.

63 (1975) 132 CLR 164.

64 (1974) 131 CLR 477.

65 *AAP* (1975) 134 CLR 338, 379.

66 *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, 478–82 [110]–[122].

67 *Vadarlis* (2001) 110 FCR 491, 495–501 [9]–[29].

68 Ibid 501 [31].

> national interest'. That is all the more so when according to English constitutional theory new prerogative powers cannot be created.[69]

French J, on the other hand, clearly rejected any notion that s 61 confines the Government to the Crown's prerogative powers:

> 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 distributing powers between the three arms of government reflected in Chs I, II and III of the Constitution.[70]

Consequently, his Honour held, the scope of s 61 was to be 'measured by reference to Australia's status as a sovereign nation and by reference to the terms of the Constitution itself'.[71] Contrary to long established authority, noted above, French J appeared to reject the view that s 61 extended to all subjects falling within the Commonwealth's legislative power;[72] but, since the power to exclude aliens was 'central to the expression of Australia's status and sovereignty as a nation',[73] it was included in s 61.[74] However, this line of reasoning is incompatible with that of the High Court in cases such as the *AAP* case[75] and, as Black CJ noted,[76] the conclusion authorising coercive action extends beyond executive powers recognised in earlier cases such as *Davis v Commonwealth* ('*Davis*').[77]

However, in reasoning from s 61 without reference to the Crown's prerogative powers, French J has the apparent support of recent High Court authority. In

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69 Ibid 501 [30].

70 Ibid 540 [183]. Beaumont J concurred in the judgment of French J.

71 Ibid 542 [191].

72 Ibid 542 [192].

73 Ibid.

74 Ibid 543 [193]. Recent Irish Supreme Court authority supports the conclusion of French J: *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26, 60 (Denham J) (Hamilton CJ concurring) ('Historically, the control of aliens is for the executive. ... [T]he executive of a state, as an incident of sovereignty, has power and control over aliens'), 62, 91 (Keane J) (Hamilton CJ concurring) ('It was accepted by counsel in the present case that the power of the State to deport aliens independently of any statutory power was part of the prerogative power'), 93 (the 'sovereign power of the State to deport aliens ... is clearly a power of an executive nature'). These remarks were entirely obiter, and it was conceded that this executive power could be 'controlled by legislation': 93.

75 (1975) 134 CLR 338.

76 *Vadarlis* (2001) 110 FCR 491, 501 [31].

77 (1988) 166 CLR 79.

Davis[78] the Court held that s 61 authorised the Government to commemorate Australia's Bicentenary and matters incidental thereto. No reliance was placed on prerogative powers, the conclusion apparently being derived directly from s 61 following the reasoning of Mason J in the *AAP* case.[79] Thus Mason CJ, Deane and Gaudron JJ held it to be a

> plain fact that the commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power.[80]

Wilson and Dawson JJ similarly merely concluded that 'the Commonwealth must necessarily have the executive capacity … to recognize and celebrate its own origins in history'.[81] Brennan J held that s 61 'undoubtedly' included such commemoration,[82] and Toohey J considered such conclusion 'entirely appropriate' because of the implications of European settlement for Australia.[83] Brennan J referred to the prerogative, although he did not employ it in reaching his conclusion which he appears to have based on the 'maintenance of this Constitution' limb of s 61, agreeing with Jacobs J in the *AAP* case that the phrase 'imports the idea of Australia as a nation',[84] authorising the Government to act for 'the protection and advancement of the Australian nation'.[85]

Hence *Davis* suggests that the depth component of s 61 (what action the Government can take in respect of subjects falling within s 61) is not limited to power authorised by the prerogative. A similar view was subsequently adopted by McHugh J who remarked, without further explanation, that 'the executive power of the Commonwealth conferred by s 61 involves *much more than the common law prerogatives of the Crown*'.[86] Although focussing on jurisdictional issues, a somewhat similar view was expressed by Gummow J while on the Federal Court:

> In Australia, with questions arising in federal jurisdiction, one looks not at the content of the prerogative in Britain, but rather to s 61 of the Constitution …

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78 Ibid.

79 Ibid 93 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J), 119 (Toohey J).

80 Ibid 94.

81 Ibid 104.

82 Ibid 114.

83 Ibid 119.

84 Ibid 110.

85 Ibid.

86 *Residential Tenancies* (1997) 190 CLR 410, 459. (Emphasis added.)

> That power ... enables the Crown to undertake all executive action *appropriate to the spheres of responsibility vested in the Commonwealth.*[87]

But how, it might be asked, is a court to apply such a vague and politically-charged criterion without reference to standards such as those provided by the prerogative?

Further support for holding that s 61 includes, but is not limited to, the Crown's prerogative powers is provided by Geoffrey Sawer, who remarked in 1976 that 'the preponderant drift of both decision and discussion and indeed the actual wording of s. 61' suggested that it included 'an area of inherent authority derived partly from the Royal Prerogative, and probably even more from the *necessities of a modern national government*'.[88]

Notwithstanding recent commentary, the preferable interpretation of s 61 is that the depth of federal executive power under the 'maintenance' limb should be limited to the Crown's prerogative powers. Although, as Geoffrey Sawer suggested, this interpretation may be out of line with the 'predominant drift' of current authority, there is no *decision* to the contrary. It is not suggested that the decisions of the High Court in *Davis*[89] or of Mason and Jacobs JJ in the *AAP* case[90] would have differed had the prerogative been employed to fix the boundaries of Commonwealth executive power. The royal prerogative is, admittedly, not an ideal criterion by which to govern executive action by a modern government. It is, as has rightly been noted, 'a residue, a remnant' of the earlier authority of English monarchs,[91] 'the last

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87 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369. (Emphasis added.) The second sentence essentially quotes Mason J in *Barton v Commonwealth* (1974) 131 CLR 477, 498.

88 G Sawer, *The Executive Power of the Commonwealth and the Whitlam Government* (unpublished Octagon Lecture, University of Western Australia, 1976), 10. (Emphasis added.) Sawer referred especially to the judgment of Mason J in the *AAP* case. Sawer later suggested that the Commonwealth Government's treaty-making power might be derived from s 61 'and that there is no need to invoke any Royal prerogative at all': G Sawer, 'Some Little-Noticed Aspects of the Tasmanian Dams Case', *Canberra Times*, 13 July 1983, 2. However, he subsequently based that power on 'a combination of s 61 and so much of the prerogative relevant to this matter as is required': G Sawer, 'The External Affairs Power' (1984) 14 *Federal Law Review* 199, 200. Sawer was unsympathetic to the notion of 'inherent' executive power; he would have preferred to confine it to 'the carrying out of the powers conferred by statute': *Report of the Executive Government Advisory Committee to the Constitutional Commission* (June 1987), 55. Neither the Committee nor the Commission adopted this view: ibid 56; *Final Report of the Constitutional Commission* (1988) [5.214].

89 *Davis v Commonwealth* (1988) 166 CLR 79.

90 (1975) 134 CLR 338.

91 C R Munro, *Studies in Constitutional Law* (2nd ed, 1999), 257. See, likewise, ibid, 258 ('[t]he prerogatives that remain are relics'. Lord Reid likewise remarked that '[t]he prerogative is really a relic of a past age, not lost by disuse': *Burmah Oil Co*

unclaimed prize of the 17th century conflict'.[92] It can also be difficult to determine, requiring extensive historical and archival research, as in *Attorney-General v De Keyser's Royal Hotel Ltd.*[93]

In *Vadarlis* French J alluded somewhat cryptically to popular sovereignty as supporting an executive power to exclude aliens.[94] However, it is difficult to see how 'the foundation of the Constitution in popular sovereignty' contributed to the legal reasoning, even if (as French J believed) the importance of a power as 'central to the expression of Australia's status and sovereignty as a nation' is a criterion for inclusion in s 61.[95] However, his Honour's allusion may reflect a desire to interpret the Constitution in a manner more appropriate to an independent nation, without reliance upon colonial notions such as the prerogative, which French J considered merely the 'common law ancestor' of the executive power of the Commonwealth.[96] Bradley Selway (when Solicitor-General of South Australia) remarked recently that '[c]onstitutional analysis based upon the role of the monarchy seems to have gone out of fashion',[97] a view supported by the preference expressed by Gleeson CJ and Gaudron J for speaking of a 'presumption that legislation does not apply to members of the executive government', rather than a presumption that it 'does not bind the Crown'.[98] While constitutional discourse should reflect present constitutional realities, one of these is that the Constitution was not inscribed upon a *tabula rasa*. It was born into a common law world, albeit one capable of development, for adaptability is one of the common law's most fundamental and valuable qualities. This is especially true of Ch II of the Constitution, which was deliberately drafted to reflect the supposed law of the Constitution, not its practice, even in 1900.[99] An interpretation of Ch II which ignores British and Australian constitutional history by taking its words at face value is not 'post-colonial', but rather one which judges the

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(Burma Trading) Ltd v Lord Advocate [1965] AC 75, 101 (HL) ('*Burmah Oil*'). For more favourable perspectives, see S Payne, 'The Royal Prerogative', in M Sunkin and S Payne (eds), above n 40, 77, 86–7; and *Laker Airways Ltd v Department of Trade* [1977] QB 643, 705 (Lord Denning MR) (noting the views of Locke and Blackstone that the prerogative is 'a discretionary power to be exercised for the public good').

92 Sedley LJ, *Freedom, Law and Justice* (1999) 8, n 24.

93 [1920] AC 508 (HL) ('*De Keyser*'). See also Winterton, above n 8, 300, n 58.

94 *Vadarlis* (2001) 110 FCR 491, 542–3 [192].

95 Ibid 542 [192].

96 Ibid 539 [181].

97 B Selway, 'Constitutional Assumptions and the Meaning of Commonwealth Executive Power' (Paper presented at Annual Public Law Weekend, ANU, 1 November 2002), 13. In his verbal remarks, Selway commented further on the High Court's apparent wish to break from the past, instancing its preference for the term 'constitutional writs' instead of 'prerogative writs' in s 75(v) of the Constitution: see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

98 *Commonwealth v Western Australia* (1999) 196 CLR 392, 410 [33].

99 See G Winterton, above n 8, 3.

constitutional architecture merely by its façade. Furthermore, it is potentially dangerous, for it could lead to grossly exaggerated views of the Governor-General's independent powers, as Donald Horne demonstrated in his 1977 satire *His Excellency's Pleasure*.[100] Even if one rejects an 'originalist' interpretation of the Constitution and interprets it in light of contemporary constitutional requirements, Ch II of the Constitution, including s 61, cannot be interpreted sensibly without reference to the Crown's prerogative powers, whether or not the 'maintenance' limb of Commonwealth executive power is confined to those powers.

However, there are strong arguments for employing the prerogative as the yardstick for determining the ambit of Commonwealth executive power.[101] First, it implements the well-established principle in common law countries that the common law is employed to interpret ambiguous provisions in written instruments, including constitutions and statutes. Secondly, notwithstanding its uncertainty in marginal cases,[102] the prerogative constitutes a substantial body of principles, rules and precedents, established over hundreds of years, the subject of considerable literature and a heritage shared with comparable nations such as the United Kingdom, Canada and New Zealand. Moreover, many prerogatives — such as the powers to conduct foreign relations, conclude treaties, send and receive ambassadors, declare war and conclude peace, confer honours and pardon offenders — are well-established. Thirdly, even if occasionally difficult to determine, the prerogative is inherently more certain and offers greater guidance to both Government and citizen than vague abstract criteria such as what is an 'appropriate' activity for a national government. Fourthly, since it originated in England under a system of parliamentary supremacy, the prerogative is subject to legislation.[103] Hence, it can be seen as merely an interim measure of executive power until Parliament regulates the subject by legislation. Finally, it is desirable that executive action be subject to legislation, especially under a system of responsible government: this promotes accountability to Parliament, giving Parliament authority to examine executive action; it strengthens the rule of law by subjecting executive action to judicial review (notwithstanding the easing of earlier constraints on judicial review of the exercise of prerogative powers);[104] and it enhances democratic

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100 See G Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 13.

101 See G Winterton, above n 8, 115–6. Significantly, a similar view has been expressed even in Ireland, which did not generally inherit the royal prerogative: D G Morgan, *The Separation of Powers in the Irish Constitution* (1997) 272.

102 See, for example, *Burmah Oil* [1965] AC 75; *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197 (CA).

103 For example, *De Keyser* [1920] AC 508.

104 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278 (Bowen CJ), 280 (Sheppard J), 302–4 (Wilcox J). (Special leave to appeal refused: (1987) 165 CLR 668.)

government since legislation involves greater democratic input than executive action.[105] As is noted below, the extent to which the Commonwealth Constitution embodies a separation between legislative and executive power is uncertain. If the scope of executive power is determined by the prerogative, which is inherently subject to legislation, executive action under s 61 is more likely to be held subject to legislative control than if executive power is derived directly from s 61.

THE SEPARATION OF LEGISLATIVE AND EXECUTIVE POWER

The structure of the Commonwealth Constitution follows that of the United States Constitution which has been held to implement a legal separation of legislative, executive and judicial powers. In each case the first Chapter (Article in the United States) vests legislative power, the second executive power and the third judicial power. Relying partly on this structure, and its mirroring of the United States Constitution, the High Court early held that the Commonwealth Constitution also implemented (by implication, not expressly) a legal separation of powers, especially judicial power.[106] Since this conclusion was founded upon constitutional structure, it must logically follow that the Commonwealth's legislative and executive powers were also legally separated, as they are in the United States. The High Court, especially influenced by the logical mind of Sir Owen Dixon,[107] indeed reached this conclusion,[108] which was also endorsed by the Privy Council.[109]

However, it has also long been recognised that the Commonwealth Constitution establishes (also by implication, not expressly)[110] a system of responsible government whereby the Government is accountable to Parliament and must retain the confidence of the House of Representatives to remain in office.[111] Responsible government originated in the United Kingdom as the political corollary of parliamentary supremacy over the executive. Hence, (in theory, albeit not in current practice) responsible government connotes a relationship of superior and inferior between, respectively, the legislative and executive branches of government. Yet this is not the relationship between governmental branches under a separation of

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105 See, likewise, S Evans, 'The Rule of Law', above n 60, 99.

106 See *New South Wales v Commonwealth* (the *Wheat* case) (1915) 20 CLR 54.

107 See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 96, 98 ('*Dignan*'); O Dixon, *Jesting Pilate* (1965), 52; O Dixon, 'The Separation of Powers in the Australian Constitution', *American Foreign Law Association Proceedings*, No 24, December 1942, 3 ('Dixon 1942').

108 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 ('*Boilermakers*').

109 *Attorney-General for Australia v R* [1957] AC 288, 315.

110 See especially ss 53, 57, 63 and 64.

111 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558, 561; G Winterton, above n 8, 75–6.

powers system, which is one of equality. Hence the inevitable question: How can a legal separation between legislative and executive power co-exist with responsible government? Sir Owen Dixon's response, echoed by the High Court in *Boilermakers*,[112] in which he presided, was to treat responsible government and its implications as confined to the political sphere: separation of powers described the *legal* relationship between legislative and executive power; responsible government described the *political* relationship between legislature and executive. Dixon considered that the 'close relationship' between the Government and Parliament under responsible government and the fact that 'executive action may be affected by parliamentary approval or disapproval'

> is not incompatible with a strict legal separation of powers. Power, in other words, is one thing. The political means of controlling its exercise is another. … I can, therefore, discover no reason in the form or text of the Australian constitution why the legal implications of the separation of powers should not have been as full as they have been in [the United States].[113]

This attempt to distinguish between the legal and political relationship between the legislative and executive branches is questionable. How can responsible government — a relationship established by the Constitution — be dismissed as purely political? As Dawson, Toohey and Gaudron JJ noted,

> it is of the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament.[114]

Indeed, the High Court, led by Dixon CJ, acknowledged (albeit unconsciously) the *legal* implications of the Commonwealth Constitution's implementation of responsible government in remarking that

> [t]he fact that responsible government is *the* central feature of the Australian constitutional system makes it correct enough to say that *we have not adopted the American theory of the separation of powers*.[115]

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112 (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ): 'But that is a matter of the relation between the two organs of government and the *political* operation of the institution. *It does not affect legal powers*'. (Emphasis added.)

113 Dixon 1942, above n 107, 5. For the complete passage, see 'Sir Owen Dixon on Separation of Powers in the Constitution' (1998) 1 *Constitutional Law and Policy Review* 38.

114 *Residential Tenancies* (1997) 190 CLR 410, 441.

115 *Boilermakers* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). (Emphasis added.)

Dixon's reasoning is surely an example of what Geoffrey Sawer aptly characterised as 'try[ing] to put more weight on purely logical considerations than pure logic will stand'.[116]

In any event, whatever the theoretical position, in practice the High Court has not enforced a legal separation between the Commonwealth's legislative and executive powers. The High Court (like the Supreme Court of the United States, but unlike the Supreme Court of Ireland)[117] has upheld very broad delegations of legislative power[118] while maintaining that the theoretical separation of legislative and executive powers remained a relevant constraint.[119] Nor has legislation been held invalid for vesting executive power in a body other than the Governor-General.[120] Indeed, in not a single case has the High Court invalidated legislation for contravening the separation between legislative and executive power.

Nevertheless, the notion that the separation of legislative and executive power limits the Commonwealth Parliament's legislative power remains alive. Solicitor-General Sir Maurice Byers, under interrogation by the Senate in July 1975 (perhaps not the most propitious occasion for constitutional pronouncements) remarked that the separation 'as between Executive and legislature' was 'of course written in and imbedded into our Constitution to a fairly strong extent'.[121] More recently, in a submission to a Senate committee's inquiry into treaty-making, Sir Maurice argued that Parliament could not validly 'take away any power [which] the Constitution give[s] to the Executive', and that 'no function of the Executive may constitutionally be discharged by the Parliament'.[122] Consequently, while Parliament could regulate the exercise of the Government's treaty-making power, '[n]o law of the Parliament could take [it] away directly or indirectly'.[123] Sir Maurice regarded a law giving Parliament (or, presumably, either House) power to veto ratification of a treaty as an invalid attempt to remove the executive's power indirectly.[124] On the other hand,

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116 G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 179.

117 See *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26.

118 See especially, *Dignan* (1931) 46 CLR 73; G Winterton, above n 8, 85–92.

119 See *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 379 (Kitto J); *Dignan* (1931) 46 CLR 73, 101 (Dixon J).

120 See G Winterton, above n 8, 101–10. Professor J E Richardson has argued that s 61 does impose legal constraints in this respect (see ibid 102–3).

121 *Commonwealth Parliamentary Debates*, Senate Vol 64, 2784 (16 July 1975).

122 M H Byers, Submission to Senate Legal and Constitutional Legislation Committee on the External Affairs Power, No 25 (8 February 1995) 5, 2, respectively (*Submissions*, Vol 2, 255, 252).

123 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995), [16.17].

124 Ibid [16.18].

Enid Campbell and Henry Burmester considered a law of the latter kind valid, while agreeing that Parliament could not itself assume the power to conclude treaties.[125]

These views clearly treat s 61 analogously with constitutional provisions which confer *specific* executive powers, such as the powers to appoint Ministers (s 64), to dissolve Parliament (ss 5, 28 and 57) and to appoint federal judges (s 72(i)). Although Parliament can probably regulate the exercise of these powers (as it has, for example, in specifying qualifications for federal judicial appointment), it cannot take the relevant power out of the hands of the person or organ in which the Constitution has vested it — the Governor-General or Governor-General in Council.[126] But to treat s 61 as analogous to provisions conferring specific executive powers requires an assumption that 'the executive power of the Commonwealth' conferred by s 61 has an ascertainable meaning, with a fixed minimum content including, for example, the power to conclude treaties. This is highly questionable, rendering a legal separation between legislative and executive power not feasible.[127] As Harrison Moore noted,

> [t]he executive power is so closely allied to the legislative that it may be impossible to draw any other line than that which expediency and practical good sense commend. ... [W]e are not encouraged to believe that the executive can make good an independent sphere of its own, free from legislative interference and control.[128]

Were the Commonwealth's legislative and executive powers held to be legally separated (contrary to the view maintained here), a 'purposive functional approach'[129] along the lines of recent United States authority should be adopted. Thus, the three branches of government should not be regarded as 'hermetically [sealed]'[130] from influence or interference by the other branches; rather the courts should invalidate only legislation which significantly impedes the executive in

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125 Ibid, [16.20] and [16.24], respectively. Professor Campbell's conclusion on the latter point was tentative. She had earlier expressed stronger reservations regarding the validity of such legislation: E Campbell, 'Parliament and the Executive', in L Zines (ed), *Commentaries on the Australian Constitution* (1977), 88, 92. For the present writer's comments on this issue, see G Winterton, 'Limits to the Use of the "Treaty Power"', in P Alston and M Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?* (1995), 29, 46-7.

126 See G Winterton, above n 8, 98–101; L Zines, above n 51, 271–3.

127 See G Winterton, above n 8, 69–71. See also above, text at n 10.

128 W H Moore, above n 62, 98.

129 A Mason, 'A New Perspective on Separation of Powers' (1996) *Canberra Bulletin of Public Administration*, No 82, 1, 2.

130 *Buckley v Valeo* (1976) 424 US 1, 121.

carrying out its constitutionally-conferred functions.[131] Courts would be especially wary of legislation which 'aggrandizes' the power of the legislature by taking over (usurping), or significantly 'encroaching' on, executive functions.[132] Applying such criteria, legislation authorising the Commonwealth Parliament itself or either House thereof to ratify international treaties would almost certainly be invalid[133] and legislation allowing Parliament, either House or a committee thereof to veto the ratification of a treaty might well suffer a similar fate.[134] However, legislation which left the treaty-ratification power in the hands of the executive but sought to regulate its exercise — for example, by requiring the executive to take specified considerations into account or imposing procedural requirements, such as reporting to Parliament or a committee thereof or to the States or the Council of Australian Governments (COAG) — would probably be valid.[135]

If the Commonwealth's legislative and executive powers were legally separated, the relationship between the legislative and executive branches would be one of co-equals, with Parliament unable to abolish or alter executive powers or control their exercise, except as noted above. However, the High Court has frequently held that the Commonwealth's executive power is subject to legislation, both in contexts in which the ambit of executive power was determined by reference to the Crown's prerogative powers (which in the United Kingdom, at least, are inherently subject to legislation)[136] and where it was not.[137] The most fulsome acknowledgement of parliamentary supremacy over the executive[138] is that of Jacobs J in the *AAP* case:

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131 See *Morrison v Olson* (1988) 487 US 654, 691 ('impede the President's ability to perform his constitutional duty'), 693 ('unduly interfering with the role of the Executive Branch'); *Nixon v Administrator of General Services* (1977) 433 US 425, 443.

132 See *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc* (1991) 501 US 252, 273–5, 277; *Mistretta v United States* (1989) 488 US 361, 382; *Morrison v Olson* (1988) 487 US 654, 680–3, 694–5.

133 Cf. *Bowsher v Synar* (1986) 478 US 714, 726 (the decision was rightly criticised by White J (dissenting) as 'distressingly formalistic': ibid 759); *Springer v Government of the Philippine Islands* (1928) 277 US 189.

134 Cf. *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc* (1991) 501 US 252.

135 Cf. *Mistretta v United States* (1989) 488 US 361; *Morrison v Olson* (1988) 487 US 654: *Wiener v United States* (1958) 357 US 349; *Humphrey's Executor v United States* (1935) 295 US 602.

136 See *Residential Tenancies* (1997) 190 CLR 410, 424 (Brennan CJ), 438, 441, 446 (Dawson, Toohey and Gaudron JJ); *AAP* case (1975) 134 CLR 338,406 (Jacobs J); *Johnson v Kent* (1975) 132 CLR 164, 170 (Barwick CJ, McTiernan, Stephen and Jacobs JJ concurring). See also G Sawer, Octagon Lecture, above n 88, 10–11, 15; L Zines, above n 51, 265; E Campbell, Submission to Senate Legal and Constitutional Legislation Committee on the External Affairs Power, No 8 (13 January 1995), in *Submissions*, vol 1, 93 ('although s. 61 "picks up" certain royal prerogatives, it does not thereby entrench them').

> The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s. 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament.[139]

The Commonwealth Parliament's power in this respect, Jacobs J noted, derives from s 51, including the express incidental power (s 51(xxxix)), or 'the inherent sovereignty of the Australian Parliament in all subject matters which lie within the province of the Government of the Commonwealth'.[140]

This power is, of course, 'subject to this Constitution'.[141] Brennan J has suggested that Commonwealth legislative power may be subject to a limitation analogous to that prohibiting it from impairing the 'capacity of a State to function as such':[142]

> There may be a similar limitation, arising from s. 61 of the Constitution, precluding the making of laws which impair the capacity of the Executive Government of the Commonwealth from functioning as such. These are the implications which protect, inter alia, the confidentiality of Cabinet documents.[143]

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137 See *Brown v West* (1990) 169 CLR 195, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ): 'Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute'. Their Honours earlier remarked that 'it may be that our Constitution provides such a separation of powers as would preclude any exercise of the executive power which takes the form of the discretionary conferring of benefits having a pecuniary value on individual members of the Parliament, not being mere facilities for the functioning of Parliament' (ibid). This appears merely to state that such benefits, unlike those conferred on Parliament itself, would not amount to an 'execution of this Constitution' within s 61, essentially repeating their Honours' earlier observations (ibid 201). But see L Zines, above n 51, 273. Judicial enforcement of the moral integrity of government is a very slippery slope: see G Winterton, 'Justice Kirby's Coda in Durham' (2002) 13 *Public Law Review* 165, 169.

138 This was expressly acknowledged by Dawson, Toohey and Gaudron JJ in *Residential Tenancies* (1997) 190 CLR 410, 446: 'The reason why a Commonwealth statute extending to the Crown binds the Commonwealth executive is to be found in the supremacy of parliament over the executive'. Cf. *New South Wales v Commonwealth* (the *Offshore Sovereignty* case) (1975) 135 CLR 337, 365 (Barwick CJ): 'In the long run the Parliament ... is in a position to control the Executive Government'.

139 (1975) 134 CLR 338, 406.

140 Ibid.

141 *Commonwealth Constitution*, s 51, opening words.

142 See *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 228, 229.

143 *Jacobsen v Rogers* (1995) 182 CLR 572, 598.

These remarks were obiter since the case concerned the validity of a warrant issued under Commonwealth legislation authorizing a search of the premises of a *State* government department, and the other justices did not address the s 61 issue. Brennan J did not expressly base his limitation on the separation of powers. Since the Constitution expressly envisages an executive branch of government including the monarch, the Governor-General and Ministers, it would certainly be unconstitutional for Parliament to purport to abolish or destroy any of these components, just as it could not lawfully destroy the States.[144] It could be argued that *extreme* impairment of the capacity of a governmental organ would effectively destroy it and, to that extent, Brennan J's dictum is unexceptionable.[145] However, it is doubtful that abolishing Cabinet confidentiality would effectively destroy the Cabinet, which is not even mentioned in the Constitution, or responsible government, which is implied therein. Indeed, it has been suggested that Australia could (like some other nations) largely abolish Cabinet confidentiality, except on a few matters of vital security, without detriment.

LEGISLATIVE OUSTER OF PREROGATIVE POWERS

The Commonwealth Parliament could not validly abolish or impair the executive power to 'execute' the Constitution; to this extent s 61 confers specific executive power. As is noted above, the High Court has recognised Parliament's power to regulate or abolish Commonwealth executive powers. However, since the cases in which this is alleged to have occurred concerned prerogative powers included in s 61,[146] the examination of this issue will be confined to such powers. (Of course, if the argument noted above for fixing the ambit of Commonwealth executive power by reference to prerogative powers were adopted, all power conferred by the 'maintenance' limb of s 61 would involve prerogative power.)

The question whether particular legislation ousts or supersedes the prerogative has been the subject of considerable litigation, especially in England, where commentators have described the issue as 'complex'[147] and 'strangely abstruse'.[148]

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144 *South Australia v Commonwealth* (the *First Uniform Tax* case) (1942) 65 CLR 373, 442 (Starke J): 'The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other.'

145 A distinction should analogously be drawn between impairment of capacity to function and 'interference with or impairment of' specific executive functions: see *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 228.

146 The judgment of French J in *Vadarlis* (2001) 110 FCR 491 is an exception, but his Honour applied the same principles as apply to ouster of the prerogative, the 'common law ancestor' of s 61 (ibid 539 [181]): see ibid 539–41 [183]–[185].

147 S Payne, above n 91, 107 ('complexity'); likewise ibid 86 ('not unproblematic').

148 S de Smith and R Brazier, *Constitutional and Administrative Law* (7th ed, 1994), 144.

The foundational case remains *Attorney-General v De Keyser's Royal Hotel Ltd*[149] in which the House of Lords unanimously held that the *Defence Act* 1842 (UK) had ousted or superseded any prerogative power to compulsorily acquire land for defence purposes; compensation was, therefore, payable to the owner of a hotel compulsorily occupied in 1916 to serve as the headquarters of the Royal Flying Corps.[150] When acquiring the property, the Government expressly relied upon legislation, not the prerogative;[151] indeed, it is doubtful whether there was a prerogative power to acquire such property without compensation.[152] The principle established by the case has rightly been described as 'a cornerstone of twentieth-century jurisprudence on the prerogative'.[153]

The House of Lords approached the question whether the statute ousted the prerogative without any presumption that it did not; nor did it emphasise any particular stringency in the relevant test. Each of their Lordships delivered a separate opinion. Lords Atkinson, Moulton and Sumner noted that the *Defence Act* gave the Crown powers at least as wide as those conferred by the prerogative, although subject to limitations such as the requirement for compensation,[154] and there was general agreement with the rhetorical question posed by Swinfen Eady MR in the Court of Appeal:

> [W]hat use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?[155]

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149 [1920] AC 508.

150 Opinion is divided on the question whether the prerogative power revives upon repeal of legislation which displaced it. (Consequently, it is preferable to speak of legislation 'ousting' or 'displacing' prerogative powers, rather than 'abrogating' them.) Lords Atkinson, Moulton and Sumner in *De Keyser* [1920] AC 508, 539–40, 554, 561 suggested (obiter) that it might, though this would, of course, be subject to any contrary inference in the repealing legislation: see G Winterton, above n 8, 117–8, 301 n 71; S Payne, above n 91, 109 ('unless the repealing statute adds some new twist'). For a contrary view (non-revival 'unless it is a major governmental attribute'), see Lord Lester and Dawn Oliver (eds), *Constitutional Law and Human Rights* (1997), [369], p 246. Cf. de Smith and Brazier, above n 148, 145.

151 *De Keyser* [1920] AC 508, 531, 548, 556, 557. Contrast the *Tampa* situation, in which the Government deliberately avoided following the procedures prescribed by the *Migration Act.*

152 Ibid 575 (Lord Parmoor).

153 P Craig, 'Prerogative, Precedent and Power', in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 65, 81.

154 *De Keyser* [1920] AC 508, 539–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner).

155 *In re De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197, 216, adopted in *De Keyser* [1920] AC 508, 526 (Lord Dunedin), 539 (Lord Atkinson).

Lord Dunedin adopted a somewhat broader approach, stressing not the fact that the legislation gave the Crown power to do what the prerogative authorised, but that legislation and the prerogative covered the same field:

> [I]f the whole ground of something which could be done by the prerogative is covered by statute, it is the statute that rules.[156]

The judgment of Lord Parmoor has rightly been considered 'the most insightful and far reaching'.[157] His Lordship construed the Act in light of the common law presumption against confiscation of private property without compensation.[158] His criteria for determining whether legislation ousted the prerogative were broad and liberal:

> [The prerogative] may be taken away or abridged by express words, by necessary implication, or ... where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong.[159]

The *Defence Act*, which provided compensation for the compulsory occupation of property, fell within the 'category of statutes made for the advancement of justice and to prevent injury and wrong'.[160] Consequently, Lord Parmoor concluded that

> [t]he constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative ... but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.[161]

Strictly speaking, the holding of *De Keyser* is limited to legislation which confers on the Crown the same or similar power to that granted by the prerogative.[162] Lord Browne-Wilkinson stated the principle of the case in this way in 1995:

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156 Ibid 526. Likewise, Lord Parmoor: '[W]here a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed' (576).

157 P Craig, above n 153, 80.

158 *De Keyser* [1920] AC 508, 576, 579.

159 Ibid 576. Lord Parmoor cited *Bacon's Abridgement* for the third category.

160 Ibid. Dr Evatt was critical of Lord Parmoor's approach, considering it 'dangerous', as raising 'political questions': H V Evatt, above n 29, 43.

161 *De Keyser* [1920] AC 508, 575.

162 See R Ward, 'Baton Rounds and Circulars' [1988] *Cambridge Law Journal* 155, 156–7.

> [I]f Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory powers so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded.[163]

A good example of the application of this principle was *Laker Airways Ltd v Department of Trade,*[164] which closely paralleled *De Keyser* in that legislation conferred on the Crown the same power as was granted by the prerogative (to revoke the 'designation' of an airline under a treaty), albeit with limitations such as a requirement for public hearings before it was exercised. The Court of Appeal unanimously upheld the primary judge in holding that the prerogative had been ousted.[165] Roskill LJ, echoing Swinfen-Eady MR 60 years earlier,[166] asked bluntly: 'Can the Crown, having failed to enter through the front door … enter through the back door and in effect achieve the same result?'[167]

The leading Australian authority on legislative ouster of the prerogative, *Barton v Commonwealth*,[168] was considerably more solicitous of the prerogative than *De Keyser* and its progeny, though it must be noted that their factual contexts were very different. In *Barton*, the High Court unanimously held that the *Extradition (Foreign States) Act 1966* (Cth), dealing with extradition of alleged offenders to and from nations with which Australia had concluded an extradition treaty,[169] did not abrogate or displace the Commonwealth Government's prerogative power to request Brazil to detain alleged offenders preparatory to returning them to Australia for trial. This decision was probably correct, but the Court's approach to the question whether legislation ousts the prerogative was considerably more stringent than that in *De Keyser.* Barwick CJ held that 'the rule that the prerogative … is not displaced except by a clear and unambiguous provision is *extremely strong*',[170] holding that the prerogative was not ousted here notwithstanding his 'strong suspicion that the draftsman of the Act intended it to be all embracing and to displace all prerogative power to seek the surrender of fugitives'.[171] Surprisingly, Barwick CJ did not mention *De Keyser*, although it was cited by counsel for the Commonwealth (M H Byers QC). Mason J, the only justice to mention *De Keyser*, required a '*clearly*

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163 *Fire Brigades* [1995] 2 AC 513, 552. However, Lord Mustill preferred to state 'the principle of [*De Keyser*]' in the broader terms of Lord Dunedin (564).

164 [1977] QB 643 .

165 Ibid 706–7 (Lord Denning MR), 721–2 (Roskill LJ), 728 (Lawton LJ).

166 See above, text at n 155.

167 *Laker Airways Ltd v Department of Trade* [1977] QB 643, 719, repeated at 722.

168 (1974) 131 CLR 477.

169 However, McTiernan and Menzies JJ considered that, as a matter of construction, the Act authorised a request for extradition even in the absence of an extradition treaty: ibid 491.

170 Ibid 488. (Emphasis added.)

171 Ibid.

expressed intention' in order to 'abrogate' the prerogative.[172] This was absent here, 'the decisive consideration' being that the relevant prerogative was 'an important power essential to a proper vindication and an effective enforcement of Australian municipal law'.[173] The effect of the Commonwealth's request to Brazil was that the Bartons would be deprived of their liberty and would not benefit (except under McTiernan and Menzies JJ's interpretation of the Act) from protections in the Act, such as its limitation to 'extraditable crimes'. However, Mason J dismissed these considerations, insofar as they related to parliamentary intention, as 'speculative',[174] an approach his Honour is unlikely to have adopted 15 years later. Jacobs J, likewise, required legislative intention to 'withdraw or curtail a prerogative power' to be '*clearly* shown'.[175] This was not demonstrated in this case, which involved 'the important prerogative power' to 'communicate freely with a foreign state'.[176]

Legislative ouster of the prerogative also arose in the recent *Tampa* case,[177] the question being whether the *Migration Act 1958* (Cth) excluded any prerogative or executive power to prevent the entry of aliens into Australia. The two judges who considered this question in the Full Federal Court — Black CJ and French J — reached opposite conclusions. Black CJ, relying principally on *De Keyser*[178] and *Laker,*[179] agreed with North J at first instance[180] that it did.[181] His Honour considered 'the accepted test' to be 'whether the legislation has the same area of operation as the prerogative',[182] which probably accurately represents the current British view. However, it is difficult to reconcile with the more stringent remarks of Barwick CJ, Mason and Jacobs JJ in *Barton*,[183] which his Honour essentially dismissed as obiter since their Honours held that the relevant legislation did not apply, thus not needing to address the position when legislation and the prerogative both covered the same field.[184] This approach to binding authority may be questioned. French J, in contrast, applied the more stringent Australian authorities to

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172 Ibid 501. (Emphasis added.)
173 Ibid.
174 Ibid 500.
175 Ibid 508. (Emphasis added.)
176 Ibid.
177 *Vadarlis* (2001) 110 FCR 491.
178 [1920] AC 508.
179 *Laker Airways Ltd v Department of Trade* [1977] QB 643. Black CJ incorrectly considered this to be a decision of the House of Lords.
180 *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, 482 [122].
181 *Vadarlis* (2001) 110 FCR 491, 507 [60], 508 [64].
182 Ibid 501 [34]; likewise 503 [37], 507 [61].
183 *Barton v Commonwealth* (1974) 131 CLR 477.
184 *Vadarlis* (2001) 110 FCR 491, 503 [38].

reach the opposite conclusion.[185] His Honour asked whether the *Migration Act* 'evince[d] a clear and unambiguous intention to deprive the Executive of the power to prevent entry' into Australia[186] (a power he described as important to Australian national sovereignty),[187] noting that

> [t]he greater the significance of a particular Executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power.[188]

French J's conclusion that the *Migration Act* did not intend to oust the executive power was a reasonable application of the Australian cases to which he referred, which included not only *Barton*[189] but also *Ling v Commonwealth* (*'Ling'*)[190] and *Booth v Williams*.[191] In *Ling* the Federal Court, comprising Gummow, Lee and Hill JJ, held that the relevant Commonwealth legislation did not oust the prerogative, quoting the stringent tests in *Barton* and *Booth v Williams* (*'Booth'*).[192] *Booth*, a 1909 New South Wales Supreme Court case at first instance, held that an English Act of 1540 did not displace a prerogative right relating to choses in action, requiring an intention to do so to be explicit or an 'irresistible' inference.[193] The Commonwealth Parliament subsequently expressly provided that

> [t]he existence of statutory powers under [the *Migration Act]* does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.[194]

However, it may be doubted whether the cases upon which French J relied represent current Australian authority.[195] In *Bropho v Western Australia* (*'Bropho'*)[196] the High Court maintained the presumption that legislation expressed in general terms

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185 Ibid 540–1 [183]–[185], 545–6 [201]–[204]. Beaumont J concurred in the judgment of French J.

186 Ibid 545 [201].

187 Ibid 542 [192], 545 [202].

188 Ibid 540 [185].

189 *Barton v Commonwealth* (1974) 131 CLR 477.

190 (1994) 51 FCR 88.

191 (1909) 9 SR (NSW) 421.

192 (1994) 51 FCR 88, 92 (Gummow, Lee and Hill JJ).

193 (1909) 9 SR (NSW) 421, 440 (Street J), quoting *Maxwell on Statutes.*

194 *Migration Act 1958* (Cth) s 7A, introduced by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) Sch 2.

195 However the High Court in *Oates v Attorney-General (Cth)* (2003) 197 ALR 105 referred only to *Barton v Commonwealth* (1974) 131 CLR 477 on the issue of legislative abrogation of executive power, although it held that decision 'not determinative' of the instant case (114 [36]).

196 (1990) 171 CLR 1.

does not bind the Crown, based on the rationale that general legislation is intended to regulate citizens rather than the government, in respect of which it may operate differently.[197] But the Court rejected previous tests which required an intention to bind the Crown either to be expressed or a 'necessary implication', such that the purpose of the legislation would be 'wholly frustrated unless the Crown were bound'.[198] Instead the Court substituted a less stringent and more flexible approach to construing such general legislation, taking into account factors including the statute's terms, 'subject matter and disclosed purpose and policy'.[199] When, as in *Bropho* itself, the Crown was engaged in commercial activities, the presumption against its application to the Crown 'will represent little more than the starting point' for ascertaining the legislative intention.[200]

The Court in *Bropho* noted that the presumption against applying to the Crown statutes expressed in general terms 'was initially confined to provisions which would have derogated from traditional prerogative rights'.[201] Hence, it would be appropriate for the more flexible *Bropho* approach to be applied to the latter question, as Gleeson CJ and Gaudron J have acknowledged.[202] Such an approach would make the stringent reasoning in *Barton*, which is analogous to the superseded presumption against applying to the Crown statutes expressed in general terms, equally obsolete. Unfortunately, these authorities were not cited in the *Tampa* case.

In determining whether legislation impliedly intends to alter, regulate or abolish a prerogative power,[203] the courts should apply the general approach to statutory interpretation outlined in *Bropho*.[204] There should, at most, be a mild presumption against such intention, especially when the prerogative power is well established and clearly important to Government. However, the subject matter of the legislation may make any such presumption inappropriate, or even reverse the presumption — as in a Bill of Rights or other rights enhancing legislation, as Lord Parmoor noted in

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197 *Commonwealth v Western Australia* (1999) 196 CLR 392, 410 [35] (Gleeson CJ and Gaudron J, adopting Story J).

198 *Bropho* (1990) 171 CLR 1, 17, quoting *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, 63 (PC).

199 *Bropho* (1990) 171 CLR 1, 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); likewise 28 (Brennan J), adding 'the nature of the activities of the Executive Government which would be affected if the Crown is bound'.

200 Ibid 23.

201 Ibid 14. See also P W Hogg and P J Monahan, *Liability of the Crown* (3rd ed, 2000), 276.

202 *Commonwealth v Western Australia* (1999) 196 CLR 392, 410 [34], 411 [36].

203 The question remains whether the legislation has 'abrogated' the executive power 'by express words or necessary implication': *Oates v Attorney-General (Cth)* (2003) 197 ALR 105, 114 [37].

204 (1990) 171 CLR 1.

De Keyser.[205] The courts should also draw on the extensive jurisprudence relating to a broadly analogous question — inconsistency of Commonwealth and State legislation under s 109 of the Constitution. There are many references in the authorities on legislative ouster of the prerogative to the question whether legislation is 'inconsistent' with the prerogative[206] and whether it 'covers the field'.[207] Moreover, similar factors assist in determining legislative intention in that respect. Do the legislative provisions amount to a 'code'?[208] Does the legislation assume the continued operation of the prerogative?[209] And does either the legislation[210] or the prerogative[211] protect rights or promote public benefit? It is not suggested that the questions arising under both issues are by any means identical; merely that both require interpretation of legislation to determine whether there is statutory intent to displace an existing legal rule or principle. Since the issues are broadly analogous, it would be appropriate for courts to avail themselves of the High Court's extensive s 109 jurisprudence.

CONCLUSION

The recent *Tampa* incident raised many important political and human rights issues, and certainly influenced the outcome of the 2001 federal election. Although undoubtedly less interesting to the general public, the consequent litigation also raised important issues concerning Commonwealth executive power, the interpretation of the *Migration Act* and the fundamental remedy of habeas corpus. The Howard Government's 'Pacific Solution' effectively denied the High Court the

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205 [1920] AC 508.

206 See, for example, *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] QB 26, 53 (Purchas LJ) (CA).

207 See de Smith and Brazier, above n 148, 144 ('intention to cover the field in question exhaustively'); *Fire Brigades* [1995] 2 AC 513, 564 (Lord Mustill) ('occupied the territory'); *Barton v Commonwealth* (1974) 131 CLR 477, 501 (Mason J) ('extend to the whole of the area'), 508 (Jacobs J) ('cover the whole field'); *De Keyser* [1920] AC 508, 526 (Lord Dunedin) (covers 'the whole ground').

208 *Laker Airways Ltd v Department of Trade* [1977] QB 643, 721, 722 (Roskill LJ) ('elaborate code'). Cf. *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 592 (Fullagar J, Dixon CJ and Kitto J concurring).

209 *Ling v Commonwealth* (1994) 51 FCR 88, 94. Cf. *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 247–8 (Stephen J), 262, 263 (Mason J).

210 *De Keyser* [1920] AC 508, 554 (Lord Moulton), 575–6, 579 (Lord Parmoor). Cf. *Viskauskas v Niland* (1983) 153 CLR 280, 292 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).

211 *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] QB 26, 53 (Purchas LJ). Cf. *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 248–9 (Stephen J).

opportunity to determine these issues, leaving Australian law the poorer for it. However, the former passengers on the *MV Tampa* may safely be assumed to have even greater regrets regarding the outcome of this sorry episode in Australia's political history.