THE IMPLEMENTATION OF POLICY THROUGH EXECUTIVE ACTION

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[*The implementation of policy decisions was formerly considered to be almost exclusively the right of the legislature. Now Parliament has seen fit to delegate discretionary powers to the executive, and the proliferation of public service departments and statutory corporations provides a convenient means for effecting executive decisions. Mr Gurry here examines the sources and scope of the Commonwealth executive power in Australia as interpreted by the Courts, and concludes that the needs of a community are better served by such an extensive power than by the limited subject matter of the specific constitutional heads of power. A warning is given, however, as to the acceptability of the exercise of this power in the absence of accountability or parliamentary supervision.*]

1. INTRODUCTION

The scope, variety and complexity of modern governmental services and action have rendered nugatory the division of governmental functions upon which the Constitution of Australia is predicated. The Constitution adopts in sections 1, 61 and 71 an antediluvian classification of legislative, executive and judicial governmental powers, originally propounded by Aristotle[1] and later expounded by Locke,[2] Montesquieu[3] and others. The rigid and simplistic analysis of governmental activities on which this classification is based is quite inappropriate to the range of governmental services which the circumstances of a sophisticated and pluralistic technological society require. The classification is so firmly entrenched in our system of thought, however, that modern analyses of governmental functions have for the most part given implied approval to the classification by the modification or extension of the concepts involved (for example, quasi- legislative powers, and quasi-judicial powers), rather than the abandonment of those concepts in favour of alternative notions.

If an examination is made of the ways in which policy is implemented by the federal government in Australia today, it is clear that the distinction maintained in the traditional classification between legislative and executive functions has to a large extent become obscured. The distinction separates on the one hand the activity of legislation, which determines the content of a law as a rule of conduct or a declaration as to powers, right

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1 See Aristotle, *Politica* Book IV, 14.

2 See Locke, *Second Treatise of Civil Government* Ch. XII.

3 See Montesquieu, *L'Esprit des Lois* Ch. 12.

or duty, and on the other hand the function of executive authority which applies the law in particular cases.[4] An analysis of contemporary governmental practice indicates that there has been a steady accumulation of power in the executive arm of government so that many functions which would undoubtedly have been characterized as legislative in the terms of the traditional classification are now exercised by the executive arm.

Two reasons for this development seem apparent. First, it is manifest that while Parliament may exercise a general supervisory function over the activities of government, it is ill-equipped to involve itself to any further extent in the processes of government. This observation was made forcefully by J. S. Mill in *Representative Government* and is borne out in the following extracts from that work:

> . . . it is equally true, though only of late and slowly beginning to be acknowledged, that a numerous assembly is as little fitted for the direct business of legislation as for that of administration.[5]
> . . . in legislation as well as administration, the only task to which a representative assembly can possibly be competent is not that of doing the work, but of causing it to be done; of determining to whom or to what sort of people it shall be confided, and giving or withholding the national sanction to it when performed. . . .[6]

Concomitant with the growing recognition of the inheritant inadequacies of the institution of Parliament has been a growing need for, or at least provision of, increased governmental services. The task of fulfilling this need or effecting this provision has increasingly fallen to the executive arm of government as a result of the appreciation of the inadequacies of Parliament as a policy-making or policy-implementing body.

Secondly, the accretion of power to the Executive may be seen as the inevitable result of the recognition of the true nature of executive power as involving more than the mere execution of formulated laws. This proposition was demonstrated clearly by Harrison Moore in *The Constitution of The Commonwealth of Australia*:[7]

> . . . there is much more in government than mere execution of the law, whether enacted or unenacted; . . . The State is a going concern; it has affairs which must be managed with prudence and judgment and which are not necessarily related to law in any other sense than that in which all conduct may be bounded by legal restraints. It is perfectly true that a very great part of this business of the state is regulated by law more than is the like business of private individuals; . . . But were those laws directing and controlling the management of the state affairs repealed, the business would not itself come to an end; it would simply have to be carried on under conditions (to parody a once famous saying) of greater freedom and more responsibility by the agents of the state.

In circumstances of increased government activity and increased complexity of social conditions, greater power in the hands of those actually conducting the business of the state is thus inevitable.

[4] 'The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.' *The Commonwealth v. Grunseit* (1943) 67 C.L.R. 58, 82 *per* Latham C.J.

[5] Mill, *Representative Government* (Everyman's Edition 1910) 235.

[6] *Ibid.* 237.

[7] Harrison Moore, *The Constitution of The Commonwealth of Australia* (2nd ed. 1910), pp. 293-4.

It is interesting to note that the concern of many writers in the nineteenth century was not with the extent of executive power but with Parliamentary interference in the activities of the Executive, and the usurpation of executive functions by the Legislature. Todd in his classic work, *On Parliamentary Government in England,* noted in the 1887 edition that:[8]

> Since the passing of the Reform Act of 1867, the House of Commons has shown a disposition to encroach, more and more, upon the sphere of government.

The author quotes a Member of the House as saying that the Commons:[9]

> . . . claims to have a voice in every subject before it is decided. By means of questions proposed to ministers, which have enormously multiplied in number and importance within the last few years, it controls and directs the course of administration to a degree never dreamt of for many years after the [first] Reform Bill.

Another writer of the time observed that since the Reform Bill of 1831, the House of Commons had gradually, and insensibly, but 'practically usurped executive functions, and really has become itself the executive'.[10]

It may be, therefore, that the emphasis placed on the accretion of power to the Executive in this age is exaggerated, and can be explained on the basis of a failure to recognize the previous existence of that power in the executive arm of government because of an unwarranted delimitation of the executive function to the mere execution of the law. Certainly the reactions of Lord Hewart in describing the nature of executive power as it existed in 1930 as 'despotic',[11] or of Sir Carleton Allen in his books, *Bureaucracy Triumphant*[12] and *Law and Orders*[13] are extreme[14] and fail to take into consideration the extensive nature of the power that has always resided in the Executive.

It is intended in the course of this paper to examine the extent of the federal government's executive power generally, and to investigate some of the ways in which government policy is implemented by the exercise of that power. In the first place, the sources and scope of the executive power will be considered. Delegated legislative power, which represents a secondary source of executive authority, will be treated separately from the scope of the executive power when considered in its primary sense as

[8] Todd, *On Parliamentary Government in England* (2nd ed. 1887) Vol 1, 421.

[9] *Ibid.* quoting Mr Lowe M.P.

[10] Harrison, 'The Deadlock in the House of Commons' (1881) *The Nineteenth Century* 317, 333.

[11] Hewart, *The New Despotism* (1929).

[12] Allen, *Bureaucracy Triumphant* (1931).

[13] Allen, *Law and Orders* (3rd ed. 1965).

[14] For a trenchant criticism of the position adopted by Hewart and Allen, see Laski, *Reflections on the Constitution* (1951) 42, where he notes:

> 'An irresponsible Lord Chief Justice, like Lord Hewart, and an academic lawyer whose hatred of change is even greater than his persuasive rhetoric, like Dr C. K. Allen, are only the best-known names in a dramatic rearguard action that has been fought for many years now against a phantom army of bureaucrats lusting for power which has never had any existence outside the imagination of those who warn us of impending doom and disaster.'

the power of the executive arm apart from statutory authority. In the latter sections of the paper some of the agencies through which executive power is exercised will be examined. In this connection, Higgins J. noted in *Baxter v. Ah Way*[15] that:

> . . . the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government of Australia.[16]

The treatment of agencies exercising executive power does not purport to be exhaustive. However, the main agencies utilized for the implementation of policy through executive action — the Department and Statutory Corporation — will be examined in the light of some of the constitutional issues involved in the use of these agencies.

2. SOURCES AND SCOPE OF EXECUTIVE POWER

The cardinal provision in the Constitution relating to federal executive power is contained in section 61 which provides:

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

Section 61, it has been pointed out,[17] has three distinct functions. First, it vests the executive power of the Commonwealth in the Crown; second, it enables it to be exercised by the Governor-General; and third, it delimits the area of that power by declaring that it 'extends to the execution and maintenance of th[e] Constitution and of the laws of the Commonwealth'. However, as was noted by Isaacs J. in *Le Mesurier v. Connor*[18] the expression 'executive power' as used in Chapter II of the Constitution is generic and its 'specific limits have to be determined *aliunde*'.[19]

The first source of executive power (although a secondary source) is that area of discretionary power delegated to the executive arm of government by the Legislature. This area of executive power raises special problems which are considered separately below.[20] The main criticism which has been provoked in this area is that the extent and nature of the powers delegated by Parliament to the Executive are such that Parliament has abdicated its responsibility in large areas so as to leave the formulation and implementation of policy entirely to the Executive. The critics maintain that the delegation of wide powers in this manner

[15] (1909) 8 C.L.R. 626.
[16] *Ibid.* 646.
[17] *The Commonwealth and The Central Wool Committee v. The Colonial Combing, Spinning and Weaving Company Limited (The Wooltops* case) (1922) 31 C.L.R. 421, 431, *per* Knox C.J. and Gavan Duffy J.
[18] (1929) 42 C.L.R. 481.
[19] *Ibid.* 514.
[20] See Part 11.

has destroyed the balance of power inherent in the doctrine of the separation of powers which is enshrined in the Constitution by virtue of the classification of powers adopted in the Constitution.

The second source of executive power is the 'executive prerogatives'[21] by virtue of which the King or his representative is entitled to act. The nature and scope of the executive prerogatives is to be determined in the first place by reference to the common law. Thus Dixon J. observed in *Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd:*[22]

> The Commonwealth Constitution, an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of the Crown in right of the Commonwealth are in many respects defined by the common law.[23]

The whole area of royal prerogatives is one plagued with obscurity and Maitland's comment that 'there is often great uncertainty as to the exact limits of the royal prerogative'[24] is a fine example of the art of understatement. Two reasons seem apparent for the obscurity which pervades this area.

First, the royal prerogatives which are exercisable by the Queen or her representative in her position as Head of the State (as opposed to the prerogatives which the Queen has as a person[25]) are said to adhere to 'the Crown' and the precise meaning of 'the Crown' in this context is not always clear. In *Bank voor Handel En Scheepvaart v. Slatford*[26] Devlin J. noted that 'the Crown is a convenient term, but one which is often used to save the asking of difficult questions'.[27] Maitland himself observed in this connection that 'the Crown does nothing but lie in the Tower of London to be gazed at by sightseers'.[28]

In effect, because of the adoption of the doctrine of ministerial responsibility, 'the Crown' in this context is equivalent to the Executive and the expression 'the Crown in right of the Commonwealth' is generally synonymous with the federal government. In more precise terms, Hood Phillips[29] discerns the following faculties which are comprehended within the term 'the Crown':

(1) the Queen or her representative in rare cases acting at her own discretion — exercising the so called 'reserve powers' of the Crown, *e.g.* choice of Prime Minister in exceptional circumstances;

[21] *The Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd* (1940) 63 C.L.R. 278, 321 *per* Evatt J.
[22] *Ibid.*
[23] *Ibid.* 304.
[24] Maitland, *The Constitutional History of England* (1908) 418.
[25] For example, 'The Queen can do no wrong'. The ambit of the personal prerogatives at the present time is uncertain, but, in respect of the implementation of policy by the Executive, such prerogatives are not important.
[26] (1952) 1 All E.R. 314.
[27] *Ibid.* 319.
[28] Maitland, *loc. cit.*
[29] Hood Phillips, *Constitutional and Administrative Law* (4th ed. 1967) 242.

(2) the Queen or her representative acting on the advice of Ministers, *e.g.* opening Parliament;
(3) the Queen or her representative acting through or by means of Ministers, *e.g.* negotiating treaties or concluding contracts;
(4) Ministers acting on behalf of the Queen — in theory, when powers are conferred by statute directly on Ministers they are exercised on behalf of the Queen.

The second reason for the obscurity which surrounds the question of the royal prerogatives is to be found in the meaning which is attached to the word 'prerogative' itself. In a number of situations use of the term 'prerogative' is limited to what may be called 'the ancient prerogatives' — that is, those prerogatives, such as the power to declare war or to enter into treaties, which have always been part of the powers of the Crown. It is clear, however, that the term 'prerogative' has a much broader meaning as signifying 'the power of the Crown apart from statutory authority'.[30] Thus, Dicey describes the royal prerogative as 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.[31] In accordance with this definition,

> Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.[32]

This description of the prerogative has been approved judicially[33] and other definitions of the prerogative have been formulated in similar terms. Thus the following statement was noted in *Attorney-General v. De Keyser's Royal Hotel, Limited*:[34]

> Those powers which the Executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative.[35]

In the Australian context, the question arises as to the extent of the prerogative power which is exercisable by the Crown in right of the Commonwealth. This question is determined partly by reference to the Constitution itself, for example section 70 vests certain powers formerly exercised by the Governors of the Colonies in the Governor-General. Principally, however, the extent of the powers which the Executive may exercise without parliamentary authority is to be determined by reference to the principles with which the High Court has circumscribed the limits of federal executive power.

The occasions on which the High Court has reviewed the nature of federal executive power have been infrequent, but it is possible to isolate four areas which have received judicial consideration and which indicate the extent of executive power:

[30] *Theodore v. Duncan* [1919] A.C. 696, 706.
[31] Dicey, *Law of the Constitution* (10th ed. 1965) 424.
[32] *Ibid.* 425.
[33] *Attorney-General v. De Keyser's Royal Hotel, Limited* [1920] A.C. 508, 526 *per* Lord Dunedin.
[34] [1920] A.C. 508.
[35] *Ibid.* 538. Quoted with approval by Latham C.J. in *The King v. Bradley and Lee* (1935) 54 C.L.R. 12, 17.

(1) Circumstances in which executive action requires legislative authority.
(2) Executive action in areas in which the Commonwealth is competent to legislate.
(3) Powers inherent in the fact of nationhood.
(4) The incidental power.

Each of these areas has a direct bearing on the scope of the executive power and, in the absence of an established line of authority defining the precise limits of the executive power, it is from these areas that the extent of the executive power must be determined.

A. *Circumstances in which Executive Action Requires Legislative Authority*

The first question which arises in relation to the scope of the executive power is the extent to which executive action may be undertaken without parliamentary authority. In this regard it seems established that the only occasion on which executive action requires parliamentary authority is when the action involves the levying of money (taxation) or the disbursement of money (appropriation) on the part of the Commonwealth. The requirement of the authority of an Act of Parliament for the levying of money dates back to the Bill of Rights,[36] while the requirement of legislative authority for appropriation has its origin in the late seventeenth century.[37] The principle that the disbursement of money requires legislative authorization also finds explicit acceptance in the Constitution. Section 81 stipulates, in accordance with accepted constitutional practice,[38] that '[a]ll revenues or moneys raised or received by the Executive Government shall form one Consolidated Revenue Fund', and section 83 provides that '[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'.

The prohibition against taxation or appropriation without legislative sanction has been carefully guarded by the courts and has been applied in circumstances in which the taxation or appropriation has been of an indirect nature. In the *Wooltops* case[39] the question arose as to the validity of certain agreements which the Executive Government had entered into

[36] 'By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament.' *Bowles v. Bank of England* (1913) 1 Ch. 57, 84 *per* Parker J.

[37] Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145, citing as authority Kenyon, *The Stuart Constitution* (1966) 388-96 and Williams, *The Eighteenth Century Constitution* (1960) 4-5, 50-3, and 200-6.

[38] 'It has long been an accepted thesis of the Constitution, as declared by the Committee on Public Moneys in 1857, that "it is essential to a complete parliamentary control of the public money that no portion of it should be arrested in its progress to the consolidated fund, from which alone it can be issued and applied with parliamentary sanction".' The *Wooltops* case (1922) 31 C.L.R. 421, 447 *per* Isaacs J.

[39] *Ibid.*

with a company which was engaged in the manufacture and sale of wool tops. At the relevant time, the purchase and sale of the particular commodities without the Government's consent was prohibited by federal regulations. The agreements were of two types: first, an agreement to give consent to the sale of wool tops by the company in return for a share of the profits of the transaction; and secondly, an agreement that the business of manufacturing wool tops would be carried on by the company as agent for the Commonwealth in consideration of the payment to the company of an annual sum by the Commonwealth (some of the agreements were a combination of both). Two of the judges, Knox C.J. and Gavan Duffy J., based their decision upon the absence of any authority for the making of the agreements in section 61 of the Constitution. However, Isaacs, Higgins and Starke JJ. held that an agreement of the first kind, involving the payment of monetary consideration *to* the Commonwealth in return for the granting of the Commonwealth's consent, amounted to the imposition of taxation by the Executive without parliamentary authority, which was illegal. The second kind of agreement, which involved the payment of money *by* the Commonwealth, was held by Isaacs, Higgins and Starke JJ. to be an appropriation which, lacking the requisite legislative authority, was invalid.

Apart from the requirement of legislative authority for action involving taxation or appropriation, it seems that executive action may be undertaken at all other times without parliamentary authority. This proposition is deducible from *The State of Victoria and The Attorney-General for the State of Victoria v. The Commonwealth of Australia and Another*,[40] a case which concerned the 'Australian Assistance Plan'. This plan involved an extensive programme of government action and policy co-ordination in the field of social welfare. Only two of the seven judges[41] dealt expressly with this point, but each stated that apart from action involving taxation or appropriation, legislative authority was not required for executive action. Jacobs J. expressed the proposition in the following terms:[42]

> Legislation is only needed when Parliament chooses to replace or affect the prerogative powers by legislation which either extends or limits or simply reproduces in the form of executive or other authority the powers previously comprehended within the prerogative. The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself. This exercise of the prerogative is in no different case from other exercises of the prerogative which fall within the powers of the Executive Government of the Commonwealth under section 61 of the Constitution.

Murphy J. stated in similar vein:[43]

> Over the years hundreds of appropriations have been made and expended on a variety of purposes without separate legislation additional to the appropriation.

[40] The *AAP* case (1976) 50 A.L.J.R. 157.
[41] Jacobs and Murphy JJ. The other judges were Barwick C.J., McTiernan, Gibbs, Stephen and Mason JJ.
[42] *Ibid.* 181.
[43] *Ibid.* 188.

Separate legislation is not necessary. In some cases it may be desirable and the Parliament has enacted such legislation.

The point was not discussed expressly by any of the other judges in the case, but none of them gave any indication or made any suggestion that the Australian Assistance Plan ought properly to have been the subject of legislation defining its scope and ambit.

It seems clear, therefore, that the only parliamentary limitation on executive action (other than those imposed in some way through parliamentary debate or questions) is the principle that action involving taxation or appropriation requires legislative authority. This principle is supposed to regulate the relationship between the Legislature and the Executive and to ensure some degree of parliamentary control over the activities of the Executive. There are, however, four aspects of the operation of the principle in relation to appropriations which indicate that its effect is limited and that in reality it provides almost no parliamentary control over the spending activities of the Executive.

First, contrary to the view expressed in certain *dicta* in the *Wooltops* case,[44] it is now established that the absence of legislative authority for the expenditure of money does not affect the validity of executive action but merely prevents the Crown from satisfying its liability to pay. This proposition was established in *New South Wales v. Bardolph*[45] which concerned the validity of an advertising contract entered into by the Lang New South Wales Government and repudiated by the succeeding government. The contract was with the proprietor of a newspaper called the *Labour Weekly* and, as no separate appropriation had been made in respect of the matter, it was contended that the contract was invalid. The High Court ultimately held that the contract lay within the ordinary and recognized functions of government and could thus be validly discharged without separate appropriation, under the class of appropriation relating to the administration of the relevant department. In the course of his judgment, however, Evatt J., whose judgment at first instance was confirmed unanimously by the Full Court, stated that the absence of legislative authority did 'not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into the contract . . . The enforcement of such contracts is to be distinguished from their inherent validity'.[46]

The requirement of legislative authority for expenditure by the Executive therefore affects only the discharge of obligations of the government and does not prevent valid commitments being made in advance of appropriation. The significance of this distinction is demonstrated by the circumstances which gave rise to the litigation in *New South Wales v. Bardolph*,[47] namely that one administration can commit a succeeding

[44] (1922) 31 C.L.R. 421.
[45] (1934) 52 C.L.R. 455.
[46] *Ibid.* 474-5.
[47] *Ibid.*

government to obligations which involve the implementation of policy anathema to the succeeding government. The absence of legislative authority does not affect the validity of such arrangements and the successor government may thus feel politically or morally bound to supply the requisite authority at a later date in order to discharge its obligations under those arrangements.

The second matter which should be noted in relation to the requirement of legislative authority for appropriation also arises out of the decision in *Bardolph's* case.[48] As mentioned, in that case it was decided that, while legislative authority is required for expenditure by the Executive, action which falls within 'the ordinary and well-recognized functions of Government'[49] can be authorized under the class of appropriation relating to the administration of the relevant department and does not require a separate and specific class of appropriation. The type of action comprehended within the description 'ordinary and well-recognized functions of Government', or, as Dixon J. expressed it, 'recognized and regular activity of Government',[50] would seem to be extensive. Starke J. considered that the question of whether an activity fell within the limits of the description was to be determined by the 'character of the transaction' and 'constitutional practice'.[51] This formulation would seem to leave substantial areas of discretion to the Executive for it is the Executive Government which determines to a large extent what constitutes 'constitutional practice' since it is the Executive Government which decides what departments shall be created and what the activities of each department shall be. Thus, it is submitted that broad areas of policy involving expenditure could be implemented through departmental action without any legislative authority or supervision other than a vote of supply in favour of the particular department. On this basis, the force of the principle that expenditure requires legislative sanction as a means of regulating the relationship between the Legislature and the Executive is significantly lessened.

The third matter which is to be noted concerning the requirement that expenditure must receive legislative approval arises out of the nature and format of Appropriation Acts. The practice adopted in connection with Appropriation Acts has been to set out briefly all items of appropriation in a schedule to the Act. In the *AAP* case, moneys were appropriated to finance a full and extensive programme implementing aspects of social welfare policy on the basis of the following simple entry:

4. Australian Assistance Plan	
01. Grants to Regional Councils for Social Development	$5,620,000
02. Development and evaluation expenses	350,000
Total —	$5,970,000

[48] *Ibid.*
[49] *Ibid.* 496 *per* Rich J.
[50] *Ibid.* 507.
[51] *Ibid.* 502.

In these circumstances the notion that Parliament exercises control over the executive expenditure by way of the provision of legislative authority is more fiction than reality. Furthermore, it is highly unlikely that Parliament would take it upon itself to select one item of appropriation out of the many items and initiate inquiry into the policies which will be financed through that appropriation, especially as one House, the Senate, may not amend proposed laws appropriating revenue or moneys.[52]

It seems that the practice of itemizing subjects of appropriation with little description of the nature of the activity involved was implicitly accepted in the *AAP* case by the High Court, since no objection to the degree of specification used in relation to the Australian Assistance Plan was raised by any of the judges. Indeed, Jacobs J. stated in relation to the question:

> No greater particularity is required for the purposes of an appropriation. Provided that purposes are stated it is a matter for the Parliament how minute and particular shall be the expression of purposes in any particular case.[53]

Murphy J. also noted in this regard that:

> The purpose of any appropriation may be indicated generally. 'One-line' appropriations are valid.[54]

Of course, it is accepted that 'there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose'.[55]

Finally, in relation to the requirement of legislative authority for executive expenditure, it seems that, rather than this requirement acting as a restriction on executive action, it may operate as a means of enlarging the scope of action otherwise available to the Executive. This result is achieved on a practical level by the interpretation which has been given by the High Court to the phrase 'purposes of the Commonwealth' in section 81 of the Constitution. This phrase determines the limits of the Parliament's power of appropriation.

The phrase 'purposes of the Commonwealth' has received detailed judicial consideration in two cases, the *Pharmaceutical Benefits* case,[56] and the *AAP* case. Two main streams of interpretation of the phrase have emerged from these cases. The first interpretation is based on the view adopted by Latham C.J. in the *Pharmaceutical Benefits* case[57] that 'the determination whether a particular purpose should be regarded and adopted as a Commonwealth purpose is a political matter'.[58] On this basis, His Honour concluded that:[59]

[52] Section 53 of the Constitution.
[53] (1976) 50 A.L.J.R. 157, 180.
[54] *Ibid.* 187.
[55] *Attorney-General for Victoria (at the relation of Dale and Others) v. The Commonwealth and Others* (the *Pharmaceutical Benefits* case) (1946) 71 C.L.R. 237, 253 *per* Latham C.J.
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.* 256.
[59] *Ibid.*

> . . . the provisions of section 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.

In the same case, McTiernan J. adopted a similar approach declaring that the 'purposes of the Commonwealth are . . . such purposes as the Parliament determines',[60] while in the *AAP* case McTiernan J. expressly adopted the words and view of Latham C.J. in the *Pharmaceutical Benefits* case.[61] The view expressed by Latham C.J. was also explicitly adopted in the *AAP* case by Mason J.[62] and Murphy J.[63]

Jacobs J., in the *AAP* case, although not expressly adopting the view of Latham C.J., favoured a similarly wide approach to the question and considered that the phrase 'purposes of the Commonwealth' comprehended not just the power ascribed to the Commonwealth by the Constitution but also powers arising as a result of the nationhood of Australia. His Honour also considered that any 'appropriation is a matter internal to the Government of the Commonwealth'.[64]

It follows that a majority of the High Court, as constituted at the time of the *AAP* case,[65] adhered in principle to the view expressed by Latham C.J. that the 'purposes of the Commonwealth' in connection with the appropriation power are such as the Parliament determines.

The second stream of interpretation in relation to the phrase 'purposes of the Commonwealth' is exemplified in the view that the purposes of the Commonwealth are the purposes for which the Commonwealth has power to make laws, which include matters incidental to the existence of the Commonwealth as a State and to the exercise of its powers as a national government (the implied 'powers of nationhood' referred to in this stream of interpretation being of a more limited nature than those which Jacobs J. would contend were inherent in the fact of nationhood). This view, in essence, was adopted for varying reasons by Barwick C.J.[66] and Gibbs J.[67] in the *AAP* case, and formed the basis of the approach adopted by Starke and Williams JJ. in the *Pharmaceutical Benefits* case.[68]

The significance of the wide meaning given to 'purposes of the Commonwealth' which, it is submitted, currently enjoys a majority in the High Court, is that Parliament may authorize the Executive to expend moneys for any purposes which Parliament deems fit, thereby practically

[60] *Ibid.* 273.
[61] (1976) 50 A.L.J.R. 157, 167.
[62] *Ibid.* 177.
[63] *Ibid.* 185.
[64] *Ibid.* 183.
[65] McTiernan, Mason, Jacobs and Murphy JJ.
[66] (1976) 50 A.L.J.R. 157, 165.
[67] *Ibid.* 169.
[68] (1946) 71 C.L.R. 237. Dixon J. (with whom Rich J. agreed) in the *Pharmaceutical Benefits* case cannot be taken to have expressed a decisive opinion on the matter.

enlarging the scope of executive action. It is conceded that an Appropriation Act merely supplies the requisite legislative *authority* for expenditure in connection with the relevant purpose, and does not *validate* that expenditure. However, in so far as the relationship between the Legislature and Executive is concerned, the wide interpretation means that Parliament is not required to ensure that authority is given for expenditure only in connection with purposes inside the scope of Commonwealth power.

Furthermore, the wide interpretation has the effect of requiring any challenges to constitutional validity to be directed at the executive action rather than the legislative authority, a majority of the Court in the *AAP* case (McTiernan, Mason, Jacobs and Murphy JJ.) being of the view that Appropriation Acts cannot be the subject of a legal challenge. The ramifications of this view are far-reaching since, as Jacobs J. pointed out in the *AAP* case, 'any relief granted by the court against an illegitimate expenditure would need, carefully and precisely and exhaustively to delineate those expenditures in respect of which relief is granted'.[69] His Honour further stated that:[70]

> The practical impossibility of so doing may well prevent the granting of relief by way of *quia timet* injunction or even by way of declaration. The complex interrelation between the heads of power within the competence of the Commonwealth would make it very difficult to frame relief except in general and therefore impermissible terms.

While this view may not be shared generally to the extent propounded by Jacobs J., the problems associated with challenging executive action may nevertheless be contrasted with the simplicity of the alternative approach, which is unavailable to litigants, of a declaration that the Appropriation Act in question is invalid in so far as it authorizes expenditure in respect of unconstitutional executive action. The ultimate consequence is greater freedom associated with the exercise of executive power.

The principle that legislative authority is required for appropriation, which had its origins is the assertion of parliamentary supremacy and the exercise of parliamentary control over the Executive, has, therefore, a limited operation in the sphere of federal government today. In reality it does not ensure parliamentary supervision of executive expenditure and in fact its operation is such as to enlarge practically the range of action available to the executive arm of government.

B. *Executive Action in Areas in which the Commonwealth is Competent to Legislate*

The scope of federal executive power is primarily delimited by the third declaration in section 61 of the Constitution which states that the executive power of the Commonwealth 'extends to the execution and mainten-

[69] (1976) 50 A.L.J.R. 157, 183.
[70] *Ibid.*

ance of th(e) Constitution, and of the laws of the Commonwealth'. In the *Wooltops* case,[71] Knox C.J. and Gavan Duffy J. held that the execution and maintenance of the Constitution meant 'the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation',[72] and that the phrase 'laws of the Commonwealth' meant 'Acts of the Parliament of the Commonwealth'.[73] These statements involve a limitation of the executive power to those areas expressly made the subject matter of Commonwealth legislative power or those areas in which the Executive is expressly authorized to act by the Constitution itself.

This view of the executive power, which represents the narrowest possible construction of the power, was endorsed in *The Commonwealth v. Australian Commonwealth Shipping Board*,[74] a case which concerned the validity of a contract to sell to a municipal council steam turbo-alternators. The majority of the Court (Knox C.J., Gavan Duffy, Rich and Starke JJ.) held that there was 'no power which enables the Parliament or the Executive Government to set up manufacturing or engineering businesses for general commercial purposes',[75] and that it was:[76]

> . . . impossible to say that an activity unwarranted in express terms by the Constitution is nevertheless vested in the Executive, and can therefore be conferred as an executive function upon such a body as the Shipping Board.

It now seems clearly established that this view of the executive power is unduly restrictive, and that the exercise of the executive power is only '*primarily* . . . limited to those areas which are expressly made the subject matters of Commonwealth legislative power'.[77] The exercise of the executive power is extended significantly beyond this primary restriction by the High Court's acceptance of the existence of powers inherent in the fact of nationhood and by the operation of the incidental power.

C. *Powers Inherent in the Fact of Nationhood*

The existence of implied powers derived from the status of the Commonwealth as a nation and as a federal government was recognised by both Starke J. and Dixon J. in the *Pharmaceutical Benefits* case.[78] Starke J. expressed the scope of such powers in narrow terms, stating in relation to 'Commonwealth purposes' that:

> Among other purposes of the Commonwealth must also be included . . . matter arising from the existence of the Commonwealth and its status as a Federal Government. Thus, . . . moneys appropriated for payment *etc.* of members of

[71] (1922) 31 C.L.R. 421.
[72] *Ibid.* 432.
[73] *Ibid.* 431.
[74] (1926) 39 C.L.R. 1.
[75] *Ibid.* 9.
[76] *Ibid.* 10.
[77] The *AAP* case *supra,* 181 *per* Jacobs J.; (emphasis added).
[78] (1945) 71 C.L.R. 237.

> Parliament, exploration and so forth, would be within the authority of the Commonwealth.[79]

His Honour did not consider that these powers extended to authorize the broad provisions regulating the sale of drugs and conduct of doctors, chemists, and persons dealing with doctors and chemists, which were the subject of litigation in the *Pharmaceutical Benefits* case.[80]

Dixon J. was inclined to favour a wider view of the scope of powers derived from the fact of nationhood, stating:

> Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a county in the world of to-day.[81]

The scope and nature of the powers inherent in the fact of nationhood were the subject of further consideration in the *AAP* case. Barwick C.J.,[82] Gibbs,[83] Mason,[84] and Jacobs JJ.[85] all expressly accepted the existence of such powers. The widest view of the ambit of these powers was adopted by Jacobs J. who considered that:

> Within the words "maintenance of this Constitution" appearing in section 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 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.[86]

On this basis, His Honour considered that matters which had a national character lay within the realm of legitimate Commonwealth activity:

> The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out. Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of services designed to meet those needs. Research and exploration likewise have a national, rather than a local, flavour.[87]

Jacobs J., therefore, adopts the view that the implied powers of the national government grow and change in order to reflect society's needs and to enable the national government to implement policies which are sufficiently wide-ranging to accommodate those needs. His Honour thus concluded that on this basis (a further basis found its roots in the

[79] *Ibid.* 266.
[80] *Ibid.*
[81] *Ibid.* 269.
[82] (1976) 50 A.L.J.R. 157, 164-5.
[83] *Ibid.* 169.
[84] *Ibid.* 178.
[85] *Ibid.* 181.
[86] *Ibid.* 181.
[87] *Ibid.* 183-4.

incidental power) the implementation of the Australian Assistance Plan, which included aspects of social welfare policy admittedly beyond the immediate scope of the specific heads of legislative power, was within Commonwealth power. It represented a valid exercise of the executive power on a national matter together with the legislative power to appropriate funds accordingly.

A narrower view of the implied powers of nationhood was taken by Mason J. in the *AAP* case who adopted an approach similar to that expounded in embryonic form by Dixon J. in the *Pharmaceutical Benefits* case,[88] conceding that the 'functions appropriate and adapted to a national government will vary from time to time'.[89] While acknowledging that the implied powers endowed the Commonwealth with 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation',[90] Mason J. noted that the scope of such powers was limited and that:

> It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.[91]

Barwick C.J. and Gibbs J. adopted views of the implied powers which, although not expressed in such detail, would seem to conform to the approach of Mason J. Barwick C.J. cited as examples of the implied powers the power to explore foreign lands, seas or areas of scientific knowledge or technology, and the power to create Departments of State.[92]

The scope of the implied powers of nationhood are thus undetermined. It may certainly be said that these powers represent an extension of Commonwealth executive power, with two main views concerning the breadth of extension finding approval. First, there is the view of Jacobs J. who favours extension of Commonwealth powers in this way to all matters of national concern or character. Secondly, there is the view of Mason J. and, *semble,* Dixon J., for whom the implied powers must be limited by 'the basal consideration . . . found in the distribution of powers and functions between the Commonwealth and the States'.[93]

D. *The Incidental Power*

As Mason J. noted in the *AAP* case,[94] in ascertaining the potential scope of the executive power an important consideration is the incidental

[88] (1945) 71 C.L.R. 237.
[89] (1976) 50 A.L.J.R. 157, 178.
[90] *Ibid.* 178.
[91] *Ibid.* 178.
[92] *Ibid.* 165.
[93] The *Pharmaceutical Benefits* case (1945) 71 C.L.R. 237, 271-2 *per* Dixon J.
[94] (1976) 50 A.L.J.R. 157, 178.

power which adds a further dimension to what may be achieved by the Commonwealth in the exercise of other specific powers. The relevance of the incidental power arises because the Executive is competent to act in those areas in which Parliament is competent to legislate, and if the incidental power contained in section 51(xxxix) significantly increases the area of legislative competence, it must also indirectly extend the range of action available to the Executive.

The nature of the incidental power has been discussed by the High Court on a number of occasions and two principles seem to have emerged which are relevant in the context of the indirect effect of the incidental power on the executive power. First, it is well established that section 51(xxxix):[95]

> . . . confers power to make law with respect, not to matters incidental to the subjects which are confided, by section 51 or elsewhere, to the Parliament, but to matters incidental to the execution of the legislative power. The distinction between a matter incidental to the execution of a power, something which attends or arises in its exercise, and a matter incidental to a subject to which the power is addressed, is material.

Jacobs J. drew attention to this distinction in the *AAP* case and pointed out that 'what is incidental to the execution of a main power includes every matter which occurs or is liable to occur in subordinate conjunction with the execution of that power, even though it forms no essential part of the main power itself'.[96] The incidental power, therefore, cannot be used to support a legislative enactment which bears no relation to the execution of a specific power and thus, it would seem, could not by extension be used to support executive action which on its own bears no relation to the execution of another power.

The second principle which emerges from the High Court's consideration of the nature of the incidental power is that the ascertainment of whether a matter is incidental to the execution of a power is largely a question of degree.[97] The extremity of the power is determined by the dictum of Dixon J. that 'it cannot authorize legislation upon matters which are *prima facie* within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote'.[98] Within this boundary there is considerable ground for extending the specific Commonwealth powers on the basis of matters incidental to their exercise, but the High Court has generally been reluctant to utilize this ground.

The most generous interpretation that has been accorded to the incidental power was advanced by Jacobs J. in the *AAP* case. His Honour directly considered the effect of the incidental power on executive action and stated that:[99]

[95] *Le Mesurier v. Connor* (1929) 42 C.L.R. 481, 497 *per* Knox, C.J., Rich and Dixon JJ.
[96] (1976) 50 A.L.J.R. 157, 184.
[97] *Burton v. Honan* (1952) 86 C.L.R. 169, 179 *per* Dixon J.
[98] *R. v. Sharkey* (1949) 79 C.L.R. 121, 151.
[99] (1976) 50 A.L.J.R. 157, 184.

> In every case it is necessary to determine whether the expenditure, if it is not for the purposes of the Commonwealth in what may compendiously . . . be described as a primary sense, is nevertheless incidental to the execution of the power to expend moneys for the purposes of the Commonwealth in that primary sense.

His Honour concluded that the incidental power may support a matter of substance and not merely a matter in and of or procedural to the relevant substantive power itself. On this basis His Honour considered that in so far as the expenditure made to implement the Australian Assistance Plan did not fall directly within a specific power of the Commonwealth, it was an expenditure of money which was incidental to the execution by the Commonwealth of its wide powers respecting social welfare.

The approach adopted by Jacobs J., it is respectfully submitted, represents a sensible application of the incidental power since the Australian Assistance Plan essentially involves a programme implementing a nationally co-ordinated administrative structure and policy in the area of social welfare. It would therefore seem to present the ideal circumstances in which to invoke the incidental power, for it concerned the means of executing a miscellany of associated powers, and as Dixon C.J. observed in *Burton v. Honan*:[100]

> . . . in considering [the incidental power] we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal Legislature the justice and wisdom of the provision which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary.[1]

A similarly wide view of the incidental power was entertained by Murphy J. in the *AAP* case, but His Honour's comments are less relevant in respect of the executive power, since he considered that the Australian Assistance Plan could be implemented simply on the basis of a valid appropriation and the exercise by the Executive of the spending power. Concerning the incidental power His Honour added that it:

> . . . enables legislation to effectuate the expenditure of the moneys, the appropriation of which has been determined by Parliament "for the purposes of the Commonwealth" and for which there is no other source of power in the Parliament.[2]

Whether the area of valid executive action will be expanded to the extent suggested by Jacobs J. by use of the incidental power is open to some doubt. His interpretation stands alone at the present time. In the absence of wider acceptance of his approach, the incidental power represents a medium by which the scope of executive power is indirectly broadened, but it would seem that this broadening is of a fairly limited nature.

E. *Conclusion*

A review of the foregoing areas, each of which directly impinges on the operation of the executive power, indicates that considerable power

[100] (1952) 86 C.L.R. 169.
[1] *Ibid.* 179.
[2] (1976) 50 A.L.J.R. 157, 188.

is concentrated in the hands of the executive arm of government apart from statutory authority. The circumstances in which legislative authority is required for executive action are limited to occasions involving taxation or appropriation, and the reality of modern parliamentary practice suggests that the exercise of this control by the Legislature in the case of appropriations is ineffective and insignificant.

On the interpretation of one judge, Parliament's power of appropriation is in any case unlimited, and the only constitutional limitations upon the scope of the spending power 'are those arising from constitutional prohibitions such as those in sections 92, 116 and 117'.[3] This view of the spending power or of executive power generally does not, however, enjoy general acceptance and executive action must be limited primarily to areas in which the Legislature is competent. Even so, this primary limitation is relaxed to the extent allowed by the doctrine of powers inherent in the fact of nationhood and by the indirect effect of the interpretation accorded to incidental power.

3. DELEGATED LEGISLATION

One of the most important sources of executive power is derived from the authority delegated to the Executive by Parliament. Through the exercise of this authority, the Executive is able to formulate policy directly in large areas of governmental activity and to implement this policy in accordance with the terms it has itself formulated. The whole process of policy formulation and implementation is carried out largely outside the sphere of parliamentary influence. As a result of the extent and importance of delegated legislation, trenchant criticism of the practice of delegating power has been aroused in various quarters,[4] the most strongly voiced criticisms expressing the fear that Parliament has ceased to be the fulcrum of power in our system of government and has become a mere instrument of the Executive.

Despite the prevalence of criticism, the practice of delegating legislative power to the Executive has been pursued with vigour by the Legislature. The practice of delegation embodies a number of advantages which reflect the necessity for its continuation and which may be summarized as follows:[5]

(1) It relieves pressure on parliamentary time and the withdrawal of procedural matters from Parliament's sphere of responsibility leaves more time for the consideration of essential matters.

(2) It enables matters of a technical nature to be dealt with by those expert in the relevant area.

[3] *Ibid.* 187 *per* Murphy J.

[4] See Hewart, *loc. cit.* and Allen, *Bureaucracy Triumphant* (1931) and *Law and Orders* (3rd ed. 1965).

[5] See generally United Kingdom, *Report of the Committee on Ministers' Powers* (1932) *Cmd* 4060, 51-3.

(3) It facilitates the rapid utilization of experience in areas involving highly innovative or experimental legislation. If all policy is enshrined in the Act, amendments even of the most uncontroversial nature will require the passage of another Act through all the parliamentary stages in both Houses.[6]

(4) It is the most effective method of accommodating emergencies when quick response to new developments is required.

The main criticisms which the practice of delegating power has provoked are as follows:

(1) The executive arm of government is directly concerned with the formulation of legislation and thus plays a considerable role in the creation of its own powers. Such a concentration of power can be undesirable.

(2) Acts may be passed merely in skeleton form, and containing only the barest general principles, leaving the formulation and implementation of practical principles to the delegate of the power.

(3) The facilities afforded to Parliament to scrutinize and control the exercise of powers delegated to Ministers are inadequate.

(4) Powers are often loosely defined, so that the area intended to be covered cannot be clearly ascertained.

Each of these criticisms is important, but they are mainly directed against the volume and character of delegated legislation rather than against the practice of delegation itself.

After an examination of the whole area of governmental practice in relation to delegated legislation, the British Committee on Ministers' Powers concluded in 1932 that the delegation of power to the Executive was inevitable, legitimate, and constitutionally desirable in certain circumstances.[7] The Committee stated, however, that if Parliament was to keep an effective control over Ministers and their Departments in the exercise of their delegated powers, certain safeguards must be observed.[8] These safeguards related in the first place to the nature of the power delegated and in this regard it was noted that the power should be clearly defined in the statute by which it is delegated, and should not include power to legislate on matters of principle but should be confined to matters of detail

[6] See Plato, *Laws* Book VI, 772B:

In all matters involving a mass of petty detail, the law-giver must leave gaps; rules and up-to-date amendments must be made from year to year by persons who have constant experience from year to year in these things and who are taught by practice until a satisfactory code is finally agreed upon to regulate such proceedings.

[7] United Kingdom, *Report of the Committee on Ministers' Powers* (1932) *Cmd* 4060, 5, 51.

[8] See generally United Kingdom, *Report of the Committee on Ministers' Powers* (1932) *Cmd* 4060, 58-9.

or administration.[9] Furthermore, the delegated authority should not include power to impose taxation or to amend Acts of Parliament. The second type of safeguard which the Committee considered ought to be observed related to the supervision which Parliament exercised over the execution of the power that had been delegated. In this connection the Committee recommended the establishment of Standing Committees of both Houses to scrutinize legislation in relation to the nature of the powers delegated therein, and to review delegated legislation in relation to its content and character.

In order to determine the scope and nature of delegated power exercised by the Federal Government in Australia today, therefore, both the nature of the powers which it is customary to delegate and the degree of supervision exercised by Parliament over the execution of those powers by the Executive should be examined.

A. *Nature of Powers Delegated*

A review of the nature of powers delegated by Parliament to the Executive indicates that, contrary to the admonitions of the Committee on Ministers' Powers, the powers delegated are neither clearly defined nor confined to matters of detail. The practice of including in every statute in which a regulation-making power is conferred on the Executive the following general formula demonstrates this proposition:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

A salient example of the delegation of wide powers to the Executive, including the power to legislate with respect to matters of substance or principle, is contained in the Environment Protection (Impact of Proposals) Act 1974-1975. In addition to a general regulation-making power,[10] the Act confers on the Governor-General power to approve, by order, 'administrative procedures'[11] for the purpose of achieving the object of the Act (which is basically the consideration of matters affecting the environment in areas of governmental activity). The approved procedures may provide for the determination of the content, nature, occasion, public availability and examination of environmental impact statements.[12] Thus, the Legislature has laid down the broad principle of the desirability

[9] This is a commonly voiced principle. See, *e.g.* the evidence given by R. G. Menzies to the Senate Select Committee on Standing Committees in 1929:

> In my opinion, legislation by Parliament should deal with principles and fundamental rules, and the details of administration should be left to the executive. I have no great fear of executive legislation provided those principles are observed.

Australia, *Senate Journals* (1929-31) 535, 561.

[10] Section 25 of the Act.

[11] Section 6.

[12] *Ibid.*

of environmental impact statements and has delegated to the Executive the responsibility for not only implementing this principle but also determining the whole nature and *modus operandi* of the principle.

The practice of delegating wide powers was the subject of litigation in *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan*,[13] in which the validity of a statutory provision was challenged upon the ground that it was an attempt to grant to the Executive a portion of the legislative power vested by the Constitution in the Parliament, such a grant being inconsistent with the distribution made by the Constitution of legislative, executive and judicial powers. The provision in question was section 3 of the Transport Workers Act 1928-1929 which conferred a power upon the Governor-General of making regulations not inconsistent that Act with respect to the employment of transport workers. The nature of the power delegated was extensive, as indicated by Dixon J.:

> It gives the Governor-General in Council a complete, although, of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden.[14]

Despite the width of the power delegated to the Governor-General in Council, however, the High Court held the legislative provision effecting the delegation to be valid. It was held that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law.

Two of the judges, Dixon and Evatt JJ., expressed the view that Parliament's power to delegate legislative authority was not unlimited. Each judge considered that a limitation was to be found in the requirement that any law of the Commonwealth Parliament must be a law *with respect to* a particular head or heads of legislative power vested by the Constitution in the Commonwealth. Thus Dixon J. observed that:

> There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.[15]

Evatt J. noted that Parliament was not competent to abdicate its powers of legislation:

> . . . not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise

[13] *Dignan's* case (1931) 46 C.L.R. 73.
[14] *Ibid.* 100.
[15] *Ibid.* 101.

> legislative power . . . but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass (this) test. . . .[16]

It would seem, therefore, that it is common practice for Parliament to delegate wide powers to the Executive, including power to legislate on matters of substance or principle. There is a constitutional requirement that the subject matter is respect of which the Executive is empowered to make laws must fall within a head or heads of Commonwealth power and the description of the subject matter must be sufficiently certain to enable this characterization to be made. With the exception of this limitation, there would appear to be no other constitutional restrictions on the capacity of the Parliament to delegate legislative powers to the Executive.

In *Dignan's* case[17] the subordinate nature of all delegated legislation was considered by both Dixon J. and Evatt J.[18] as one of the reasons for the legitimacy of the practice of delegation. Delegated legislation depends for its efficacy, not only on the enactment, but also upon the continuing operation of the statute by which it is so authorized. Thus the statute 'is conceived to be the source of obligation and the expression of the continuing will of the Legislature'.[19] This view implies knowledge on the part of the Parliament of the use which is being made of the delegated authority, and in order to assess the reality of the view it is necessary therefore to examine the degree of parliamentary supervision which is exercised over the execution of delegated power.

B. *Parliamentary Supervision of Delegated Legislation*

The principle that all delegated legislation should be subject to parliamentary scrutiny is embodied in section 48 of the Commonwealth Acts Interpretation Act 1901-1973 which provides that regulations must be laid before each House of Parliament within 15 sittings days of that House after the making of the regulations. If either House passes a resolution (of which notice has been given at any time within 15 sitting days after the laying of the regulations) disallowing any of the regulations, the regulations so disallowed shall cease to have effect.

The requirement that delegated legislation must be laid before each House theoretically affords members the opportunity for voicing criticisms through the use of question time, adjournment debates and other forms of the House. However, as Sir John Peden remarked to the Senate Select Committee on Standing Committees of 1929-1930:

[16] *Ibid.* 121.
[17] *Ibid.*
[18] *Ibid.* 102, 118.
[19] *Ibid.* 102 *per* Dixon J.

Members do not, generally, study regulations, and regulations are criticized only occasionally, when they pinch someone who protests to his parliamentary representative. In the absence of that pinch, regulations go through as a matter of course.[20]

The reality of the situation perceived in this observation led the Select Committee to recommend the establishment of a scrutiny committee to which all regulations laid on the Table of the Senate should be referred. The Select Committee considered that the work of the proposed scrutiny committee should include the examination of regulations to ascertain:

(1) that they are in accord with the Statute;
(2) that they do not trespass unduly on personal rights and liberties;
(3) that they do not make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
(4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.[21]

In 1932 the Senate established a Standing Committee on Regulations and Ordinances to perform these functions.

However, despite the provision of an opportunity for parliamentary review and the establishment of machinery to ensure that that opportunity is utilized, it seems reasonable to conclude that, as a matter of practice, the Executive is able to exercise its delegated powers with a minimum of supervision by the Parliament and that important areas of policy can be implemented by the Executive exercising delegated authority without any parliamentary interference. This situation is due in the first place to the lack of concern which it has been noted that Australian Parliamentarians have expressed in relation to the practice of delegation. Two commentators have observed that 'it might fairly be said that Australian Parliamentarians have shown in the past an almost complete lack of interest in controlling delegated legislation'.[22] The suggestion has been made that, to provoke the attention of members, an affirmative resolution approving regulations should be required whenever the grant of delegated power permits regulations to be made on matters of policy or in circumstances where fundamental rights are likely to be affected.[23]

Furthermore, the Senate Standing Committee which has been established to avoid complete parliamentary nescience of the exercise of delegated authority suffers from one constitutive weakness. In its report, recommending the establishment of the Standing Committee, the Senate Select Committee noted that 'as a general rule, it should be recognized that the Standing Committee would lose prestige if it set itself up as a critic of governmental policy or departmental practice'.[24] This recommendation was subsequently carried into effect by the Standing Committee which stated in its Fourth Report:

[20] Australia, Senate Journals (1929-31) 535, 580.
[21] Australia, Senate Journals (1929-31) 535, 544-5.
[22] Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) 113.
[23] *Ibid.*
[24] Australia, Senate Journals (1929-31) 535, 545.

> . . . it was inevitable that many regulations would come before the Committee which, while quite correct in form, gave effect to some item of Government policy of a controversial nature. After careful consideration of this aspect, the Committee agreed that questions involving Government policy in regulations . . . fell outside the scope of the Committee. This decision necessarily limited the Committee's activities very considerably.[25]

The Standing Committee has compensated for this limitation somewhat by the careful exercise of its authority to ensure that regulations are not concerned with matters which should more properly be the subject of enactment.[26] Nevertheless, considerable areas relating to the implementation of policy by the Executive are beyond the scope of the Committee's functions and thus beyond the effective review of Parliament.

Finally, it should be noted that (unless a contrary intention appears in the empowering Act) regulations take effect from the date of notification in the *Government Gazette,* or such other date as may be specified in the regulations. This date may occur when Parliament is in recess and policy can thus be implemented by the Executive without opportunity for disallowance by either House until the resumption of Parliament. Crisp notes the following incident in this connection:

> In 1936 Parliament had just completed its sittings when regulations were issued implementing what became known as the 'Trade Diversion Policy', which seriously injured commercial relations with the United States and Japan. This measure roused strong controversy, but Parliament was not called into session for almost four months and hence there was no opportunity for either House of Parliament, had it been so minded, to disallow these regulations in the early days of their currency. In such circumstances four months may be a crucial gap.[27]

C. *Conclusion*

It has been conceded in most quarters that without delegated legislation 'effective government would be impossible'.[28] However, the unsystematic growth of the practice has produced a creature of uncertain dimensions. In Australia, it is clear that the practice of delegating legislative powers is prevalent and the nature of the powers delegated has been such as to leave wide discretions in the hands of the Executive in relation to the formulation and implementation of policy. The High Court has found no constitutional objection to this practice and while the Parliament has proved to be a fertile progenitor of delegated powers it has also been a neglectful parent.

4. AGENCIES EXERCISING EXECUTIVE AUTHORITY — THE DEPARTMENT

The main agency exercising executive authority is the government department constituted in accordance with section 64 of the Constitution

[25] Australia, Fourth Report of the Senate Standing Committee on Regulations and Ordinances, adopted by the Senate on 3 November 1938 *Senate Journals* (1937-40) 301.

[26] See in this connection, Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) 32-42.

[27] Crisp, *Australian National Government* (2nd ed. 1970) 425.

[28] *Dignan's* case (1931) 46 C.L.R. 73, 117 *per* Evatt J.

under the administration of a Minister of State for the Commonwealth. Section 64 provides that the Governor-General may appoint Ministers to administer 'such departments of State of the Commonwealth as the Governor-General in Council may establish'.

The functions which may be performed by the department are, of course, confined to the areas of executive competence which it has been indicated are enjoyed by the Commonwealth. There is, however, one departmental practice which can have the effect of extending the powers of the Commonwealth and enabling policy to be implemented in areas outside the sphere of the Commonwealth's theoretical legislative and executive competence. This practice has been termed 'administrative quasi legislation'[29] and consists in the plethora of circulars, notes or papers issued by government departments which enunciate the policies pursuant to which the departments propose to exercise discretions vested in them in specified fields. Examples of quasi-legislation of an uncontroversial nature are the rulings of the Commissioner of Taxation or the internal departmental instructions issued to officers of the Taxation Department. The exercise of the power[30] of the Australian Broadcasting Control Board to prescribe programme standards provides another example.

Quasi legislation raises special problems. Clearly much of it is concerned with trivial and insignificant topics, but much is also concerned with important matters and the relevant circular or paper can exercise a legislative effect in its area of influence. The practice of quasi legislation is almost wholly unregulated and does not conform to any set patterns. Thus Streatfeild J. commented in *Patchett v. Leathem*[31] in relation to departmental circulars concerning house requisitioning in England:

> Whereas ordinary legislation, by passing through both Houses of Parliament, or, at least lying on the Table of both Houses, is thus twice blessed, this type of so called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable right of property may be affected; thirdly, it is a jumble of provisions, legislative, administrative or directive in character, and sometimes difficult to disentangle one from the other; and fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council, but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction.[32]

An example of the way in which policies which are perhaps beyond the range of legitimate Commonwealth activity may be implemented though quasi legislation is provided in the field of foreign ownership of Australian real estate. Government policy in this area has been established not by legislation but by Ministerial statements. The first statement was made on 20th March 1973[33] by the then Treasurer, Mr Crean. This was superseded in a comprehensive statement by the then Prime Minister,

[29] Megarry, note under this title (1944) 60 *Law Quarterly Review* 125.
[30] Broadcasting and Television Act 1942-74 (Cth), s. 99.
[31] (1949) 65 T.L.R. 69.
[32] *Ibid.* 70.
[33] *Australian Government Digest* I, 423.

Mr Whitlam on 24th September 1975.[34] The then Treasurer, Mr Lynch enunciated the policy of the Fraser Liberal Government in a statement to the House of Representatives — on 1st April 1976 and this policy direction now supersedes those of the Whitlam Labor Governments. In each of these statements it was made clear that the Reserve Bank's power to grant exchange control approval under the Banking (Foreign Exchange) Regulations would be used as an instrument for the effectuation of government policy relating to foreign ownership of real estate.[35] These Regulations were made under section 39 of the Banking Act which empowers the Governor-General to make regulations essentially for the purpose of the control of *foreign exchange.*

No doubt many aspects of the control of foreign investment in relation to real estate are within Commonwealth powers, but the policy enunciated in the statements of Mr Whitlam and Mr Lynch is so widely expressed that it would extend, for example, to the control of a series of purchases of real estate by a company incorporated in a State of Australia in which 15% or more of the equity is owned by a foreign shareholder or shareholders. Such a transaction would seem to lie outside the sphere of Commonwealth influence but government policy requires a company in these circumstances to submit a foreign investment proposal for approval to the Foreign Investment Review Board (formerly the Foreign Investment Advisory Committee), a body established by administrative action. Furthermore the policy will be enforced by use of the Banking (Foreign Exchange) Regulations, and thus, unless the proposal is approved by the Board, Reserve Bank approval for *any* of that company's foreign exchange transactions may be refused. Thus, the transaction requiring Reserve Bank approval may not even relate to the investment proposal but may involve, for example, a dividend remission to the overseas shareholder. It is possible that the Bank's approval may be withheld on all transactions until government policy in the area of foreign investment in real estate is complied with.

A perusal of Mr Whitlam's or Mr Lynch's statement will indicate the extensive nature of the policy which is enunciated. Many areas covered by the statement would seem to be beyond Commonwealth powers but the policy is nevertheless implemented though the exercise of various discretions vested in agencies of the Executive Government. Other

[34] *Australian Government Weekly Digest* I, 835-44.

[35] *Ibid.* 837 where Mr Whitlam stated:

> Of course, where any aspect of a foreign investment proposal requires approval under the Banking (Foreign Exchange) Regulations, the Reserve Bank will continue its practice of withholding such approval until the Government has indicated that the proposal is not against the national interest.

See also Press Release No. 62 of Mr Lynch, issued on 1st April 1976, in which he stated '. . . where Reserve Bank approvals are required in respect of a proposal falling within the ambit of Foreign Investment Policy, the Bank will continue its practice of withholding approval until the Government has indicated that the proposal is not inconsistent with the policy'.

examples besides the one mentioned could be easily formulated to demonstrate that the policy extends to areas outside Commonwealth competence. But the implementation of such policy by these means could only be impugned on two grounds. First, it could be challenged on the basis of the administrative law doctrine that where an agency has a discretion to make a decision affecting a person's right, it must not take into account irrelevant considerations. Considerations concerning the ownership of real estate would seem to be irrelevant to the exercise of a power relating to matters of currency and foreign exchange. Secondly, the implementation of the policy could be challenged on the basis of executive action in a sphere beyond the competence of the Commonwealth. In relation to this ground, however, considerable difficulty would be involved in formulating the grounds of relief and, indeed, in adducing sufficient evidence of ultra vires executive action since the deliberations of the interdepartmental committee would presumably be unavailable.

Quasi legislation, therefore, represents a way in which the Commonwealth can implement policies which it might otherwise not have the means to achieve. The efficacy of this practice is enhanced by the terms of section 64 which suggest that there is no restriction on the power of the Government to establish new departments. It would seem that departments could be created which bear only a tenuous relationship to the heads of Commonwealth power, the existence of the departments being justified, if not by the express terms of section 64, then by the powers inherent in the fact of nationhood.[36] Commonwealth practice seems to confirm the extent of the power to create new departments — *e.g.* the Department of the Environment. If the Government is able to create new departments subject only to the restriction of political expedience, then the use of quasi legislation by way of policy statements and circulars could significantly increase the sphere of Commonwealth activity. Even if no means for the enforcement of the relevant policy were available, the mere existence of the policy would exert some influence.

5. AGENCIES EXERCISING EXECUTIVE AUTHORITY — STATUTORY CORPORATIONS

The major agency exercising executive authority outside the government department is the statutory corporation. The statutory corporation is a body created by statute possessing a considerable, though varying, degree of independence from Ministerial control, and exercising functions primarily for the public benefit. The organization of, and activities conducted by, statutory corporations very significantly and it has been said that:

> Like flowers in spring they have grown as variously and profusely and with as little regard for conventional patterns. They are even less susceptible of orderly

[36] See the judgment of Barwick C.J. in the *AAP* case at 164-5.

classification: with quasi-governmental bodies, a new species often suggests a new genus.[37]

In the development of the theory and practice relating to statutory corporations two competing principles have striven for mastery: on the one hand, the principle of independence from political control or interference has asserted itself in the claim for the need to develop long-term stable policies in certain areas; on the other hand, the object of executive accountability to Parliament has demanded the maintenance of tight reins on the activities of these bodies. The dominance of one principle over the other has depended to a large extent on the type of activities in which the corporation is engaged, (thus the Australian Broadcasting Commission has usually enjoyed well-deserved independence), and on the strength of personality and resolution of the relevant Minister and officers of the corporation.

Professor Sawer has shown that the statutory corporation was used at an early date 'as the means by which radical democrats in Australian politics were able to carry a programme of active government participation in national development against the opposition of the older conservative parties whose chief propaganda weapon was the claim that such policies led to corruption'.[38] While Sawer states that from these origins the statutory corporation became an aspect of conservative politics,[39] it now seems that the wheel has turned the full circle. The legislative history of the Whitlam Labor Governments indicates that statutory corporations are once again being used as instruments of progressive policies — see, for example, the Social Welfare Commission Act, 1973, and the following Bills which were introduced into the House in 1975: Purchasing Commission Bill, Australian Government Insurance Corporation Bill, and Australian Overseas Trade Corporation Bill.

The use of statutory corporations raises two main issues in the constitutional context — first, the degree of independence which these bodies may enjoy without abrogating the principle of responsible government implicit in the Constitution; secondly, the extent, if any, of theoretical or practical additions to Commonwealth competence effected by the use of statutory corporations.

A. *Independence of Statutory Corporations*

In 1955 the Commonwealth Solicitor-General gave to the Parliamentary Public Accounts Committee the following opinion concerning the constitutional practice relating to statutory corporations. It was stated:

[37] Street, 'Quasi-Government Bodies since 1918', in Campion *(et al.), British Government since 1918* (1950) 160.

[38] Sawer, 'The Public Corporation in Australia', in Friedmann (ed.), *The Public Corporation* (1954) 13.

[39] *Ibid.* 14.

(i) that the establishment by Parliament of a public corporation rather than a Department of State as the chosen instrument for the conduct of a business undertaking implies an intention that the corporation should enjoy a substantial measure of freedom from political direction and control;
(ii) that Ministerial control over the public corporation should be restricted to matters of general policy and principle and should not extend to the details of management;
(iii) that in order to promote business efficiency and flexibility it is necessary to accept some derogation from the complete measure of Ministerial accountability to Parliament which is insisted on, in the constitutional systems of the British Commonwealth, in relation to the Department of State.[40]

While this opinion suggests that there are some conventions which guide conduct in this area, it would seem more correct to say that convention in this area is determined by the practice of government than to say that the practice of government is determined by any set or specified conventions. It is necessary, therefore, to examine the type of controls which are in practice usually imposed on statutory corporations, bearing in mind that the incidence and nature of these controls will differ in relation to each corporation.

Control of the activities of statutory corporations can be maintained indirectly by the government of the day through the exercise of the power to make appointments of senior staff to the corporations. This power is perhaps most effectively utilized at the time of the establishment of the corporation when its use may facilitate the institution of long-term policies having an orientation which is acceptable to that government. The power of appointment is less influential when the government of the day is charged with the task of merely filling a vacancy and it is doubtful that policy-orientation could be affected significantly in this manner.

More direct controls over the activities of statutory corporations are usually contained in the empowering Act. Common provisions in this regard require:

— ministerial approval before contracts exceeding certain amounts may be entered into;
— auditing of the corporation's accounts by the Auditor-General;
— the submission of annual reports and financial statements to the Minister for laying before Parliament.

Financial controls are also maintained through restrictions on the borrowing powers of the corporation. In addition, the capital of the corporation is usually defined as being the value of the assets transferred to the corporation by Australia, and the Minister is often given discretion to determine if, when and how such capital should be repaid.

Parliamentary supervision of statutory corporations is exercised through debates, questions to the responsible Minister, the scrutiny of the Public Accounts Committee, and through the limited control provided by the appropriations power.

[40] Australia, *21st and 22nd Reports of the Commonwealth Parliamentary Public Accounts Committee* (1955) 84.

The question of the desirability of ministerial control is most accentuated in the area of policy formulation. However, there do not seem to be any norms from which to draw firm conclusions about the extent of ministerial interference. In areas which are essentially non-partisan, the corporation is usually given a free rein within the limitations of its sphere of competence. In other areas there has been an increasing tendency to make provision for policy direction in the empowering Act. Thus the Australian Film Commission Act 1975 provides in section 8(1) that the 'Minister may, by writing under his hand, give directions to the Commission with respect to the exercise of its powers or the performance of its functions'. A slightly different approach is adopted in the Australian Industry Development Corporation Act 1970-1975 (Cth). Instead of making provision for ministerial direction, the Act requires the corporation to take government policy into account in the performance of its functions. Section 8(1) of the Act is in the following terms:

> In the performance of its functions the Corporation shall have regard to the current monetary policy of the Australian Government and to the policies of the Australian Government in relation to trade practices, the environment, industrial relations urban and regional development and the efficiency of industry.

The practice relating to statutory corporations is marked by its diversity and lack of uniformity. Besides the adoption of a method of operation founded on business principles, the essential achievement of the device of the statutory corporation is the removal of an area of governmental activity from the sphere of political expedience. Such a removal effect reduces public accountability for the relevant activity, and in so doing, it would seem desirable that political influence and interference be kept to a necessary minimum, or else the justification for the freedom from the rigours of the ordinary governmental processes is invalidated.

B. *Extensions to Commonwealth Competence*

A statutory corporation established under Commonwealth legislation can only be invested with powers and functions in respect of which the Commonwealth is itself competent. The area of Commonwealth competence is primarily delimited by the specific heads of power contained in sections 51 and 52 of the Constitution, but, as has been discussed,[41] this area has been extended by the High Court's recognition of the existence of powers inherent in the fact of nationhood. These powers are particularly apposite in the case of statutory corporations and would support the establishment of corporations invested with functions beyond the immediate sphere of influence envisaged by the specific heads of power in sections 51 and 52.

[41] *Supra* 202-4.

The relevance of the powers inherent in the fact of nationhood arises out of the nature of the functions which are usually given to statutory corporations. These are often calculated to encourage the development of new areas of governmental activity, to investigate the feasibility of various areas of commerce or business, to experiment with new forms of policy implementation or co-ordination, or to engage in research into various matters. These are all properly able to be characterized as 'the functions of the central government of a country in the world of to-day'.[42] In this connection Barwick C.J. noted in the *AAP* case that:

> The extent of powers which are inherent in the fact of nationhood and of international personality has not been fully explored. . . . One such power, for example, is the power to explore, whether it be of foreign lands or seas or in areas of scientific knowledge or technology.[43]

Much recent legislation establishing statutory corporations, which does not seemingly draw validity from any specific head of power, can be supported on the basis of the implied powers of nationhood. Into this category would fit the Criminology Research Act 1971 and the Australian Film Commission Act 1975.

Besides the extension of Commonwealth powers in this way, which rests on a valid theoretical basis, the use of statutory corporations also gives rise to an extension of Commonwealth competence as a matter of practice for another reason. This accretion to Commonwealth power results from the wide and vague terminology used to describe the functions of corporations. If the language is construed liberally the functions of many corporations would include activities which are *ultra vires* the Commonwealth. If the Act were challenged on that basis, however, there would be sufficient connection with the heads of power to justify the application of section 15A of the Acts Interpretation Act 1901-1973[44] and the reading down of the relevant provisions. It follows that the Board of the corporation could give a liberal construction to its functions and powers and extend its activities into the area beyond the scope of Commonwealth competence. Any challenge to the constitutionality of the activities so undertaken would have to be on the basis of invalid executive action and, as has been pointed out,[45] appropriate relief would be difficult for the Court to frame in these circumstances and, even if properly framed, would not invalidate the whole structure of the corporations and its operations.

C. *Conclusion*

The device of the statutory corporation, therefore, represents a flexible instrument for the exercise of executive authority. The traditional doctrine

[42] The *Pharmaceutical Benefits* case (1945) 71 C.L.R. 237, 269 *per* Dixon J.

[43] (1976) 50 A.L.J.R. 157, 164-5.

[44] 'Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.'

[45] *Supra* 201.

of ministerial accountability to Parliament for executive action is modified by its use and, in so far as the corporation enjoys substantial autonomy, this modification is desirable. However, where the corporation is a mere tool of the government of the day, its existence may provide a convenient excuse for the implementation of policy with a minimum of interference from Parliament and the least possible accountability to the public.

The use of statutory corporations also provides a convenient method for the exercise of the implied powers of nationhood and the exertion of Commonwealth influence in new areas of governmental action. On a theoretical and practical level, the specific heads of power are extended in this way.

6. CONCLUSION

It is clear from this survey that the exercise of executive power is an effective means for the implementation of governmental policy. It is also clear that the areas of influence available to the Executive in the exercise of its power apart from statutory authority, as well as in the exercise of its delegated power, are extensive and reflect the needs of a national community more adequately than does the subject matter of the specific heads of power contained in sections 51 and 52 of the Constitution.

The Constitution is perhaps purposely vague in the description of the nature and content of executive power. The meagre description in section 61 of an executive power which 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth' is barely adequate to accommodate the vast range of activities, functions and services comprehended within the generic term 'executive' in modern government. Isaacs J. pronounced in 1922 that:[46]

> It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter.

The embryonic growth of a doctrine which may fulfil the dictates of this duty can be detected in the recognition of the existence of powers inherent in the fact of nationhood. If the doctrine is ultimately accepted in the form expounded by Jacobs J. in the *AAP* case, there is a hope that Australian society will not be administered on the basis of a division of powers representative of remote and long-past social conditions, but will be governed in a manner reflective of present needs and requirements.

In the evolution of any new system or doctrine opposition is encountered which has as its motivating force aversion to change. The wasteful nature of such opposition is readily apparent. Instead of adopting reactionary attitudes based on views that given forms or structures are

[46] The *Wooltops* case (1922) 31 C.L.R. 421, 438-9.

sacrosanct or timeless, energy could be directed at seeking to incorporate the value postulates on which the old forms and structures were based into the new forms and structures which social conditions have produced. Thus many lament the waning relevance of Parliament in the governmental processes and view with suspicion what appears to them to be the increasing power grabbed by a monolithic bureaucracy. Instead of seeking to reverse the trend and re-concentrate power in the Legislature their attention would be better directed at the development of modes of executive accountability since accountability to the public is the fundamental value postulate on which the institution of Parliament is founded.