

EXECUTIVE POWER UNDER THE CONSTITUTION: A PRESIDENTIAL AND PARLIAMENTARY SYSTEM COMPARED

GABRIELLE APPLEBY*

ADAM WEBSTER**

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* Associate Professor, UNSW Law, University of New South Wales, Co-Director, *The Judiciary Project*, Gilbert + Tobin Centre of Public Law.

** Lecturer, Adelaide Law School, University of Adelaide. This Article was presented at the 23rd Annual Ira C. Rothgerber Jr. Conference on Constitutional Law. The authors would like to thank Professor Harold Bruff for his thoughtful comments on an earlier draft of this Article as well as the editors of the *University of Colorado Law Review*.

INTRODUCTION

*With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.*¹

– Justice Robert Jackson

In a 2014 article published in the *Adelaide Law Review*, Professor Harold Bruff explained the U.S. executive power to an Australian audience.² Bruff described the constitutions of Australia and the United States as “cousins”;³ they share some traits—such as federalism⁴—but in other areas there is less of a resemblance. The Australian system of government blends features of the federal system of the United States with the parliamentary system of the United Kingdom. In 1980, Elaine Thompson famously described it as a “Washminster” system of government.⁵ The framers of the Australian Constitution were familiar with the U.S. Constitution, both through their readings—particularly Lord Bryce’s well-timed treatise, *The American Commonwealth*, published the decade preceding the major Australian constitutional drafting conventions⁶—and

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

2. Harold H. Bruff, *The President and Congress: Separation of Powers in the United States of America*, 35 *ADEL. L. REV.* 205 (2014).

3. *Id.*

4. For some of the common features of the two constitutions see, e.g., Sir Anthony Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience*, 16 *FED. L. REV.* 1, 2–4 (1986); see generally JOHN QUICK & ROBERT GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (Angus & Robertson 1901); W HARRISON MOORE, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA* (Maxwell 2d ed. 1910).

5. The expression refers to the fact that the Australian constitutional framework is a hybrid of the U.K. parliamentary system found in the Palace of Westminster and the U.S. federal system found in Washington, D.C. See Elaine Thompson, *The “Washminster” Mutation*, in *RESPONSIBLE GOVERNMENT IN AUSTRALIA* 32 (Patrick Weller & Dean Jaensch eds., 1980).

6. JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (MacMillan 1888). Australian constitutional historian John La Nauze commented that Bryce’s book “lay on the table” during these debates. JOHN LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 18–19, 273 (Melbourne Univ. Press 1972). Most

through their personal experiences.⁷ The development of the U.S. Constitution and the constitutional practices of the United Kingdom were frequently referenced and compared during the drafting of the Australian Constitution.⁸

Bruff considered how the American experience might assist in Australia's understanding of its executive power, particularly at a time when the Australian government appears to be increasingly relying upon "inherent," extra-statutory sources as the basis for its actions.⁹ Since Bruff's article there have been a number of further instances when the High Court of Australia has had to consider the scope of executive power.¹⁰ Against the background of such developments, this Article provides a brief explanation of the Australian executive power and, drawing on Bruff's American analysis, offers a comparison of the two systems of executive government. In this Article, we argue that the High Court has played an important role in regulating the limits of executive power in circumstances where the legislature has been reluctant to supervise the executive.

In Part I of this Article, we provide a brief overview of the major points of comparison between the constitutional structures of the Australian and U.S. systems, as highlighted in Bruff's 2014 article, with particular attention to the differences between the American separation of powers and the Australian practice of responsible government. In Part II, we explore the adoption and practice of responsible government in

recently, see Stephen Gageler, *James Bryce and the Australian Constitution*, 43 *FED. L. REV.* 177 (2015).

7. See, e.g., *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 30; *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 98, 100, 102.

8. See generally *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April 1891; *Official Report of the National Australasian Convention Debates*, Adelaide, March 22 to May 5 1897; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 2 September to 24 September 1897; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March 1898. Unlike the United States and Australia, the United Kingdom does not have a formal written constitution, and its constitutional structure relies heavily on historical practice and convention, as well as the common law. For further discussion of constitutional practices in the United Kingdom see, e.g., PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS* (2d ed. 2012).

9. See *infra* Section III.B.5.

10. These further instances are discussed *infra* Section III.B.

Australia in greater depth. We highlight that while, in theory, in the domestic sphere the Australian government is “responsible” and accountable to the Parliament, modern legislative practice has often failed to hold the executive to account within this system. In the foreign sphere, the practice is reversed, with greater parliamentary oversight introduced into a system of previously unbounded prerogative power. In Part III, we explain the different aspects of executive power under the Australian Constitution, exploring the exercise of these powers and their regulation against the framework and ideals of responsible government and accountability. We investigate the circumstances under which the Australian government relies on nonstatutory executive power, and how the Australian High Court has attempted to limit and regulate this power using the constitutional structure of responsible government.

I. BRUFF’S U.S./AUSTRALIAN COMPARISON

In this first Part of this Article, we explain some of the key similarities and differences between the constitutions of the United States and Australia, with particular emphasis on the key differences in the respective executive branches of government.

A. *Constitutional Structure*

At first blush, the most obvious transplants from the U.S. Constitution into the Australian text are the vertical distribution of powers across the central (what we refer to in Australia as “the Commonwealth”) and State governments, and the principle of horizontal separation of powers across the three branches of government.

The structure of the first three chapters of the Australian Constitution—the legislature, the executive, and the judiciary—resembles the first three articles of the U.S. Constitution.¹¹ This structural similarity can be largely attributed to Andrew Inglis Clark—one of the framers of the Australian Constitution—who was fascinated by the U.S.

11. Compare *Australian Constitution* chs I, II, III with U.S. CONST. arts. I, II, III. As in the United States, the Australian legislature comprises two Houses: the House of Representatives and the Senate. *Australian Constitution* s 1.

Constitution.¹² Clark's mirroring of Articles I, II, and III in his first draft of the Australian Constitution in 1891 was a feature that survived the drafting process at the constitutional conventions in the 1890s, the referenda that were passed in each colony, and remained in the final version of document that was ultimately passed by the Parliament of the United Kingdom in 1900.¹³

Despite some similarities in structure and wording between the two constitutions, there is one major difference between Chapters I and II of the Australian Constitution and Articles I and II of the U.S. Constitution: the principle, or perhaps more accurately the practice, of *responsible government*. With only some exceptions, Australia's head of state, the Governor-General, acts on the advice of his or her Ministers and not as an autonomous government player like the U.S. President.¹⁴ Government Ministers are collectively responsible to the House of Representatives: they must maintain the "confidence" of this house to maintain government. Individually, Ministers are responsible for answering questions and providing information about their department and portfolio to the legislature in much the same way as in the United Kingdom.¹⁵ Section 64 of the Australian Constitution provides that "no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of

12. See William G. Buss, *Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States*, 33 MELB. U. L. REV. 718, 720–21 (2009); John M. Williams, *Introduction to ANDREW INGLIS CLARK, STUDIES OF THE AUSTRALIAN CONSTITUTION*, at v (Legal Books 1997) (1901).

13. The Australian Constitution remains unceremoniously attached as an addendum to the Commonwealth of Australia Act, 1900, 63 & 64 Vict., c. 12, § 9 (U.K.). At the time that the Australian Constitution came into force in 1901, the Parliament of the United Kingdom still had power to pass laws that applied in the colonies. Colonial Laws Validity Act 1865, 28 & 29 Vict. c. 63 (U.K.). The power of the U.K. Parliament to pass laws for the Commonwealth and the States has since been abolished. See *Statute of Westminster Adoption Act 1942* (Cth) (Austl.), adopting the Statute of Westminster 1931, 22 & 23 Geo. 5 c. 4 (U.K.); *Australia Act 1986* (Cth) (Austl.); *Australia Act 1986*, c. 2 (U.K.); see also GABRIELLE APPLEBY ET AL., *AUSTRALIAN PUBLIC LAW* 48–58 (2d ed. 2014).

14. See *Australian Constitution* s 63; QUICK & GARRAN, *supra* note 4, at 707; APPLEBY ET AL., *supra* note 13, at 175.

15. See *Question Time*, PARLIAMENTARY EDUC. OFF., <http://www.peo.gov.au/learning/fact-sheets/question-time.html> [https://perma.cc/956V-BCUX]; cf. *Question Time*, UK PARLIAMENT, <http://www.parliament.uk/about/how/business/questions/> [https://perma.cc/LDJ5-VX56].

Representatives.”¹⁶ This is obviously in direct contrast to the incompatibility clause in Article I, Section 6 of the U.S. Constitution.¹⁷

B. Differences in the Executive Branches

The Australian system of government, therefore, does not have a directly representative executive and there is no “balancing of forces” between the legislature and executive as there is in the United States.¹⁸ To keep the executive in check, the Australian system relies upon the proper functioning of the conventions of responsible government.

Under these conventions, government Ministers are accountable to Parliament through mechanisms such as Question Time, in which Ministers must respond to questions from members of Parliament regarding the operations of their Departments, and the investigations undertaken by parliamentary committees, which have the power to require the production of documents and summon witnesses.¹⁹ Committees often operate most effectively in the Senate because in Australia the political party that forms the executive government will (usually²⁰) hold a majority in the Australian House of Representatives. However, that party will not necessarily have control of the Senate, and is even less likely to do so since the introduction of proportional representation in that House.²¹

16. *Australian Constitution* s 64.

17. The U.S. Constitution states that “no Person holding any Office under the United States, shall be a Member of either House during the Continuance in Office.” U.S. CONST. art. I, § 6.

18. See generally HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* (Carolina Acad. Press 2006).

19. DEPT OF THE HOUSE OF REPRESENTATIVES, *HOUSE OF REPRESENTATIVES PRACTICE* 621–706 (I.C. Harris ed., 5th ed. 2005)

20. The exception being where an election has returned a “hung parliament” without a majority in the lower house, and the government has been appointed because of support from smaller parties or independent members. In this instance, the lower house often performs a more important accountability function. For more information on hung parliaments in Australia, see *Hung Parliament*, PARLIAMENT AUSTL. (Oct. 12 2010), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/hungparliament [<https://perma.cc/ELX5-CUQ7>]. See also APPLEBY ET AL., *supra* note 13, at 176–77.

21. “Proportional representation” refers to the voting system where the number of seats that a party is allocated in the Senate is proportionate to the number of votes they receive. For more information on the proportional voting

While these mechanisms provide a level of accountability between the executive and Parliament in theory, this is not always borne out in practice. The theory of responsible government has been seriously undermined by the growth in the size and complexity of the modern administrative state and the evolution of a two-party dominated political system, in which a strong system of party discipline operates. Australian party politics is dominated by two major parties, the (conservative) Liberal Party, which is in a formal coalition with the smaller National Party,²² and the Labor Party.²³ As in other parliamentary democracies, the necessity of maintaining the confidence of the lower house has driven the development of strong party discipline in these parties.²⁴ In a parliamentary system, a government must maintain a majority in the lower house to maintain control of the parliament, and thus government.²⁵ Strong party discipline is important in this regard because the governing party cannot afford its own members to “defect” and vote against the government. This is particularly important where the government has a slender majority in the lower house. Strong party discipline, however, undermines the capacity of the individual Member of Parliament (MP) to scrutinise and question the actions of the government and Ministers. In recognition of the failures of parliamentary accountability in Australia, in the 1970s and 1980s the federal government instigated a series of inquiries into strengthening judicial review and the introduction of non-judicial accountability mechanisms, including the introduction of a merits review tribunal system, an Ombudsman, and a

system in the Australian Senate, see *Voting – The Senate*, AUSTL. ELECTORAL COMMISSION (Feb. 25, 2014), http://www.aec.gov.au/voting/How_to_vote/Voting_Senate.htm [<https://perma.cc/R6Q2-HSWX>].

22. This coalition has been in place since the 1920s, and in practice has proved very strong, with the “Coalition” often being referred to as a single party (indeed, in the State of Queensland, the parties have merged). At the federal level, the convention is that the dominant Liberal Party will select the Prime Minister and the Deputy Prime Minister will be drawn from the National Party. Even when the Liberal Party has gained sufficient seats in the House of Representatives to govern in its own right, the coalition has been maintained.

23. *Political Parties*, PARLIAMENTARY EDUC. OFF., <http://www.peo.gov.au/learning/fact-sheets/political-parties.html> [<https://perma.cc/2XLY-KSUQ>].

24. Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 632–33 (2014).

25. See APPLEBY ET AL., *supra* note 13, at 155.

freedom of information regime.²⁶ These developments have become known in Australia as the “new administrative law.”²⁷

Despite the introduction and strengthening of these administrative law mechanisms, there has continued to be a concerning lack of parliamentary oversight around the exercise of executive power. As we discuss in the final Part of this Article, in relation to Parliament’s failure to supervise executive spending, the Australian courts have recently stepped into the vacuum to play an important role in executive oversight.²⁸ Bruff explains that this role for the courts might be met with some concern from the American legal scholar:

[The Australian] system of responsible government does not include the American check of the separation of legislative and executive power, with all of its attendant jealousies. That leaves the courts as the constraining institution, with the difficult duty of defining what it means to “maintain” the *Constitution*. To an American, this seems to place great pressure on the judiciary to decide questions it may feel unsuited to resolve.²⁹

In this Article, we seek to allay Bruff’s concerns relating to judicial oversight of the executive as it has manifested, and continues to expand, in the Australian context. In 2014, Professor Stephen Gardbaum argued that the undermining of faith in political accountability mechanisms as “an effective and sufficient check on government action” by institutional developments and changed political practices, has “lower[ed] the historical resistance to judicial power.”³⁰ In Australia, we have seen the courts adopt an innovative response to this failing faith in political accountability. It has been the Australian experience that the court has an important role in a constitutional system that assumes the robust practice of

26. See Administrative Review Committee, Parliament of Australia, *Report* (1971) (“Kerr Report”); Committee on Administrative Discretions, Parliament of Australia, *Interim Report of the Committee on Administrative Discretions* (1973) (“Bland Report”).

27. See, e.g., *Administrative Appeals Tribunal Act 1975* (Cth) (Austl.); *Ombudsman Act 1976* (Cth) (Austl.); *Administrative Decision (Judicial Review) Act 1977* (Cth) (Austl.); *Freedom of Information Act 1982* (Cth) (Austl.).

28. See *infra* Section III.B.

29. Bruff, *supra* note 2, at 222.

30. Gardbaum, *supra* note 24, at 618–19.

“responsible government,” in “prodding”³¹ Parliament to play a larger role in controlling and scrutinising executive power.

II. RESPONSIBLE GOVERNMENT AND THE AUSTRALIAN CONSTITUTION

A. *The Concept of Responsible Government*

As Bruff notes, at the time the United States adopted its Constitution, responsible government had not developed in the United Kingdom.³² The U.S. framers were wary of executive ministers also being within the Parliament for fear of “corruption” of the legislative process. As Bruff explained, “English kings had developed a technique that jeopardized legislative independence. They ‘corrupted’ Parliament by granting lucrative offices to its members, in a successful effort to sway their loyalties and maximize power.”³³ However, as Bruff also notes, the British experience actually had the reverse effect: holding offices in both the executive and the legislature “would allow the development of parliamentary control of the ministry.”³⁴

The American framers did not have the benefit of seeing the evolution of responsible government in the United Kingdom. In contrast, the framers of the Australian Constitution had the benefit of reflecting upon the American experience as well as seeing the practice of responsible government in the United Kingdom and later in the Australian colonies. Writing in 1901, John Quick and Robert Garran—the authors of the leading commentary on the Australian Constitution at the time of its enactment—described “the gradual transfer of the executive power from the sovereign to Responsible Ministers [as] one of the most remarkable and interesting revolutions recorded in the history of England.”³⁵

31. Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MOD. L. REV. 1, 31 (2014).

32. Bruff, *supra* note 2, at 207.

33. HAROLD H. BRUFF, UNTRODDED GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 15 (2015).

34. *Id.* at 15–16.

35. QUICK & GARRAN, *supra* note 4, at 704. Quick and Garran went on to note:

Ever since the resignation of Sir Robert Walpole in 1742, it has been recognized that the Crown could not for any length of time continue to

Indeed, throughout the nineteenth century, the Australian colonists had fought with the U.K. Parliament to be granted the twin institutions of representative and responsible government.³⁶ It was not until 1855–56, when the majority of the colonies were finally empowered to draft their own constitutional documents, that this was achieved.³⁷ These institutions were believed to bring autonomy and freedom to the colonies, and would check the previously autocratic powers of the colonial Governors.³⁸ As is explained in the following Section, the experiences of the colonies with regard to the institutions of representative and responsible government were influential in the drafting of the Australian Constitution in the 1890s.

B. The Historical Adoption of Responsible Government in Australia

The question for the framers of the Australian Constitution was whether Australia should retain the system of responsible government, which to date had served the colonies well, or whether they should adopt the American approach and separate the executive from the legislature. However, it was only in the mid-nineteenth century that the colonies had received elected institutions with constitutional powers to constrain that previously exercised by the autocratic Governors. This organisation of government, which emphasised the democratic credentials of parliament and the accountability of the executive to it, would prove highly influential. There was thus very little support for a U.S. presidential-style executive amongst the Australian framers for fear of vesting one person with too much power.³⁹ There was also no desire in the Australian colonies for independence from the United

carry on the government of the country, except through Ministers having the confidence of the House of Commons. That constitutes the essence of Responsible Government.

Id.

36. See generally APPLEBY ET AL., *supra* note 13, at 43–47.

37. New South Wales Constitution Act 1855, 18 & 19 Vict. c. 54 (U.K.); Victoria Constitution Act 1855, 18 & 19 Vict. c. 55 (U.K.); *Constitution Act 1855* (Tas) (Austl.); *Constitution Act 1856* (SA) (Austl.).

38. APPLEBY ET AL., *supra* note 13, at 33–35, 43–47.

39. *Id.* at 43.

Kingdom.⁴⁰ Rather, the purpose of the Australian Constitution was to provide the necessary mechanics for the federation of the Australian colonies for the purposes of fortifying defence capacity and smoothing trade relations.⁴¹ Under the Constitution, the Queen would retain the power to appoint the Governor-General; indeed, the Queen also maintained the power to disallow any Act of the Commonwealth Parliament.⁴²

The following exchange between two of the South Australian Constitutional Convention delegates illustrates the absence of support for Australians to elect their Governor-General like the President of the United States:

Mr. HOLDER: No comparison could be made by fair analogy with the position in the United States. The President there is very different from anything we propose to provide for in the Governor-General here. We should hesitate very long before we confer upon a Governor-General the powers which are vested in the President of the United States. The President is more powerful in many respects than the Queen of England herself. He combines in his own person, powers, and authorities we would not dream of conferring on anyone. Instead of a Governor-General, we might have in our midst a man who might, for the whole term of his office, defeat the people's representatives and the Executive, and do just as he pleases. So the President of the United States can to-day, not only because of the Constitution, but because of his election by the great body of the people. I hope that we shall not make the mistake of providing for elective Governors, because of the serious risk we should run.

Mr. GLYNN: There is a unanimity of opinion against it.⁴³

40. There was no suggestion by the representatives of the colonies during the drafting of the Australian Constitution in the 1890s that the monarch should not be the head of state. The Australian Constitution also retained a right to appeal to the Privy Council. However, the right of appeal to the Privy Council has since been abolished. *Australia Act 1986* (Cth) s 11 (Austl.).

41. APPLEBY ET AL., *supra* note 13, at 50–57.

42. The Provision remains in the Constitution, although it has never been used. *Australian Constitution* s 59.

43. *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 145 (Frederick Holder and Patrick Glynn).

The challenge for the framers of the Australian Constitution was to combine a U.S.-style federal system with a U.K.-style executive system of responsible government. Not all of the delegates at the constitutional conventions agreed it was possible. The South Australia delegate, Sir Richard Baker, argued at the 1897 Constitutional Convention that responsible government was inconsistent with federalism and that delegates must choose between them: “Now, the first question that suggests itself to my mind is this: Is the commonly called responsible government system—the Cabinet system—consistent with true Federation? . . . I am afraid that if we adopt this Cabinet system of Executive it will either kill Federation or Federation will kill it.”⁴⁴

The fear was that the executive government would be drawn from the party with a majority in the House of Representatives, leaving the Senate to “wane until it becomes only a dignified appendage of the House of Representatives.”⁴⁵ Others rejected Sir Richard Baker’s claims and took the view that the Senate would be a much more powerful body. Western Australian, Sir John Forrest, drew upon the U.S. experience to support this view:

Some of us have travelled in the United States, and have had opportunities of observation there. Do the Americans tell us that the Senate is a weak and discredited body? Do those who have travelled in America say that? No; they say that it is a great and a powerful body. The very best and wisest men in the country endeavour to get into it to take part in its deliberations.⁴⁶

While drawing on the U.S. experience for some support, the delegates were also acutely aware that the Australian proposal of responsible government within a federation was unique. The Australian framers were traversing untrodden ground. As Tasmanian delegate, William Moore, explained at the Constitutional Convention in Sydney in 1897:

44. *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 28 (Sir Richard Baker).

45. *Id.* at 29.

46. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 14 September 1897, 486 (Sir John Forrest).

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In the United States the principle of responsible government would be foreign to the working of the federal constitution. . . . In the work upon which we are now engaged we are endeavouring to form a federation on a principle never known before. We are endeavouring to federate a number of colonies, and to apply to the working of the finance of that federation the principles of responsible government. This is entirely new, and we cannot look back through the vista of history for any evidence or proof to show how it will work.⁴⁷

Ultimately, the delegates went with what was familiar: responsible government. It was also, no doubt, difficult for many of the framers to abandon an institution that they had so recently fought for. (Responsible government had only been achieved in Western Australia in 1890,⁴⁸ which perhaps explained that colony's reluctance to join the federation at all; having only recently achieved some autonomy from the British government, it was reluctant to cede powers to the new Commonwealth.) In arguing for the inclusion of responsible government, Victorian delegate, Henry Higgins, stated:

I like to go to what the people are used to, and this is one of the broad reasons in favour of responsible government. Responsible government has worked well in the colonies; the people are familiar with it; we know the ways of responsible government; the mother-country has worked under it; and I hope the House will be chary about allowing any departure from responsible government.⁴⁹

And if responsible government proved to be inconsistent with federation, there would always be an opportunity to amend the Constitution.⁵⁰ Indeed, Sir Samuel Griffith had

47. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 14 September 1897, 527 (William Moore).

48. *See Constitution Act 1889* (WA) (Austl.).

49. *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 96 (Henry Higgins).

50. *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 44 (George Turner). Amending the Australian Constitution requires: (1) a majority of people in a majority of the States (i.e. four of the seven States); and (2) an overall majority of the population to agree to the amendment. *See Australian Constitution* s 128.

initially argued that responsible government should be incorporated in an “elastic” manner⁵¹ so it could develop and change as necessary, warning against constitutional prescription on the basis that the incorporation of responsible government in a federal system was experimental.⁵² The adoption of responsible government largely through convention and not extensive constitutional provision would provide this elasticity.

A key concern for the Australian framers was what powers to give an elected Senate, which was accepted as a necessary institution to give the States representation in the Parliament and give effect to federation. Responsible government operated in the United Kingdom with an appointed House of Lords who had, at least by convention, exercised restraint in its oversight of the government and the representative House of Commons. In the Australian debates, nationalists were worried that an elected Senate with equal powers to the House of Representatives, particularly over money bills, would have the political power to grind the central government to a halt.⁵³ The federalists believed that the Senate would form an important part of the States’ powers to oversee and limit the central government—of particular concern to the smaller colonies. South Australian delegate, Dr. John Cockburn, argued:

The whole principle of federation is to recognise the co-ordinate power of the population and of the states. There can be no federation if you give all the powers to the popular assembly. . . . It is no use giving representation to the states house if you emasculate that house by placing all power in the other house.⁵⁴

After much debate, the Australian framers eventually adopted Section 53 of the Constitution as a compromise

51. *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 35–38, 40–41.

52. *Official Report of the National Australasian Convention Debates*, Adelaide, 24–30 March 1897, 66, 146–47, 184–85, 193–95, 211, 247, 307, 315, 330, 334.

53. See, e.g., *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 14 September 1897, 527–28; 15 September 1897, 551–52, 554–55; 20 September 1897, 894–95.

54. *Official Report of the National Australasian Convention Debates*, Sydney, 16 March 1891, 382 (John Cockburn).

between the positions. Section 53 provides that the Senate has equal powers to the House of Representatives except in relation to money bills. Appropriation and taxation bills cannot originate or be amended in the Senate.⁵⁵

C. *Australian Government Practice Today*

Ultimately, the framers adopted a system of representative and responsible government as the best way of restraining government power. Under the Australian Constitution, the legislature is elected by the people (and is therefore representative of the people).⁵⁶ Today, there are 150 seats in the Australian House of Representatives, with the electoral districts being of approximately the same size. The Senate is made up of seventy-six Senators—twelve Senators from each of the six states and two Senators from each of the mainland territories (the Australian Capital Territory and the Northern Territory).⁵⁷ Members of the House of Representatives are elected for a period of three years and Senators are elected for a period of six years.⁵⁸ A half-Senate election occurs every three years.⁵⁹ The Ministers of the executive government are members of the federal Parliament and will usually be from the political party (or a coalition of parties) that holds the majority in the House of Representatives. The Prime Minister is the leader of that political party (or coalition of parties).⁶⁰

The exercise of executive power in Australia must not only be understood by reference to the conventions, but also to the modern practice of responsible government. While the United States did not adopt responsible government, Bruff explains

55. This was based on a similar compromise reached in South Australia after it introduced an elected upper house. BOYLE TRAVERS FINNISS, *THE CONSTITUTIONAL HISTORY OF SOUTH AUSTRALIA*, 554–55 (Burden & Bonython 1886); and see further discussion of the compromise and the current operation of Section 53 in Gabrielle Appleby & John Williams, *A Tale of Two Clerks: When Are Appropriations Appropriate in the Senate?* 20 PUB. L. REV. 194 (2009).

56. *Australian Constitution* ss 7, 24.

57. *Senators and Members*, PARLIAMENT AUSTL., http://www.aph.gov.au/senators_and_members [https://perma.cc/K4Q4-JH35].

58. *Australian Constitution* ss 7, 28.

59. *Id.* s 13; *cf.* U.S. CONST. art. I, § 3.

60. As Quick and Garran noted, “In selecting his Prime Minister, the Governor-General will be constrained to choose the statesman who possesses the confidence of the people of the Commonwealth as a whole, and that confidence will be mainly evidence by the majority which he can command in the [House of Representatives].” See QUICK & GARRAN, *supra* note 4, at 700.

that in America too, it is practice and conventions that have been developed by both the legislative and executive branches that shape the exercise of executive power.⁶¹ Bruff observes that in modern U.S. practice, Presidents are controlled “either too much or too little” and there is “not much middle ground where the control seems about right.”⁶² In the domestic sphere, Bruff describes the way the President can be “bound” by Congress in matters such as the funding of the federal government and the appointment of judicial and executive officers.⁶³ Bruff contrasts this with the way in which Presidents have developed conventions in the field of foreign policy and war making, which has meant Presidents are “unbound” in foreign affairs.⁶⁴ This has resulted in a pragmatic but constitutionally undesirable state of affairs where, in domestic policy, Presidents “dance at the edge of existing statutes,” where action is neither clearly authorised nor clearly forbidden.⁶⁵ What Bruff is alluding to is that, while this position may be constitutionally “second best,” it may also be a necessary response to the separation of, and competition between, branches in a presidential-style system to allow government to govern effectively.

In contrast, the executive government in Australia is, in theory, bounded in the domestic sphere by parliamentary oversight. However, in practice, the Australian executive has exercised its powers largely with impunity—even from a Senate that it does not control. Or at least has done so in the absence of a particularly nasty, looming political showdown.

Of course, the Australian Constitution is practised today in ways vastly different from those imagined by the framers, and not least with respect to responsible government. One immediate assumption that did not eventuate was that the Senate would operate as a States House. Instead, the Senate quickly became, in effect, a second party-house. So the feared conflict between federation and responsible government did not arise—at least in this guise. What party-control of the Senate has meant is that the Senate has provided party-political review of government action rather than State-based review.

61. Bruff, *supra* note 2, at 220.

62. *Id.*

63. *Id.* at 209–12.

64. *Id.* at 212–21.

65. *Id.* at 212.

This dictates the times and types of conflict that have arisen between the Houses.

At least since proportional representation was introduced in the Senate, thereby reducing the likelihood of government control, it has been employed as a tool in party-stoushes.⁶⁶ In the most famous confrontation between the government and an Opposition Senate, in 1975, Liberal Opposition Leader Malcolm Fraser directed the Senate not to pass Labor Prime Minister Gough Whitlam's budget until its political demands were met. Whitlam refused, and the failure of his government to secure supply led to the first and only removal of the democratically elected Prime Minister by the Governor-General pursuant to the "reserve powers" (these powers are explained in more detail below).⁶⁷ More recently, the "harvesting" of preference votes has seen the election of "micro" political parties in the Senate, often holding the balance of power and requiring the government to engage in skilled negotiations with largely inexperienced and vastly divergent politicians to secure the passage of their legislative agenda.⁶⁸

In contrast to the 1975 precedent where the Senate was used to bring down a government, and the more recent rise of the micro-parties, what the party-dominated nature of the Senate has more often meant is that it has been reluctant to flex the muscle it does have against the government. Parliamentary failure to hold the government to account can be most frequently seen in politically sensitive areas—such as national security and immigration—where there is often very little of substance distinguishing the positions of the two major parties. The Opposition is reluctant to be as "soft" by questioning strong government actions. Bipartisan support for policies can thus sometimes be an enemy of responsible government. Further, in any two-party system, the Opposition party is, of course, always dreaming of the day it again takes

66. A "stoush" is a colloquial Australian phrase to reference a fight; it derives from the Scottish *stash* or *stashie*, which means "uproar." *Stoush*, MACQUARIE COMPLETE AUSTRALIAN DICTIONARY (5th ed. 2009).

67. *The Dismissal, 1975*, NAT'L ARCHIVES OF AUSTL., <http://naa.gov.au/collection/fact-sheets/fs240.aspx> [<https://perma.cc/CTT8-CPXG>].

68. There has been much debate as to the democratic legitimacy of such tactics and calls for reform. See an explanation of the history, criticisms and analysis of the reform proposals as well as the politics of it in Michael Maley, *Senate Electoral Reform*, AUSTRALIAN PUB. L. (Sept. 29, 2015) <http://auspublaw.org/2015/09/senate-electoral-reform/> [<https://perma.cc/5L4Y-X98K>].

office. This can provide an institutional incentive not to provide overly robust scrutiny to government. Whilst in opposition, a party can often score political points in revealing maladministration and other executive failings, but the Opposition is also aware that it does not want to set precedents that make governing—for either party in office—too difficult. Two examples illustrate this phenomenon.

The first is the apparent reluctance of Senate committees—even when those that are dominated by the Opposition—to exercise their powers to compel the production of documents or the attendance of witnesses. In 2002, the Senate Select Committee on a Certain Maritime Incident investigated the conduct of the Ministers in Prime Minister John Howard's conservative Liberal government in relation to the "Children Overboard" incident.⁶⁹ This referred to an announcement by the Minister for Immigration that "a number of children had been thrown overboard" from a boat carrying asylum seekers making their way to Australia.⁷⁰ Despite the claim being untrue, it was repeated by other Ministers, including the Prime Minister, in the lead up to the federal election. The Senate Select Committee was established with the task of investigating how the story had originated, when the government knew it to be untrue, and why it took so long for this to be publicly clarified.⁷¹ Despite issuing summonses, the Committee had real trouble accessing documents and witnesses.⁷² The Chair wrote that "ultimately the Executive, in the form of the Cabinet, checked the inquiry's ability to examine relevant witnesses. This meant the Executive was able to exercise its power to prevent full parliamentary scrutiny of itself. This is not open government."⁷³ But the Committee had the power to *require* the production of the documents and the attendance of witnesses. It could call on the Senate to use its powers to hold any person who refused to comply in contempt.⁷⁴ But it did not. It claimed that it had decided not to compel one former Minister to appear because it

69. Senate Select Committee, Parliament of Australia, *Report on a Certain Maritime Incident* (2002).

70. *Id.* at xxi.

71. *Id.* at xxi–xxii.

72. *Id.* at xiv–xv.

73. *Id.* at xvii.

74. J.R. ODGERS, ODGERS' AUSTRALIAN SENATE PRACTICE 484–85 (Harry Evans & Rosemary Laing eds., 13th ed. 2012).

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would have resulted in a protracted legal challenge that would have been of enormous cost to taxpayers.⁷⁵

Disputes as to the government's obligation to make information, materials, and witnesses available to Parliament—and particularly the Senate—continue; and the Senate continues to allow its responsibility to hold Ministers to account to be frustrated by government tactics. In 2014, following the government's refusal to provide the Senate with information and answers on its immigration policy, and specifically the turn-back of boats carrying asylum seekers to Australia from Indonesia, the Senate Legal and Constitutional Affairs References Committee recommended the adoption of a formal protocol for resolving disputes between the government and the Senate over claims of executive privilege.⁷⁶ Government Ministers and government officials had refused to answer questions by the Parliament and the Committee on the controversial policy, claiming that it would place its operation at risk.⁷⁷ The Minister for Immigration refused to provide the Committee with documents, citing the public interest in maintaining confidentiality over the information for national security, defense, international relations, as well as law enforcement reasons. The Senate referred the matter to the Committee, which was unable to resolve the claims. It explained it had been “frustrated” in its mandate by the government's refusal to provide the documents, and observed this was a pattern of government behavior: “Contested claims of public interest immunity have frustrated the Senate on various occasions over many years.”⁷⁸ As well as recommending the adoption of a formal protocol between the Senate and government to resolve executive privilege claims, the Committee also recommended the Senate engage its “political” and “procedural” penalties against the government: unrelenting political attack, censure motions against Ministers

75. Senate Select Committee., *supra* note 69, at xv.

76. Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *A Claim of Public Interest Immunity Raised over Documents* (2014) vii.

77. *Immigration Minister Scott Morrison Stays Silent on Asylum Boats*, Sydney Morning Herald (Nov. 15, 2013), <http://www.smh.com.au/federal-politics/political-news/immigration-minister-scott-morrison-stays-silent-on-asylum-boats-20131114-2xjnl.html> [<https://perma.cc/8M42-6RLU>].

78. Senate Legal and Constitutional Affairs References Committee, *supra* note 76, at 17.

or the government, extension of question time until questions are answered, delaying the passage of legislation until information is provided.⁷⁹ Attempts in the Senate to employ the tactics have been frustrated by increased bipartisanship over immigration policy in Australia.

The second example is the scrutiny that the Senate exercises over delegated legislation. In Australia, the delegation of legislative power from Parliament to the executive was accepted as constitutionally permissible in 1931.⁸⁰ In many respects, the Australian parliamentary regime for scrutiny of delegated legislation is world-leading. Today, the scrutiny regime is contained in the Legislative Instruments Act 2003 and requires the entry of legislative instruments in a publicly available register, the laying of these instruments before both Houses of Parliament, the possibility of disallowance by one of the Houses of Parliament, and sunset provisions.⁸¹ In 1932, the Senate Standing Committee on Regulations and Ordinances was established to assist the Senate in undertaking its task of scrutiny of delegated legislation. However, in practice, at least in the past, scrutiny by the Committee has often degenerated into an unproductive to-ing and fro-ing between the Committee and the government that plays out, roughly, as follows.

The Committee identifies a number of important concerns with the delegated instruments as enacted by the government and deficiencies in the government's explanation of these aspects of the instruments (such as retrospective operation). The government provides perfunctory responses, usually reiterating its initial explanation (that the Committee has complained of being inadequate). In an elaborately formal conclusion to this dance, the Committee will then "thank" the Minister for his or her responses and conclude their investigation into the matter, leaving the question of whether to disallow the regulations to the full Senate.⁸² This rarely

79. *Id.* at vii, 11.

80. *Victorian Stevedoring & Gen Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (Austl.).

81. The *Legislative Instruments Act 2003* (Cth) will be amended by the *Acts and Instruments (Framework Reform) Act 2015* (Cth), when it comes into force. The Act's title will change to the *Legislation Act 2003* (Cth), but the substance of the scrutiny process will not change.

82. See Gabrielle Appleby, *Challenging the Orthodoxy: Giving the Court a Role in the Scrutiny of Delegated Legislation*, 69 PARLIAMENTARY AFF. 269 (2016).

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occurs unless the regulation is particularly controversial politically. We consider below some recent evidence of a change in the practice of the Committee. It would appear to be emboldened by the High Court's recent decisions emphasizing the role and importance of the Senate in bringing the executive to account.

Another major change in the practice of responsible government in Australia has been the reduced political expectation that Ministers will be responsible to Parliament for the actions of their department. This can be explained by reference to two political developments. The first is the growth in the size and complexity of government departments, which has undermined the reasonableness of the expectation that Ministers know and take responsibility in Parliament for everything that occurs within their departments. In 1998, the government issued a *Guide on Key Elements of Ministerial Responsibility*, which, although no longer formally in force, continues to reflect the current practice of the convention of individual ministerial responsibility:

[The convention] does not mean that ministers bear individual liability for all actions of their departments. Where they neither knew, nor should have known about matters of departmental administration which come under scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take responsibility.⁸³

The second major change is that the centralisation of decision-making power in the department of Prime Minister and Cabinet. This change has meant that individual Ministers often have little autonomy in determining the direction of departmental actions.⁸⁴

We now turn from the exercise of domestic government power to consider foreign affairs. In this arena, Bruff explains that Presidents authorise extraordinary powers largely in secret with little participation from Congress.⁸⁵ In the

83. JOHN HOWARD, *A GUIDE ON KEY ELEMENTS OF MINISTERIAL RESPONSIBILITY* 17 (1998).

84. JUDITH BANNISTER, GABRIELLE APPLEBY, ANNA OLIJNYK & JOANNA HOWE, *GOVERNMENT ACCOUNTABILITY: AUSTRALIAN ADMINISTRATIVE LAW* 160–61 (2014).

85. Bruff, *supra* note 2, at 205.

Australian foreign policy sphere, the executive is subject to more scrutiny today than it had at federation, but even this is light-touch, and it is probably correct to say that the Australian executive remains unbounded in this sphere. At federation Australia's foreign policy—including the entry into international treaties and the power to declare war—was still largely undertaken by the British government. These powers were not expressly conferred on the new federal government, or, as in the United States, divided between the President and the Congress.⁸⁶ They would be found, rather, in the prerogatives that were vested in the executive through Section 61 of the Australian Constitution.⁸⁷

Legislative scrutiny in foreign policy has been late in coming. However, there has generally been a move towards openness and scrutiny rather than away from it. For example, the Commonwealth executive has the prerogative power to enter into and ratify treaties without any involvement from the legislature.⁸⁸ There is no requirement, as in the United States, for the Senate to ratify the executive's entry into treaties. For almost a century there was no parliamentary involvement at all in the treaty ratification process. This changed in 1996. The conservative government led by Prime Minister John Howard introduced a number of non-binding constraints on the treaty-making powers of the executive, including that all proposed treaty action be tabled in Parliament at least fifteen sitting days prior to the taking of binding action (with exceptions for urgent and sensitive treaties) and the establishment of a Joint Standing Committee on Treaties (JSCOT) to scrutinise and report on proposed treaty action.⁸⁹ The 1996 reforms have undoubtedly led to a more transparent and open treaty-making process in Australia. But they have not led to scrutiny that has resulted in substantial change in executive action. JSCOT very rarely recommends against ratification; in any event, the government is free to ignore any such recommendation. Further, the government has often introduced legislation to

86. See *infra* Section III.B.3.

87. See *infra* Section III.B.3.

88. *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278.

89. *Role of the Committee*, PARLIAMENT AUSTL., http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee [<https://perma.cc/2RCT-8QK4>].

implement a treaty before JSCOT has concluded its inquiry.⁹⁰

III. EXECUTIVE POWER IN AUSTRALIA—AN OVERVIEW

In *Untrodden Ground*, Bruff noted that Article II of the U.S. Constitution exemplifies the principles of “brevity and occasional obscurity.”⁹¹ In the Australian Constitution, Section 61—the first section within Chapter II—states with brevity and obscurity resembling its American cousin: “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.”⁹²

The opening words of Section 61 of the Australian Constitution have some similarity to the opening words of Article II, Section 1 of the U.S. Constitution.⁹³ But, as Sir Samuel Griffith explained to the 1891 convention: “This part of the bill practically embodies what is known to us as the British Constitution as we have it working at the present time.”⁹⁴

In the first Section of this Part III, we identify the various aspects of executive power of the federal government and to whom that power is vested. We then explain each of the aspects of executive power in greater detail.

90. See, e.g., Joint Standing Committee on Treaties, Parliament of Australia, *Report 52: Treaties Tabled in March 2003* (2003) 53–54.

91. BRUFF, *supra* note 33, at 11.

92. *Australian Constitution* s 61. The Governor-General is appointed by the Queen or King on the recommendation of the Prime Minister. Section 2 of the Australian Constitution states: “A Governor-General appointed by the Queen shall be Her Majesty’s representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen’s pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.” There is no fixed time period for the appointment of a Governor-General, but appointments are usually for a period of about five years. *Governor-General’s Role*, GOVERNOR-GEN. COMMONWEALTH AUSTL. (July 20, 2015), <http://www.gg.gov.au/governor-generals-role> [https://perma.cc/D2TR-NKSS].

93. The opening words of Article II, Section 1 state: “The executive power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1.

94. *Official Report of the National Australasian Convention Debates*, Sydney, 31 March 1891, 527 (Samuel Griffith); see also *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 766 (Henry John Wrixon); *Id.* at 769–73 (Alfred Deakin & Samuel Griffith).

A. The Organisation of Executive Power in Australia

While the executive power of the federal government is vested in the Queen and exercisable by the Governor-General, in practical terms, it is the Prime Minister and ministers that hold the power. While not expressly stated within the Australian Constitution, the unwritten convention is that the Governor-General acts on the advice of the government ministers. This is the very backbone of responsible government. Section 62 of the Australian Constitution establishes a body called the Federal Executive Council, which advises the Governor-General. Section 63 states that where reference is made within the Constitution to the “Governor-General in Council,” it “shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.”⁹⁵ All ministers are sworn in as members of Federal Executive Council.⁹⁶ While the formal mechanism for providing advice to the Governor-General is through the Federal Executive Council, in practice, it is the Cabinet—comprising of the senior government ministers—that makes the key government decisions and advises the Governor-General.⁹⁷ The current Cabinet of Prime Minister Malcolm Turnbull consists of twenty members, although this number will vary between governments.

There are some limited situations in which the Governor-General will not act on the advice of Cabinet, known as the “reserve powers.” These powers are engaged in times when the Prime Minister fails to act in accordance with the conventions of responsible government and at other times when the constitutional order is under serious attack.⁹⁸ Acting independently of the Cabinet, the Governor-General has the power to dissolve Parliament (or to refuse to dissolve Parliament) and to appoint and dismiss a Prime Minister.⁹⁹

95. *Australian Constitution* s 64.

96. *Id.*

97. As Quick and Garran noted in 1901, “It must be remembered, however, that the Executive Council as created by statute is not the Cabinet as known in parliamentary practice. The Cabinet is an informal body having no definite legal status; it is in fact an institution unknown to the law; it exists by custom alone, and yet it is the dominant force in the Executive Government of every British country.” QUICK & GARRAN, *supra* note 4, at 704–05.

98. See CHERYL SAUNDERS, *THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS* 161–63 (2010).

99. *Id.*

Other than appointing a Prime Minister after an election, which is usually a relatively uncontroversial action, the reserve powers are rarely used. It is well-accepted by officeholders that they must be exercised with some caution because the exercise of the power may attract criticism given that it is an unelected official acting against the wishes of an elected government. In Australia, the most controversial exercise remains the sacking of Prime Minister Gough Whitlam by the Governor-General, Sir John Kerr, when he was unable to guarantee the passage of his budget through a Senate controlled by the Opposition.¹⁰⁰ But even this action was restrained: Opposition Leader Malcolm Fraser was appointed as a caretaker Prime Minister on the condition that he secure supply through the Senate and then immediately call a general election.¹⁰¹ Fraser's Liberal-National coalition won the resulting election, the Australian public eventually having grown weary of Whitlam's economic failures and blunder-prone government.¹⁰²

In Australia, following Griffith's predictions, the executive power in Section 61 was presumed for over a century to be the same as that enjoyed by the British Crown. There was some debate about how the prerogatives and the other nonstatutory powers (including the power to contract and spend) ought to be limited federally. In Australia, there is no free-standing spending power, as was found in the general welfare clause of the U.S. Constitution¹⁰³ in the case of *United States v. Butler*.¹⁰⁴ In the United States, the conditional deployment of the federal spending power may be used to achieve federal objectives outside Congress' enumerated legislative powers.¹⁰⁵

In contrast, in Australia, the power to spend is drawn either from Section 96 of the Australian Constitution, which grants the federal Parliament the power to make grants to the states on any condition it sees fit, or must be found in the general grant of executive power in Section 61.¹⁰⁶ There have been debates about whether the federal government's executive capacities—which were presumed to include the power to spend and contract—ought to be limited in their breadth by

100. See *The Dismissal, 1975*, *supra* note 67.

101. *Id.*

102. *Id.*

103. U.S. CONST. art. I, § 8.

104. *United States v. Butler*, 297 U.S. 1 (1936).

105. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

106. *Australian Constitution* ss 61, 96.

reference to the heads of legislative power granted to the federal Parliament.¹⁰⁷ The existence of such limits remains a subject of debate, the High Court not having ruled definitively on the question.¹⁰⁸ By and large, successive federal governments acted as if the federal limits were largely non-existent in relation to the nonstatutory executive powers, particularly the spending power. The Commonwealth government's first public servant, and later first Solicitor-General, gave evidence before the 1929 Royal Commission on the Constitution that the appropriations power in the Constitution (presumed at that time to be concomitant with the spending power) was "an absolute power" of appropriation, and that "the Commonwealth Parliament has always acted on that supposition."¹⁰⁹ As we explain below, it was not until 2009 that the assumptions contained within this statement were called into question.

It has really only been in the last decade that the High Court has explained that what Section 61 of the Constitution created was something entirely new: that it imported aspects of the British prerogative, but was also informed by the federal division of powers, the restraints of responsible government, and the evolving fact of Australia's nationhood. Today, the scope of the executive power in Section 61 is accepted to include:

1. Powers expressly conferred by the Constitution, usually upon the Governor-General, but exercisable on the advice of the government's Ministers;
2. Powers conferred by federal statutes, which are necessarily limited by the division of legislative powers between the Commonwealth and state parliaments;

107. *Id.* ss 51, 52.

108. *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 (Austl.) (the "AAP Case"), for example, which challenged the Whitlam Government's reliance on its spending power to finance a scheme of regional councils, was decided by a 4-3 majority, although on the substantive question of the breadth of the executive's spending powers, the Court split 3-3, with Justice Stephen not deciding the spending power issue because he found the plaintiff States lacked standing.

109. Commonwealth, Royal Commission on the Constitution, *Report* (1929) Minutes of Evidence pt 1, 69.

3. Prerogative powers inherited from the British Crown, distributed between the state and federal executives; and
4. The inherent constitutional “nationhood” power.

These different sources of executive power may look familiar to a U.S. constitutional scholar.

For a long time it was also assumed that Section 61 incorporated the “common law capacities” of the British Crown. That is, those powers that the Crown enjoyed in common with other persons: the power to contract, to spend, to give money away, to gather information and hold inquiries, to hold and dispose of property, to sue and be sued.¹¹⁰ However, more recently the High Court has cast doubt on this position.¹¹¹ One argument that has been advanced in defence of the existence of these capacities is that, by their nature, they are non-coercive and not peculiarly “governmental.” However, in the 2012 decision, *Williams v Commonwealth [No. 1]* the Court acknowledged that when the government exercises such capacities, those capacities take on a different character: the political and financial strength of the government allows it to employ them to achieve policy objectives and regulate behaviour. As Justice Hayne said:

The argument asserting that the Executive Government of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a natural person was no more than a particular form of anthropomorphism writ large. It was an argument that sought to endow an artificial legal person with human characteristics. The dangers of doing that are self-evident.¹¹²

The extent of what might remain of the Commonwealth’s “common law capacities” after the decision in *Williams [No. 1]* is explored in more depth below.¹¹³

110. The term “common law capacities” comes from Blackstone. 1 WILLIAM BLACKSTONE, COMMENTARIES *232.

111. *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156 (Austl.).

112. *Williams [No. 1]* (2012) 248 CLR at 254 n.204.

113. See *infra* Section III.B.5. And see also questions raised, but not answered,

B. *The Aspects of the Australian Executive Power*

In the last Section of this Article we explore each of these aspects of the executive power in Australia. We further consider the conventions that have developed in our system to control each dimension of executive.

1. Powers Expressly Conferred by the Constitution

The Queen's only role in exercising executive power in Australia is in the appointment and removal of the Governor-General on the advice of the Prime Minister. Where the Constitution directly confers powers on the executive, these powers are largely vested in the Governor-General. The Constitution provides the Governor-General the power to prorogue,¹¹⁴ dissolve and summon Parliament;¹¹⁵ issue the writs for a general election;¹¹⁶ convene joint sittings of the two Houses;¹¹⁷ give assent to Bills;¹¹⁸ command the military forces;¹¹⁹ and appoint and remove judges.¹²⁰ It is generally accepted that while these powers can be regulated by Parliament, they cannot be taken away from the Governor-General.¹²¹

in Geoffrey Lindell, *The Changed Landscape of the Executive Power of the Commonwealth After the Williams Case*, 39 MONASH U. L. REV. 348, 373–74 (2013).

114. To prorogue parliament is to terminate the session of Parliament. For a detailed discussion of the prorogation of parliament, see DEP'T OF THE HOUSE OF REPRESENTATIVES, *supra* note 19, at ch 7.

115. *Australian Constitution* s 5.

116. *Id.* s 32. The Governor-General also has the power to issue writs where there is a vacancy in the House or Representatives. *Id.* s 33. The process for filling a vacancy in the Australian Senate is different and does not require the issuing of writs. *See id.* s 15.

117. *Id.* s 57.

118. *Id.* s 58.

119. *Id.* s 68.

120. *Id.* s 72. The Governor-General also has the power to remove members of the Inter-State Commission. *Id.* s 103. However, this power is largely redundant given that the Inter-State Commission has been abolished.

121. GEORGE WINTERTON, *PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL: A CONSTITUTIONAL ANALYSIS* 98–101 (1983). *See also* LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* (5th ed. 2008). In 1999, a referendum was held on whether to move from a monarchy to a republic. This referendum proposed changing references to the Governor-General in the Constitution to the "President," who would be appointed by the Parliament. The referendum was defeated (with only forty-five percent of Australians voting for the proposal), and while the question of whether and when Australia should move to adopt a formal

2. Powers Conferred by Statute

Today, the vast majority of executive power is conferred by legislation. Legislation confers all manner of powers on the Governor-General, ministers, federal public servants, and other statutory officeholders. Where powers are conferred by Parliament, it is generally perceived that there is greater *ex ante* democratic legitimacy and accountability, having had the benefit of scrutiny from both Houses as well as (often) parliamentary committees.¹²² The conferral of powers on the executive by statute is also seen as beneficial from an *ex post* accountability perspective, with greater clarity provided as to the limits of the power, and the availability of more review mechanisms.¹²³ The scope of the federal Parliament to confer power on the executive is also limited by the breadth of its legislative power, which is enumerated in Sections 51 and 52 of the Australian Constitution.

With no strict separation of power between the legislature and the executive in Australia, the High Court has also accepted in the leading 1931 decision of *Dignan* that Parliament may delegate its legislative power to the executive.¹²⁴ The reasoning offered by the two leading judges in *Dignan* left an unsavoury taste in the mouths of constitutional scholars.¹²⁵ Justice Dixon cast aside his developing doctrine of

republic structure, the issue has not gained much momentum in recent years.

122. Cf. U.S. CONST. art. I, § 8. Further, Section 51(xxxix) of the Australian Constitution provides that the federal Parliament has the power to make last with respect to “matters incidental to the execution of any power vested by the Constitution . . . in the Government of the Commonwealth . . . or in any department or officer of the Commonwealth.” This power is known as the “incidental power” and provides the Parliament with the power to codify the executive’s nonstatutory powers. APPLEBY ET AL., *supra* note 13, at 179.

123. At the federal level, for example, judicial review through the Administrative Decisions (Judicial Review) Act is only available over powers conferred by statute. *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 (Austl.). Likewise, merits review in the Administrative Appeals Tribunal must be conferred by statute. *Administrative Appeals Tribunal Act 1975* (Cth) s 25 (Austl.).

124. *Victorian Stevedoring & Gen Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (Austl.). While the power can be delegated, it cannot abdicate its power. *Id.* at 119–20 (Evatt, J). Delegation occurs in many different forms—regulations, ordinances, rules, by-laws and proclamations—although its most common is in the form of a “regulation-making power.” *Id.* at 117–18.

125. WINTERTON, *supra* note 121, at 87; see also Geoffrey Sawer, *The Separation of Powers in Australian Federalism*, 35 AUSTL. L. J. 177 (1961); Denise Meyerson, *Rethinking the Constitutionality of Delegated Legislation*, 11 AUSTL. J.

separation of powers when it came to delegated legislation, explaining:

[I]t is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation.¹²⁶

Extra-judicially, he confessed that his position in the case was driven by “judicial incredulity” at the consequences of applying the separation of powers to delegations, and he explained that “[l]egal symmetry gave way to common sense.”¹²⁷ Justice Evatt relied upon the principle of parliamentary sovereignty that he claimed we had inherited from England,¹²⁸ despite the fact that Australia had adopted a written, rigid constitutional text, severely undermining any argument that parliamentary sovereignty could exist in Australia in an unmodified form. He also relied on the “close relationship” between the legislative and executive agencies created by responsible government.¹²⁹

The Australian High Court did not take the path that was adopted in the United States. There, the Supreme Court has accepted that the separation of powers limits the delegation of legislative power to the executive. Indeed, during the 1930s and the judicial-executive wrangling over FDR’s New Deal, the Court relied on the “non-delegation doctrine” to strike down a number of statutes.¹³⁰ The doctrine requires congressional delegations to set out “intelligible principles” to which the executive must conform in creating delegated legislative instruments.¹³¹ Since that era, the Court has, however, been reluctant to enforce the doctrine in the sense of striking down

ADMIN. L. 45 (2003); ZINES, *supra* note 121, at 198–207.

126. *Victorian Stevedoring*, 46 CLR at 91 (Dixon, J); *see also id.* at 115, 117 (Evatt, J).

127. Owen Dixon, *The Law and the Constitution*, 51 L. Q. REV. 590, 606 (1935).

128. *Victorian Stevedoring*, 46 CLR at 117.

129. *Id.* at 114.

130. BRUFF, *supra* note 18, at 132–36.

131. *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *See also United States v. Chi. Milwaukee St. Paul & Pac. R.R. Co.*, 282 U.S. 311, 324 (1931); *Whitman v. Am. Trucking Ass’n Inc.*, 531 U.S. 457, 472 (2001).

delegations,¹³² although it has continued to assert, or at least accept, the doctrine's existence.¹³³ The doctrine has had some effect: the Court will rely upon it to construe congressional delegations narrowly so as to "find" the necessary intelligible principles.¹³⁴ However, as Justice Scalia explained in *Whitman v. American Trucking Associations Inc.*, a case in which the Court upheld a delegation to the Environmental Protection Agency to set ambient air quality standards that in the judgment of the Administrator are "requisite to protect the public health"¹³⁵: "In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"¹³⁶

Bruff argues that the U.S. Supreme Court's position on delegations and the development of the "avoidance doctrine" reflects an appropriate role for the Court.¹³⁷ He expresses concern that any more robust application of the doctrine would be an illegitimate judicial interference with congressional judgment about the need for delegation, and the required breadth of delegation, in any given case.¹³⁸ These judgments require a degree of subjective judgment in terms of the requisite specificity, and strong enforcement may lead to a confrontation between the courts and the Congress who disagree on the need, and capacity, to spell out more precise standards.¹³⁹ Bruff argues for its continued use in this way by the Court.¹⁴⁰

In contrast to the United States' restricted development of

132. The only delegations that it has struck down being during the New Deal. See, e.g., *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

133. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 68, 71 (1965).

134. See BRUFF, *supra* note 18, at 137.

135. Clean Air Act, 42 U.S.C. §§ 7401, 7409(b)(1) (1970).

136. *Whitman*, 531 U.S. at 475 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

137. BRUFF, *supra* note 18, at 140.

138. *Id.*; see also GEORGE WINTERTON, *PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL: A CONSTITUTIONAL ANALYSIS* 91 (Melbourne Univ. Press 1983).

139. BRUFF, *supra* note 18, at 140. For other critiques of the doctrine, see Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987), and Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393 (1987).

140. BRUFF, *supra* note 18, at 141–42.

permissible legislative delegation, Australia has gone as far as allowing delegation that overrides other legislation. Such provisions are known as Henry VIII clauses.¹⁴¹ This position was inherited from English practice, dominated as it is by the concept of parliamentary sovereignty.

One attempt to answer criticisms that delegation removes parts of the legislative power from the democratic processes of the Parliament has been the introduction of a “disallowance” procedure. The Legislative Instruments Act 2003 allows for a “notice of motion to disallow” to be brought in either House of Parliament within fifteen days of the delegated legislation being laid before that House.¹⁴² The disallowance procedure is, however, plagued by its potential for abuse by the government and effective avoidance. Delegated instruments come into force when made, and disallowance affects their operation only from the date of disallowance. On occasion, delegated legislative instruments have been able to achieve their entire objective before Parliament has even had an opportunity to consider disallowance. Thus delegated legislation that is disallowed by Parliament may still have a permanent effect. One example of this was in 2003 when the Howard government retrospectively excised, by regulation, islands off the Northern Territory to prevent a boat of fourteen Turkish Kurds from being able to access the processes and protections for seeking asylum under Australia’s Migration Act.¹⁴³ The Senate disallowed the regulations, but they remained in force for the crucial period when the asylum seekers had landed.¹⁴⁴ In other cases, Parliament may be wary of disallowing a regulation because it has already had a substantial period of operation before Parliament has had an opportunity to review it.¹⁴⁵

141. So-called after the Statute of Proclamations 1539, during the reign of Henry VIII, which provided: “The King for the Time being, with the Advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.” 31 Hen. 8 c. 8 (U.K.).

142. *Legislative Instruments Act 2003* (Cth) s 42 (Austl.).

143. Ernst Willheim, Comment, *Government by Regulation: Deficiencies in Parliamentary Scrutiny?*, 15 PUB. L. REV. 5, 9 (2004).

144. JAFFE, *supra* note 133, at 10.

145. For a discussion of this practice, see ADMIN. REV. COUNCIL, RULE MAKING BY COMMONWEALTH AGENCIES, REP. NO. 35, at 42 (1992).

3. The Prerogative Powers

The common law that was received by the Australian colonies upon settlement included the royal prerogative powers—the powers that were historically exercised by the King or Queen.¹⁴⁶ Upon federation in 1901, parts of these powers were received by the federal executive by virtue of Section 61 of the Australian Constitution.¹⁴⁷ As Professor Anne Twomey has explained:

[A]uthority [for the prerogative] is recognised by the common law and hence defined by the courts, even though its original source lies outside the common law. That power cannot now be expanded. No new prerogative can be established by the courts. The prerogative is therefore limited to those powers that can be identified by reference to historical use and [which] have not been subsequently abrogated by legislation. It falls within a limited and diminishing field.¹⁴⁸

In *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)*, Justice Evatt explained that the prerogative included the following powers, rights and privileges:

1. The royal or “executive” prerogatives, which include the power to declare and wage war (and includes the deployment of the armed forces), or make peace, enter into treaties, grant pardon and establish Royal Commissions;
2. Certain preferences or immunities, which include the right to have a preference as a creditor over other creditors and an immunity from prosecution;

146. *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320–21.

147. *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Austl.).

148. Anne Twomey, *Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers*, 34 MELB. U. LAW. REV. 313, 325 (2010).

3. The property rights by virtue of the prerogatives, including the right to royal fish and treasure and the right to precious metals.¹⁴⁹

As we have seen, the exercise of the foreign policy prerogatives without parliamentary oversight has caused some consternation in Australia, with the introduction in 1996 of a number of measures aimed at increasing oversight and transparency of the executive's power to enter into treaties.¹⁵⁰ Most recently, the exercise of the prerogative to deploy armed forces without the involvement of Parliament has also been the subject of debate.

Unlike in the United States, in Australia it is the executive and not the legislature that declares war.¹⁵¹ Some Members of the Australian Parliament have argued that the matter should be put before the Parliament.¹⁵² The debate over parliamentary approval for war or the use of military force has never looked like it would seriously be won by its proponents. The executive's power to declare war and use military force is supported by both major parties. Bipartisanship has again stood in the way of greater executive scrutiny.

Nonetheless, the debate raises an interesting constitutional question as to how it could be achieved. It would not necessarily require constitutional amendment, but it might be achieved by the passage of carefully drafted legislation. The High Court of Australia has stated:

Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of

149. (1940) 63 CLR 278, 320–21.

150. See discussion *supra* Section II.C.

151. Cf. U.S. CONST. art. I, § 8, cl. 11. Although, as Bruff has explained in his scholarship, the American President has often in practice avoided requirements for congressional approval by avoiding a formal declaration of war, despite significant deployment of military force.

152. *'We Are Part of the War': Andrew Wilkie and Greens Angry at Iraq Announcement*, SYDNEY MORNING HERALD (Aug. 31, 2014), <http://www.smh.com.au/federal-politics/political-news/we-are-part-of-the-war-andrew-wilkie-and-greens-angry-at-iraq-announcement-20140831-10alrm.html> [<https://perma.cc/2LY6-ZEEL>]. For legislative attempts to provide Parliament with greater involvement in the process of deploying troops, see DEIDRE MCKEOWN & ROY JORDAN, DEP'T OF PARLIAMENTARY SERVS., PARLIAMENTARY INVOLVEMENT IN DECLARING WAR AND DEPLOYING FORCES OVERSEAS 1–3 (2010), <https://www.aph.gov.au/binaries/library/pubs/bn/pol/parliamentaryinvolvement.pdf> [<https://perma.cc/TW3F-DCQT>].

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control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope.¹⁵³

Any legislation establishing a process for abolishing or varying the prerogative would need to be done in clear and unambiguous language, where the particular aspect of executive power is “intimately connected to Australia’s status as an independent, sovereign nation [S]tate.”¹⁵⁴ As Justice French—now Chief Justice of the High Court of Australia—has noted: “The 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.”¹⁵⁵

There is a further complicating issue as to whether such legislation would interfere with the exercise of executive power vested in the Governor-General by Section 68 of the Constitution, which vests the command of the military forces in the Governor-General.¹⁵⁶ It would seem that Parliament could not remove or curtail the rights of the Governor-General as commander in chief, but could legislate so as to require parliamentary approval of the deployment of the armed forces.

The position in Australia can be contrasted with that in the United Kingdom. Since the question of joining the United States in the invasion of Iraq in 2003 was put to the House of Commons for a vote,¹⁵⁷ it has now become an established practice in the United Kingdom to consult the Parliament on the use of military force:

In 2011, the Government acknowledged¹⁵⁸ that a convention had developed in Parliament that before troops were committed the House of Commons should have an

153. *Brown v West* (1990) 169 CLR 195, 202 (Austl.).

154. *Ruddock v Vardarlis* (“Tampa Case”) (2001) 110 FCR 491, 540 n.185 (Austl.).

155. *Id.*

156. *Australian Constitution* s 68.

157. See generally Prime Minister Tony Blair on the introduction to this debate in Hansard. Parl Deb HC (6th ser.) (2003) col. 760. The votes were held on March 18, 2003.

158. See statements made by the Leader of the House of Commons Sir George Young during a debate at Hansard on March 10, 2011. Parl Deb HC (2011) col. 1066 (U.K.).

opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.¹⁵⁹

While this practice in the United Kingdom allows for debate of the issue, the final decision on the deployment of troops still rests with the executive government. However, the convention appears to have become entrenched relatively quickly. In August 2013, for example, the U.K. Parliament refused to authorise further use of military force in Syria, a position that was accepted by the Prime Minister.¹⁶⁰

4. The “Nationhood Power”

One aspect of Australia’s executive power over which scholars have exercised much consternation is the so-called “nationhood power.” In many respects this is similar to the concept of “inherent” executive power that has been found under the American Constitution. Section 61 of the Australian Constitution has been held to include an ability to engage in activities unique to the Commonwealth Government and necessary for the nation as a whole.¹⁶¹ Justice Jacobs explained that the “nationhood power” was necessary for the “maintenance” of the Constitution in the following way:

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, a nation governed by a system of law in which the powers of

159. THE CABINET MANUAL – A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT 44 (1st ed. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [<https://perma.cc/N8CR-LJZ9>].

160. *House of Commons Debate on Syria*, UK PARLIAMENT (Aug. 30, 2013), <http://www.parliament.uk/business/news/2013/august/commons-debate-on-syria/> [<https://perma.cc/UDD9-3Q83>]. The Prime Minister’s response was, “[I]t is clear to me that the British parliament, reflecting the views of the British people, does not want to see British military action. I get that and the government will act accordingly.” See also Nicholas Watt & Nick Hopkins, *Cameron Forced to Rule Out British Attack on Syria After MPs Reject Motion*, THE GUARDIAN (Aug. 29, 2013, 6:07 PM), <http://www.theguardian.com/world/2013/aug/29/cameron-british-attack-syria-mps> [<https://perma.cc/JZ8S-29NV>].

161. *AAP Case* (1975) 134 CLR 338, 397 (Austl.). With respect to the implied “nationhood power,” see also *Davis v Commonwealth* (1988) 166 CLR 79 (Austl.) and *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156 (Austl.).

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government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.¹⁶²

Chief Justice French has observed that the precise scope of the nationhood power is unclear.¹⁶³ He also explained that it is an inevitably evolving concept: “While history and the common law inform [the content of executive power], 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.”¹⁶⁴ Perhaps the most helpful general statement of the concept is Justice Mason’s explanation of the “nationhood power”:

But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss. 51(xxxix.) 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.¹⁶⁵

The “nationhood power” (in conjunction with the incidental legislative power in s 51(xxxix)) was first invoked in relation to legislation with respect to subversion and sedition.¹⁶⁶ Today, while the scope of the power continues to be unclear, it is generally accepted that it includes the power:

1. To respond to emergencies such as war or natural disasters;¹⁶⁷

162. *AAP Case*, 134 CLR at 406.

163. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 48–49 (Austl.). See also SARAH JOSEPH & MELISSA CASTAN, *FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW* 158 (Lawbook Co., 3d ed. 2010); Twomey, *supra* note 148, at 327–42.

164. *Pape*, 238 CLR at 48.

165. *AAP Case*, 134 CLR at 397. See generally Leslie Zines, *The Inherent Executive Power of the Commonwealth*, 16 PUB. L. REV. 279, 283 (2005).

166. *Burns v Ransley* (1949) 79 CLR 101 (Austl.); *The King v Sharkey* (1949) 79 CLR 121 (Austl.).

167. *Pape*, 238 CLR at 182 (Heydon, J).

2. To deal with symbols of nationhood (such as the national anthem and flag);¹⁶⁸ and
3. To undertake scientific and technical research, public health and exploration.¹⁶⁹

The “nationhood power” has been successfully invoked by the Commonwealth in *Davis v Commonwealth* to uphold legislation supporting the celebration of Australia’s bicentenary¹⁷⁰ and in *Pape* to uphold legislation that gives effect to a tax-bonus scheme, one of the government’s stimulus responses to the Global Financial Crisis.¹⁷¹

The Court has been careful to explain that the mere fact that a matter may be of national importance does not in itself expand the Commonwealth’s legislative power. The High Court has cautioned that the nationhood power does not extend to “any subject, which the Executive Government regards as of national interest and concern.”¹⁷²

Australian constitutional scholars have been critical of the inherent nationhood power, both in terms of the basis on which the Court has invoked it (arguing that the prerogative or other constitutional powers could have provided the necessary support) and its lack of clear limits. Leading executive power commentator Professor Anne Twomey complained after the 2009 decision in *Pape* that the Court:

[L]eft an implied executive nationhood power floating untethered above the Constitution, to be used in the future as a justification for Commonwealth legislation on anything that the Commonwealth regards as an “emergency” that it considers can best be addressed by the Commonwealth financial power. It is one more step away from a federation towards Commonwealth hegemony.¹⁷³

168. *Davis v Commonwealth* (1988) 166 CLR 79, 110–11 (Austl.).

169. *AAP Case*, 134 CLR at 362 (Barwick, CJ), 398 (Mason, J), 418–19 (Jacobs, J).

170. *Davis*, 166 CLR 79.

171. *Pape*, 238 CLR 1.

172. *The Queen v Hughes* (2000) 202 CLR 535, 555 (Austl.).

173. Twomey, *supra* note 148, at 343; *see also* Peter Gerangelos, *The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, ‘Nationhood’ and the Future of the Prerogative*, 12 OXFORD U.

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Bruff attempts to placate Australia's fears about the executive's reliance on these powers and provide some "comfort" by reference to the long American history with them. Bruff explains that, in the United States, "[t]here is much loose talk about 'inherent' executive power to do this or that, but in fact presidential actions can almost always be tied to some explicit grant of constitutional power (although the connection is somewhat tenuous at times)."¹⁷⁴ While, as Bruff puts it, "discussions [about 'inherent' executive power] careen around in the American constitutional literature like loose cannons . . . Presidents have usually grounded their actions in particular constitutional powers, so that legislators, courts and citizens might then dispute the validity of these actions in an informed way."¹⁷⁵

In Australia, we do not have a long established history from which to draw conclusions about the extent of reliance on nonstatutory powers such as the inherent nationhood power. Nor have we had a history of substantial conflicts that would test the executive's tendency to rely on such powers in emergency situations. However, we can observe that from the few cases that have been heard that reliance upon an inherent power does appear to be an argument of last resort. This may reflect its still developing status. It may also simply reflect good legal counsel: where a non-express executive power is relied upon, it is preferable that an alternative legal basis is also argued, if at all possible.

For example, in the challenges to the National School Chaplaincy funding program (discussed in more detail below),¹⁷⁶ the Commonwealth defended the validity of the scheme first by reference to its power to make laws with respect to corporations and to provide benefits to students. It relied in the alternative upon the more controversial nonstatutory power arguments (in that case relating to the Commonwealth's executive capacities rather than the nationhood power).

What is also evident is that in the Australian

COMMONWEALTH L.J. 1 (2012).

174. Bruff, *supra* note 2, at 216. It is this theme that he develops in his most recent work. BRUFF, *supra* note 33.

175. Bruff, *supra* note 2, at 222.

176. In both cases it was unsuccessful. *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156 (Austl.); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 (Austl.).

constitutional system, where the government generally dominates the Parliament, the government has often been able to ask Parliament for authorisation, including retrospective authorisation, of some of its more controversial uses of nonstatutory executive power. This has also contributed to the lack of cases in the High Court that have directly considered the scope of the inherent power.

For example, in 2001, the government successfully relied upon an argument in the Full Federal Court that it had an inherent power to exclude aliens from the state and to expel or deport such persons forcibly.¹⁷⁷ After the case, the government introduced and the Parliament passed the Border Protection (Validation and Enforcement Powers) Act 2001, which provided retrospective statutory authorisation for the actions of the SAS troops that had been the subject of the challenge.¹⁷⁸ Following this development, the High Court refused special leave to hear an appeal from the case.¹⁷⁹

In a more recent High Court challenge the government relied on explicit statutory powers in the Maritime Powers Act 2013 to justify its interception of a boat carrying Sri Lankan asylum seekers, the detention of those asylum seekers on board, and then the forced return of those asylum seekers to India.¹⁸⁰ That Act re-enacted the powers that had been introduced by the Border Protection (Validation and Enforcement Powers) Act 2001. Section 72(4) confers powers on maritime officers to detain persons in Australia's contiguous zone and to move them into the Australian migration zone, or outside of it, including to a place outside of Australia. Notably, in the recent High Court Challenge, while the Commonwealth government relied primarily on the statutory power, it also argued that it possessed an inherent power to detain and remove the asylum seekers, the power that had been successfully relied upon in the 2001 challenge. The majority of

177. *Tampa Case* (2001) 110 FCR 491 (Austl.). Justice French (later appointed Chief Justice of the High Court) authored the leading majority opinion.

178. *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). The Special Air Service (SAS) Regiment of the Australian Army is a special operations force similar to the United States Navy's SEALs.

179. *Vadarlis v MIMA & Ors M93/2001* [2001] HCA Trans 563 (29 October 2001), <http://www.austlii.edu.au/au/other/HCATrans/2001/563.html> [<https://perma.cc/SJ4B-97CZ>].

180. *Maritime Powers Act 2013* (Cth); *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (Austl.).

the Court accepted that the Maritime Powers Act provided statutory power to authorise the government's actions.¹⁸¹

5. The Common Law Capacities and the High Court's Regulation of the Exercise of Executive Power

For almost a century, it was assumed that the central government possessed a fleet of “common law capacities,” those powers that the Crown has historically enjoyed but that are shared with any natural person or corporation. Colonial governors exercised these capacities as their powers derived from the British Crown, and the State governments continued to exercise those powers that had been enjoyed by the colonies. The federal government's capacities, however, had to be sourced in Section 61 of the Constitution. And for many years this position was accepted, with some debate over the breadth of the capacities and whether the federal division of powers limited them as the legislative powers were.¹⁸²

In a case decided in 2012, however, this assumption was exploded by the High Court—at least in relation to the central government's capacity to enter into contracts and to spend money outside the prerogative, the nationhood power, and the ordinary course of administering government.¹⁸³ The implications of the decision on the other common law capacities remains unexplored by the Court.¹⁸⁴ The Commonwealth appears to be acting on the basis that they remain unchanged.

In *Williams v Commonwealth [No. 1]*, a challenge was brought to the federal funding of school chaplains in schools, the “National School Chaplaincy Program.”¹⁸⁵ Under the program, the federal government funded school chaplaincy providers at schools across the country.¹⁸⁶ Mr. Ron Williams was a father of children attending the Darling Heights State

181. *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (Austl.).

182. APPLEBY ET AL., *supra* note 13, at 185–88.

183. *Williams [No. 1]* 248 CLR 156.

184. See, e.g., Nicholas Aroney, *A Power ‘Singular and Eccentric’—Royal Commissions Executive Power After Williams*, 25 PUB. L. REV. 99 (2014) (examining the continued existence of the power to conduct inquiries in a post-*Williams* era).

185. 248 CLR at 180.

186. *Id.*

School, at which the Scripture Union of Queensland was funded to provide chaplaincy services.¹⁸⁷ There was no legislation supporting the scheme; rather, it relied upon the government's inherent power to enter into contracts and to spend.¹⁸⁸ Williams's arguments that the program was unconstitutional based on the protections of religious freedom and the separation of religion from the state offered in the Australian Constitution were rejected.¹⁸⁹ But he was successful in arguing that, without statutory authorisation, the federal government lacked the executive power to enter into the service agreements and provide the funding.¹⁹⁰

Williams [No. 1] followed on the heels of a landmark 2009 decision, *Pape v Commissioner of Taxation*, where the High Court had held that the Commonwealth's power to spend money was not sourced in the constitutional provisions requiring parliamentary appropriations for expenditures.¹⁹¹ Rather, the power to spend had to be sourced elsewhere in the Constitution. In *Pape*, the High Court accepted that the nationhood power supported a fiscal stimulus measure that responded to the Global Financial Crisis.¹⁹²

In *Williams [No. 1]*, the government argued that its power to fund the National School Chaplaincy Program was derived from its common law capacity to contract and to spend.¹⁹³ It took two slightly different positions, but both were based on the existence of the capacity as their starting point. For this point, they relied, *inter alia*, on the position of one of the prominent framers, and later Attorney-General and Prime Minister, Alfred Deakin who said in relation to Section 61:

No exhaustive definition is attempted in the Constitution—
obviously because any such attempt would have involved a

187. *Id.*

188. *Id.* at 179.

189. *Id.* at 180; *see also Australian Constitution* s 116. This provision has been subject to a narrow reading by the Australian High Court. *See, e.g., Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ), 372–73 (Barton J) (Austl.); *Adelaide Co. of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 129 (Austl.).

190. *Williams [No. 1]* 248 CLR at 216.

191. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 64 (French, CJ), 89–92 (Gummow, Crennan and Bell, JJ).

192. *Id.*

193. *Williams [No. 1]* 248 CLR at 165 (Austl.) (S J Gageler SC) (during argument).

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risk of undue, and perhaps unintentional, limitation of the executive power. Had it been intended to limit the scope of the executive power to matters on which the Commonwealth Parliament had legislated, nothing would have been easier than to say so.¹⁹⁴

In *Williams [No. 1]*, the Commonwealth's primary argument was that its common law capacities were unlimited in their breadth. If this failed, it argued in the alternative that the expenditures on national school chaplains fell within any restricted conception of the federal capacities because they were sufficiently connected to the federal powers with respect to corporations (the chaplaincy providers were all corporations) or to provide benefits to students.¹⁹⁵ In a surprising move, a four-judge majority of the High Court rejected the position that the Commonwealth government enjoyed a "common law capacity," in the absence of legislation, to make general expenditures and enter into contracts (outside of specified areas, including contracts entered into under the prerogative, the nationhood power, and in the ordinary administration of government).¹⁹⁶ This position was accepted by the whole court two years later in *Williams v Commonwealth [No. 2]*.¹⁹⁷

To inform its position, the Court relied upon the interplay of the principles of federalism and responsible government within Section 61 of the Constitution. It was the unknown interplay of these principles that had so worried the framers at the time of the Constitution's adoption.¹⁹⁸ The majority was concerned that through spending and contracting, the Commonwealth would be able to regulate areas beyond its legislative competence and thereby intrude into the constitutional jurisdiction of the States and thus undermine the division of legislative powers in the federal compact. Even where the Commonwealth was contracting and spending within its legislative competence, if it did so without legislative

194. Alfred Deakin, *Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth*, in 1 PATRICK BRAZIL & BEVAN MITCHELL, *OPINIONS OF ATTORNEYS-GENERAL OF THE COMMONWEALTH OF AUSTRALIA: 1901-14* at 129, 130 (1981).

195. *Williams [No. 1]* 248 CLR at 167 (S J Gageler SC) (during argument).

196. *Id.* at 193 (French CJ), 236-39 (Gummow and Bell JJ), 253 (Hayne J).

197. *Williams v Commonwealth [No. 2]* (2014) 252 CLR 416, 469 (Austl.). Justice Crennan agreed with the majority on this point. *Id.* at 471.

198. See *supra* notes 44-46 and accompanying text.

backing it would be able to achieve policy objectives without parliamentary oversight, and particularly without full Senate oversight (remembering that under Section 53 of the Constitution the Senate's oversight of appropriations legislation is limited).

A number of observations can be made regarding the High Court's decision in *Williams [No. 1]* and its aftershocks, although we have, no doubt, not felt the full reverberations. Following the second successful challenge to the national school chaplaincy program in *Williams [No. 2]*, the Commonwealth has resorted to funding this particular scheme through a Section 96 grant to the States.¹⁹⁹ But hundreds of other programs remain funded through the regulations passed after *Williams [No. 1]*, and remain open to constitutional challenge.²⁰⁰

Bruff has previously expressed concern about greater judicial involvement in enforcing limits on executive power. He noted that “[t]o an American, this seems to place a great pressure on the judiciary to decide questions it may feel unsuited to resolve.”²⁰¹ The first observation that can be made is that the Court is not enforcing *substantive* limits on the breadth of the executive's capacities, but rather insisting that such powers be authorised by Parliament. It is insisting on parliamentary *processes* that would strengthen the accountability of the executive to the Parliament. The Court is undoubtedly venturing into untrodden ground in enforcing the constitutional relationship between the executive and the Parliament, previously considered a sacred political garden,²⁰² but is also doing so in a cautious manner, “prodding” Parliament to engage in greater scrutiny rather than engaging in it itself. The Australian court has adopted a role similar to that described and advocated by Professor Deirdre Curtin in the context of the European Union:

Courts . . . have some role to play in prodding parliaments
(and executive actors) to be more open and responsive. Both

199. Section 96 provides an express constitutional power for the federal Parliament to make grants to the States. *Australian Constitution* s 96.

200. Andrew Lynch, *Commonwealth Spending After Williams (No 2): Has the New Dawn Risen?*, 26 PUB. L. REV. 83, 83 (2015).

201. Bruff, *supra* note 2, at 222.

202. *E.g.*, *Victorian Stevedoring & Gen Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (Austl.); *Combet v Commonwealth* (2005) 224 CLR 494 (Austl.).

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sets of actors—courts and parliaments—have distinctive but complementary roles to play in ensuring that systems of representative democracy are not further hollowed out or blacked out.²⁰³

All of this is not to say the development is not significant and will not result in shifts in the power dynamic between the branches. Appleby has argued elsewhere that this more proactive court, willing to enforce Parliament's role in responsible government against it, could herald even broader constitutional change if the Court were to adopt a similar approach in other areas, such as if it took to prodding Parliament to provide greater supervision of the delegation of legislative power.²⁰⁴

The Court's foray into this forbidden garden has received a mixed reception. The most frequent criticism of the *Williams [No. 1]* decision has not been that it has placed the court in a pressured position in determining future cases. Instead, the decision is criticised because it overturned an assumption on which the federal government had relied for almost a century, and that the newly required procedure will be difficult for the government to work with in future. Professor Geoffrey Lindell explained that while "from a democratic point of view" the court's intervention might be lauded, he believed

this may have come at a high practical cost in terms of governmental efficiency and the hardships created for those who contract with governments. . . . One does not have to be more than a casual observer of political affairs to know . . . how difficult it is to obtain parliamentary approval for government policies even without minority governments. Democratic considerations need to be counterbalanced by the additional need for governments not to be hamstrung and prevented from acting decisively and promptly in the face of pressing popular demands.²⁰⁵

203. Curtin, *supra* note 31.

204. Appleby, *supra* note 82; Gabrielle Appleby & Joanna Howe, *Scrutinising Parliament's Scrutiny of Delegated Legislative Power*, 15 OXFORD U. COMMONWEALTH L.J. 3 (2015).

205. Lindell, *supra* note 113, at 386.

The second observation to make is that the Parliament has largely responded to the decision by refusing to take the mantle thrust upon it by the Court. Parliament seems more alert to the practical difficulties with the judgment, which were alluded to by Lindell, than interested in taking a greater role in scrutinising executive spending. As we explained above, the Parliament has often taken a lax approach to supervising the executive, particularly when both major parties believe that too much scrutiny might make it difficult to govern if and when they have their hands on the levers of power. This could previously be seen in the field of expenditure, for example, where the Parliament had increasingly relied on wide, outcome-defined appropriations that gave little, if any, indication of what expenditure was actually being approved. (Indeed, if the Parliament had taken its role in scrutinising and approving expenditures through the appropriations process more seriously, there may have been no need for the Court to step in as the excessive spending programs of the Commonwealth may have been circumscribed.)

Following the decision, Parliament continued in its malaise. This is despite the grand statements of some Parliamentarians. Independent Rob Oakeshott, for example, described the *Williams* case as adding:

to the cultural shift in our institutions and marks a return to the importance of this chamber, the parliament and the parliamentary process and a reaffirmation of the states and the foundation blocks upon which this place and the whole concept of the Commonwealth are built. . . .

In my view the *Williams* case will now establish two very clear paths for the future for anyone involved in the executive. One is through parliamentary processes and very clearly defining any grant programs through the parliament itself. The second one is by agreement with the states. If there is anything in this ruling, it is at its very heart saying to all of U.S., “respect this chamber, respect this parliament and respect the role of the states in the delivery of programs and services to the communities.”²⁰⁶

206. Commonwealth, *Parliamentary Debates*, House of Representatives, 26

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Oakeshott then supported the introduction of a new provision that would delegate the Parliament's oversight of executive spending to the executive itself. Section 32B of the Financial Framework (Supplementary Powers) Act 1997 provides that the Commonwealth executive is authorised to make, vary, or administer funding programs that are set out in the regulations.²⁰⁷ The regulations include over 400 programs.²⁰⁸ Despite concerns that many of the regulations would not be constitutionally valid, and potentially flew in the face of the High Court's decision, the amendments received bipartisan support and swiftly passed both Houses of Parliament.²⁰⁹

Parliament's response to the Court's ruling in *Williams [No. 1]* demonstrates the limits of the Court's powers to force a reluctant legislature to supervise the executive. Writing in *Youngstown*, in the context of the President's power to seize private property during times of emergency without express constitutional power or statutory authority, Justice Jackson said:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . We may say the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.²¹⁰

June 2012, 8073–74 (Robert Oakeshott); see also Anne Twomey, *Bringing Down the House? Keeping School Chaplains Means a Surrender to the Executive*, CONVERSATION (June 27, 2012) <https://theconversation.com/bringing-down-the-house-keeping-school-chaplains-means-a-surrender-to-the-executive-7926> [<https://perma.cc/G8W7-H6JL>].

207. *Financial Framework (Supplementary Powers) Act 1997* (Cth) s 32B (Austl.).

208. *Williams [No. 2]* involved a challenge to the regulations authorising the national school chaplaincy program, which the High Court struck down as not having a sufficient connection to a head of federal power. See *Williams v Commonwealth [No. 2]* (2014) 252 CLR 416 (Austl.). The program is now funded through grants to the States, an avenue expressly authorised by Section 96 of the Australian Constitution.

209. See further discussion of this aspect of the decision in Gabrielle Appleby & Adam Webster, *Parliament's Role in Constitutional Interpretation*, 37 MELBOURNE U. L. REV. 255 (2013).

210. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

However, he concluded that it was nonetheless the Court's role to continue to insist on congressional oversight of executive power:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.²¹¹

The third observation to be made about *Williams [No. 1]* is that the constitutional validity of the Section 32B model is less than certain. There are arguments that Section 32B amounts to an impermissible delegation of power because it is expressed in such broad terms that it cannot be a law with respect to a head of federal legislative power.²¹² Alternatively, the delegation of this particular type of legislative authorisation might be found to be constitutionally impermissible given that the legislation is enacted as part of Parliament's constitutional function to bring the executive to account. In *Williams [No. 2]*, the Court made reference to Williams's argument that Section 32B was wholly invalid on the basis that it was an impermissible delegation of legislative power. Ultimately, the Court accepted that Section 32B could be construed as providing power to the Commonwealth to make, vary, or administer arrangements or grants only where it is within the power of the Parliament to do so, and therefore decided it was unnecessary to answer the larger question.²¹³

Parliament's lack of concern for ensuring that its response to the Court's decision was constitutionally valid, and willingness to give the executive a largely free reign again in executive spending, has left both branches dancing at the edge of constitutional certainty. In Bruff's language, their actions

211. *Id.* We are grateful to Professor Martin Flaherty for drawing this judgment to our attention. See also Martin S. Flaherty, *Harold Bruff, Untrodden Ground: America's Evolutionary Presidency*, 65 CASE W. RES. L. REV. 881 (2015) (book review).

212. One of the few limits imposed on delegations by both Justices Dixon and Evatt in *Victorian Stevedoring & Gen Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (Austl.).

213. *Williams [No. 2]* 252 CLR at 455–57.

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are not clearly valid, but not clearly forbidden either.²¹⁴ Paradoxically, Bruff made similar observations in the U.S. context about presidential responses to an overly controlling Congress on domestic policy, where presidents have responded by taking action neither clearly authorised nor clearly forbidden.²¹⁵

The fourth observation is that, while purporting to respond to the Court's concerns about lack of accountability in the Commonwealth's expenditure of public moneys, the Section 32B model seriously undermines the level of control that Parliament retains over spending approvals. Not only is there restricted parliamentary scrutiny because delegation has been chosen as the method of authorisation; the nature of those authorisations further undermines accountability when combined with the existing framework for parliamentary scrutiny of delegated legislation. Under the Legislative Instruments Act 2003, certain legislative instruments may be disallowed by Parliament.²¹⁶ These include regulations authorising expenditures under Section 32B. However, as explained above, disallowed instruments cease to have effect from the date of disallowance only. Where one-off legislative authorisation is required—such as the approval of a particular federal expenditure—a regulation may achieve its entire objective, and be effectively “spent” (if you can pardon the pun), before Parliament has an opportunity to consider and debate disallowance.

The fifth, and more positive observation, is that the decision appears to have emboldened the Senate's Regulations and Ordinances Committee to take a more active role in attaining the constitutional basis for regulations authorising spending. The Committee has asserted that its terms of reference require it to investigate whether delegated legislation is made in accordance with the delegating legislation and the Constitution. In light of the *Williams* decisions, it has asserted that: “[T]he Explanatory Statement . . . for all instruments specifying programs for the purposes of section 32B . . . should explicitly state, for each new program, the constitutional head of power that supports the expenditure.”²¹⁷

214. Bruff, *supra* note 2, at 212.

215. *Id.*

216. *Legislative Instruments Act 2003* (Cth) s 42 (Austl.).

217. Senate Standing Committee on Regulations and Ordinances, *Delegated*

Perhaps unsurprisingly given previous practice, the government has been largely unresponsive to this request, at least as a matter of substance. In 2014, for example, the then Minister for Finance, Senator Mathias Cormann, responded: “The Government does not agree, however, that this means explanatory statements must in effect set out the constitutional and other legal reasoning taken into account in formulating legislation and expenditure programmes.”²¹⁸

But the Committee refused to dance. Instead of thanking the Minister and leaving it at that, the Committee “dug its heels in,”²¹⁹ which eventually resulted in a more detailed response from the Minister. However, Professor Andrew Lynch has observed that the battle is “more superficial than substantive”: “It is clear that the Committee is easily satisfied and does not see its role to include challenging the answers given by government. It has accepted without question the power identified by the Minister in every single case.”²²⁰

The Committee, however, has continued to show commitment to its campaign to force governmental explanation of the constitutional provisions supporting its spending programs. In 2015, the Committee questioned the constitutional basis for the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, and specifically the authorisation of expenditures to schools to support the mathematics and computer coding curriculum.²²¹ The Committee and the government engaged in an extended dance; the Committee requested further information about the nature of the constitutional basis for the expenditures, and also insisted that the government provide it with copies of the government’s legal advice in relation to the constitutional basis for the expenditures on four occasions. Each time, the Minister refused.²²² The Committee eventually insisted that the Government either provide the legal advice or make an explicit claim for public interest immunity over the advice, in which case it required an “explicit and positive assurance” from the

Legislation Monitor 15 of 2014 (2014) 4.

218. *Id.*

219. Lynch, *supra* note 200, at 86.

220. *Id.*

221. Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2015* (2015) 3.

222. *Id.*

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Minister that “he was satisfied that there was sufficient constitutional authority for the exercise of that power.”²²³ The Minister made the claim for public interest immunity and provided the Committee with the sought after “assurance.” The Committee “thanked the minister for his prompt response” and concluded its examination of the instrument.²²⁴

The Committee’s newly found boldness has also extended to its scrutiny of delegated legislation in other contexts. Since its election in 2013, the Abbott government had been committed to rolling back the regulation of financial planners, or more officially, to “reduce compliance costs and regulatory burden on the financial services sector.”²²⁵ It attempted to do so by regulation in 2014, but the Senate disallowed the regulation after Labor convinced a number of micro-parties to support its opposition to the changes. In 2015, the government made the Corporations Amendment (Financial Advice) Regulation 2015.²²⁶ The government explained that the Senate’s disallowance of the initial instrument had caused some “disruption” to the finance industry,²²⁷ and the new regulation was intended to “provide certainty to industry as quickly as possible” until primary legislation could be introduced and passed.²²⁸ The Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 was at that time being considered by the Senate. The regulations could thus be described as “anticipating” or “pre-empt[ing]” the changes to the primary legislation, not yet passed by the Parliament.²²⁹ The Chair of the Committee explained the Committee’s concerns about the practice:

223. *Id.* at 11.

224. *Id.* at 13.

225. *Future of Financial Advice*, AUSTL. GOV’T: THE TREASURY, <http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm> [https://perma.cc/532P-LXWV].

226. *Corporations Amendment (Financial Advice) Regulation 2015* (Cth) (Austl.).

227. Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 11 of 2015* (2015) 5.

228. *Id.* at 4.

229. Senator John Williams, Senate Standing Committee on Regulations and Ordinances, Speech at Parliamentary Debates (Sept. 17, 2015).

In particular, pre-emptive regulations of this type can lead to a situation where the regulation does not ultimately reflect the will of the Senate, as expressed by its consideration of the subsequent bill.

For example, if the subsequent bill is not passed, or is passed with amendments that do not reflect the substance of the pre-emptive regulation, the regulation will continue in force despite the fact it does not reflect the outcome of the Senate's determination of the bill.²³⁰

The response of the Committee was proactive. The Committee determined that the appropriate solution was to ensure that any "pre-emptive" regulations of this kind remained within the disallowance window until the Senate had passed the primary legislation. To ensure this, the Committee itself moved a disallowance motion against the Corporations Amendment (Financial Advice) Regulation 2015.²³¹

In the *Williams* litigation, the Australian High Court intervened in the relationship between the Australian Parliament and the Executive in an attempt to require greater legislative scrutiny of parliamentary spending. Unfortunately, what we have seen is that while there are exceptions, the major responses from the Australian Parliament to the cases demonstrate that it remains reluctant to engage more actively in such scrutiny, and thus the ideals of responsible government remain unrealised in its Australian practice.

CONCLUSION

As Bruff observed in 2014, the Australian and American Constitutions are cousins.²³² As could be said of many cousins, their upbringings and influences have differed markedly and they share much but not all genetic material. The practice of government in the two systems therefore has passing resemblances but also major departures. Where there are departures, it is worth considering the reasons and operations for them to see whether there are any lessons to be taken.

230. *Id.*

231. Senate Standing Committee on Regulations and Ordinances, *supra* note 227, at 6.

232. Bruff, *supra* note 2, at 205.

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In relation to the executive power, while the American presidency has found itself bounded in domestic affairs and unbounded in foreign affairs, the Australian executive has had a rather different experience. In domestic affairs, despite the Australian Constitution's adoption of a system of responsible government, the Australian executive has often found itself remarkably unaccountable to the Parliament. In fact, Parliament has often demonstrated a reluctance to flex its powers to hold the government to account. Successive governments are thus able to govern efficiently, but not necessarily openly or accountably. In foreign policy, while the Australian Constitution gives the Parliament no role to play, legislative change in the last decade has brought greater parliamentary scrutiny, if not enforceable accountability, in this sphere.

Finally, Australia has only recently had to grapple with the concept of "inherent" executive power. Australian commentators are, understandably, wary of its possibilities and dangers. But the evidence thus far is that, as Bruff predicted, the government is aware of the political cost of relying only on an amorphous "inherent power" argument; it will try, where it can, to peg its actions to more explicit bases.

However, in other respects, Bruff's arguments have less application to the Australian system, and recent judicial movement might be of interest to an American audience. Bruff warned in *Balance of Forces* against the Court taking too proactive a role in enforcing parliamentary oversight of the executive (an argument he made in relation to delegation of legislative power).²³³ Without such a proactive Court and despite one of our foundational constitutional concepts being the responsibility of the executive to Parliament, we have seen in Australia a legislature reluctant to supervise the executive. In the face of the Australian legislature's failures, the Court has stepped in, *requiring* Parliament to authorise executive expenditure and contracting. This is a step onto untrodden ground. Thus far, there have been mixed responses to the Court's ruling. Parliament's initial response has been to continue its insipid interest in regulating executive spending. But there is increasing evidence that the Senate's Regulations and Ordinances Committee has become emboldened, perhaps

233. BRUFF, *supra* note 18, at 140.

by the Court's judgment and call to arms. Whether the Court's intervention will have the long-term effect of achieving the much sought after "middle ground," "where control seems about right,"²³⁴ is yet to be seen.

234. Bruff, *supra* note 2, at 220.