The three forms of executive power and the consequences for administrative law review

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This article argues that, following the landmark decisions in *Pape v Commissioner of Taxation*[1] (*Pape*) and *Williams v Commonwealth of Australia*[2] (*Williams*), there are three key, discernible and functional forms of 'executive power' now accepted in Australian jurisprudence.

The first is as non-statutory executive power[3] or the 'inherent executive power'.[4] In this form the executive power is a power to act (including to contract or spend) without any legislation at all, but only where that action is:

- particularly characteristic of Australia as a sovereign nation;
- as a remnant of the Crown prerogative;[5] or
- in service of the ordinary functions of government.

It is in this form that the executive power is both at its most menial and at its most lofty in the sense that it supports both the power to give effect to the ordinary functions of government, including to purchase departmental stationary, and, for example, the power to enter into treaties, declare war and protect borders (as was accepted in the MV *Tampa* litigation in 2001).[6]

The second is as an independent head of legislative power, as if it were implied into the list in s 51 of the *Constitution*. In this form, as a head of legislative power, we are told that the executive power supports legislation that deals with matters that are inherent in Australia's status as a nation. It was this power that the High Court accepted, in *Pape*, supported legislation to make one-off payments to support the national economy and, in *Davis and Ors v Commonwealth*[7] (*Davis*), to support legislation to deal with Australia's bicentennial celebrations in the 1980s.[8]

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1 [2009] HCA 23; (2009) 238 CLR 1.

2 [2012] HCA 23; (2012) 248 CLR 156.

3 The term 'non-statutory executive power' is used by Hayne and Bell JJ in *CPCF v Minister for Immigration and Border Protection* (2015) 143 ALD 443 [150].

4 The term used in L Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279.

5 This functional form of non-statutory executive power encompasses a number of the categories listed by French J in *Williams v Commonwealth of Australia* [2012] HCA 23 [4] in respect of which the executive does not require specific legislation to spend or enter contracts: (a) in the administration of departments of state pursuant to s 64 of the *Constitution*; (b) in the execution and maintenance of the laws of the Commonwealth; (c) in the exercise of power conferred by or derived from an Act of the Parliament; (d) in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth; and (e) in the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

6 See note 33 below.

7 [1988] HCA 63; (1988) 166 CLR 79.

8 It may also be in this form, therefore, that the Parliament has power to abrogate executive power by statute (*CPCF v Minister for Immigration and Border Protection* (2015) 143 ALD 443 [279] (Kiefel J)).

The third is as a mechanical executive 'capacity'[9] to take actions necessary to give effect to legislation. It is in this form that executive power is subject to traditionally understood concepts of administrative law, both under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and by reference to jurisdictional error, in the sense that jurisdictional error asks whether an exercise of executive power is within the jurisdiction granted by law. It was also in this form, and not the non-statutory form, that the *Williams* decision insisted that the executive power to enter into funding contracts, in order to give effect to programs, existed or ought to exist.

This article considers the consequences that this three-tiered taxonomy has for administrative law.

The origins of the taxonomy

Noting this taxonomy of executive power, the revelation in *Williams* was not that the act of entering into a Commonwealth funding agreement was not actually an exercise of the executive power. It is also not correct to consider that *Williams* 'reduced' the scope of the executive power.[10] The revelation in *Williams* was that Commonwealth program spending was not an exercise of non-statutory executive power (the first form listed above); it was an exercise of executive power as *capacity* authorised under legislation (the third form). Executive power was not reduced; it was *reformulated* in its relationship to the legislature.

It might be possible to argue that these three, and quite distinct, forms of the executive power were in some respect inevitable in the sense that they necessarily derive from the terms of s 61 itself. Section 61 is stated in the following terms:

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

The reference to 'vesting' might suggest that there is a mysterious and pre-existing fundamental power, which, upon Australia's federation, was vested in the Queen (with respect to Australia as an independent nation rather than as a colony) as exercisable by the Governor-General, perhaps coextensive with an ancient notion of a Crown prerogative or at least consistent with those powers implied to have been acquired upon Australia's nationhood and sovereignty. It might be argued that this implies a mysterious and autonomous form of Commonwealth power that does not derive from either legislation or the common law: it precedes both. The reference to 'execution and maintenance of this *Constitution*' suggests that there are powers authorised by the *Constitution* which are to be executed; and functions established by it to be maintained. This may imply that the content and structure of the *Constitution*, as characterised by a separation of powers, authorises Parliament-made laws in relation to matters that are uniquely the province of the Commonwealth, consistent with a form of 'implied nationhood' power. And the final reference to execution and maintenance of (parliamentary)[11] laws reflects an executive capacity: Commonwealth officers doing what legislation says the executive government ought.

9 This is Anne Twomey's description of one of the 'classes' of executive power accepted by French J in *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1: see Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' [2010] MelbULawRw 9; (2010) 34 *Melbourne University Law Review* 313 (see Parts I and II of that article).

10 An argument made in G Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2014) 39 *Monash University Law Review* 348.

11 In *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Limited* [1922] HCA 62; 31 CLR 42 (the *Wooltops case*), Knox CJ and Gavan Duffy J accepted that 'laws of the Commonwealth' probably means Acts of the Parliament of the Commonwealth.

In one of the earliest instances of High Court consideration of the executive power in 1922, *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Limited*[12] (the *Wooltops case*), the High Court had already cast significant doubt over whether Commonwealth agreements[13] to give effect to its policy and programs could be supported by the executive power alone without specific legislative authority. In the joint judgment of Knox CJ and Gavan Duffy J, and in the judgment of Isaacs J, the High Court had already accepted that s 61 'has three distinct functions':

> it vests the executive power of the Commonwealth in the Sovereign, it enables that power to be exercised by the Governor-General as the Sovereign's representative, and it delimits the area of that power by declaring that it extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth ...[14]

Knox CJ and Gavan Duffy J held that, as the agreements at issue were not 'mediately or immediately authorized by any Act of the Parliament' and did not otherwise operate in 'execution or maintenance of the Constitution itself', they were not within the power of the Commonwealth executive to make.

Some 90 years later, in *Williams*, there was certainly a reversionary and originalist approach — particularly in the approach of French CJ, who took particular pains to have detailed and lengthy regard to 'prehistory and drafting history'[15] of the *Constitution* as well as to justify his reasoning by reference to the very early cases dealing with the executive power. Nevertheless, in 2012, *Williams* was not (nor was *Pape*) simply a return to the High Court's characterisation of the executive power in the early 1920s. Things had slowly changed. By the time *Williams* was decided in 2012, the High Court had accepted, or at least appeared to accept,[16] in *Victoria v The Commonwealth and Hayden*[17] (the *AAP case*), that certain spending programs for purposes particularly adapted to 'character and status of the Commonwealth as a national government'[18] may be supported by the executive and incidental power; and that measures taken to secure the national economy[19] and to incorporate a Bicentennial Authority for particularly national purposes were sourced from the executive power.[20] The difficult task for the High Court in *Williams* involved maintaining the appearance of literal construction of the terms and original intentions of the *Constitution* while accepting the practical reality that some form of evolutionary construction of the executive power was necessary to validate at least some measures characteristic of ageing nationhood.

On one view, tolerating a complex taxonomy of executive power was a necessary means to tread this line.

What *Williams* did not clarify was how the taxonomy of executive power might operate for administrative law litigants seeking to challenge acts, conduct and decisions of the Commonwealth. In particular:

- After *Williams*, will it remain the case that 'non-statutory' executive power is not meaningfully justiciable?

12 Ibid, note 11.
13 Described succinctly by French J in *Williams v Commonwealth of Australia* [2012] HCA 23 [65] as 'agreements, without statutory backing, under which it would give necessary regulatory consents for the acquisition of wool and sheepskins and the manufacture and sale of wool tops by the Colonial Combing, Spinning and Weaving Co Ltd'.
14 31 CLR 431 (Knox CJ and Gavan Duffy J).
15 [2012] HCA 23 — French CJ's own subheading from [40].
16 As stated by Dr Max Spry, 'The Executive Power of the Commonwealth: Its Scope and Limits', Research Paper 28, 1995–96 <www.aph.gov.au/binaries/library/pubs/rp/1995-96/96rp28.pdf>: 'It is a particularly difficult case with the Court divided in its reasons and the ultimate majority being determined by one judge's view on the issue of standing.'
17 (1975) 134 CLR 338.
18 Ibid 396 (Mason J).
19 As was the case in *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1.
20 *Davis and Ors v Commonwealth* [1988] HCA 63; (1988) 166 CLR 79.

- Where the Commonwealth administers funding contracts based on legislation enacted after *Williams*, are the executive actions involved in administering those arrangements susceptible to traditional grounds of administrative review? How, if at all, does jurisdictional error apply to characterise the scope of the Commonwealth's contract management when the source of power is a hybrid of private and public law sources?

Non-statutory executive power and jurisdictional error

There is, of course, a simple model of the executive power inherent in the separation of powers. Based on this model, the role of judiciary is to ensure that the executive acts according to law. This model is also a basic model of administrative law itself. It is, in a very important sense, this simple model that the High Court has in mind, at least since *Craig v South Australia*,[21] when it uses the elusive but thematic term 'jurisdictional error'. While, we are told, it is 'neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error',[22] the generality of the conception is at least clear: jurisdictional error is a description of executive action (or a decision of a lower court) that exceeds the authority granted it to act under law.

Former Chief Justice of the New South Wales Supreme Court, James Spigelman AC QC, emphasised the simplicity of the conception of jurisdictional error when he said:[23]

> It can readily be accepted that there is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.
>
> Nevertheless, as Chief Justice Gleeson pointed out: 'Twilight does not invalidate the distinction between night and day'.[24]

Furthermore,[25] as Hayne J put it in *Re Refugee Review Tribunal; Ex parte Aala*:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error when the decision-maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction … The former kind of error concerns departures from limits upon the exercise of the power. The latter does not.[26]

The concept of jurisdictional error has been developed through reiteration of a statement by Sir Gerard Brennan in 1990 that, as Stephen Gageler observes,[27] began to feature with increasing prominence in almost every administrative law decision of the High Court since the late 1990s:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.[28]

21 (1995) 184 CLR 163.
22 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.
23 The Hon JJ Spigelman AC, 'The Centrality of Jurisdictional Error' (Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010), available online at <http://archive.hrnicholls.com.au/articles/Other/spigelman250310%5b1%5d.pdf>.
24 Ibid 21–2.
25 Quoted by Spigelman, ibid 22.
26 [2000] HCA 57; (2000) 204 CLR 82 [163].
27 Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 9.
28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

On this formulation, the role of a court when considering jurisdictional error is to consider only whether that action is permitted within the law. Jurisdictional error is therefore a conception of executive power itself, because it describes the scope of authority of the executive, as coextensive with the powers granted under Ch II of the *Constitution*, Commonwealth legislation and the common law.

Arguably it was no more than this simple model of executive power that the constitutional framers actually had in mind when drafting Ch II of the *Constitution*. Besides s 61 itself, Ch II, at least on its face, is simply concerned with the rather boring machinery of government administration, including by:

- clarifying the role of the Governor-General, who must only act on advice from the Federal Executive Council (ss 62–63, 70);
- dealing with appointment of ministers of departments of state (s 64), their number and salaries (ss 65–66); and
- dealing with appointment of 'civil servants' (s 67) and the transfer of roles from state departments (s 69).

While there is a possible implication in s 61 that the executive also embodies prerogatives reserved for the Crown, or at least powers reserved to the Commonwealth as a sovereign nation (which has become known as the implied nationhood power),[29] the remainder of Ch II contains no such *express* reference.

If the model of executive power espoused by Ch II were merely a description of the task of giving effect to laws, executive power would be coextensive with the sole object of administrative law and jurisdictional error in particular. However, this is not the case.

Jurisdictional error, so we are told by the High Court, implies a number of relatively familiar, if expanding, grounds, all of which relate to the express or implied scope of executive power understood as a capacity to give effect to laws. These are usefully traced from the landmark decision in *Craig v South Australia*[30] as including applying the incorrect legal test; ignoring relevant material; relying on irrelevant material; unreasonableness; making a decision without offering procedural fairness and so on. When such grounds are considered in the context of statutory decision-making, the statute, of course, provides the *substance* for consideration in the sense that the statute outlines the appropriate test to be applied, expressly sets out or implies the considerations to be considered and infers (and possibly ousts by express reference) the standard and procedure for offering procedural fairness. The statute therefore sets the bounds for jurisdiction.

This conception of jurisdictional error, however, appears to be reserved for executive power, understood merely as capacity. When the non-statutory executive power is purported to have been exercised as a manifestation of the so-called implied nationhood power or as a form of the prerogative or even to give effect to the ordinary functions of government, it would appear that courts consider that the substance of the power is not amenable to being tested on familiar administrative law grounds. Rather, it appears that courts accept that, where the non-statutory executive power is being utilised, the process and particular steps involved are not otherwise justiciable and are not subject to the familiar grounds of administrative review. This is illustrated by a number of cases, as discussed below.

29 See note 42 below.

30 (1995) 184 CLR 163; and see the exceptional commentary tracing the development of jurisdictional error in Kirsten Walker QC, 'Jurisdictional Error Since *Craig*' (2016) 86 *AIAL Forum* 35, 37–8.

The most vivid and most familiar manifestation of the executive power in its non-statutory form is the coercive force of the military acting under command — a power also possibly[31] supported by s 68 of the *Constitution*, as also contained in Ch II. This form of executive power, of course, is also known in many other countries and constitutional contexts, including, among many examples, in the United States, where it arguably supports presidential 'executive orders'; and in Fiji, where the 2006 coup d'état was initially justified on the basis of an unbounded executive power to act in national crisis.[32]

In Australia, the briefest background is suited to so well known a story: in August 2001 the MV *Tampa*, a Norwegian freighter which had rescued 433 asylum seekers, was intercepted and forcibly boarded by Australian Special Air Services troops, acting under the orders of the executive government, who took control of the vessel and stopped it approaching Australian territory.

Proceedings were taken to challenge the actions of the troops, culminating in an appeal before the Full Federal Court.[33] In these proceedings, it was accepted that the Australian Special Air Services troops had not been expressly authorised under the *Migration Act 1958* (Cth), or otherwise under a law of the Commonwealth Parliament, to take the actions they had taken. The issue was, rather, whether the actions of the troops were nevertheless authorised by the non-legislative form of the executive power derived under s 61 (and s 68) of the *Constitution*. Fascinatingly, French J, apparently unburdened by the same distrust in the scope of the executive power that characterised his judgment in *Williams*, in accepting that the executive power included the power to take action in relation to 'the exclusion of expulsion of a foreigner', stated:

> It is not necessary for present purposes to consider the full content of executive power ... In my opinion, absent statutory authority, there is such a power at least to prevent entry into Australia. It is not necessary, for present purposes, to consider its full extent.[34]

The essential finding was that, as the executive power encompassed a general right for the Australian military to take action to exclude non-citizens, the specific actions taken — to enter the vessel without any other authority, to take over control of the vessel, to change its course and ultimately to arrange for the detention of the asylum seekers offshore — were not otherwise justiciable. By implication, we were told, it was not necessary to consider the detailed substance of the executive power in the sense of the specific acts it could be taken to authorise. The Full Federal Court, with Black CJ in strong dissent, made clear that its key role was to confirm whether the mission of intercepting and re-routing the freighter, taken as a whole, was supported by executive power and did not characterise the question as being whether the separate coercive actions of the troops were authorised by reference to the scope of their jurisdiction to so act.

It was consistent with this approach that there was no identifiable administrative law issue raised. For example, there was no question of whether the troops acted unreasonably or whether the decision to give them orders was unreasonable. No recognisable administrative law question was raised as to what the mandatory considerations were for the decision (whether these included Australia's international law obligations in respect of refugees). No question was raised of any duty to offer procedural fairness. Perhaps even the suggestion that coercive military acts are subject to common administrative law grounds sounds awkward, if not absurd.

31 Or possibly not, given that s 68 arguably just reflects who is notionally in charge of the military by stating that 'The command in chief of the navel and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.

32 See the discussion of the Fijian coup in Twomey, above n 9, Part I.

33 *Minister for Immigration and Multicultural Affairs v Vadarlis* (2001) 110 FCR 491.

34 Ibid 542.

Whether the High Court would have approached the question differently was never resolved: the High Court refused leave to appeal. The High Court's position on the scope of the coercive action that the executive power provides to the border force at sea was also not resolved in 2015 by *CPCF v Minister for Immigration and Border Protection*[35] (*CPFC*). While the majority in that case held that it was unnecessary to consider the scope of the executive power (because the actions taken to detain asylum seekers at sea were held to have been supported by statute), Hayne and Bell JJ, dissenting, appeared to offer a rebuke to the approach taken in the MV *Tampa* litigation. In Hayne and Bell JJ's joint judgment, the question was approached as follows:

> Does the executive power of the Commonwealth of itself provide legal authority for an officer of the Commonwealth to detain a person and thus commit a trespass?
>
> That question must be answered 'No'.
>
> [150] ... why should an Australian court hold that an officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of an alien without judicial mandate can do so outside the territorial boundaries of Australia without any statutory authority? Reference to the so-called non-statutory executive power of the Commonwealth provides no answer to that question. Reference to the royal prerogative provides no answer. Reference to 'the defence and protection of the nation' is irrelevant, especially if it is intended to evoke echoes of the power to declare war and engage in war-like operations. Reference to an implied executive 'nationhood power' to respond to national emergencies is likewise irrelevant. Powers of those kinds are not engaged in this case. To hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.[36]

Although the judgments in the MV *Tampa* case from French J and the dissenting views in *CPFC* from Hayne and Bell JJ differ as to the scope of the executive power to take coercive action in relation to asylum seekers, what the two approaches have in common is that non-statutory executive power is not considered to be subject to the grounds of administrative review and is not susceptible to questions about possible jurisdictional error. The task of the Court, when faced with a purported exercise of non-statutory executive power, especially as carried out by the military, appears to be to confirm whether or not the general subject-matter of the activity (coercive detention, interception and so on) falls within the undefined bounds of the executive power deriving from a Crown prerogative or from the implications of nationhood itself.

This approach, of course, is fundamentally different from how a court approaches executive decision-making when made under an enactment of Parliament, where a decision may well be generally supported by the subject-matter and scope of the relevant constitutional head of power supporting the decision but may otherwise be made in jurisdictional error, or at least as an error of law on the face of the record, because of a failure in the decision-making process, such as a failure to have regard to mandatory consideration[37] or to not offer an affected person a hearing.[38]

Whether this approach to review of the non-statutory executive power is reserved for actions of the military is not clear. If not for a settlement that followed an appeal to the High Court, the High Court may have considered whether executive power is susceptible to jurisdictional error and familiar administrative law grounds of review, on appeal from *Acquista Investments Pty Ltd v Urban Renewal Authority*.[39] In that case a decision of the South Australian Cabinet directly to procure a developer was essentially held to be immune from

35 (2015) 143 ALD 443.
36 Ibid [147]–[150].
37 As was the case in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24.
38 *Kioa v West* [1985] HCA 81.
39 [2015] SASCFC 91.

judicial review as an exercise of its executive power.[40] As distinct from the detention and interception cases discussed above, the applicants in this case, fascinatingly, argued that the decision was *Wednesbury* unreasonable, which would have tested the High Court's views on whether executive power (albeit in its state manifestation) is subject to review on a familiar administrative law ground. How the High Court would have approached the issue of whether a commercial decision of Cabinet was susceptible to administrative review, and how the High Court considers that *Williams* applies to state contracts, remains to be seen.

The appeal would also have raised questions about the continuing applicability of *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd*,[41] which arguably still stands for authority that Cabinet decisions are not justiciable.

Until the issue is raised before the High Court, it would seem that, in Australia, non-statutory executive power is essentially subject to a different standard of administrative review, as compared with decisions or actions taken under legislation.

This may appear incongruous, especially in view of the fact that, when non-statutory executive power is being exercised, it is often at its most coercive and at its most likely to affect individual rights.

Executive power as a head of power and administrative law

Executive power also continues to be referred to as incorporating a function as a head of power for legislation, apparently derived from a Crown prerogative, or at least as an 'implied nationhood' power.[42]

There is an anomaly inherent in that observation. The legislative heads of power set out in the shopping list at s 51 of the *Constitution* were precisely set out to prescribe the extent of the powers that the drafters intended ought to be reserved for the Commonwealth as a sovereign nation. On this view, an 'implied nationhood' power would be redundant, because the extent of matters reserved to the Commonwealth are already set out expressly. Why would the drafters have included powers so fundamental to sovereign nationhood as the 'trade and commerce with other countries' power, the 'external affairs' power, and the 'immigration' and 'naturalisation and aliens' powers in s 51 if those powers were already embedded into s 61 and implied as legislative heads of power under a broader 'implied nationhood power'?

The problem, of course, with this view is that the shopping list in s 51 is quaint and inevitably insufficient to deal with the evolution of matters that are likely to be considered particularly suited to a modern Commonwealth government. Notwithstanding a resurgence in 'originalist'[43] thinking in Australia and an ongoing valorisation of the *Constitution* as a living document,[44] it seems plain that the list in s 51 is dated, incomplete and, on its literal terms, not able to be taken to describe all the matters that are suited to a modern national government. While we see references to 'bounties', 'beacons' and 'buoys', for example, there is no express reference to housing affordability, universities, schools, health and aged care. The High Court therefore needs some way to read into the *Constitution* limited powers

40 Ibid [97]–[98] and [103] in particular, as well as the commentary in N Seddon, *Government Contracts* (Federation Press, 6th ed, 2018) 467–8.

41 (1987) FCR 274. Not to be confused with *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) HCA 40; 162 CLR 24, which raised a question about mandatory considerations required under statute, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

42 A notion deriving from Mason J's judgment in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 (the *AAP case*).

43 See, as a particularly strident example, J Goldsworthy, 'Originalism in Australia' (2017) 31 *DPCE Online* 607–15.

44 See the thorough criticism of this approach in M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) MelbULawRw 1; (2000) 24 *Melbourne University Law Review* 1.

that are not expressly set out but are nevertheless particularly suited to the Commonwealth as a nation.

The High Court has, however, developed an implied nationhood power rather cautiously.

In *Pape* itself,[45] the High Court was very cautious about where it would be perceived to set the limits of an implied nationhood power. French CJ — who was no longer the French J who decided the MV *Tampa* litigation in 2001, when the capacity of the executive power to deal with matters of perceived national sovereignty was given a wide berth, and was not yet the French CJ who decided *Williams* in 2012, when the executive power was arguably significantly reformulated (and arguably reduced) — was particularly notable for wanting to achieve a suitable balance. His Honour said that the executive power, inasmuch as it could be perceived as a legislative head of power supporting the 'Tax Bonus' legislation at issue,[46] could extend to 'short term fiscal measures' to meet circumstances threatening the Australian economy (such as the Global Financial Crisis); however, he made clear that he was not to be interpreted as suggesting that the executive power supports 'a general power to manage the economy' or to react to any 'national emergency',[47] although Gummow, Crennan and Bell JJ appeared slightly more open to accepting the implied nationhood power inherent in the executive power might extend to 'national emergencies'.[48]

In *Davis*,[49] in 1988, the High Court was approached with a similar question about whether an implied nationhood power existed under s 61 and, if so, whether that extended to the incorporation of a Bicentennial Authority and whether broader measures to commemorate the Bicentenary set out in statute were supported by legislation, holding that, because commemoration of the Bicentenary was 'pre-eminently the business and concern of the Commonwealth as a national government [such measures fall] squarely within the federal executive power'.[50]

What are the administrative law repercussions of accepting that the executive power operates as a legislative head of power? Both *Davis* and *Pape* merely asked about the scope of the executive power as a question involving the validity of the relevant underlying legislation. Mr Pape, of course, did not frame his review as an administrative law challenge in respect to his specific payment: he had loftier goals in mind, seeking to invalidate the underlying legislation and the legitimacy of the enabling appropriation for all recipients of the Tax Bonus in Australia.

Where the executive power as legislative head of power may have administrative law consequences is hinted at in *Williams*. It would appear to follow from the reasoning in *Williams* that, while the Commonwealth may choose to legislate to support funding programs where there is executive power deriving from a prerogative or from a notion of an implied nationhood power, it may also validly choose not to. Chief Justice French took pains to clarify this by stating that his decision did 'involve' any question about the power of the Commonwealth to enter into contracts and expend moneys: 'in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth'; and in 'the exercise of inherent authority derived from the character and status of the Commonwealth as the national government'.[51]

45 See the useful overview in Twomey, above n 9.
46 The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).
47 See *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 [133] and [10] (French CJ).
48 Ibid 91 [241].
49 *Davis and Ors v Commonwealth* [1988] HCA 63; (1988) 166 CLR 79.
50 Ibid 94 (Mason CJ and Deane and Gaudron JJ).
51 See note 5 above.

Williams appeared to accept, therefore, that, where the executive power itself would support legislation, legislation is optional. This was already known to an extent: why would the Parliament have chosen to pass the *Flags Act 1953* (Cth) and yet have chosen to leave the national anthem to a proclamation of the Governor-General?

Similarly, the one-off payments at issue in *Pape* could just as easily have been made based on a mere appropriation of funds, without specific further legislation setting out eligibility and payment matters.

Where the Commonwealth chooses legislation to give effect to matters falling within the executive power, it would seem that the administrative law review rights of affected individuals would be highly distinct from any rights that might exist under a non-statutory spending scheme, noting, as above, the reticence of courts to accept that executive power taken in its non-statutory form is meaningfully justiciable. I will discuss this further below.

Executive power as a mere capacity to administer contracts

The immediate conundrum for administrative law posed by the three-tiered taxonomy of executive power relates to why administrative law rights differ so significantly depending on the form of executive power being exercised. Further, following *Williams*, now that the executive power to spend in relation to funding programs is clearly statutory (executive power as *capacity* to give effect to legislation), it may be that administrative law remedies will be argued by litigants in circumstances affected by newly legislated spending decisions.

The Commonwealth statute books are obviously wide and varied, dealing generally with a range of matters that give effect to government policy. Significant new policy programs, such as the National Disability Insurance Scheme, changes to workplace relations laws, tax and welfare, among many other matters that have a clear basis in s 51 powers, are set out in clearly identifiable Acts of Parliament. New policies announced during the annual Budget process are often subject to not only the associated appropriation of money but also the passage of enabling and detailed legislation.

The Commonwealth's traditional wide-scale spending legislation, such as social welfare legislation, has never,[52] of course, operated on the basis of a single provision that says the Commonwealth is authorised to enter into, administer and vary agreements with individual welfare recipients, leaving it to an executive capacity to enter into those agreements. Rather, welfare and other wide-scale Commonwealth payments legislation typically contains details about recipients' eligibility circumstances; mandatory considerations for decision-makers granting payments; methods for payments; internal review rights; confidentiality and so on.

There were a number of programs run by the Commonwealth that, until *Williams*, had no foundation in legislation, even where the Commonwealth had the legislative power to enact legislation (derived from either s 51 or s 61) and, even where those programs were set up to make payments, administer subsidies and deal with other matters that were traditionally the subject of legislation.

Implicit in the thinking behind the High Court's approach in *Williams*, and possibly even in the *Wooltops case* 90 years earlier, is that many government spending or regulatory programs which had relied solely on a contract to set out the terms and conditions on which the Commonwealth makes payments or otherwise regulates, could, and potentially should, be based in legislation, where there is a sufficient legislative head of power. This would not only provide for parliamentary oversight of the way in which the spending

52 From at least 1908, when the *Invalid and Old-age Pensions Act 1908* (Cth) was enacted as the founding moment of Australian welfare legislation.

system is set up;[53] it would also clarify the rights of funding recipients or those affected by the program inasmuch as those rights would be based on existing principles and grounds of administrative law that apply to decisions and other actions that purport to be made under legislation. Even challenges mounted on the basis of 'jurisdictional error' in relation to decisions which do not need to be made 'under an enactment', in the ADJR sense,[54] generally involve questions about whether the decision-maker has exceeded the scope of jurisdiction granted under statute. Administrative law review rights are obviously fundamentally distinct from contractual rights that parties have under a contract and go far beyond rights inherent in the capacity to sue for breach of contract. Administrative law rights are also unconstrained by privity of contract such that disaffected third parties, who have standing, may be able to seek administrative review.

Further, it is also implicit in the reasons of the majority judgments in *Williams* that the High Court considered that there is nothing particularly clear about the method by which the Commonwealth chooses to administer some spending and regulatory programs through contract and some through legislation. While most forms of government purchasing and procurement (departmental expenses or capital acquisitions, for example) of the kind identified by *Williams*, in pursuance of the ordinary functions of government, are unavoidably suited to contract, many contractual grant programs or other regulatory measures are arguably just as suited to statute. When the Commonwealth outlined, by enacting a mechanism to list, through regulations, all of the existing spending programs it administered as potentially affected by the *Williams* decision by the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), the list of those programs was replete with examples of payments to individuals and other spending mechanisms where eligibility for payment had been set out in administrative guidelines which could just as well have been — and, prior to *Williams*, have been — set out in an Act.[55]

The legislation enacted following the *Williams* decision did not attempt to prescribe into legislation all the terms and conditions on which the range of those existing spending programs operated. Rather, that legislation only provided authority to enter into, vary and administer the relevant contracts or agreements.[56] Importantly, the legislation sought primarily to validate the formation of the underlying contracts by ensuring that the Commonwealth has executive capacity to enter into them and, as such, that legislation addressed the immediate issue identified in *Williams*.

However, it is not yet clear how and whether the new funding legislation provides a power based on legislation to Commonwealth officials in respect of ongoing administration of funding contracts, once they have been validly entered into.

In a case where a Commonwealth official makes a decision under a contract that incorporates eligibility terms that are set out in program guidelines, a number of basic questions arise as to whether that decision is subject to review only through breach of contract or whether there is a way to import the decision as being reviewable on administrative law grounds, including on the basis of jurisdictional error. One of the questions here is what form the power of the officer takes and which model of executive power is being exercised.

53 A complaint made by Anne Twomey in her article, 'Parliament's Abject Surrender to the Executive', 27 June 2012, was that the legislative mechanism utilised to react to *Williams* may not have afforded sufficient parliamentary oversight in any event (despite its bipartisan and cross-bench support).

54 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3 and 5.

55 To mention just a few, the list in Sch 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) included disaster recovery assistance to individuals (402.028), ABSTUDY payment (407.068), and 'Working age payments' (407.058).

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

As I have argued above, the *Williams* decision did not reject that executive power was involved in administering funding contracts — the decision merely clarified that the executive power being exercised by Commonwealth officials was a mechanical form of executive power, as mere capacity to give effect to legislation. On this conception, after *Williams*, where programs remain administered under contracts which rely on legislative authority prescribed under the *Financial Framework (Supplementary Powers) Act 1997* (Cth), it is difficult to characterise whether the power to administer the program funding agreements is a power that arises solely under contract or under legislation or under both. The answer is probably both.

For example, if the agreements with the Scripture Union Queensland (SUQ) had survived *Williams v Commonwealth of Australia* (No 2)[57] — which they would have (just like numerous other funding agreements based on post-*Williams* legislation) if the High Court had agreed the legislative provision in the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) supporting them was sufficiently supported by a legislative head of power in s 51 of the *Constitution* — what kind of administrative law rights of review might have been exercised by:

- the SUQ if a decision was made to withhold funding on the basis that a milestone or deliverable set out in the contract was not met; or
- a concerned parent if a particular chaplain employed under the terms of the contract was not considered suitable.

Clearly, in the first case, SUQ would also have recourse to contractual remedies; however, would they be able to mount sensible proceedings in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) to argue that the decision to withhold funding was made in jurisdictional error? More uncertainly, would the parent in the second case, who, as a non-party to the relevant contract, clearly would have no standing to allege breach of contract, nevertheless be able to mount an administrative law challenge on the basis that the selection of the chaplain was reviewable on administrative law grounds? Plainly, review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) would not be possible (decisions made under s 32B of the *Financial Framework (Supplementary Powers) Act 1997* were specifically exempted from ADJR Act review).[58] However, it has been observed that there would be no procedural bar to commencing proceedings either under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act 1903* in the Federal Court.[59]

The *Williams* decision and, more crucially, the method through which it has been addressed in legislation means that it now appears that Commonwealth contract managers, and spending delegates, are arguably relying on a hybrid of legal sources when administering a funding contract: sources founded both in the terms of the contract (and therefore general principles of contract law) and as derived from their executive capacity to 'make, vary or administer' the arrangement, as now provided under statute.

This opens the possibility for administrative law principles to begin to shape Commonwealth contracting in ways not previously foreseen. Until *Williams*, a body of law had already been established dealing with the circumstances in which failure to observe statutory preconditions associated with a government contract may invalidate the contract or render it void. The law in this area focuses on whether any statutory preconditions to contract formation are directory (not essential) or mandatory.[60] However, *Williams* and the legislation

57 *Williams v Commonwealth of Australia* [2014] HCA 23.
58 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 1, para (he).
59 See the discussion in R Creyke, M Groves, J McMillan, and M Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 5th ed, 2019) 556.
60 See Seddon, above n 40, 464–84.

made to react to it may open the possibility for litigants to argue that specific acts or decisions made under a funding program are amenable to administrative law review, even where there is no suggestion that the contract is invalid, such as where is step is taken to withhold money, make a payment, or exercise a regulatory discretion based on discretion set out in the funding agreement or in incorporated terms set out in program guidelines.

It remains to be seen whether the model recently embodied by the *Government Procurement (Judicial Review) Act 2018* (Cth) may, for instance, be adopted in some form to deal with funding programs or 'grant' agreements of the Commonwealth. As initially enacted, that Act only covers certain 'covered procurements', which are likely to fall within the ordinary functions of government in the context of the *Williams* decision and therefore which do not require specific legislative authority. That Act, apart from theoretical rights that already existed for potential administrative law litigants under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903*, establishes a codified complaints and injunction process associated with alleged breaches of the *Commonwealth Procurement Rules* which are likely to be associated with the initial procurement process rather than ongoing administration on resultant contracts. Further judicial review legislation outlining the rights of persons seeking review of the administration of funding programs which are administered through contract might also be within the capacity of future parliaments.

Conclusion

The three forms of executive power that appear to be accepted following the *Pape* and *Williams* decisions discussed in this article are:

- non-statutory;
- head of legislative power; and
- capacity to give effect to legislation.

They raise significant and complex questions for administrative lawyers and the future of administrative law. This is especially the case in relation to whether administrative law grounds will begin to be accepted to apply to review of the exercise of non-statutory executive power; and whether administrative law grounds will start to be argued by litigants seeking to challenge grant funding decisions associated with government contracts which are authorised by legislation.

The judgment in *Williams* did not address these questions, as it attempted walk a difficult line between an originalist understanding of the *Constitution* and the slow development of an implied nationhood power that implies more into nationhood than had been foreseen in 1901. In so doing, it has raised new, and unresolved, questions about the appropriate relationship between executive power and administrative law and about the appropriate form of legislation the Commonwealth should consider enacting to authorise, and to administer, its spending and regulatory programs.