

MINISTERIAL ADVISERS AND THE AUSTRALIAN CONSTITUTION

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*Ministerial advisers are relatively new institutional actors within the Commonwealth Executive. Ministerial advisers were not envisaged at federation and pose a challenge to constitutional theory, which largely focuses on the position of public servants and Ministers. This article analyses the position of ministerial advisers within the constitutional framework of the Australian Executive. It also considers the constitutional basis for the employment of ministerial advisers at the Commonwealth level, including the appropriation of their salaries and the power to contract for their employment. In doing so, it illustrates the practical operation of the tests in the cases of *Williams v Commonwealth* and *Pape v Commissioner of Taxation*. The author argues that ministerial advisers have become integrated within the constitutional framework of the Executive such that their activities fall within the ordinary and well-recognised functions of government as they play an integral role in assisting in the administration of a government department.*

Key Words: ministerial advisers, ministerial staff, constitutionality, appropriations, executive power

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I INTRODUCTION

[Ministerial advisers] operate in an area which strict constitutional theory does not recognize as existing.¹

Ministerial advisers, personally appointed by Ministers and working out of their private offices, have become an integral part of the political landscape in the last 30 years. Ministerial advisers at the Commonwealth level are subject to legislation concerning their employment² as well as a Code of Conduct.³ Traditionally ministerial advisers are seen to be mere emanations of their Minister and therefore accountable to their Minister personally, while the Ministers are accountable to Parliament.⁴ Although ministerial advisers are personally employed by Ministers in their private offices, they perform public functions, including advising on public policy, media, political, parliamentary management and party management matters.⁵ A Commonwealth Senate Select Committee found that ‘it can no longer be assumed that advisers act at the express direction of ministers and/or with their knowledge and consent. Increasingly, advisers are wielding executive power in their own right’.⁶

In 2012, Jennifer Westacott, the Chair of the Business Council of Australia launched a scathing attack on ministerial advisers, claiming that public servants were ‘undermined by political gatekeepers, often with little expertise and no accountability’.⁷ In 2013, Terry Moran, former Secretary of the Department of the Prime Minister and Cabinet, stated that ministerial advisers ‘are becoming a black hole of accountability within our parliamentary democracy’.⁸ This is a contemporary issue that is deserving of further analysis.

Ministerial advisers operate within the public sphere but have thus far largely been subject to private law accountability frameworks, that is dismissal through a

¹ J R Mallory, ‘The Minister’s Office Staff: An Unreformed Part of the Public Service’ (1967) 10(1) *Canadian Public Administration* 25.

² *Members of Parliament (Staff) Act 1984* (Cth).

³ Code of Conduct for Ministerial Staff <http://www.smos.gov.au/media/code_of_conduct.html>.

⁴ H Collins, ‘What shall we do with the Westminster Model?’ in R Smith and P Weller (eds), *Public Service Inquiries in Australia* (1978) 366. Senate Debates, 7 February 1995, 611.

⁵ *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [22].

⁶ Senate Select Committee, *A Certain Maritime Incident* (2002) Commonwealth of Australia xxxvii.

⁷ Jennifer Westacott, ‘A Servant to Short-Termism’, *The Australian* (Sydney), 21 September 2012 <<http://www.bca.com.au/Content/102032.aspx>>.

⁸ Ross Peake, ‘Call for Ministerial Advisers to be Personally Responsible’, *The Canberra Times* (Canberra), 16 April 2013 <<http://www.canberratimes.com.au/national/public-service/call-for-ministerial-advisers-to-be-personally-responsible-20130416-2hx41.html>>.

personal employment contract with the Minister.⁹ Given the phenomenon of ministerial advisers arose long after the *Constitution* was developed, their position in relation to the Executive is unclear, including accountability for their public actions and interactions with the public service.

Ministerial advisers were not envisaged at federation and pose a challenge to constitutional theory, which largely focuses on the position of public servants and Ministers. As RFI Smith stated:

No matter how skilled and tactful ministerial advisers are, their position cannot be accommodated readily in either theory or practice. They are a response to anomalies generated by problems of contemporary government and their position is itself anomalous. It is also one that is likely to persist.¹⁰

As ministerial advisers are now institutionalised as significant actors within our system of government, it is desirable to scrutinise the constitutional position of ministerial advisers. Although at federation there was no concept of ministerial advisers and they have not been incorporated into the constitutional framework, the question is whether ministerial advisers could nevertheless be said to be validly employed in accordance with the *Constitution*.

Previous research on ministerial advisers has been predominantly in the field of political science.¹¹ There has not been a comprehensive constitutional analysis of the position of ministerial advisers. This article will examine the constitutional position of ministerial advisers within the Australian Executive, as well as the constitutionality of employing ministerial advisers and appropriating their salaries from public money. It is desirable to have a deeper understanding of these constitutional issues because the salaries of ministerial advisers are appropriated from public funds, and it is thus important to precisely outline their position within the constitutional framework, as well as constitutional basis for their employment

⁹ Attempts to compel ministerial advisers to appear before parliamentary committees at the Commonwealth level have been resisted on the basis that there is a constitutional convention preventing their appearance. Yee-Fui Ng, 'Dispelling Myths about Conventions: Ministerial Advisers and Parliamentary Committees' (2016) 51(3) *Australian Journal of Political Science* 512.

¹⁰ RFI Smith, 'Appendix 1J: Ministerial Advisers' in Royal Commission on Australian Government Administration, *Appendixes to Report*, Volume One (1976) 305.

¹¹ Eg Anne Tierman, *Power without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (UNSW Press, 2007); James Walter, *The Ministers' Minds: Personal Advisers in National Government* (Oxford University Publishing, 1986); David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, 2nd ed, 2004); Patrick Weller, *Don't Tell the Prime Minister* (Scribe Publications, 2002). A recent monograph examines the legal regulation of ministerial advisers but does not cover constitutional issues. Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).

and the appropriation of their salaries. Further, the emergence of ministerial advisers and their institutionalisation are a phenomenon that post-dates the *Constitution*, so it is illuminating to consider on what basis the Commonwealth Parliament is able to legislate in relation to ministerial advisers. In addition, the cases of *Williams v Commonwealth* (“*Williams (No 1)*”) ¹² and *Pape v Commissioner of Taxation* (“*Pape*”) ¹³ throw new light on the Commonwealth Executive’s power of appropriation and expenditure under the *Constitution*, and it is desirable to examine the position of ministerial advisers following these cases. In conducting this examination, the exceptions to statutory authorisation in *Williams* and scope of appropriations after *Pape* is analysed in more detail. This in turn provides some illumination of the practical operation of the tests in *Williams* and *Pape*.

To analyse the constitutionality of the appropriation of salaries and employment of ministerial advisers, there are a few questions that will be explored. First, how do ministerial advisers fit within the constitutional framework of the Executive? Second, is the *Members of Parliament (Staff) Act 1984* (Cth) (‘*MOPS Act*’) constitutionally valid (Part II)? Third, how is the salary of ministerial advisers appropriated (Part III)?

The article finds that the salary of ministerial advisers is validly appropriated and the power to expend money on the salaries of ministerial advisers falls within the scope of the ordinary and well-recognised functions of government. Nevertheless, due to Professor Geoffrey Lindell’s ‘new activity’ test discussed below, statutory authorisation may still be required for the expenditure on the salaries of ministerial advisers. This is provided by the *MOPS Act*, which is valid as part of the incidental scope of the executive power under section 51(xxxix).

II POSITION OF MINISTERIAL ADVISERS WITHIN THE CONSTITUTIONAL FRAMEWORK

There is express recognition of both the positions of Ministers and the public servants employed by departments in sections 64 and 67 of the *Constitution*. However, there is no constitutional recognition of the position ministerial advisers. This is not surprising, as the position of ministerial advisers did not exist during federation and has evolved over the years.

¹² *Williams v Commonwealth* (2012) 248 CLR 156 (the School Chaplain’s Case).

¹³ (2009) 238 CLR 1.

Ministerial advisers occupy an uncertain position in the operation of the Executive arm of government as they are employed by Ministers personally and report directly to the Minister. It is unclear if their accountabilities extend beyond accountability to the Minister as part of a normal employment contract. Ministerial advisers clearly perform public functions that affect the governing of the nation. Nevertheless, they are external to the public service, with a separate employment framework.

The employment of ministerial advisers is a relatively new occurrence which started in the last 40 years which has only gradually become formalised and institutionalised through explicit recognition in legislation. This means that the *Constitution* will generally not reflect the position of ministerial advisers. Hence, to ascertain the constitutional position of ministerial advisers in relation to the Executive, it is necessary to analyse the constitutional provisions relating to public servants and public service departments and to assess whether the employment of ministerial advisers could potentially fall within the scope of these provisions. The main provisions dealing with public servants and departments are the public service transfer provisions (sections 69 and 52(ii)), section 67 and section 61 of the *Constitution*.

A *Transfer of State Public Service Departments to the Commonwealth*

1 *Section 69*

At the inception of the Commonwealth, certain public service departments, public servants and properties were transferred from the States to the Commonwealth Government under section 69 of the *Constitution*.¹⁴ Other departments not listed in section 69 but within the heads of legislative power of the Commonwealth also came under the control of the Commonwealth when the Commonwealth Government chose to authorise their transfer.¹⁵ Section 69 also contemplated the creation of new departments of service on the establishment of the Commonwealth, such as those attending to the Commonwealth Parliament and Commonwealth Executive.¹⁶

¹⁴ The departments listed are posts, telegraphs, and telephones, naval and military defence, lighthouses, lightships, beacons, and buoys, quarantine; and customs and of excise. *Australian Constitution* s 69.

¹⁵ For example, departments relating to astronomical and meteorological observations (section 51(vii)), census and statistics (section 51(xi)), currency and coinage (section 51(xii)), bankruptcy and insolvency (section 51(xvii)), copyrights, patents and trademarks (section 51(xviii)). The Commonwealth Parliament may also be able to assume control of other departments if the States referred their powers over the subject matter under section 51(xxxvii). John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus & Robertson, 1901) 817.

¹⁶ *Ibid* 818-9.

However, given that the various Commonwealth departments have now been transferred, sections 84 and 85 are spent provisions, except for transfers of departments when States refer their powers to the Commonwealth. This referral provision is not relevant to ministerial advisers as there are separate employment regimes for Commonwealth and State ministerial advisers.

2 Section 52(ii)

Section 52(ii) provides that the Commonwealth Parliament shall have exclusive power to make laws for the peace, order, and good government of the Commonwealth for ‘matters relating to any public service department transferred to the Commonwealth Executive Government’. The purpose of this section is to provide the Commonwealth Parliament with exclusive power to make laws with respect to departments transferred under section 69, to the exclusion of State Parliaments.¹⁷ Thus, the transferred departments were subject to the laws of the State until exclusive power was vested in the Commonwealth Government, but the State Parliaments had no power to alter or repeal these laws since federation.¹⁸ Quick and Garran note that this subsection would prevent a State from subsequently establishing a competing postal service or authorise a corporation to do so and make legislative mandates to those departments.¹⁹ This exclusive power would seem to continue in contemporary times such that States would not be able to set up competing departments to undermine the Commonwealth public service departments transferred under section 69 of the *Constitution*.

The question is whether ‘matters relating to any department’ could include the employment of ministerial advisers. This could mean that the Commonwealth had exclusive power over the employment and classification of ministerial advisers for departments transferred under section 69. Quick and Garran opine that ‘matters relating to any department’ would include all matters relating to the organisation, equipment, working and management of the department, the appointment, classification and dismissal of officers, and the general body of law relating to its conduct and administration, and would cover the machinery, procedure and regulation, ‘without which a public department would be impotent’.²⁰ However, it

¹⁷ Ibid 661.

¹⁸ Ibid 661.

¹⁹ Ibid 660.

²⁰ Ibid 660.

does not cover the whole of the principal and substantive law dealing with the matters controlled or controllable by the department.²¹

From Quick and Garran's list, it would seem that the 'matters relating to a department' largely relate to *internal* matters and operations within a department, rather than external mechanisms that assist in the communication between the department and the Minister, such as ministerial advisers. Ministerial advisers are a category of employees who sit outside the public service employment framework and are not an internal part of a department. Hence it does not appear that ministerial advisers would fall within the ambit of section 52(ii).

Section 52(ii) does not seem to be of relevance to ministerial advisers as it is intended to grant the Commonwealth exclusive power over transferred departments to the exclusion of States. There is no problem with this for ministerial advisers, as there is a strong separation between the employment framework of ministerial advisers at the Commonwealth and State level. As 'matters relating to any department' do not include the employment of ministerial advisers, ministerial advisers do not fall within the transfer provisions in the *Constitution*. At any rate, these provisions are largely obsolete.

B *Section 67*

Section 67 of the *Constitution* provides for the appointment by the Governor-General of civil servants as 'officers of the Commonwealth Executive Government' until this power is provided to another authority. Public servants are distinguished from the politicians by section 44 of the *Constitution*, which prohibits a person holding any office of profit under the Crown from being Members of Parliament.

The question is whether ministerial advisers can be considered to be civil servants appointed under section 67 of the *Constitution*. I argue that section 67 does not cover ministerial advisers. The constitutional convention debates show that the framers envisaged that civil servants would be apolitical and free from appointment based on political patronage. For instance, Wise, who sat on the Civil Service Commission in his colony, moved for an amendment to section 67 to add the words 'provided that no such officer shall be removed except for cause assigned'.²² His concern was that civil servants may be removed from office for purely political reasons to 'make room for political friends', which is akin to the

²¹ Ibid 660.

²² *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 916-7.

‘spoils’ system in the United States, where the spoils go to the victor.²³ In the spoils system, high and low official positions were used to reward friends and offer incentives to work for the political party.²⁴ This resulted in a system that was corrupt and inefficient.²⁵ Max Weber has criticised the American system for its low level of competence and endemic corruption:

[T]here were 300,000-400,000 party members, who could show no other qualification than their good service to the Party. This situation could not persist without enormous disadvantages; corruption and waste without any parallel which could only be tolerated by a country with at the time unlimited economic opportunities.²⁶

However, Sir George Turner optimistically said that the American situation is not likely to happen in Australia, as Australia has an Executive which is responsible to Parliament, and a Minister who tried to remove public servants for the purpose of ‘putting their friends in high places’ would be removed by Parliament.²⁷ Turner and Isaacs also pointed out that the amendment would not provide proper protection for public servants at any rate, as if the government ‘were so corrupt as to put their supporters in office they would take very good care to find some reason for making [public service] dismissals’.²⁸

These comments suggest that civil servants are meant to be apolitical and the employment of ministerial advisers based on political partisanship would be highly undesirable and beyond the scope of the provision.²⁹ Thus, ministerial advisers were not intended to be within the ambit of that provision at federation. Ministerial advisers are often employed for the express purpose of being partisan advisers and sometimes as a reward for their political support.³⁰ The framers would have

²³ *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 916-7.

²⁴ The spoils system in the United States is generally associated with the presidency of Andrew Jackson (1829-37) and Martin Van Buren (1837-41). See Edward C Page, *Political Authority and Bureaucratic Power: A Comparative Analysis* (2nd ed, Harvester Wheatsheaf, Hertfordshire, 1992) 27.

²⁵ For instance, Thomas Swartwout, an appointee of President Andrew Jackson to the Customs Service in New York, embezzled \$1.25 million, while his successor, Van Buren, stole \$200,000. *Ibid* 27.

²⁶ Max Weber, *Wirtschaft und Gesellschaft* (5th ed, Tübingen, JCB Mohr, 1972) 846.

²⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 917.

²⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 917-9.

²⁹ The framers’ intentions may be relevant ‘for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged’. *Cole v Whitfield* (1988) 165 CLR 360, 385. See generally Patrick Emerton, ‘Political Freedoms and Entitlements in the Australian Constitution: An Example of Referential Intentions Yielding Unintended Legal Consequences’ (2010) 38 *Federal Law Review* 169; Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1.

³⁰ Maria Maley, *Partisans at the Centre of Government: The Role of Ministerial Advisers in*

disapproved of the role of the partisan ministerial adviser and would not have imagined that it would be entrenched in the system of government to such an extent that it could be regarded as an ordinary and well-recognised function of government.

Since federation, some of the framers' fears have been borne out. For example, senior public servants are now in fixed term contracts and are able to be removed by the government without just cause as long as the principles of procedural fairness are complied with.³¹ This means that senior public servants are able to be removed for political purposes and replaced with political appointees by the government of the day.

Despite this, the traditional distinction between an apolitical public service and partisan ministerial advisers has been maintained in terms of employment provisions, with public servants and ministerial advisers being employed under separate legislative regimes. The impartiality of public servants is also emphasised in the Australian Public Service Values.³² Therefore, ministerial advisers are not covered by section 67 of the *Constitution* relating to civil servants.

C *Executive Power (Section 61)*

The constitutional framework for the Executive is set out in Chapter II of the *Constitution*. The source of executive power in Australia is section 61 of the *Constitution*, rather than the prerogative as in Britain.³³ 'The executive power of the Commonwealth', says section 61, 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.³⁴ French CJ in *Pape* elaborated on the content of executive power in section 61, which are:

- powers granted by statutes made under the *Constitution*;
- prerogative powers possessed by the Crown;
- non-prerogative 'capacities' of the Commonwealth that may be possessed by persons other than the Crown; and

the Keating government 1991-96 (PhD Thesis, Australian National University, 2002) 211-212; Benito Folino, *A Government of Advisers: The Role, Influence and Accountability of Ministerial Advisers in the New South Wales Political System* (PhD Thesis, University of New South Wales, 2010) 120-3.

³¹ *Barratt v Howard* (2000) 96 FCR 428, 451-452. Patrick Weller, *Australia's Mandarins: The Frank and the Fearless?* (Allen & Unwin, 2001) 33.

³² Australian Public Service Values < <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct/aps-values>>.

³³ *Pape* (2009) 238 CLR 1, 60 (French CJ), 83 [214], 89 [234] (Gummow, Crennan and Bell JJ); *Williams v Commonwealth* (2014) 309 ALR 41, 58-9 [76]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 61 [99] (Crennan J) ('*Williams No 2*'); *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, [42] (French CJ).

³⁴ *Australian Constitution* s 61.

- the capacity to engage in enterprises and activities that ‘serve the proper purposes of a national government’ (dubbed the ‘nationhood power’ by commentators).³⁵

Thus, Commonwealth executive power thus includes powers conferred on the Commonwealth by statute, as well as non-statutory powers, such as the prerogative powers, capacities of the Commonwealth and the nationhood power. The aspects of executive power most relevant to this article is the prerogative power and capacities of the Commonwealth that are shared with other legal persons.

1 Prerogative Power

It has long been recognised that the Crown has the power to employ and dismiss public servants at pleasure as part of the prerogative³⁶ or as an implied term of the employment contract.³⁷ This prerogative is likely to extend to ministerial advisers as well. This is because ministerial advisers are servants of the Crown, who are employed by the Commonwealth in an official capacity and are subject to the instructions of the Minister.³⁸ Thus, even without legislation, there would be the prerogative power to employ and dismiss ministerial advisers.

Nevertheless, the prerogative may be abrogated by legislation.³⁹ For instance, Australian courts have held that the Australian public service legislation supplanted any operation of the common law right to dismiss a Crown servant ‘at pleasure’ without any notice or reason.⁴⁰ The relationship between public servants and the executive is thus governed by the provisions of public service legislation.⁴¹ Invalid termination of employment could lead to damages for repudiation of the employment contract.⁴² Likewise, the *Members of Parliament (Staff) Act 1984* (Cth) (*‘MOPS Act’*) (discussed in Part II below) would supplant the prerogative power to employ and dismiss ministerial advisers.

³⁵ *Pape* (2009) 238 CLR 1, 59-63 (French CJ).

³⁶ *Parker v Miller* (SC(WA), Full Court, 8 May 1998, unreported, 29).

³⁷ *Shenton v Smith* [1895] AC 229, 234-5; *Ryder v Foley* (1906) 4 CLR 422, 435-6.

³⁸ *Sneddon v State of New South Wales* [2012] NSWCA 351, [204]-[207]. Ministerial advisers are also ‘officers of the Commonwealth’ under section 75(v) and part of ‘the Commonwealth’ under section 75(iii) of the *Constitution*. Ng, above n 11, 80-8.

³⁹ *A-G (UK) v De Keyser’s Royal Hotel Ltd* [1920] AC 508; *Ruddock v Vadarlis* (2001) 110 FCR 491, 501-4 [33]-[40] (Black CJ), 539-40 [181]-[182] (French J); *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27 (25 August 2010) [14] (French CJ), [94] (Gummow, Hayne, Heydon and Crennan JJ).

⁴⁰ *Bennett v Commonwealth* (1980) 44 FLR 446; *Coutts v Commonwealth* (1985) 157 CLR 91, 103.

⁴¹ *Director-General of Education v Suttlings* (1987) 162 CLR 427, 437-38.

⁴² *Lucy v Commonwealth* (1923) 33 CLR 229.

2 *Capacities of Commonwealth*

Another relevant facet of executive power is the capacity of the Commonwealth Executive to contract for the employment of ministerial advisers. The case of *Williams (No 1)*, affirmed by *Williams (No 2)*, resolved the question of whether the Commonwealth Executive had an unlimited power to contract or was constrained by the scope of the Commonwealth's legislative powers, and whether statutory authorisation was required for contracting and spending public money. The majority in *Williams (No 1)* held that the Commonwealth Executive requires statutory authorisation to enter into contracts and spend money; with French CJ and Crennan J flagging several exceptions to this principle.⁴³ This meant that the categories of cases in which the Commonwealth Executive may spend and contract without statutory authorisation is dramatically narrower than was previously understood by commentators. Nevertheless, French CJ and Crennan J flagged several exceptions to this principle. These exceptions have not been accepted by the majority of a court, but may provide good insight into how future jurisprudence may develop. French CJ and Crennan J held that the Commonwealth may contract and spend without statutory authority in the following areas:

- prerogative powers, e.g. the power to enter a treaty or wage war (Crennan J),⁴⁴
- ordinary and well-recognised functions of government: the power to carry out the administration of departments of State under section 64 of the *Constitution* (French CJ)⁴⁵ and in the ordinary course of administering a recognised part of the Commonwealth government (Crennan J);⁴⁶
- nationhood power, i.e. activities that may 'properly be characterised as deriving from the character and status of the Commonwealth as a national government' (French CJ);⁴⁷ and
- doing all things that are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect (French CJ).⁴⁸ However, this is not a real exception as, by definition, this aspect of incidental power is reliant on valid legislation. Thus, statutory authorisation is required.

⁴³ *Williams* (2012) 248 CLR 156, 179-80 [4] (French CJ), 239 [161] (Gummow and Bell JJ), 357-8 [542]-[544] (Crennan J); *Williams v Commonwealth* (2014) 309 ALR 41, 58-9 [76]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 61 [99] (Crennan J).

⁴⁴ *Ibid* 342 [484] (Crennan J).

⁴⁵ *Ibid* 191 [34] (French CJ).

⁴⁶ *Ibid* 342 [484] (Crennan J).

⁴⁷ *Ibid* 191 [34] (French CJ).

⁴⁸ *Ibid* 191 [34] (French CJ).

As prerogative power has already been discussed, the other significant exception to statutory authorisation is the ordinary and well-recognised function of government. This is because all explicitly recognised nationhood cases have been concerned with legislative power⁴⁹ and the incidental power exception actually requires legislation.

If the employment of ministerial advisers falls within the scope of the ordinary and well-recognised functions of government that flow from section 64 in administering Commonwealth departments, then the Commonwealth Executive is able to contract for their employment without statutory authorisation. The employment of public servants would clearly fall within the scope of the ordinary functions of government, given that public servants are explicitly recognised in the *Constitution* under section 67 and are an integral part of administering a department of State under section 64 of the *Constitution*. However, the position is less clear for the employment of ministerial advisers, who are less obviously linked to governmental departments.

As French CJ indicated, the content of what constitutes the ordinary and well-recognised functions of government could be illuminated by section 64 of the *Constitution*, which includes the power for the maintenance and administration of the Commonwealth public service.⁵⁰ Thus, section 64 sets out elements of executive power referred to in section 61.

The scope of section 64 is unclear and is said to vary according to governmental practice over the years. Nevertheless, case law does provide some illumination of the content of section 64 and what constitutes the ordinary and well-recognised functions of government. The plaintiff and defendant in *Williams (No 1)* agreed that executive power exercised as part of the ordinary course of administering a recognised part of the Commonwealth government or with the incidents of the ordinary and well-recognised functions of government would vary from time to time, but would include:

... the operation of the Parliament, and the servicing of the departments of State of the Commonwealth, the administration of which is referred to in s 64 of the *Constitution*, including the funding of activities in which the departments engage or consider engagement.⁵¹

⁴⁹ Eg *AAP Case* (1975) 134 CLR 338; *Davis* (1988) 166 CLR 79; *Pharmaceutical Benefits Case* (1945) 71 CLR 237; *Pape* (2009) 238 CLR 1.

⁵⁰ *Williams* (2012) 248 CLR 156, 191 [34] (French CJ); *Community and Public Sector Union v Woodward* (1997) 76 FCR 551.

⁵¹ *Williams* (2012) 248 CLR 156, 233 [139] (Gummow and Bell JJ).

Further examples of ordinary administration of government are given in *New South Wales v Bardolph* ('*Bardolph*'), which include entering into government advertising contracts, leasing premises and purchasing books in the library of the Attorney-General's Department.⁵²

French CJ, Hayne and Crennan JJ in *Williams (No 1)* distinguished *Bardolph*, as it was based on a unitary constitution (namely, that of New South Wales) that did not involve a relationship between the Commonwealth and State Executives; nor did it involve the relationship between executive power under section 61 and section 64 of the *Constitution*.⁵³ However, the High Court did not overrule *Bardolph* and in fact French CJ, Crennan and Kiefel JJ held, consistently with *Bardolph*, that Commonwealth executive power does extend to the power to carry out the ordinary administration of government.⁵⁴

In *Bardolph*, the High Court ruled that the advertising contracts for the Tourism Bureau were within the scope of the ordinary and well-recognised functions of government. From the judgments, a number of factors were relevant to what was considered to be an ordinary and well-recognised function of government: it is a part of government that has been around for a lengthy period (the Court did not define what timeline would constitute a sufficiently long period) (Rich, Evatt and Dixon JJ),⁵⁵ Parliament regularly appropriates funds for this purpose (Evatt and Dixon JJ),⁵⁶ and staff are employed whose ordinary and regular duties include performing the function (Starke, Evatt and Dixon JJ).⁵⁷

The formulation of 'ordinary and well-recognised functions of government' has been criticised by Professors Enid Campbell and Leslie Zines because it requires the courts to distinguish between the traditional functions of government compared to extraordinary governmental functions.⁵⁸ This is a line that is difficult

⁵² *New South Wales v Bardolph* (1934) 52 CLR 455.

⁵³ *Williams* (2012) 248 CLR 156, 214 [79] (French CJ), 256 [209] (Hayne J), 355 [532] (Crennan J).

⁵⁴ French CJ held that Commonwealth executive power included the administration of departments of State under section 64 of the *Constitution*, while Crennan J held that the Commonwealth executive had powers that derived from the capacities of the Commonwealth as a juristic person, such as capacities to enter a contract and spend money, when exercised in the ordinary course of administering a recognised part of the Commonwealth government, and Kiefel J held that Commonwealth executive power extended to the essential functions and administration of a constitutional government. *Williams* (2012) 248 CLR 156, 191 [34] (French CJ), 342 [484] (Crennan J), 370 [582] (Kiefel J).

⁵⁵ *Bardolph* (1934) 52 CLR 455, 462 (Rich J), 472 (Evatt J), 507 (Dixon J).

⁵⁶ *Ibid* 472 (Evatt J), 507 (Dixon J).

⁵⁷ *Ibid* 472 (Evatt J), 502-3 (Dixon J), 507 (Starke J).

⁵⁸ Enid Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 380-1.

to draw as it varies according to government practices and would create uncertainty for those who deal with the government. Consequently, it is uncertain how broadly this exception will be interpreted.

Another potential avenue for deciphering the content of the ‘ordinary and well-recognised functions of government’ is to consider how the expression ‘ordinary annual services of the government’ in sections 53 and 54 of the *Constitution* has been interpreted. However, sections 53 and 54 serve different constitutional purposes and are worded slightly differently; hence this may not be a perfect analogy.

The expression ‘ordinary annual services of the government’ refers to annual appropriations that are necessary for the continuing and settled operations of government, as opposed to major projects and new policies.⁵⁹ Section 54 of the *Constitution* states that a proposed law appropriating money for the ordinary annual services of the government can deal only with such appropriations, while section 53 provides that the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. There is thus an incentive for the government to adopt an expansive meaning of ‘ordinary annual services’ to avoid parliamentary scrutiny. However, in the Compact of 1965, which sets out the agreement between the government and Parliament, the categories that are not part of the ordinary annual services of government include:

- the construction of public works and buildings;
- the acquisition of sites and buildings;
- items of plant and equipment clearly definable as capital expenditure;
- grants to the States under section 96 of the *Constitution*; and
- new policies not authorised by special legislation.⁶⁰

The list of categories that constitute extraordinary services of government thus includes significant new projects, capital infrastructure and policies, as well as activities relating to the States.

An analogous test was proposed by Professor Geoffrey Lindell, who suggested that Crennan J’s judgment in *Williams (No 1)* can be seen to propose a ‘new activity’

⁵⁹ Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice* (13th ed, 2012) 369-73 <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>.

⁶⁰ Senate Resolution, 17 February 1977, J572; Parliamentary Papers 130/1976; Updated Senate Resolution 15 June 2011, J979. See Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice* (13th ed, 2012) 369-73 <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>.

test which can be utilised to identify what constitutes an extraordinary contract requiring parliamentary approval, based on the ‘new’ nature of the activity that falls outside the recognised categories of contracts and payments.⁶¹ This test has only been expounded by one High Court judge to date, but represents the only elaboration of the doctrine. The ‘new activity’ test means that new policies or technologies would require parliamentary approval. For instance, if a government revamps the workplace relations system to focus on enterprise bargaining rather than individual employment contracts, this would need to be scrutinised by Parliament. On the other hand, policies which are pre-existing such as the policy to pay public servants’ wages appropriated from public funds do not require legislation to support them beyond the appropriation of the funds in question.

Nevertheless, even the ‘new activity’ test is not entirely clear cut. The High Court in *Combet* has acknowledged that it was difficult to ascertain the boundaries of appropriations and even examining parliamentary history and practice in appropriations did not assist in delineating the boundary of what constituted ordinary services of government compared to ‘new activities’ and major projects.⁶² For instance, contrary to the ‘new activity’ test, in *Bardolph* legislative approval for the advertising contracts was never required and successive appropriations were sufficient to render the contracts an ordinary function of government.

Lindell queried whether the contracts for advertising for Work Choices in *Combet* would constitute a contract relating to a new policy that required further legislative approval, given that it advertised a new policy platform for workplace relations.⁶³ It is debatable whether the advertising for Work Choices can be viewed as regular advertising of government activity or advertising a novel and controversial government activity. If advertising Work Choices is seen to be merely normal governmental advertising, then it would not constitute a new activity. Alternatively, if the Work Choices policy was passed by Parliament through legislation (which was not the case in *Combet*),⁶⁴ then advertising the new policy, which has been scrutinised by Parliament, would be less controversial. However, if advertising Work Choices is seen to be advertising a novel and controversial government policy, then it would be a new activity that requires legislative approval. The expenditure on government advertising of proposed new workplace relations

⁶¹ *Williams* (2012) 248 CLR 156, 343 [487], 345 [490], 345 [493], 351-2 [515]–[516], 353-4 [527]–[530], 354-5 [532] (Crennan J). Geoffrey Lindell, ‘The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case’ (2013) 39(2) *Monash University Law Review* 348, 371, 372.

⁶² *Combet* (2005) 224 CLR 494, 531 (Gleeson CJ), 575-6 (Gummow, Hayne, Callinan and Heydon JJ).

⁶³ Geoffrey Lindell, ‘The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case’, above n 61, 373.

⁶⁴ *Combet* (2005) 224 CLR 494, 495.

policies without legislative approval besides the *Appropriation Act* was upheld by the High Court in *Combet*.⁶⁵

However, it should be noted that *Bardolph* and *Combet* were decided before *Pape*, at a time when the *Appropriations Acts* were considered to be a sufficient form of statutory authorisation for spending. Thus, the ‘new activity’ test may represent a new requirement for statutory authorisation after *Pape* and *Williams (No 1)*. The ‘new activity’ test reduces the scope of the exception to statutory authorisation as fewer activities would fall within the definition of ‘ordinary and well-recognised functions of government’. This means that after *Pape* and *Williams (No 1)*, statutory authorisation may be needed for new policies and activities of government.

The question now is whether contracting for the employment of ministerial advisers by the Commonwealth government without statutory authorisation is constitutionally valid as part of the ordinary and well-recognised functions of government. In other words, can the employment of ministerial advisers, which is a relatively new phenomenon that post-dates the *Constitution*, nevertheless be part of the ordinary and well-recognised functions of government?

It is possible that the functions of persons and bodies could be part of the ordinary and well-recognised functions of government even if their existence post-dates the *Constitution*, provided the factors in *Bardolph* and the ‘new activity’ test in *Williams (No 1)* are met. Applying the considerations in *Bardolph*, it can be observed that ministerial advisers have been part of the political landscape for 40 years, although their position has only been explicitly recognised in statute since 1984 with the *MOPS Act*. Further, there has been a yearly appropriation of ministerial adviser salaries in Parliament at least since 1980 as part of the ‘ordinary services of government’ in *Appropriation Act (No 1)*. Ministerial adviser salaries are classified under *Appropriation Act (No 1)*, which is reserved for the ordinary annual services of the Government, while *Appropriation Act (No 2)* covers new policies.⁶⁶ There have not been any challenges in Parliament to the classification of the salaries of ministerial advisers as part of the ordinary annual services of government; which are distinct from appropriations for departments. This shows that ministerial adviser salaries are considered by Parliament to be part of the ordinary services of government.

⁶⁵ (2005) 224 CLR 494.

⁶⁶ Lotta Ziegert, ‘Does the Public Purse have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*’ (2006) 28 *Sydney Law Review* 387, 396.

Further, utilising the agreed factors in *Williams (No 1)* of whether ministerial advisers are part of the servicing of Commonwealth departments,⁶⁷ ministerial advisers play a role in advising their Ministers on government and departmental policies from a strategic and political angle.⁶⁸ They also provide a link between the Minister and the public service. In *Re Australian Education Union; Ex parte Victoria*, the High Court recognised the position of ministerial advisers as being in the higher echelons of government, along with Ministers, heads of departments, high level statutory office holders, parliamentary officers and judges.⁶⁹ Hence, I argue that ministerial advisers are an integral part in assisting in the administration of a government department. Therefore, it can be argued that due to a situation in the modern world where government has become large and complex and Ministers are unable to handle the various matters under their portfolios without the assistance of specialised partisan ministerial advisers, the current practices of government mean that efficient and effective government administration now includes ministerial advisers as an integral part of the Executive. Hence contracting for the employment of ministerial advisers would fall within the scope of section 64 of the *Constitution* as their duties are part of the ordinary and well-recognised functions of government.

To sum up, the employment of ministerial advisers falls within the scope of the ordinary functions of government. However, based on the analysis of *Williams (No 1)* that results in the ‘new activity test’, statutory authorisation could have been required if ministerial advisers were employed for the first time in Australia, if employing them would be regarded as a new activity distinct from employing public servants. The employment of public servants is sanctioned by the *Constitution*, but the employment of press secretaries and political advisers could have represented a new activity that required legislative approval. Statutory authorisation has been acquired in this case through the *MOPS Act*, provided that the statute is valid. I will now show that the *MOPS Act* is valid.

III IS THE MEMBERS OF PARLIAMENT (STAFF) ACT 1984 (CTH) CONSTITUTIONALLY VALID?

There is a legislative framework governing the employment of ministerial advisers, which is the *Members of Parliament (Staff) Act 1984 (Cth)* (*‘MOPS Act’*). The *MOPS Act* provides for the employment of consultants and staff by Ministers, certain office-holders, Senators and Members of the House of Representatives.

⁶⁷ *Williams* (2012) 248 CLR 156, 233 [139] (Gummow and Bell JJ).

⁶⁸ Ng, above n 11.

⁶⁹ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Callinan and McHugh JJ).

Ministerial advisers are employed under section 13 of the *MOPS Act*, as personal staff employed by Ministers.⁷⁰ The same provision also provides for the employment of parliamentary staff by the Leader and Deputy Leader of Opposition in the Senate and House of Representatives. Thus, section 13 encompasses the employment of both executive and parliamentary staff. The source of power to employ these two categories of staff is different. For parliamentary staff, section 49 of the *Constitution* imports the powers, privileges, and immunities of the United Kingdom House of Commons in 1901, including the power to employ parliamentary officers.⁷¹ In terms of ministerial advisers, who are part of the Executive, the source of power is arguably based on a combination of executive power under section 61 and incidental power under section 51(xxxix). I will focus on the employment of ministerial advisers and explore case law on executive power and incidental power under section 51(xxxix).

A Case Law on Executive Power and Incidental Power under Section 51(xxxix)

Case law has established that the Commonwealth has the power to legislate in the area of internal security and to protect against seditious and subversive conduct, either supported by section 51(xxxix) combined with executive power,⁷² or as an inherent part of the Commonwealth's existence as a political institution.⁷³ The weight of authority points towards section 51(xxxix) combined with section 61 as the source of power to legislate against subversive activities, with only Dixon J promoting the inherent power approach. The incidental power under section

⁷⁰ *Members of Parliament (Staff) Act 1984* (Cth) s 13.

⁷¹ Thomas Erskine May, Reginald F D Palgrave and Alfred Bonham-Carter, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament* (London, W Clowes and Sons, 10th ed, 1893) 193-4. The 11th edition was published in 1906.

⁷² Latham CJ in *Burns v Ransley* and *R v Sharkey* (Webb J agreeing in *R v Sharkey*) affirmed that section 51(xxxix) combined with executive power enables Parliament to make laws 'to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers'. This power also extends to the power to protect organs of the Executive and Legislature against 'physical attack and interference', as well as against utterance of words 'intended to excite disaffection against the Government' or to prevent activities impeding defence and war-like activities. *Burns v Ransley* (1949) 79 CLR 101, 109-10 (Latham CJ); *R v Sharkey* (1949) 79 CLR 121, 135 (Latham CJ), 163 (Webb J). McTiernan J in *R v Sharkey* also found that section (xxxix) supported legislation protecting Commonwealth governmental institutions from seditious words. *R v Sharkey* (1949) 79 CLR 121, 157 (McTiernan J).

⁷³ Dixon J found a Commonwealth power to legislate against subversive conduct arising 'out of the very nature and existence of the Commonwealth as a political institution', rather than being sourced from a combination of section 51(xxxix) and other constitutional powers. As Dixon J held in the *Communist Party Case*: 'As appears from *Burns v Ransley* and *R v Sharkey*, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51(xxxix) with those of other constitutional powers'. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J). See *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J).

51(xxxix) may be used in conjunction with executive power to protect the existence of the Commonwealth as a polity because such matters strike at ‘the very foundation of the *Constitution*’.⁷⁴ These cases show that the protection and maintenance of the *Constitution* is a duty of the Executive, and Parliament may legislate to create criminal offences in support of this.

Following this, there was a series of nationhood cases that relied on executive power in conjunction with the incidental power to validate legislation.⁷⁵ Mirroring the case law on subversion, there are two mooted possible sources of the nationhood power: an implied legislative nationhood power or a combination of section 61 and incidental power under section 51(xxxix).⁷⁶

Case law has since established that the only source of nationhood power is the combination of sections 61 and 51(xxxix). This means that legislative power only exists to the extent that it can be viewed as incidental to a valid exercise of executive power.⁷⁷ In *Pape*, there did not seem to be much support for an implied legislative nationhood power.⁷⁸ Hayne and Kiefel JJ upheld the existence of the implied legislative power in respect of subversive activities.⁷⁹ However, as discussed above, the subversion cases were largely based on the incidental scope of executive power under section 51(xxxix). In addition, prerogative power does extend to the suppression of subversive activities.⁸⁰ Therefore there is no need for an independent legislative nationhood power to support the suppression of subversive activities.

The scope of executive power combined with incidental power under section 51(xxxix) is limited. Brennan J in *Davis* held that section 51(xxxix) only confers

⁷⁴ *Davis* (1988) 166 CLR 79, 102 (Wilson and Dawson JJ).

⁷⁵ *AAP Case* (1975) 134 CLR 338; *Davis* (1988) 166 CLR 79; *Pape* (2009) 238 CLR 1; *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397-8.

⁷⁶ In *Davis*, Wilson, Dawson and Toohey JJ held that a combination of sections 61 and 51(xxxix) was the only source of the nationhood power, while Mason, Deane and Gaudron JJ decided that, in addition to the incidental power in section 51(xxxix), there may also exist an implied legislative nationhood power. Brennan J did not decide on the issue. *Davis* (1988) 166 CLR 79, 93 (Mason, Deane and Gaudron JJ), 117 (Toohey J), 101-2 (Wilson and Dawson JJ).

⁷⁷ *Davis* (1988) 166 CLR 79, 117 (Toohey J), 101-2 (Wilson and Dawson JJ).

⁷⁸ The existence of an implied legislative nationhood power was not resolved in *Pape*. French CJ did not find it necessary to discuss an implied legislative nationhood power, while Gummow, Crennan and Bell JJ did not discuss this issue. Hayne and Kiefel JJ decided that there may be an implied legislative nationhood power for the Commonwealth Executive to handle subversive activities and endeavours such as in *R v Sharkey* and *Burns v Ransley*, but found that this implied legislative power was of limited scope and did not extend to regulating the national economy. *Pape* (2009) 238 CLR 1, 63-4 [133] (French CJ), 125 [363]-[364] (Hayne and Kiefel JJ), 177 [510].

⁷⁹ *Pape* (2009) 238 CLR 1, 125 [364] (Hayne and Kiefel JJ).

⁸⁰ George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne, Melbourne University Press, 1983) 32.

a power to make a law in respect of a matter incidental to the exercise of executive power, rather than a broader power to legislate with respect to a general subject matter or even a matter incidental to the subject matter.⁸¹ As will be shown below, the incidental power under section 51(xxxix) has been interpreted restrictively, in a way that limits the scope of the nationhood power based on considerations of federalism, with a cautious reading of coercive laws. This is desirable to reduce the scope of non-statutory executive power.

B *Is the MOPS Act Supported by Sections 61 and 51(xxxix)?*

The source of power to employ ministerial advisers will now be considered. Section 51(xxxix) provides the Commonwealth Parliament with the power to legislate with respect to matters incidental to the execution of any power vested by the *Constitution* in the Commonwealth Government, or in any department or officer of the Commonwealth.⁸² There are two aspects of the definition of incidental power under section 51(xxxix) that will be explored separately in regards to the *MOPS Act*. It will be considered whether the *MOPS Act* is legislation in respect of:

- matters incidental to the execution of executive power; or
- matters incidental to the execution of any power vested in any ‘officer of the Commonwealth’.

First, I will examine whether the *MOPS Act* is legislation that is incidental to the execution of executive power. To this end, it is necessary to ascertain whether contracting for the employment of ministerial advisers is a matter incidental to the execution by Ministers of their powers under section 64 of the *Constitution* in administering departments of State.

It is strongly arguable that contracting for the employment of ministerial advisers is incidental to Ministers exercising executive power and administering departments of State. This is because ministerial advisers assist and advise Ministers in their performance of executive and statutory powers.⁸³ Thus, the employment of ministerial advisers is incidental to Ministers’ exercise of their powers under the *Constitution*.

Another question is whether the *MOPS Act* is valid on the basis that it falls within the incidental power to legislate under section 51(xxxix) with respect to matters incidental to the execution of any power vested by the *Constitution* in an

⁸¹ *Davis* (1988) 166 CLR 79, 111 (Brennan J).

⁸² *Australian Constitution* s 51(xxxix).

⁸³ Ng, above n 11.

‘officer of the Commonwealth’. In the language of section 51(xxxix), Ministers certainly do ‘execute’ executive and statutory powers. Both Ministers and public servants are recognised in sections 64 and 67 of the *Constitution* respectively as officers of the Executive Government of the Commonwealth. Thus, it can be argued that Ministers and public servants are ‘officers of the Commonwealth’ under section 51(xxxix). This is supported by the fact that Ministers are clearly part of ‘the Commonwealth’ under section 75(iii).⁸⁴ Relevantly, as Ministers are ‘officers of the Commonwealth’ under section 51(xxxix), the question is whether the *MOPS Act* is incidental to assisting Ministers in the exercise of the powers vested in them by the *Constitution*. As discussed above, ministerial advisers assist Ministers in carrying out their executive and statutory functions; hence the employment of ministerial advisers would be part of the incidental scope of assisting Ministers as ‘officers of the Commonwealth’ under section 51(xxxix).

C *Are there any Limitations on the Scope of Executive Power and Incidental Power under section 51(xxxix) that apply to the MOPS Act?*

This article will now consider whether there are any limitations on the scope of executive power and incidental power under section 51(xxxix) identified in case law that apply to the *MOPS Act*.

1 *Federalism*

Judges in the nationhood cases have noted the federal distribution of powers as a concern in interpreting the nationhood power combined with incidental power, although they accord this consideration varying weight. For example, in *Pape*, despite the split 4:3 decision, all judges unanimously stated that executive power must be limited by considerations of federalism.⁸⁵ This approach is a consolidation of views from previous judgments.⁸⁶

⁸⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 275 (Rich and Williams JJ), 367 (Dixon J).

⁸⁵ *Pape* (2009) 238 CLR 1, 63 [132] (French CJ), 83 [214], 85 [220] (Gummow, Crennan and Bell JJ), 119 [336]-[339] (Hayne and Kiefel JJ), 190 [541], 134 [397] (Heydon J), quoted with approval by Hayne J in *Williams* (2012) 248 CLR 156, 251-2 [197]-[198].

⁸⁶ Eg in the *AAP Case*, Mason J noted that the scope of executive power to engage in activities based on the existence and character of the Commonwealth as a national polity was narrow and should not subvert the legislative distribution of powers between the Commonwealth and the States, as it was only based on the incidental power in section 51(xxxix): *AAP Case* (1975) 134 CLR 338, 397-8 (Mason J). In *Davis*, Brennan J remarked that in determining whether an enterprise or activity lies within the executive power of the Commonwealth, consideration should be given to the sufficiency of State powers to engage effectively in the enterprise or activity and the need for national action (whether unilateral or in cooperation with the States), and Deane J held that the existence of Commonwealth executive power extending beyond the heads of Commonwealth legislative power is most likely to be found where

Hence, the High Court will adopt a restrained approach towards approving incidental power as a head of legislative power. This is because there is a more tenuous link between legislation utilising incidental power and Commonwealth legislative power, as it does not fall within the other enumerated heads of legislative power. A broad interpretation of executive power and the incidental head of legislative power can undermine the federal compact and the distribution of powers between the Commonwealth and States.

The question is whether the national character of the Commonwealth Executive impinges on the ability of the State Executives to co-exist as distinct polities in terms of the power to employ ministerial advisers. There is no reason to think that the employment of Commonwealth ministerial advisers has a negative impact on the executive power of the State Executives. The Commonwealth scheme of employing ministerial advisers does not impede State executive power, as the States have their own employment structures for ministerial advisers that are completely separate from the Commonwealth.

2 *Coercive v Facultative Laws*

There is another potential limitation to the scope of incidental power regarding coercive compared to facultative laws. It is notable that the nationhood cases examined by the court involved facultative legislation, such as allowing celebration of a bicentenary, national symbols and organisations, and tax bonus payments. French CJ remarked in *Pape* that the Court is likely to approach future questions about the application of executive power to coercive laws, absent statutory authority made under a head of power other than section 51(xxxix), conservatively⁸⁷ due to the admonition of Dixon J in *Australian Communist Party v Commonwealth* ('*Communist Party Case*') that:

History ... shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.⁸⁸

⁸⁷ 'Commonwealth executive or legislative action involves no real competition with State executive or legislative competence'. *Davis* (1988) 166 CLR 79, 93-4 (Deane J), 111 (Brennan J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 252 (Deane J).

⁸⁷ *Pape* (2009) 238 CLR 1, 24 [10] (French CJ).

⁸⁸ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187. See also *Williams* (2012) 248 CLR 156, 232 [135] (Gummow and Bell JJ); *Davis* (1988) 166 CLR 79, 112-13 (Brennan J).

This signals a change in approach from the previous sedition cases to a more conservative approach against further extending the reach of section 51(xxxix).⁸⁹ Therefore, the ability of section 51(xxxix) in conjunction with executive power to authorise coercion should ideally be seen as being confined to protection of the State against subversive behaviour, with very few exceptions to that principle.

Thus, the scope of Commonwealth legislative power based on nationhood and incidental power may be limited by whether the nature of the law is facultative or coercive. Although the combination of nationhood power and section 51(xxxix) is able to authorise coercive activity,⁹⁰ the court would be cautious about extending this power.

In terms of the validity of the *MOPS Act*, the *MOPS Act* is facultative as it facilitates the power of Ministers to employ ministerial advisers, and does not involve any coercive elements. Therefore, it is clear that the *MOPS Act* is able to validate the employment of ministerial advisers, as it is supported by a combination of executive power under section 61 and incidental power under section 51(xxxix) and there are no relevant limitations that apply.

IV APPROPRIATION OF AND EXPENDITURE ON SALARIES OF MINISTERIAL ADVISERS

In addition to a valid constitutional basis for the spending, the appropriation for salaries of ministerial advisers also needs to be valid. Appropriations involve:

- annual appropriation legislation, which comprises the budget and authorises government expenditure within one year; or
- permanent appropriation legislation, which provides an indefinite standing authority for government expenditure.⁹¹

The salaries of ministerial advisers are paid out of an annual appropriation made to the Department of Finance. The relevant appropriation in 2016-17 was made for the purpose of ‘[s]upport for Parliamentarians and others as required by the Australian Government through the delivery of, and advice on, entitlements and targeted assistance’ by *Appropriation Act (No 1) 2016-17 (Cth)*.⁹² The Portfolio Budget Statement by the Department of Finance provides additional content to the

⁸⁹ The power to protect the State against subversive behaviour may now be covered under the defence power. *Thomas v Mowbray* (2007) 223 CLR 307.

⁹⁰ See eg *Burns v Ransley* (1949) 79 CLR 101, 109-10 (Latham CJ), 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J); *Davis* (1988) 166 CLR 79, 99 (Mason CJ, Deane and Gaudron JJ).

⁹¹ *Brown v West* (1990) 169 CLR 195, 205-8 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁹² *Appropriation Act (No 1) 2016-17 (Cth)*, Schedule 1, Department of Finance, Outcome 3.

Appropriation Act and can be used as an interpretive guide.⁹³ According to the Department of Finance Portfolio Budget Statement 2016-17, ministerial adviser salaries formed part of the line item appropriation for ‘Electorate and Ministerial Support Costs’.⁹⁴

The appropriations for ministerial adviser salaries go back to at least 1980 with the *Appropriation Act (No 1) 1980-81* (Cth).⁹⁵ It is more difficult to ascertain appropriations prior to this period as appropriations before 1980 involved a lump sum appropriation for each department, without specifying line items for the appropriations.⁹⁶ The quantum of the salaries for ministerial advisers has increased significantly. In 1980-81, the appropriation for salaries and payments in the nature of salaries to ministerial advisers was \$11,084,200, while in 2015-16, the government spent \$241,782,000 on ministerial adviser staff and payroll-related costs.⁹⁷ When adjusted for inflation, this is an increase of 479%.⁹⁸

There have been regular appropriations for the salaries of ministerial advisers at least since 1980. The question is whether the appropriations are valid. The relevant sections of the *Constitution* pertaining to appropriations are sections 81 and 83.⁹⁹ Section 81 provides that funds received by the Commonwealth Executive shall form a consolidated revenue fund, and that money appropriated from consolidated revenue has to be ‘for the purposes of the Commonwealth’. Section

⁹³ Section 4 of the *Appropriation Act (No 1) 2012-13* (Cth) explicitly incorporates the Portfolio Statements by declaring that these are ‘relevant documents’ for the purposes of section 15AB of the *Acts Interpretation Act 1901* (Cth). Section 15AB of the *Acts Interpretation Act 1901* (Cth) provides that extrinsic material can be used to interpret the provisions of an Act to determine the meaning of an Act, including where an Act declares a document to be a ‘relevant document’.

⁹⁴ Australian Government Department of Finance, *Portfolio Budget Statements 2016-17* (2016) Budget Related Paper No 1.8, Finance Portfolio, ‘Ministerial and Parliamentary Services’, program 3.1, 52 <<http://www.finance.gov.au/sites/default/files/2016-17-pbs-full.pdf?v=1>>.

⁹⁵ The appropriations of salaries of ministerial advisers are distinct from the appropriation of salaries for public servants within a department. The salaries of public servants form part of ‘departmental appropriations’ for each department and are appropriated as part of the ordinary annual services of government in *Appropriation Act (No 1)*. On the other hand, ministerial advisers’ salaries are classified separately from that of public servants, as ministerial advisers’ salaries are considered to be an ‘administered item’, rather than a ‘departmental item’. An ‘administered item’ is to be applied for expenditure for the purpose of contributing to achieving a budget outcome. In the case of ministerial adviser salaries, as stated above, the stipulated outcome is to provide support for Parliamentarians.

⁹⁶ See eg *Appropriation Act (No 1) 1979-80* (Cth) s 4.

⁹⁷ Australian Government Department of Finance, Budget 2016-17, Portfolio Budget Statements 2016-17, Budget Related Paper No 1.8 (2016) 68 <<http://www.finance.gov.au/sites/default/files/2016-17-pbs-full.pdf?v=1>>.

⁹⁸ Using the RBA calculator, the salaries in 1980-81 adjusted in real terms are \$41,775,459.73, with an average annual inflation rate of 3.9%. Reserve Bank of Australia, *Inflation Calculator* (2017) <<http://www.rba.gov.au/calculator/annualDecimal.html>>.

⁹⁹ See generally Cheryl Saunders, ‘The Sources and Scope of Commonwealth Power to Spend’ (2009) 20 *Public Law Review* 256; Charles Lawson, ‘Re-invigorating the Accountability and Transparency of the Australian Government’s Expenditure’ (2008) 32(3) *Melbourne University Law Review* 879.

83 provides that appropriations have to be made by law, which means that appropriations have to be made through a valid Commonwealth statute, that is, with parliamentary authorisation.¹⁰⁰ The appropriations provisions were included in the *Constitution* as an evolved written form of an English convention about the fiscal supervision of the Parliament over the Executive.¹⁰¹ The control of expenditure by Parliament is said to be the ‘most ancient, as well as the most valued, prerogative of the House of Commons’.¹⁰²

The key question about the validity of an appropriation for the salaries of ministerial advisers is how the phrase ‘purposes of the Commonwealth’ in section 81 of the *Constitution* should be interpreted in relation to the salaries of ministerial advisers. Previously the High Court had differing views about whether section 81 should be interpreted broadly to encompass any purpose determined by Parliament as a ‘purpose of the Commonwealth’,¹⁰³ or should be limited based on the distribution of legislative powers in the *Constitution*.¹⁰⁴ In *Pape*, the High Court judges still did not have a united view on whether the scope of the appropriations was limited by the phrase ‘purposes of the Commonwealth’. Gummow, Crennan and Bell JJ preferred the broad view that appropriations could be for any purpose and were not limited by the enumerated heads of Commonwealth legislative power,¹⁰⁵ while Hayne and Kiefel JJ seemed to prefer the broad view that appropriations were not likely to be limited by the heads of legislative power, but did not rule definitively on the issue.¹⁰⁶ On the other hand, French CJ and Heydon J preferred the narrow view that appropriations were limited by the scope of Commonwealth legislative power.¹⁰⁷

¹⁰⁰ *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 450 (Isaacs J); *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); John Waugh, ‘Evading Control of Parliamentary Spending: Some Early Case Studies’ (1998) 9 *Public Law Review* 28; Enid Campbell, ‘Parliamentary Appropriations’ (1971) 4(1) *Adelaide Law Review* 145.

¹⁰¹ Quick and Garran, above n 15, 812; Gabrielle Appleby, ‘There Must be Limits: The Commonwealth Spending Power’ (2009) 37(1) *Federal Law Review* 93, 116.

¹⁰² Alpheus Todd, *Parliamentary Government in England* (London, Marston, 1892) vol 2, 96. See A J V Durell, *The Principles and Practice of the System of Control over Parliamentary Grants* (Portsmouth, Gieves, 1917) 3.

¹⁰³ *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 254 (Latham CJ), 273 (McTiernan J) (‘*Pharmaceutical Benefits Case*’); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 367–9 (McTiernan J), 396 (Mason J), 417 (Murphy J) (‘*AAP Case*’). See also Commonwealth, Royal Commission on the Constitution of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) Minutes of Evidence, pt 1, 69; Cheryl Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11 *Melbourne University Law Review* 369, 372, 373, 401, 403.

¹⁰⁴ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 271 (Dixon J), 282 (Williams J); *AAP Case* (1975) 134 CLR 338, 360–3 (Barwick CJ), 373–4 (Gibbs J).

¹⁰⁵ *Pape* (2009) 238 CLR 1, 75 [185], 82 [210] (Gummow, Crennan and Bell JJ).

¹⁰⁶ *Ibid* 103 [290].

¹⁰⁷ *Ibid* 55–6 [111], [113] (French CJ), 213–4 [608] (Heydon J). Cf *Pape* (2009) 238 CLR 1, 111 [317] (Hayne and Kiefel JJ). See Andrew McLeod, ‘Case Note: The Executive and Financial Powers of the Commonwealth- *Pape v Commissioner of Taxation*’ (2010) 32(1) *Sydney Law Review* 123, 130.

This article will elaborate on French CJ's narrow view in *Pape*. This is because, as French CJ adopts the narrowest view, if the test of French CJ is satisfied, the appropriation would be valid for the rest of the judges who adopt a broader and more generous view of appropriations as being in essence unlimited. Heydon J adopted essentially the same position as French CJ, of appropriations being limited by the scope of Commonwealth legislative power.¹⁰⁸

For French CJ the 'purposes of the Commonwealth' could be created by specific legislation or the *Constitution*:

The 'purposes of the Commonwealth' are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*.¹⁰⁹

French CJ explicitly distinguished the validity of the appropriation from the subsequent expenditure of public funds. He found that sections 81 and 83 do not confer power; rather the source of legislative power must be found elsewhere in the *Constitution* or other statutes:

Substantive power to spend the public moneys of the Commonwealth is not to be found in s 81 or s 83, but elsewhere in the Constitution or statutes made under it. That substantive power may be conferred by the exercise of the legislative powers of the Commonwealth. It may also be an element or incident of the executive power of the Commonwealth derived from s 61, subject to the appropriation requirement and supportable by legislation made under the incidental power in s 51(xxxix).¹¹⁰

This approach was unanimously agreed by the High Court in *Pape*, who held that although the power to appropriate money is broad, sections 81 and 83 are not sufficient bases for the power to spend.¹¹¹ Rather, the power for the Commonwealth Executive to spend must be found in valid legislation or in the *Constitution*.¹¹² This means that section 81 is not a substantive head of power, and authority for spending decisions must be found in statutes or within the scope of incidental power supported by legislation.

¹⁰⁸ Heydon J stated that the words 'by law' in section 83 limit the power of appropriation to what can be done by enactment of a valid law, which implied a limitation on the appropriation power to what can be achieved under Commonwealth legislative power. Ibid 213-4 [608] (Heydon J).

¹⁰⁹ Ibid 56 [113] (French CJ).

¹¹⁰ Ibid 55 [111] (French CJ).

¹¹¹ Ibid 55 (French CJ), 73 [178], 75 [186] (Gummow, Crennan and Bell JJ), 103, 105 [296] (Hayne and Kiefel JJ), 210, 213 (Heydon J).

¹¹² Ibid.

Thus, French CJ's judgment can be seen to introduce a two-step test. First, he utilised the 'purposes of the Commonwealth' to establish a valid appropriation by considering whether appropriations are supported by valid legislation under sections 51 and 52 of the *Constitution* or by section 61, rather than section 81. Second, there must be valid legislation that authorises expenditure. Often the same legislation that establishes a valid appropriation in Step 1 will authorise the expenditure in Step 2. However, this is not necessarily the case. For example, in *Pape*, a tax bonus was paid as part of a fiscal stimulus package as part of a valid appropriation under the *Taxation Administration Act 1953* (Cth), read with section 3 of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth), while section 61 of the *Constitution* in combination with section 51(xxxix) established the legislative head of power for the expenditure.

French CJ's test will now be applied to appropriations for the salaries of ministerial advisers. As mentioned above, for French CJ the 'purposes of the Commonwealth' can be created by specific legislation. To establish Step 1, the *MOPS Act* makes the appropriation of ministerial adviser salaries a 'purpose of the Commonwealth', provided that the *MOPS Act* is supported by a valid head of legislative power. The *MOPS Act* is constitutionally valid (as shown in Part II); hence the appropriation is valid. For ministerial advisers, the legislation that authorises the appropriation also authorises the expenditure. Hence, in Step 2, the *MOPS Act* may authorise contracting and expenditure provided that the *MOPS Act* has a valid source of constitutional power. As stated above, the *MOPS Act* is constitutionally valid. Therefore, French CJ would find that the appropriation of and expenditure on the salaries of ministerial advisers are permissible under the *MOPS Act*. As French CJ has the narrowest test, the other judges would also have no issue with the salaries of ministerial advisers given that the broad view allows for any purpose determined by Parliament to be a 'purpose of the Commonwealth'.

Thus, whichever interpretation of the scope of appropriations under section 81 is adopted, the appropriation of and expenditure on the salaries of ministerial advisers would be valid. This is because, as shown in Part II, the Commonwealth has the power to legislate for the employment of ministerial advisers under section 51(xxxix) and executive power under section 61. Therefore, there has been a valid appropriation and expenditure of the salaries of ministerial advisers at least since 1980. Even before this period, there would be the prerogative power to hire and fire ministerial advisers as servants of the Crown.

V CONCLUSION

The traditional actors within the Executive of the Governor-General, Ministers and public servants are no longer the only actors who engage in public functions. The scope of governmental activity has increased over the years. Governing has become more complex and demanding following the 24/7 news cycle such that Ministers are unable to cope with the workload themselves and employ ministerial advisers to assist them.

The idea of partisan advisers for Ministers was denigrated by the framers of the *Constitution* as being corrupt and undesirable.¹¹³ The ideal of the impartial public service continues to this day in spirit, as seen in the Australian Public Service Values.¹¹⁴ However, partisan ministerial advisers have slowly and steadily grown as an institutionalised source of advice — a phenomenon which would not have been imaginable at federation. There has been a distinct shift in attitude towards partisan political advisers being a formalised part of government, with their position officially recognised through statute. Fundamental questions arise, such as what is the nature of the Executive Government? What is the constitutional basis of new institutional actors such as ministerial advisers?

In this article, it has been shown that the Commonwealth Executive has the power to expend public funds and contract to employ ministerial advisers through Commonwealth executive power under section 61. In addition, this article establishes that the *MOPS Act* is constitutionally able to support the employment of ministerial advisers under section 51(xxxix) as a subject incidental to the scope of executive power in section 61. It has also been shown that contracting for the employment of ministerial advisers has become part of the ‘ordinary and well-recognised functions of government’, as they are now an essential part of the administration of departments, being a conduit between the Ministers and the public service. Therefore, there has been a shift from the time of federation, where the idea of ministerial advisers would have been denigrated, to a situation where ministerial advisers are now an integral and institutionalised aspect of governing the nation. Their numbers have steadily increased and they play an integral role as a link between the Ministers and the public service. Their position has been legislatively recognised and their salaries have been appropriated from public funds at least since 1980. Thus, ministerial advisers are significant new actors in the Executive government. As their roles expand and their numbers grow, it is necessary to ensure that legal principles keep up with political realities. The law

¹¹³ *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 916-7 (Bernhard Ringrose Wise); 917 (Sir George Turner).

¹¹⁴ Australian Public Service Values < <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct/aps-values>>.

can no longer afford to ignore the operation of ministerial advisers within our system of government.

