

SECTION 61 OF THE *COMMONWEALTH CONSTITUTION* AND AN 'HISTORICAL CONSTITUTIONAL APPROACH': AN EXCURSUS ON JUSTICE GAGELER'S REASONING IN THE *M68* CASE

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This paper seeks to supplement the other papers in this Special Edition by reflecting upon the value of the interpretative methodology articulated by J W R Allison, 'the historical constitutional approach', that appears to be particularly suited to resolving difficult questions about the ambit of the Commonwealth's executive power. It articulates an approach to constitutional interpretation that explains why and how constitutional history, historical sources of law, their interplay with the evolution of forms of government and the relationship between its various branches, may be very useful, if not essential, in resolving contemporary legal issues. It will examine this approach by comparing it with the reasoning of Gageler J in the M68 Case which exhibits very interesting parallels with this approach.

*'Yet to know is properly to understand a thing with reason and through its cause.'*¹

I INTRODUCTION

The aim of this paper is modest. It seeks to supplement the other papers in this Special Edition by reflecting upon the value of the interpretative methodology articulated by J W R Allison, 'the historical constitutional approach'² that appears to be particularly suited to resolving difficult questions arising from s

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¹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (J & WT Clarke, 18th edn, 1823), part 183b: '*Scire autem proprie est rem ratione et per causam cognoscere.*' Attributed to Aristotle, *Metaphysics*, Book 1.

² This was set out in J W F Allison, *The English Historical Constitution* (Cambridge University Press, 2007).

61 of the *Constitution* and the ambit of the Commonwealth's executive power.³ It articulates an approach to constitutional interpretation that explains why and how constitutional history, historical *sources* of law, their interplay with the evolution of forms of government and the relationship between its various branches, may be very useful, if not essential, in resolving contemporary legal issues. Dr Allison's thesis will be explored in more detail in Part II. Its gist can be stated thus: constitutional arrangements that have had a continuing history, whether from the distant or recent past, and in which change or reform are inherent, constitute legitimate and necessary sources of current constitutional law and principle. In other words, it confirms the legitimacy of such sources and also makes them more prominent in contemporary legal debates about the nature of the constitution. Although Allison's work is centred on the unwritten United Kingdom constitution, it will be shown that it has much significance for Australia's written constitution, especially in provisions such as s 61 which cannot be interpreted accurately by recourse to the text alone.

My interest in Dr Allison's work was engaged when considering the problems which arise from the very meagre text of s 61 and its failure to provide much more than general guidance as to the content and ambit of the non-statutory power for which it provides. How are these important issues to be resolved when the text simply states that the power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'? The problem is compounded by the fact that little, if any, assistance can be derived from a purely abstract conceptual analysis of 'executive power' to determine whether any particular powers are inherent in the notion – unless one is speculating about an ideal polity. That 'the executive', the government, is able validly to exercise a particular power in any particular polity from time to time is purely a function of the constitution, laws, conventions and usages, as they have evolved over time and by reference to the political and constitutional history of that polity, which pertain at the time the power is being exercised.⁴ In light of s 61's meagre text, recourse to such sources becomes particularly material and clearly warrants a serious consideration of the value of a 'historical constitutional approach'.

³ Formally vested in the Queen and made "exercisable by the Governor-General" as her representative.

⁴ Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle, Interpretation* (Cambridge University Press, 2015) 384.

reference has been made by Australian courts to English constitutional history and related common law developments, the 1688 settlement and the Bill of Rights, the historical subjection of common law powers and capacities to Parliament, and to Lord Diplock's dictum that '[i]t is 350 years and civil war too late for the Queen's courts to broaden the prerogative.'¹² Of course, the nature and content of the prerogative is presently determinable by reference to the Australian common law, albeit reference may be made to English cases in this regard.¹³

If the usefulness of 'traditional conceptions' is already accepted by the Court in its jurisprudence on executive power, what then does Allison's thesis usefully add? Its value lies in the provision of a structured theoretical and jurisprudential methodology which articulates and justifies, in legal terms, this recourse to historical sources and 'traditional conceptions'. It also explains the circumstances and preconditions determinative of their present relevance as sources of law and the basis upon which they may be distinguished from past law which is of historical and antiquarian interest only, 'old law'.

My appreciation of its current usefulness as an explanatory and interpretative method was enhanced upon reading Gageler J's judgment in *Plaintiff M68/2015 v Minister for Immigration and Border Protection, & Ors*,¹⁴ the first expansive analysis of non-statutory executive power following *Pape* and *Williams*.¹⁵ In its reasoning there can be discerned an application of Allison's approach to Australian circumstances, and current Australian issues, uncanny as it is inadvertent. It placed heavy, indeed almost exclusive, reliance on 'traditional conceptions' to interpret s 61: the prerogative powers known to the common law, the capacities which emanate from the Commonwealth's juristic personality, the Australian understanding of 'the Crown' at federation, the principles of responsible government implied in the *Constitution* as understood in light of Australian colonial experience and as reflected in the deliberations of the framers, as well as ancient statutes which have either

¹² *British Broadcasting Corporation v Johns* [1965] Ch 32, 79. See, eg, *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 (Black CJ).

¹³ See Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) *Melbourne University Law Review* 385.

¹⁴ (2016) 257 CLR 42.

¹⁵ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

curtailed or abrogated prerogative executive power such that it is no longer recognised by the common law.

Interestingly, no express mention was made of any inherent executive 'nationhood power,' recognised in the *Pape* case,¹⁶ derived not from the common law incorporated therein but directly from s 61, its content determinable by reference to the status of the Commonwealth as a national government. It is not certain whether this is telling of his Honour's view on the existence of such a power, or whether his silence reflects its irrelevance to the resolution of the precise issue before the Court – even though it would appear to be very relevant. Also absent was any statement, increasingly common in more recent cases, that downplayed or discounted the contemporary relevance, as sources of law, of 'traditional conceptions'. Whether so intended by their authors or not, that is the impression that they may have given: there is Gummow J's dicta in *Re Ditford* that 'in Australia ... one looks not to the content of the prerogative in Britain but rather to s 61 of the Constitution....'¹⁷ There is the High Court's continuing injunction since *Marquet's* case to trace constitutional principles to Australian sources, principally the *Constitution*, whatever their historical origins might otherwise be.¹⁸ If these statements conveyed nothing more than that recourse can only be had to 'traditional conceptions' following an initial reference to s 61, and that reference to otherwise extra-constitutional sources must be grounded in the *Constitution* itself, they are unexceptionable.

On the other hand, there are those more pointed judicial statements to the effect that the Commonwealth executive power in s 61 'cannot be treated as a species of the royal prerogative';¹⁹ that the prerogative is the 'common law ancestor' of s 61 power;²⁰ that '[w]hile history and the common law inform its

¹⁶ While this terminology will be used here, it is noted that this single term to refer to the power does not reflect the nuances in the various judgments which gave recognition to such a power, some more expansive of the power than others. These nuances are explained carefully by Professor Twomey in 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, especially in Part IV.

¹⁷ *Re Ditford; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265, 285; although his Honour wrote extra-judicially, in W M C Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) *Australian Law Journal* 167, 178, that 'it is settled that in certain respects the executive power has limitations which follow those established in the United Kingdom.'

¹⁸ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66].

¹⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 543.

²⁰ *Ibid* 539

content, it is not a locked display cabinet in a constitutional museum ... [that] [i]t has to be capable of serving the proper purposes of a national government';²¹ and that 'the executive power of the Commonwealth conferred by s 61 involves *much more than the common law prerogatives of the Crown*.'²² With the former remarks as accompaniment, a more expansive view of the executive power of the Commonwealth is envisaged, one not limited in ambit by the common law, one which enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and one that interprets 's 61 import[ing] more than a species of what is identified as "the prerogative" in constitutional theory.'²³ These reinforce Professor Sawyer's prescient perception of a 'preponderant drift' toward recognition of an 'area of inherent authority' in s 61 which derives 'partly from the Royal Prerogative', but 'probably even more from the necessities of a modern government.'²⁴ Sawyer was not sympathetic to the notion of inherent executive power, preferring it to be confined to powers conferred by statute.²⁵

What is to be made of these statements? First, their impact ought not to be overstated given that the continuing role of the prerogative has not been denied.²⁶ Secondly, it may be possible, and plausible, to interpret the foundational dicta from which 'nationhood' has been derived as simply expanding *the sphere* ('breadth'), in a federal sense, in which the Commonwealth Executive may exercise its non-statutory powers as opposed to adding power already derived from the prerogative and from juristic

²¹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].

²² *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J) (emphasis added).

²³ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ).

²⁴ Geoffrey Sawyer, 'The Executive Power of the Commonwealth and the Whitlam Government', unpublished Octagon Lecture, The University of Western Australia (1976) 10 cited in George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 430-1.

²⁵ *Report of the Executive Government Advisory Committee to the Constitutional Commission* (June 1987) 55 cited in George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 33. Also cited therein is the remark by Bradley Selway when South Australian Solicitor-General that '[c]onstitutional analysis based upon the role of the monarchy seems to have gone out of fashion': 34.

²⁶ See *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 citing *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 304. See also *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 184-5 [22].

of the Commonwealth's executive power in s 61. But first it is necessary to examine those aspects of Allison's thesis which are presently relevant.

II INTERPRETATIONAL METHODOLOGY AND 'THE HISTORICAL CONSTITUTIONAL APPROACH'

As indicated above, the central tenet of Dr Allison's thesis presently relevant may be stated succinctly thus: 'constitutional arrangements that have continued from the recent or distant past into the present *with change or reform intrinsic to those arrangements*' are legitimate, indeed necessary, sources of current constitutional principle and law.³¹ Whilst Allison's thesis was framed as an interpretative methodology for the evolving unwritten constitution of the United Kingdom, its tenets nevertheless may be applied to the provisions of written constitutions, such as s 61, which provide little textual guidance as to their precise meaning and which can only be understood by recourse to extra-textual sources which they incorporate or to which they refer. With a provision such as s 61, especially in light of the context of its origins, recourse must be had to 'historical' constitutional sources, even those pre-dating the instrument, to achieve accurate contemporary interpretation.³² But, as Allison's thesis emphasises, this is only the case where those sources remain presently relevant as recognised sources of law. An unintended manifestation of this approach to Australian circumstances can be seen in the following statement by Professor Zines:

The principle that the executive government has no power at common law to levy a tax is not derived from contemplating the concept of the executive power. It is because of English historical development, particularly the struggles of the 17th century. If the executive power in Britain and Australia includes the declaration of war, it is because the English Parliament was prepared to leave this power with the King, content with the control it had of the standing army and the appropriation of money to conduct the war.³³

³¹ Allison, above n 2, 16 (emphasis added).

³² See, to similar effect, Bradley Selway, 'All at Sea – Constitutional Assumptions and the "Executive Power of the Commonwealth"' (2003) 31 *Federal Law Review* 495.

³³ Zines, above n 11, 279.

the English word ‘constitution; to refer both to the establishment and ‘the composition of the political community.’ Thus, posited Allison:

The historical constitution [may be] plausibly conceived to embrace the forms of government that are established, in the connotation of Cicero’s *constitution*, to accumulate past experience in such a way as to compose the *politeia*, the body politic. ... Qualifying the constitution as historical emphasises, in addition, the dynamic — the process of establishing forms and modes of formation integral to it in the accumulation of past experience and the composition of the political community. ... The historical constitution is ... the varying and variable forms of government — the legal and political rules, principles, and practices relating to government — that are established through being given constitutional significance by a political community in view of their historical formation — the modes by which they were attained and the normative historical accounts of their attainment.³⁸

The general appeal and legitimacy of a written constitution such as Australia’s cannot, however, be referenced to ‘the historical constitution’ in the same unqualified way as it may in Britain. For ‘[a] codified constitution’s appeal would seem to depend significantly upon appreciation of *the singularity of its original formulation...*’³⁹ This is especially perceptive in that it provides due recognition to the watershed moment of the coming into force of a new written constitution, the profundity of the constitutional moment which resulted in the establishment of the new polity, the Commonwealth of Australia; and that the quest for constitutional law and principle must ultimately be traced to this source henceforth, as emphasised in *Marquet*.⁴⁰ Thus, any historical constitutional approach must be qualified by ultimate recourse to the written instrument and its interpretation.

Nevertheless, the door is left open for the ‘historical constitutional approach’ in circumstances where the ‘codified’ constitution itself permits, or indeed requires, recourse to ‘historical’ sources and ‘traditional conceptions’ which it impliedly incorporates, albeit they pre-date it and evolve independently of it; and even though they are ultimately subject to it.

³⁸ Allison, above n 2, 18-9.

³⁹ *Ibid.*

⁴⁰ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66].

Moreover, the *Australian Constitution* came about within a tradition which was true to the etymology of the word – accumulating past experience to compose the *politeia* – and not from that revolutionary tradition in which the past is sought to be obliterated by the establishment of a new utopian order, history itself being restarted from ‘the Constitution of the Year 1’. The Anglo-Australian tradition has been on the whole – excepting the more extreme puritan moments of the Great Rebellion in seventeenth century England – one of evolutionary gradualism. Even ‘revolutions’ in that tradition, including those of 1642, 1688 and the American Revolution, are regarded more as ‘restorations’ of the proper established constitutional order and of traditional civil liberties – not the clearing away of all past legal forms and institutions to set up a constitutional *tabula rasa*.

Resort to ‘traditional conceptions’ and historical sources to interpret the *Commonwealth Constitution* is therefore very much a part of the very tradition from which it derived. Bradley Selway, for example, when Solicitor-General for South Australia, stated that s 61 can only be understood ‘in the context of Imperial and colonial history, including the law relating to the common law prerogative’.⁴¹ Thus, in the case of s 61 vesting executive power in ‘the Queen’, it would support recourse to the non-statutory prerogative powers of the Crown known to the common law, to those limitations to executive power which resulted from previous parliamentary abrogation of prerogative executive power, such as taxation and imprisonment, and to those other aspects of British constitutional history which define the relationship between executive and legislative power – principally responsible government adapted to the particular Australian constitutional establishment of a federal system. Access to such sources does not undermine the singularity of the original formulation of the *Constitution*, nor deny the import of the establishment by written compact of the Commonwealth as a polity with three branches of government. It does not undermine the final appeal to Australian sources in its interpretation. For at the core of this approach is the recognition of the current interpretative influence of constitutional arrangements that have had a continuous relevance from the recent or distant past into the present and in which resides the vital attribute that change or reform is intrinsic to those arrangements.

⁴¹ Selway, above n 32, 505.

Allison is careful to avoid two pitfalls in his approach which may otherwise render historical analysis of little current analytical value, which pitfalls are also avoided by Gageler J in *M68* as will be seen. First, reliance is not placed on a conception of the ‘ancient’ constitution which derives validity, venerability or transcendent quality solely from its very (or mere) antiquity, embedded in the ancient common law or preeminent ancient statutes.⁴² Secondly, neither is reliance placed on a conception of the constitution which existed in some past golden age or classical era and which ought to be revived — ‘revolutionary in an old sense of the word.’⁴³ Both views have been prevalent at certain times, not uncommonly when used as adversarial justifications for positions taken in constitutional and political conflicts. By contrast, Allison emphasised only those constitutional arrangements that have *continuing* legal relevance because evolution and reform is intrinsic to them.

A similar approach had been evident before the influence of Dicey gave pre-eminence to the analytical over the historical. One example is the work of Earl John Russell⁴⁴ during the political debates which culminated in the *Reform Acts* in the nineteenth century. Russell advocated a form of evolutionary gradualism which sought to reform the constitution by correcting abuses through ‘amendments strictly conformable to its spirit’. He opposed the devising of a constitution *a priori*, refusing ‘to deviate from *the track of the Constitution* into the maze of fancy, or the wilderness of abstract rights.’⁴⁵ Part of this historical constitutional understanding is the need for comparative study, at least to the extent that foreign sources have been influential: ‘the dynamic interaction of political communities and their respective constitutional forms.’⁴⁶ Allison referred to this as the ‘external perspective’ in contrast to purely English sources, ‘internal’. In the United Kingdom, its interaction with the European Union and its constituent instruments, and the law emanating from these, provides a most compelling example, although now being reversed. In Australia, the influence of federal constitutions (the United States of America, Canada, Switzerland) in comparison, emulation and avoidance, American doctrines such as the separation of powers, British

⁴² Allison, above n 2, 15.

⁴³ Ibid 15-6.

⁴⁴ Ibid 16-7.

⁴⁵ Ibid (emphasis in the original).

⁴⁶ Ibid 9.

principles of responsible government, remain clearly important for Australian constitutional jurisprudence. Of course, the evolution of British constitutional principle transitions from the status of an ‘internal’ to an ‘external’ point of view as Australia’s legal independence from the United Kingdom has evolved. In *M68*, for example, Gageler J made reference to the ‘external’ point of view to refer to the influence of Swiss and American models on Australian federalism.⁴⁷ Professor Winterton, when writing specifically about s 61, referred to Canadian, Indian, Irish and South African analogues to highlight the lack of definition of ‘executive power’ in those constitutions and the need to rely on traditional conceptions to understand its content, thus reinforcing the need to resort to common law historical threads to appreciate current meaning.⁴⁸ Allison’s particular reflections on Dicey are relevant to Australian perspectives both ‘internal’ and ‘external’: in relation to the former, to appreciate the dominant British constitutional mindset at the time of federation when considering responsible government and parliamentary supremacy⁴⁹; and, with respect to the ‘external’, to appreciate the American influence relating to the separation of powers and federalism. In addition, there remains the continuing importance of developments in the United Kingdom, and other Commonwealth jurisdictions, to the extent they may be relevant or influential — these presently being ‘external’.

By contrast, Dicey was very influential, according to Allison, in discounting, even separating, the historical from the legal by his analytical approach. He did this by giving primacy to the determination of ‘the law as it now stands’ and relegating historical analysis to secondary concern.

Dicey aspired to a scientific approach in pursuit of a consistent and logically coherent scheme of legal rules and principles. His method was that of observation and objective description through the composition of sets or categories and the division or subdivision of their components.⁵⁰

This is in itself remarkable given the ascendancy of historicism at the time Dicey was writing, at least on the Continent; although perhaps not so surprising

⁴⁷ (2016) 257 CLR 42, 91 [115].

⁴⁸ Winterton, ‘The Relationship’, above n 25, 23.

⁴⁹ See Aroney et al, above n 4, 431-42.

⁵⁰ Allison, above n 2, 8.

in the atmosphere of the more pragmatic philosophical approaches ascendant in Britain, principally the positivism and empiricism of the post-Benthamite nineteenth century. While this strictly analytical approach may be more appropriate for private law, constitutional law is another matter. It is of the very nature of a constitution that it is a legal and political blueprint for the organisation of a polity which is meant to last. It must be couched in terms of sufficient generality that enable its continued efficacy in evolving circumstances; to provide for principles which, while sourced therein, are intrinsically permitted to evolve. Yet, in order to maintain fidelity to the original compact, it must allow for the maintenance of those historical sources and principles – ‘traditional conceptions’ – which are permitted by any constitution to remain intrinsic to its evolution and interpretation. The principle of responsible government is an excellent illustration.⁵¹

Moreover, a purely analytical approach gives rise to three problems, each of which can be avoided by ‘the historical constitutional approach’. The first is the problem of ‘fidelity’: If Dicey’s method sought only objectively to describe legal principles and their scheme, it could not prescribe or maintain ‘fidelity’ to that scheme. A constitution’s sources of fidelity were ‘left analytically obscure or indistinct, as was the normative force of a judicial or other claim that official conduct can be constitutional or unconstitutional.’⁵² To a certain extent, this problem is obviated in Australia simply by the fact that fidelity to a constitutional text remains, to varying degrees, a paramount concern, even by those who would otherwise advocate a ‘living tree’ approach to constitutional interpretation. And because ‘traditional conceptions’ are appreciated as evolving in the historical approach, the issue of fidelity will not arise.

The second problem is more immediately compelling: Dicey’s analytical scheme ‘was rendered static by his relegation of the historical view and consequent focus *on constitutional form, not formation*. It was imposed upon an evolving constitution at a relatively arbitrary and fleeting moment — the moment of analysis.’⁵³ This danger of ossification within the purely analytical approach can apply also with respect to Australia’s written constitution. For example, the extent of the Commonwealth’s non-statutory executive power in s

⁵¹ *Egan v Willis* (1998) 195 CLR 424, 451.

⁵² Allison, above n 2, 8.

⁵³ *Ibid* 9 (emphasis added).

being of equal importance, albeit without reconciling them.⁵⁶ An important contemporary of Dicey, Homersham Cox, adopted an analytical method which expressly incorporated the historical by reference to Coke's dictum, quoted in the epigraph to this article: 'yet to know is properly to understand a thing with reason and through its cause.' In other words, this conception of *causa* is 'intrinsic to proper understanding' and 'a historical *causa* for an established principle or institution of government would have made a proper understanding of it necessarily historical.'⁵⁷ This may very well be a most appropriate articulation of recourse to 'traditional conceptions' to interpret s 61, and, as will be seen, the approach taken by Gageler J in *M68*. Ironically, Dicey's work makes constant reference to history, especially the seventeenth century conflicts and other constitutional landmarks, yet strangely kept 'strictly extraneous to his legal analysis'.⁵⁸

That the relevance of an historical constitutional approach is not limited to purely British concerns can be seen in Professor Winterton's defence of his exclusive use of 'traditional conceptions' to define the ambit of non-statutory executive power in s 61.⁵⁹ In response to the more recent tendency to discount the common law in this regard, he famously wrote:

While constitutional discourse should reflect present constitutional realities, *one of these* is that the Constitution was not inscribed upon a *tabula rasa*. It was born into a common law world, albeit one capable of development, *for adaptability is one of the common law's most fundamental and valuable qualities*.⁶⁰

Note how Allison's thesis resonates here. This, he continued,

is especially true of Ch II of the Constitution, which was deliberately drafted to reflect the supposed law of the Constitution, not its practice, even in 1900. An interpretation of Ch II which ignores British and Australian constitutional history by taking its words at face value is not 'postcolonial', *but rather one which judges the constitutional architecture merely by its façade*. Moreover, it is

⁵⁶ Ibid 13.

⁵⁷ Ibid.

⁵⁸ Ibid 14.

⁵⁹ Winterton, *Parliament, the Executive and the Governor-General*, above n 10, ch 1. The 'historical constitutional approach' within an orthodox analysis resonates throughout Professor Winterton's major work.

⁶⁰ Winterton, 'The Relationship', above n 25, 34 (emphasis added).

potentially dangerous, for it could lead to grossly exaggerated views of the Governor-General's independent powers . . . Even if one rejects an 'originalist' interpretation of the Constitution and interprets it in light of contemporary constitutional requirements, Ch II of the Constitution, including s 61, cannot be interpreted sensibly without reference to the Crown's prerogative powers, whether or not the 'maintenance' element of Commonwealth executive power is confined to those powers.⁶¹

Other scholars in analogous jurisdictions have advocated a similar approach. Thus, in the United States, Ernest Young wrote that

This kind of flexibility is essential to avoid the fallacy of treating the Constitution as a document that was created at a single time with a single set of premises and goals. The text of many provisions, for example, is sufficiently clear that almost all questions involving them can be resolved without recourse to other interpretative methods. In other areas, *the values historically associated with a provision*, as well as its tradition of interpretation over time, may require that some types of arguments count more than others.⁶²

To what extent then is this type of reasoning evident in Gageler J's judgement, and, more importantly, to what extent is it useful in that very difficult determination of whether impugned executive action is authorised by the non-statutory executive power of the Commonwealth?

III THE 'HISTORICAL CONSTITUTIONAL APPROACH' APPLIED

A *Context: The M68 Case*

In *M68*, a majority of the High Court, including Gageler J, held valid retrospective legislation that authorised the continued off-shore detention of an 'unlawful non-citizen' pursuant to arrangements with Nauru and independent security contractors.⁶³ Because the principal issue decided by the Court was whether the law was authorised by the aliens power, s 51 (xix), and whether it

⁶¹ Ibid 34-35 (emphasis added).

⁶² Ernest Young, 'Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation' (1994) 72 *North Carolina Law Review* 619, 689-90 (emphasis added).

⁶³ French CJ, Kiefel, Bell, Gageler, Keane, and Nettle JJ. Gordon J dissenting.

contravened the evolving principle in *Lim's* case,⁶⁴ it was not necessary to decide on whether the detention was authorised by s 61. But as the Commonwealth did not concede that it lacked authority from that source, Gageler J regarded it as appropriate to consider the issue in more detail.⁶⁵ Gordon J also considered the issue, but only briefly to conclude that the Executive did not have power to detain a person without statutory authorisation,⁶⁶ confirming similar statements made in the *CPCF* case.⁶⁷ Her Honour acknowledged that the limits of s 61 power 'have not been defined', and that there are 'undoubtedly significant fields' where the Executive can act without statutory authorisation.⁶⁸ No explicit reference was made to any inherent national power in s 61 to support any such executive detention.

Gageler J held that the 'procurement' of the plaintiff's detention on Nauru by 'the Executive Government' pursuant to prior agreements was 'beyond the executive power of the Commonwealth' in the absence of statutory authorisation.⁶⁹ It is possible to discern an approach in his Honour's reasoning which relies predominantly on 'traditional conceptions' and historical sources, particularly the political and constitutional context relating to the establishment of the Commonwealth and the Convention Debates. It manifested certain threads in his 2009 Byers Lecture⁷⁰ in which reasoned articulation was given to such an approach when interpreting the Commonwealth's legislative power, the form of representative and responsible government for which the Constitution provides and the precise constitutional principles and limitations which can be implied from this source, as well as the nature of the relationship between executive and legislative power. But his Honour's approach to the protracted problem of the ambit and content of the Commonwealth's executive power in the instant case of executive detention finds a deeper jurisprudential resonance in Allison's approach that justifies its use as a basic methodology. It accommodates historical enquiry and 'traditional

⁶⁴ *Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

⁶⁵ (2016) 257 CLR 42, 90 [114].

⁶⁶ *Ibid* 158 [372]-[373].

⁶⁷ *CPCF v Minister for Border Protection* (2015) 255 CLR 514, 567-8 [147]-[150], 595-600 [258]-[276].

⁶⁸ (2016) 257 CLR 42, 158 [368]. See also *Williams v The Commonwealth* (2012) 248 CLR 156, 191 [34], 184-5 [22], 226-7 [121], 342 [483], 362 [560].

⁶⁹ (2016) 257 CLR 42, 109 [175]

⁷⁰ Stephen Gageler, 'Beyond the text: A vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138, see especially at 146.

conceptions' with an analytical approach to s 61. While his Honour's judgment proceeded by a type of deductive legal reasoning, it is deductive not in the sense of drawing conclusions about the particular from the general by way of abstract conceptualisation of executive power. Rather the conceptualisation proceeded from a consideration of the common law, history, custom and usage – 'traditional conceptions' – incorporated within the *Constitution* and from the nature of the form of government for which it provides. This deductive approach was also manifested in the structure of the judgment, which is set out here before the more detailed examination which follows.

Commencing with a general examination of the Executive Government in the *Constitution*,⁷¹ his Honour analysed the external influences on Australian conceptions of responsible government at the time the *Constitution* was framed, the Australian colonial experience with responsible government, Australian conceptions of 'the Crown', and the relationship between it, Parliament and the judicial branch. From this he refined his examination to 'the nature of executive power' in which again he referred to historical opinions, early decisions, the work of English writers Blackstone and Dicey and historical English conceptions of the royal prerogative, as well as Professor Winterton's 'depth/breadth' analysis to explain the dimensions of the power based on federalism and the separation of powers. Proceeding further toward the particular, the limitations on Executive Power were then explored making reference to those limitations 'rooted in constitutional history and the tradition of the common law', and to High Court reasoning which emphasised the 'impossibility of understanding [s 61] ... other than by reference to common law principles bearing on the operation of responsible government' and 'the general principles of the constitutional law of England' which pre-date the *Constitution* but which nevertheless remain presently pertinent.⁷² Thence narrowing his focus to the precise legal issue, he examined 'executive power and liberty' and again reference was made to cases, including English cases, which referred to 'fundamental freedoms guaranteed by ancient principles of the common law or ancient statutes', including the English *Habeus Corpus* acts which are part of the 'accepted constitutional framework' and thence to 'the common law of Australia' to inform the content of s 61 and the extent of any

⁷¹ (2016) 257 CLR 42, 90 [115].

⁷² *Ibid* 99-100 [138]-[140].

power to detain.⁷³ He thus reached the conclusion that s 61 did not authorise the offshore detention and deprivation of liberty of a friendly alien by the Executive Government of the Commonwealth. As each of these is explored in more detail, the application of ‘the historical constitutional approach’ will become most apparent.

B ‘The Executive Government in the Constitution’

Historical considerations and traditional conceptions are woven into the fabric of his Honour’s reasoning throughout. His examination of the ‘Executive Government in the Constitution’⁷⁴ provided for in Ch II explored the framers’ intentions in that regard and how these were influenced by Allison’s ‘internal’ and ‘external’ perspectives; that is, the use made by the framers ‘in no slavish spirit’ (quoting Bryce) of English doctrines, including those applied in the colonies (internal) and American, Swiss and Canadian rules (external) as suited to their circumstances. Their ‘careful appropriation and adaptation of constitutional precedent to local circumstances’⁷⁵ was most influential in the drafting of Ch II, and remains central to understanding the relationship between the Executive Government and Parliament. By tracing the evolution of responsible cabinet government in the Australian colonies, he was able to discern ‘that peculiarly functionalised Australian conception of “the Government”’ and the practical approach to its status ‘untroubled by concerns as to the juristic nature of the “the Crown”’.⁷⁶

Instead of ‘the Crown’, Gageler J made reference to ‘the Executive Government’, and to ‘the Commonwealth’ when referring to the polity established by the *Constitution*, including its three branches. In adopting this usage, his Honour relied upon Australian colonial experience to gain a sense of the predominant denotation of ‘the Crown’. This is significant because it helps to ameliorate the problems with the notion of ‘the Crown’ which emerge in the United Kingdom. These arise from the evolving nature of the role of the Monarch from personal rule to a constitutional role which yet acknowledged a

⁷³ Ibid 101-7 [147]-[166].

⁷⁴ Ibid 90-1 [115].

⁷⁵ Ibid.

⁷⁶ Ibid 91 [118]-[119] quoting Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 4.

Without discounting the difficulties arising from the various usages of ‘the Crown’, Gageler J noted that in Australia, the term was appreciated almost exclusively from a ‘practical’ perspective⁸² heavily influenced by the diverse imperatives and singular burdens placed upon the government of a colony to develop the colony — providing for infra-structure, essential services and so on — which in more mature economies could be left to private enterprise. This was a point not lost on the Privy Council.⁸³ This pragmatic approach to ‘the Crown’ and its juristic personality resulted in the predominant understanding of the term to mean ‘the government’. It was an approach apparently untroubled by the metaphysical niceties that sometimes accompany the consideration of these terms. It could not afford to do otherwise. As Professor Saunders noted more generally: ‘the concept of the Crown thus was part of the assumed institutional fabric of government in the former colonies, shaping the powers of executive government and its relationship with the other branches.’⁸⁴

Although this approach made up in terms of efficacy what it may have lacked in subtlety and theoretical sophistication, it could also be said that it simply accommodated this subtlety and inevitable ambiguity to achieve an efficacious application to Australian circumstances: a workable, though still enigmatic in part, conception of ‘the Crown’. Such compromises are certainly not unknown in Anglo-Australian constitutionalism. From this, his Honour was able to remark that the ‘practical setting’ enabled ‘*that peculiarly functionalised Australian conception of “the Government”* [to] take root’⁸⁵ and that ‘Chapter II of the *Constitution* was framed against *that political and practical* background.’⁸⁶ Thus, while ‘the Crown’ did not have autochthonous origins, its adaptation into the peculiar setting of the establishment of the federal Commonwealth led to an autochthonous understanding of it, an understanding which continues to be informed by the common law powers of the Crown as applicable in 1900 and as developed by Australian courts.⁸⁷ This

⁸² (2016) 257 CLR 42, 91-2 [118].

⁸³ *Farnell v Bowman* (1887) 12 App Cas 643, 649.

⁸⁴ Saunders, above n 77, 882.

⁸⁵ (2016) 257 CLR 42, 91-2 [118] (emphasis added).

⁸⁶ *Ibid* 92 [119] (emphasis added).

⁸⁷ Condylis, above n 13. This article presents a persuasive thesis as to how to achieve some reconciliation between the view which would advocate that the ambit of s 61 be determined by the common law and the current view of the High Court that, ultimately, it is determinable by reference to the implied ‘nationhood’ power. The reconciliation is achieved without compromising the requirement to locate the sources of power ultimately to Australian ones. This is not the place to

was because, in the absence of clear textual definition to 'executive power' in s 61, it was necessary to provide a legally discernible source for the power which could be exercised by 'the Crown' as government.

This was manifested in the High Court's identification in *Sue v Hill* of the various usages of 'the Crown' adopted in Australia.⁸⁸ The third usage identified therein reflected in particular that which Gageler J referred to as the dominant and 'peculiarly functionalised' conception of the 'the Government' in Australia: 'the Crown ...identifies... "the Government", being the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business.'⁸⁹ Significant interpretative assistance was derived by the plurality also from the following statement of Professor Pitt Cobbett, reinforcing Gageler J's emphasis on Australian understandings: '*In Australia, these [prerogative] powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King.*'⁹⁰ Thus, 'the Crown' was predominantly used to refer to the 'entire executive organisation of the Commonwealth',⁹¹ to 'the Government' within a system of responsible government; a 'shorthand expression for the executive government'.⁹²

The alternate usage of 'the Crown' to denote the body politic was less evident.⁹³ 'The Commonwealth' was a ready substitute, the term achieving prominence by its adoption in the *Constitution*. It is these two conceptions of 'the Crown' – as polity and government – which appear to be reconciled, at least in so far as separate terminology is concerned, in *Williams (No 1)* where reference to 'the Crown' as 'body politic' was replaced by 'the Commonwealth'

explore this issue further, although it should be noted that a further examination and discussion of Mr Condylis's arguments is certainly warranted.

⁸⁸ (1999) 199 CLR 462, 497-502 [83]-[92].

⁸⁹ Ibid 499 [87].

⁹⁰ Ibid 499 [88] quoting from the 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145, 146-7 (emphasis added.) The confusion between the public and private capacity of the supreme magistrate is of course not a new problem, being known in Roman Law. Roman Law simply resolved the problem by the private/public distinction: 'Public authority stemmed from the office, not the man personally... Contrary to what is routinely asserted by modernist theorists regarding the personal nature of pre-modern polities, nothing could be more "public" in the Roman tradition than the *res publica*, which could not belong to the emperor privately.': see Kaldellis, above n 37, 40.

⁹¹ James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 2015) 471.

⁹² Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 207. See also Peter W Hogg, *Liability of the Crown* (Carswell, 2nd ed, 1989) 9.

⁹³ *Sue v Hill* (1999) 199 CLR 462, 498 [84].

to refer to the Australian polity with its three branches of government. It is the Commonwealth as polity which has legal personality, its executive power being exercised by its executive branch, that is, the Executive Government, in whom it is invested by s 61 when interpreted consistently with responsible government.⁹⁴ This would mean that the previously common usage of ‘the Commonwealth’ to refer, as Dixon J did in the *Bank Nationalisation Case*, to “the central Government of the country” understood in accordance with “the conceptions of ordinary life”⁹⁵ may now be best substituted by ‘the Executive Government’. And, when considering the ambit of the non-statutory executive power of the body politic, the principal emphasis is on the executive branch which exercises that power: ‘the Executive Government’.

‘[F]ramed against that political and practical background’, Ch II therefore could only be interpreted as the *formal* establishment of a government of the Queen, executive power being exercised by the Governor-General, but in substance establishing parliamentary cabinet government which would exercise substantive executive power pursuant to the principles of responsible government.⁹⁶ Moreover, this executive power was to be interpreted as belonging to a government ‘which was to have its own distinct national identity and its own distinctly national sphere of governmental responsibility.’⁹⁷ The historical approach is plainly manifested in this summary statement of the position:

The overall constitutional context for any consideration of the nature of Commonwealth executive power is therefore that ... the executive power of the Commonwealth is and was always to be permitted to be exercised at a functional level by Ministers and by other officers of the Executive Government acting in their official capacities or through agents. It is and was always to involve broad powers of administration, including in relation to the delivery of government services. Its exercise by the Executive Government [and its officers and agents] ... is and was always to be susceptible of control by Commonwealth statute. And its exercise is and was always to be capable of exposing the Commonwealth to common law liability determined in the exercise of jurisdiction under s 75(iii) and

⁹⁴ *Williams (No 1)* (2012) 284 CLR 156, 184 [21].

⁹⁵ (2016) 257 CLR 42, 94 [124].

⁹⁶ *Ibid* 92 [119]-[120].

⁹⁷ *Ibid* 92 [119].

of exposing officers of the Executive Government to writs issued and orders made in the exercise of jurisdiction under s 75(v). In 'the last resort' it is necessarily for a court to determine whether a given act is within constitutional limits.⁹⁸

Two of the observations above deserve particular attention: First, the interpretation of the ambit of Commonwealth executive power must be consistent with the requirement that it have broad administrative powers to deliver government services. It is not therefore to be interpreted unnecessarily narrowly. Secondly, it must be defined consistently with the imperatives of responsible government by which the executive is always subject to statutory regulation and control, that by '*its very nature in a system of responsible government...* it is susceptible to control by the exercise of legislative power by Parliament.'⁹⁹

This last point is particularly significant in light of the recognition in *Pape* of an inherent 'nationhood' power derived directly from s 61, a power to which, interestingly, his Honour does not refer. Whatever its content, being a power directly derived from s 61, arguably it is not susceptible to complete legislative regulation, at least not legislative abnegation. And being a direct grant of executive power similar to others in the *Constitution*, it cannot be removed from the Governor-General. The extent to which it may be regulated or otherwise interfered with by the legislature, is uncertain.¹⁰⁰ A rigorous application of the separation of powers would also tend to protect it from such interference, certainly from legislative abnegation as has already been argued by some commentators.¹⁰¹ In this struggle between constitutional principles – responsible government and the separation of powers – it is clear that reference to such historical considerations and the principles informing the written text¹⁰² alone may assist in determining the primacy of responsible

⁹⁸ Ibid 95-6 [128] (emphasis added).

⁹⁹ *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 441 (Dawson, Toohey and Gaudron JJ) (emphasis added).

¹⁰⁰ Aroney et al, above n 4, 490-5.

¹⁰¹ See, eg, the position taken by J E Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 50, 82; Professor K W Ryan expressed this view in his Opinion presented to the Standing Committee 'D' at the 1978 Australian Constitutional Convention: see Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 99.

¹⁰² See Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 3 where it is noted that the framers stated merely the formal position relating to the executive branch and its

government in interpreting s 61 to ensure that any interpretation ensures complete legislative control over any non-statutory executive power. ‘That political and practical background’ pursuant to which Chapter II was framed included the prevailing historical constitutional narrative of the supremacy of Parliament over the executive.¹⁰³ This unambiguously defended the position that the power emanating from 61, including any implied ‘nationhood’ power, is not immune from legislative control; that responsible government trumps any separation of legislative and executive power, that parliamentary supremacy over the Crown remains (even presently) triumphant even as against any separation between legislative and executive power; and it is a settlement whose constitutional importance, even as an aid to interpretation, is not diminished by its age.

Reinforcing his point, his Honour stated that the supremacy of Parliament was ‘not left to chance in the design of the *Constitution*’.¹⁰⁴ Reference was made to the power of Parliament to legislate for the appointment and removal of all officers of the Executive Government (excepting the Governor-General and Ministers), to the enumeration of subject matters of legislative power pursuant to which the Parliament may confer statutory authority on an officer of the Executive Government, and to s 51(xxxix) which gives specific legislative power with respect to matters “‘incidental to the execution”” of power vested by the *Constitution* in the “the Government””.¹⁰⁵ It provides for ‘legislative facilitation of the execution of the executive power of the Commonwealth’ and also provides for ‘legislative regulation of the manner and circumstances of the execution of the executive power of the Commonwealth.’¹⁰⁶

This last point is very significant for three reasons: first, it removes any doubts that might arise as to the supremacy of Parliament over the executive post *Pape*. Secondly, his Honour reinforced legislative supremacy by reference to another express constitutional provision: Chapter I of the *Constitution*

power, not its actual position, being ‘afraid of appearing gauche and uneducated in British eyes’ and confident that ‘no constitutional lawyer could suggest for a moment that the conferred on the Governor-General were to be taken literally.’

¹⁰³ (2016) 257 CLR 42, 92 [119], 93-4 [121]-[123].

¹⁰⁴ *Ibid* 93 [121].

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* 93 [122] citing *Brown v West* (1990) 169 CLR 195, 202.

doing so would render s 61 meaningless and attempts at definition “dangerous”.¹¹⁴

Reference to the historical origins of the *Constitution* also enabled a rejection of any notion that s 61 does not provide for any non-statutory power at all, that the Executive Government has no power except that provided by statute or the *Constitution* itself. Drawing upon a further observation by Deakin, the power provided for by s 61 is ‘administrative’ in addition to being ‘executive’ in the strict sense. That is, ‘it must obviously include the power ... to effectively administer the whole Government’.¹¹⁵ While statute may well provide for much of its powers and capacities in this regard, in order to be able effectively to govern, its powers cannot be said to be limited to those provided by statute. In addition to major prerogative powers relating to foreign affairs, war and defence, the Executive Government must have the capacity to administer departments, to own, manage and dispose of property, enter into contracts, employ personnel, conduct enquiries, spend money and undertake activities which a natural person or corporation may need to undertake, although the extent of such capacities cannot simply be equated with those of a natural person.¹¹⁶

What then are the sources of its content and how does the federal nature of the polity interplay with this question? Gageler J acknowledged two dimensions to this problem. The first related to the relationship between the executive and legislature at the federal level: what can the former actually do without the prior authorisation of the latter? The second related to the limitations on Commonwealth executive power resulting from the federal distribution of powers, that is, vis-à-vis that of the States. His Honour relied on Professor Winterton’s schema by which the first dimension was referred to as ‘depth’ and the latter ‘breadth’, reinforcing its express endorsement by Heydon J in *Williams (No 1)* — ‘not only neat but illuminating’¹¹⁷ — and other academic commentators.¹¹⁸

¹¹⁴ (2016) 257 CLR 369, 96 [129].

¹¹⁵ Ibid quoting from 130-1 of the Opinion.

¹¹⁶ See Twomey, above n 16, 316 and accompanying text.

¹¹⁷ (2012) 248 CLR 156, 312 [385] n 578. See also Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) 177-81.

¹¹⁸ See for example, inter alia, ibid, 176-82.

and civil liberties if non-statutory executive powers were interpreted too broadly, their limits left vague, thus possibly to permit of a slow aggrandisement of the power and of pockets of immunity from parliamentary control. Witness Winterton's insistent rejection of the existence of any inherent power in the 'maintenance' limb of s 61 beyond that which was recognised by the common law. Otherwise, it would be 'virtually limitless' in ambit, 'a vague and uncertain power if ever there was one', 'dangerous for civil liberties and *the equilibrium of government* for the executive to exercise a virtually unlimited power to '[maintain] ... this Constitution'.¹²⁴ While such dangers may be ameliorated by the government's political responsibility and accountability to Parliament for their exercise, these are but a 'weak instrument of control', incapable of curtailing the overreach of executive power during troubled times when government might invoke the 'protection of 'national security' as a smokescreen' for its actions, including the use of military power to enforce its will.¹²⁵ Albeit such enormities remain unlikely in a mature democracy, 'it is well to bear in mind that a democratic polity may need protection from its own executive almost as much as from outside subversion.'¹²⁶ Important as they may be as tenets of constitutional morality, Winterton argued that surer reliance alone derived from the legal effect of the *Constitution* and the (evolving) constitutional settlement it represents 'involving the rule of law, and responsible and representative government' to hinder any interpretation of s61 'as would create a field of executive independence from parliamentary control.'¹²⁷

The 'depth/breadth' methodology thus was framed precisely within the context of these policy preferences and normative justifications, themselves based on an appreciation of historical and comparative precedents, the efficacy of 'traditional conceptions' in this regard, and the general trend of constitutional norms in Anglo-Australian constitutional history.¹²⁸ The continued reliance upon these by Gageler J therefore clearly reflected the identification of his methodology with relevant aspects of 'the historical constitutional approach'.

¹²⁴ Ibid 97.

¹²⁵ Ibid 32-3.

¹²⁶ Ibid 33.

¹²⁷ Ibid 3-34.

¹²⁸ Ibid 29.

The particular concern to limit executive power in the depth dimension was very apparent in Winterton's rejection of a functional approach to s 61, that is, one which would define its powers to include those 'which of necessity inhere in governments'.¹²⁹ This would be contrary to the principles and policy underlying the 'depth/breadth' formulation as originally stated. And its indeterminate nature might hinder the establishment of any clear ambit to executive power in either dimension. Hence Winterton's insistence that reference should be made strictly to the common law, as presently determined by Australian courts,¹³⁰ to determine both the content and ambit of this power. To do otherwise would result in two unacceptable alternatives: either the rejection of any executive power beyond that provided for by statute or expressly by the *Constitution*, or the recognition of certain powers that inhere in government, their content impossible to ascertain by purely legal criteria, and running the (not inconsiderable) risk of 'giving the executive "carte blanche"'.¹³¹ Permitting a self-defining executive power, one which, even if it condescended to judicial review, was open to be defined by the philosophical (and political) proclivities of judges, was neither prudent, nor good policy.

While Gageler J did not expressly engage with this particular issue, what can be made of the omission in his reasoning of any reference to an implied nationhood power in s 61? Does his express reference to 'depth/breadth' constitute an endorsement of Winterton's precise limitation of depth to the prerogative (in the broad sense) in addition to his policy and normative preferences? It may be telling in this regard that he interpreted¹³² Mason J's frequently cited statement in *Barton* – that executive power in s 61 'enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution'¹³³ – purely in the context of the 'breadth' dimension. This may be suggestive, although by no means certain, of a certain reticence to acknowledge the existence of purely inherent power in s 61. Immediately following he noted Mason J's *discrete* reference to the depth dimension when Mason J stated that s 61 'includes the prerogative powers of

¹²⁹ Ibid 35.

¹³⁰ See Condylis, above n 13.

¹³¹ Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 35.

¹³² (2016) 257 CLR 42, 97 [131].

¹³³ *Barton v Commonwealth* (1947) 131 CLR 477, 498.

the Crown, that is, those powers accorded to the Crown by the common law.¹³⁴ While Gageler J did not then say that s 61 includes *only* those power prerogative powers and capacities recognised by the common law, he also completely omitted reference to any ‘nationhood’ power. Instead, he proceeded to make some very useful observations about the various categories of non-statutory executive power and the adoption of a nomenclature to ease confusion.

D *A Word About Nomenclature:
‘The Prerogative’ in Gageler’s Reasoning*

The term ‘the prerogative’ has been problematic. It has been plagued by a shifting definition over time that has resulted in inevitable ambiguities and inaccuracies in usage.¹³⁵ This is a consequence of Dicey’s revision of Blackstone’s definition to expand the meaning beyond those powers and rights which the common law recognised as belonging uniquely to the Crown, in contradistinction to subjects, to include all those capacities shared with natural persons that the Crown could exercise without statutory authorisation.¹³⁶ Judicial reasoning in the United Kingdom (variably, though less so than previously) and to a certain extent in Australia (though no longer so)¹³⁷ took to Dicey’s nomenclature. Professor Winterton also did so in *Parliament, the Executive and the Governor-General*, there being, at the time of publication ‘[i]n fact ... neither a rational basis nor any utility’ in Blackstone’s distinction.¹³⁸ On this view, the most important discrimen was that power could be exercised without statutory authorisation, not whether it was unique to the Crown. The common law determined the ambit of any particular power or capacity, including whether it had to be exercised pursuant to the general law or otherwise.

However, Winterton’s initial assessment of this debate as ‘sterile’ was tempered in his later writings, implying a utility in Blackstone’s distinction for

¹³⁴ (2016) 257 CLR 42, 97 [131] quoting *Barton v Commonwealth* (1947) 131 CLR 477, 498.

¹³⁵ For a recent exposition, see Wade, above n 80.

¹³⁶ Aroney et al, above n 4, 445-6; Winterton, ‘The Relationship’, above n 25, 26.

¹³⁷ Winterton, ‘The Relationship’, above n 25, 26.

¹³⁸ Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 112.

certain purposes.¹³⁹ Professor Zines adopted Blackstone’s approach,¹⁴⁰ given judicial imprimatur in Australia by Brennan J in his careful analysis in *Davis*.¹⁴¹ This is the approach expressly supported by Gageler J in *M68*. The rationale behind the present acceptance of Blackstone’s definition in Australia was the recognition of the important differences between the Crown’s unique ‘prerogative’ power and its shared (with other legal persons) ‘capacities’ which may resonate in the determination of their nature, content and ambit: The former alone may, in certain circumstances, interfere with the legal rights and duties of others whereas the latter are always subject to the general law and do not permit of coercive action.¹⁴² Moreover, equating the ‘capacities’ with those of a natural person has always been problematic given the very different impact and import of those capacities resulting from the fact that they are being exercised by government; a point emphasised in *Williams (No 1)* – and which constituted one basis for the majority decision to limit the non-statutory component of the capacity to spend and contract to the ordinary course of the administration of government.¹⁴³ As a result, it has been suggested that policy considerations should be taken into account to limit the non-statutory component of the ‘capacities’ of the Executive Government. For example, it has led to suggestions that where any capacity by the Government may interfere with individual freedoms and civil liberties, statutory authorisation should be required before it can be exercised.¹⁴⁴

For these reasons, Gageler J also adopted Brennan J’s preference for Blackstone’s approach,¹⁴⁵ reinforcing its express adoption by French CJ and

¹³⁹ Winterton, ‘The Relationship’, above n 25, 26 .

¹⁴⁰ As did Professor Stellios in Stellios, *Zines’s The High Court and the Constitution*, above n 91, 374-5.

¹⁴¹ *Davis v Commonwealth* (1988) 166 CLR 79, 108.

¹⁴² Zines, above n 11; Stellios, *Zines’s The High Court and the Constitution*, above n 91, 374-5.

¹⁴³ *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 193 [38], 213-4 [76]-[77], 352 [521].

French CJ quoted Professor Winterton’s statement that ‘governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character.’ The various dimensions to this problem were explored by Professor Zines in Zines, above n 11, 283-6 where he drew upon the work of Professor Winterton and the following important papers: C A Saunders and K K F Yam, ‘Government Regulation by Contract: Implications for the Rule of Law’ (2004) 15 *Public Law Review* 51 and Margit Cohn, ‘Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive’ (2005) 25 *Oxford Journal of Legal Studies* 97.

¹⁴⁴ This view was expressed by Cohn: *ibid* 120. Zines in Zines, above n 11, 285 said that there was ‘much to be said’ for Cohn’s view, it being analogous to the rule of statutory interpretation solicitous of such rights.

¹⁴⁵ (2016) 257 CLR 42, 97 [132]-[133], 98-9 [136].

Crennan J in *Williams (No 1)*.¹⁴⁶ His Honour proceeded deliberately to set out a very useful nomenclature reinforcing previous judicial tendencies in this regard:¹⁴⁷

1. 'a statutory power or capacity', that is, a non-prerogative statutory power;
2. 'prerogative (non-statutory) executive power or capacity', denoting the prerogative in the narrow Blackstonian sense; and
3. 'non-prerogative executive capacity', denoting those non-statutory capacities shared with other legal persons though not necessarily equivalent to them.

In relation to the second category, this includes actions which would otherwise be placed in category (iii) as 'capacities' if these were not being exercised pursuant to prerogative power. The second and third categories, his Honour stated, constituted the residue of discretionary or arbitrary authority left in the hands of the Executive Government and thereby encompassed every act which it may lawfully undertake without statutory authorisation. His Honour confirmed the proposition that 'prerogative executive power or capacity' is capable of interfering with the legal rights and duties of others.¹⁴⁸ A 'non-prerogative executive capacity', on the other hand, is to be regarded as 'the utilisation of a bare capacity or permission, which can also be described as ability to act or as a "faculty"'.¹⁴⁹ The absolute requirement that the exercise of a 'capacity' is subject to the general law, both common law and statute, assists in qualifying it as a concept discrete from 'power' in this context. That is, 'power' denotes the ability to take action which may affect legal rights and obligations and may not be subject to them in certain circumstances. 'Capacity' denotes a mere faculty subject to the general law.¹⁵⁰ The effects of a non-prerogative

¹⁴⁶ (2012) 248 CLR 156, 186 [25], 344 [488].

¹⁴⁷ See, eg, (2016) 257 CLR 42, 99 [138]. It is a little uncertain whether his Honour regards the 'nationhood' power as a subset of 'prerogative executive power', albeit not sourced in the common law but directly from s 61, or whether it is to be treated as a separate sui generic category.

¹⁴⁸ Ibid 97 [133].

¹⁴⁹ Ibid 98 [135]. His Honour cited *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 439 quoting *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 308.

¹⁵⁰ While not possible to explore this here, in a very interesting article Adam Perry, 'The Crown's Administrative Powers' (2015) 131 *Law Quarterly Review* 652, examines the different aspects of 'capacities', drawing a distinction between the Crown's non-prerogative, non-statutory 'legal'

'capacity' on legal rights and relations 'result *not from the act being uniquely that of the Executive Government* but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor.'¹⁵¹ In other words, 'the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.'¹⁵²

To emphasise the fundamental nature of this attribute, his Honour referred to it as an 'inherent' characteristic¹⁵³ supported in both Australia and the United Kingdom by the denial of any *prerogative* executive power to dispense with the operation of the general law.¹⁵⁴ Therefore, the Executive Government cannot suspend the operation of the general law when it seeks to exercise its non-prerogative capacities in circumstances where the law may frustrate its policy. That general proposition was not disturbed, although elaborated upon, by the finding in *Williams (No 1)* that the non-prerogative capacities of the Executive Government is not to be equated for all purposes with the capacities of a natural person,¹⁵⁵ a point which had in any event already been appreciated by academic commentators.¹⁵⁶ Whether this should lead to further limitations to the capacities in the depth dimension is not something his Honour elaborated upon. But his response to the proposition from *Williams (No 1)* – that many, but not all, instances of executive spending and contracting require legislative authorisation – was not quite an endorsement of that position as settled: '[w]hether that characterisation is warranted need not be explored.'¹⁵⁷ While that aspect of *Williams* was not relevant to decide the present case, nevertheless there is a certain enigmatic quality to the response which may reinforce his Honour's enigmatic omission of 'nationhood' in his

capacities and 'administrative' capacities. This internal distinction may assist with the vexed question as to when statutory authorization ought to be required before they may be exercised.

¹⁵¹ (2016) 257 CLR 42, 98 [135] (emphasis added).

¹⁵² *Ibid* (emphasis added) citing *Clough v Leahy* (1904) 2 CLR 139, 155-6.

¹⁵³ *Ibid* 98 [136].

¹⁵⁴ *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J), 593 (Deane J).

¹⁵⁵ (2016) 257 CLR 42, 101 [145].

¹⁵⁶ See, eg, above n 135-6 and accompanying text. Professor Winterton, prior to the *Williams* cases, had stated that the source of the capacities was that the Crown was a corporation sole and shared those legal capacities belonging to natural persons. But he had warned that this 'general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so because governmental action is inherently different from private action.' Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 121.

¹⁵⁷ (2016) 257 CLR 42, 101 [145].

reasoning. However, it cannot be said that it is reflective of a preference for the ‘common assumption’ (at least in the narrow sense) which was rejected in that case. On the other hand, to the extent that it could, it may reinforce his Honour’s apparent preference for the hitherto more traditional approach to s 61, emphasising ‘traditional conceptions’ and the common law.

Despite these uncertainties, the nomenclature set out in the reasoning, as well as the important distinctions noted above, do constitute a very useful basis upon which to achieve an understanding of any executive action which may be in issue, as his Honour did in this case. Before looking at the precise issue of executive detention, he explored the more general question of limitations in which the application of a historical constitutional approach becomes most apparent.

E *‘Limitations on executive power’*

To appreciate the limits on the Commonwealth’s executive power in its ‘depth’ dimension, his Honour referred to the abiding similarity between the prerogatives and the capacities which lay ‘in the identity *of their provenance*.’¹⁵⁸ While both derive indirectly from s 61, in the absence of any guidance from the section, how are these limits to be determined? These, his Honour stated, are ‘to be understood (*as distinct from merely interpreted*) in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and *in light of constitutional history and the tradition of the common law*.’¹⁵⁹ Note here again the consistency with Allison’s approach.

His Honour’s choice of particular past decisions and judicial statements reflecting this approach is also telling. Approving reference was first made to Isaacs J’s reasoning in the *Wooltops* case¹⁶⁰ that s 61 can only be understood by reference to ‘common law principles bearing on the operation of responsible government’. The ‘constitutional domain’ for which s 61 provides cannot itself determine whether any exercise of executive power is valid¹⁶¹ and hence

¹⁵⁸ Ibid 99 [137] (emphasis added).

¹⁵⁹ Ibid 99 [138] (emphasis added).

¹⁶⁰ (1922) 31 CLR 421 cited at (2016) 257 CLR 369, 99-100 [140].

¹⁶¹ (1922) 31 CLR 421, 440.

reference had to be made to those executive powers recognised by the common law incorporated therein. Could the Commonwealth validly enter into a contract with a private company by which it agreed to consent to the sale of its products in consideration for which the Commonwealth would receive a share of profits? Because in substance this was characterised as taxation without prior statutory authorisation, it was invalid: the common law no longer recognised a prerogative power to tax. Gageler J quoted approvingly from the reasoning of Starke J, which made more expansive reference to the common law and constitutional history to establish that Parliament had clearly won the historical struggle to deny prerogative taxation and had made it impossible for the Monarch to exact, extort, or raise moneys from the subject for the Monarch's use as the price of exercising his control in a particular way or as consideration for permitting the subject to carry on his trade or business.¹⁶² In accord, Gageler J approvingly referred to the statement of Isaacs J that s 61 simply marked out the field of Commonwealth executive action, the precise content of which, absent statute, had to be determined by reference to the prerogative powers of the Crown.

This reference is ultimately to Australian sources. In the words of Professor Zines:

[A]nything that comes under the rubric of Crown prerogative is seen as now having a statutory, in the sense of constitutional [s 61], basis in so far as it pertains to the Commonwealth. Yet it is clear that in applying s 61 in this area one must go to common law principles to determine the existence of prerogative power, privilege or immunity, its extent and limitations.¹⁶³

In similar vein, Gummow J, did not think it contrary to this proposition to state that 'it is settled that in certain respects the executive power has limitations which follow those established in the United Kingdom.'¹⁶⁴

The enigmatic nature of the omission by Gageler J of express reference to an inherent 'nationhood' power in s 61 is reinforced by his emphasis on the prerogative and the common law found in the foundational reasoning in

¹⁶² (2016) 257 CLR 42, 100 [141]-[142].

¹⁶³ Zines, above n 11, 279-8 referring to referring to *Barton v Commonwealth*(1974) 131 CLR 777, 498 (Mason J) and the *AAP* case (1975) 134 CLR 338, 405-6 (Jacobs J).

¹⁶⁴ Gummow, above n 17, 167.

Wooltops. Moreover, he stated, “[t]his analysis of the executive power of the Commonwealth... is not, I think, affected by recent cases focussed on the capacity of the Executive Government of the Commonwealth to expend appropriated funds.”¹⁶⁵ He was referring to *Pape* and *Williams*. What does he mean? The principal significance of the former, in his Honour’s reasoning, was not its interpretation of s 61 to include an inherent ‘nationhood’ power, which he did not mention, but rather its finding that ss 81 and 83 of the *Constitution* cannot be interpreted as a source of power to authorise executive expenditure. In other words, the Executive Government’s expenditure of public funds is more than the mere execution of an appropriation law and must be authorised by power found elsewhere in the *Constitution* or valid statute. His Honour, however, did not state where the power was found in that case nor did he refer to the conclusion of the majority that the common law was no longer the determinant of the ambit of s 61 power. The case, rather, ‘was focussed on the capacity of the Executive Government of the Commonwealth to expend appropriated funds’.¹⁶⁶ If his Honour is using the word ‘capacity’ pursuant to his own nomenclature, then this may be suggestive that he regarded *Pape* as doing no more than recognising a *capacity* to spend money, and that the Commonwealth (as opposed to the States) could do so by way of the ‘tax bonus’ because ‘nationhood’ provided the necessary ‘breadth’. However, on the other hand, in his own nomenclature he referred to ‘prerogative powers *and capacities*’ and if he was using ‘capacity’ in this sense, the view may be maintained that the spending of money in *Pape* was an exercise of a *prerogative capacity* by virtue of ‘nationhood’ in the depth dimension beyond any power recognised by the common law. But which precise usage his Honour meant remains unclear and firm conclusions are elusive. But what is clear is the emphasis on, and possibly preference for, the common law as the determinant of non-statutory executive power.¹⁶⁷

Yet, given that the precise issue in the case was the ambit of executive power to detain non-citizens and that the enquiry related to *prerogative* power in the depth dimension, should not something have had to be said about the ‘nationhood’ power? For it was this very issue and related issues of border-

¹⁶⁵ (2016) 257 CLR 42, 100-1 [143].

¹⁶⁶ *Ibid.*

¹⁶⁷ This may be a manifestation of the approach advocated by Condylis, above n 13, in which the interpretation even of an inherent nationhood power is melded with an examination of the relevant common law prerogatives, maintaining their continuing primacy.

protection which first gave rise to the express articulation and acceptance of such a power by the majority in the *Tampa* case.¹⁶⁸ Did it not need to be questioned whether there was a power in s 61 beyond the prerogative powers and non-prerogative capacities 'which form part of, but do not complete, the executive power' in s 61, as French CJ put it in *Pape*.¹⁶⁹ Did it not warrant some consideration of the power described more expansively by the plurality which 'enables the undertaking of action appropriate to the position of the Commonwealth of a polity created by the Constitution'?¹⁷⁰ Did it not need to be considered whether the Commonwealth actions in issue here were peculiarly adapted to the government of the country and which otherwise could not be carried out for the public benefit – the predominant test for valid application of any executive nationhood power?¹⁷¹ While not an express denial of 'nationhood', it appears to constitute a serious discounting of it and a reaffirmation of the common law prerogatives and capacities as principal, not peripheral or 'last resort', sources of the depth of s 61 power.

As for *Williams (No 1)*, his Honour appears to have restricted its impact very much to its facts: Noting that in *Williams (No 2)* it was interpreted to have held that 'many, but not all, instances of executive spending and contracting require legislative authorisation'.¹⁷² his Honour did not engage further with that decision. It did not have any bearing on executive deprivation of liberty. Apart from its rejection of a simple equation of the capacities of the Executive Government with those of a natural person, as mentioned above, *Williams* was otherwise relevant only on the question of 'breadth'; that is, that breadth was not to be determined solely by reference to the reach of Commonwealth legislative power.¹⁷³ But if not Commonwealth legislative competence, what then is the determinant of 'breadth's' ambit? Given that his Honour did not mention 'nationhood' in the context of 'depth', does it reinforce the perception that 'nationhood' now plays only a role as the determinant of 'breadth'? That is, the sphere of Commonwealth executive competence in the exercise of its capacities is determinable by reference to what

¹⁶⁸ *Ruddock v Vadarlis* (2001) 110 FCR 491.

¹⁶⁹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid* 50 [95], 61 [129], 62 [131], 63 [133], 87 [228], 91 [241], 92 [242], 116 [329], 180-1 [519] – [520].

¹⁷² *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 465 [68].

¹⁷³ (2016) 257 CLR 42, 101 [145].

is peculiarly adapted to the government of a nation and which otherwise could not be carried out for the public benefit. Independently of his Honour's view on this, there is a case which may nevertheless be made in support of this proposition based on a particular reading of the foundational cases and dicta which led to the eventual recognition of the 'nationhood' power.¹⁷⁴

Whatever one is to make of this, at least his Honour unambiguously rejected the existence of a sphere of executive power beyond the reach of legislation, no matter how 'breadth' is defined, as his remarks about s 51(xxxix) noted above make very clear. And in terms of the limits on executive power, it is clear that his Honour was making principal reference to 'traditional conceptions', to the common law, whether it was prerogative power or simply executive capacities, in the depth dimension. The breadth dimension, however, remains unsettled.

F "Executive power and liberty"

It is apparent from Gageler J's reasoning here, and in the preceding sections, that it is not a refutation of the imperative ultimately to look to Australian sources to say that the *Constitution* does incorporate those aspects of the English legal and constitutional inheritance which, even if they have acquired the veneer of antiquity, are very much active within Australian constitutional arrangements. To the extent that they are 'active', they remain important sources of both law and interpretative assistance because evolution and reform are intrinsic to them, whether they derive from the recent or distant past: a clear application of 'the historical constitutional approach'.

This is most clearly evident in his Honour's consideration of those legal principles governing the liberty of the subject and executive detention. For example, he quoted with approval the observations of Brennan J in *Re Bolton, Ex Parte Beane* in which a Commonwealth officer was ordered to discharge from custody an alien who had been detained in Australia without statutory authorisation:

¹⁷⁴ See Twomey, above n 16, 330-9.

Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes *which are so much part of the accepted constitutional framework* that their terms, if not their very existence, may be overlooked until a case arises which evokes *their contemporary and undiminished force*.¹⁷⁵

In the same way that the common law no longer recognised a prerogative to tax, so now it did not recognise any non-statutory executive power to deprive a person of liberty. The informing principle was that 'the common law of Australia knows no *lettre de cachet* or executive warrant pursuant to which either the citizen or alien can be deprived of his freedom by mere administrative decision or action.'¹⁷⁶ This precise point became the foundational proposition in the seminal plurality judgement of Brennan, Deane and Dawson JJ, with whom Mason CJ agreed, in *Lim v Minister for Immigration et al*¹⁷⁷ which Gageler J adopted as presenting the current law: Excepting in circumstances of the execution of prerogative powers in wartime, an alien who is unlawfully within the country is not an outlaw and the common law does not permit such a person to be deprived of liberty or property without some other positive legal authorisation or judicial mandate.

In argument in *M68* it was submitted that the inability of a Commonwealth officer to authorise or enforce a deprivation of liberty was not the result of some incapacity on the part of the Executive Government. It was rather because Commonwealth officers were subject like everyone else to common law sanctions for the invasion of common law rights. But where the writ of the common law did not run, such as on Nauru, the Executive Government was not hindered by the common law's impediments. Echoing Lord Diplock's dictum that '[i]t is 350 years and civil war too late for the Queen's courts to broaden the prerogative',¹⁷⁸ Gageler J stated that this argument similarly was 'three centuries too late'.¹⁷⁹ He made reference in this context to the various United Kingdom *Habeus Corpus Acts* and the *Petition of Right 1627* which severely curtailed any Executive capacity to deprive a person of liberty. These were examples of those 'ancient statutes' to which Brennan J

¹⁷⁵ (1987) 162 CLR 514, 520-1 quoted in *M68* (2016) 257 CLR 42, 101-2 [147] (emphasis added).

¹⁷⁶ In *Re Bolton; Ex parte Bean* (1987) 162 CLR 514, 528 (Deane J).

¹⁷⁷ *Lim v Minister for Immigration* (1992) 176 CLR 1, 19.

¹⁷⁸ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79. See, eg, Black CJ in the important case of *Ruddock v Vadarlis* (2001) 110 FCR 491, 501.

¹⁷⁹ (2016) 257 CLR 42, 103 [154].

referred and which ‘remain of undiminished significance within our current constitutional structure.’¹⁸⁰ The former act made available the writ of habeus corpus on demand to the judges of the King’s Bench or Common Pleas. The latter Act rendered inadequate the orders of the Monarch as a justification for the imprisonment of the subject. More than that, his Honour noted that these statutes and the history of the great writ had a more fundamental structural affect.¹⁸¹ Put simply, they abolished any executive capacity to order detentions without authorisation by law, subject to any exception under the war prerogative.¹⁸² This principle was accepted and applicable to Australian colonial governments and the Commonwealth Executive and is encompassed within those general fundamental principles which, although not expressly stated in the *Constitution*, nevertheless – quoting from Isaacs J in *Ex Parte Walsh; in re Yates* – ‘form one united conception for the necessary adjustment of the individual and social rights and duties of members of the State.’¹⁸³ Thus,

[The] inability of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is not simply the consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. It is the consequence of an inherent constitutional incapacity which is commensurate with the availability, long settled at the time of establishment of the Commonwealth, of habeus corpus to compel release from any executive detention not affirmatively authorised by statute.¹⁸⁴

The essential indicator of the limits on the Executive Government provided for by the *Constitution* were thus those ancient English statutes that curtailed the capacity of the Crown to infringe upon the liberty of the subject and which emerged from past constitutional battles within the political community from which Australian constitutional arrangements had their source: a clear manifestation of Allison’s ‘historical constitutional approach’ to interpret s 61.¹⁸⁵ Significantly, this inherent incapacity, reflected in the common law, is a limitation in the depth dimension. It cannot be removed by statute, and nor can it be removed by the law of another state. On the other hand,

¹⁸⁰ Ibid 103 [155].

¹⁸¹ Ibid 104 [156].

¹⁸² Ibid 104 [157].

¹⁸³ Ibid 104-5 [158] quoting *Ex Parte Walsh; in re Yates* (1925) 37 CLR 36, 79.

¹⁸⁴ Ibid 105 [159].

¹⁸⁵ Ibid 106 [162] – [163].

Parliament may confer by statute on the Executive Government a power or authority to detain, subject to the existence of a relevant head of power and compliance with Ch III of the *Constitution*.¹⁸⁶

On the facts in issue, there was no suggestion of the availability of any prerogative to justify the detention as might be the case in situations of enemy aliens in war time, or which 'might be argued to arise as an incident of a prerogative power to prevent an alien from entering Australia.'¹⁸⁷

IV CONCLUDING REFLECTIONS

From this examination of Gageler J's reasoning, it is clear that the method adopted in both the overall structure and in the reasoning relating to each issue discussed, from the general to the particular, correlates with the approach advocated by Dr Allison. It is interwoven in the reasoning, almost as an underlying assumption. Allison's thesis may thus provide jurisprudential justification and validation of an approach to s 61 executive power which makes principal reference to historical considerations and sources, to 'traditional conceptions', both essential and respectable in a modern context. It certainly rejects any attempt to diminish, or discount entirely, such considerations; not simply because it defends them from any charge that they are archaic, 'old law', but because it acknowledges and explains their continuing constitutional relevance in interpreting and understanding s 61 and indeed the rest of Chapter II. It reinforces the views of those commentators who press the case for interpreting the *Constitution* pursuant to these, who may be sceptical of discovering *inherent* power (in the depth dimension) in s 61 purely on the basis of the 'national' or 'nationhood' considerations which are ill-defined and lack legally-discernible principles to inform their precise content and ambit. Nicholas Condylis, for example, recently pressed the case for a reinterpretation of 'nationhood' by reference purely to common law principles based on what he referred to as the 'indigenous prerogative'.¹⁸⁸ It also reinforces the normative position which underlies the traditional depth/breadth schema; that is, to adopt an interpretation which ensures government action is always subject to

¹⁸⁶ Ibid 106 [164].

¹⁸⁷ Ibid.

¹⁸⁸ Condylis, above n 13.

legislative regulation and control, and that the validity of such action is not dependent on the opinion of the government. Such an approach is most consistent with basic principles of responsible government implied from the *Constitution* and with the broader, dominant, constitutional tradition in which the *Constitution* was framed.

This is not to suggest that resort to the common law prerogatives is ideal: rather, as Professor Winterton argued, 'there is no more satisfactory alternative'.¹⁸⁹ The difficulties involved in ascertaining these in hard cases is also acknowledged. But it must also be accepted that those which are most commonly referred to – conducting foreign relations, concluding treaties, conducting war and defending the nation – have a clear identifiable core of meaning, albeit there may be some uncertainty on the periphery.¹⁹⁰ And the difficulties which arise with the non-prerogative capacities, such as the extent to which they can or should be equated with those of a natural person, are both acknowledged and being addressed. This reinforces an approach to the executive power of the Commonwealth which rejects any attempt to interpret the *Constitution* as if it were written upon a *tabula rasa*. Allison's thesis provides reasoned jurisprudential support for such a view, at least with respect to constitutions based on Westminster models.

But what more can be said about the parallels between Gageler J's approach and that of Allison? It was remarked above that Gageler J made no explicit reference to an inherent 'nationhood' power in s 61. Why this is remarkable is that the issue of executive detention in the context of border protection is the very same issue that first called forth the articulation of such a power by the majority in the Full Federal Court in the *Tampa* case and the first express rejection of the common law prerogatives as the ambit of s 61 power in its 'maintenance' limb. This position was subsequently adopted it would seem in *Pape* and confirmed in *Williams*. Why did Gageler J then resort exclusively to the 'traditional conceptions' to determine the issue? There are a number of possible explanations: For example, first, it might be concluded that His Honour did not regard 'nationhood' as arising except in exceptional emergency situations which somehow threatened the polity itself, whether it be in terms of national security in the traditional sense, or in the sense of a serious threat to

¹⁸⁹ Winterton, *Parliament, the Executive and the Governor-General*, above n 10, 115.

¹⁹⁰ *Ibid.*

the nation's economic security (as in the 'Global Financial Crisis' in *Pape*.) The facts of this case therefore did not warrant its consideration. Secondly, it might simply be the case that his Honour could resolve the issue simply and with certainty by reference to the common law and to those ancient statutes which simply removed any prerogative power in the Crown to detain subjects and deprive them of liberty. Thus deprived of power, reminiscent of the deprivation of any prerogative power to tax, the common law no longer recognised the power without statutory authorisation, certainly at the time the *Constitution* became operative, and indeed long before. He was therefore able to avoid the complexities which may arise in seeking to justify his position by reference to the 'nationhood' power and its uncertain definition. Thirdly, it could be argued that his reasoning evinces a more general preference to avoid the utilisation of an 'amorphous' power such as 'nationhood' because he is in accord with the normative and policy preferences underlying Winterton's breadth/depth analysis which he expressly adopted. Fourthly, perhaps his own interpretational methodology, as revealed in his Byers Lecture abovementioned, coupled with his apparent (inadvertent) alignment with Allison's approach, has led him to a clear preference for the more traditional approaches to s 61 which places sole reliance on 'traditional conceptions' and constitutional history. If recognition is to be given to 'nationhood', it should be only in the dimension of breadth when considering the ambit of executive capacities.

But, it should be emphasised, it cannot be said with any certainty whether any or all of the above reflections upon his reasoning are in fact accurate assessments of his Honour's position. To the extent that any or all of the above are, there appears to be a relegation – or elevation depending on one's viewpoint – of 'nationhood' to those rare circumstances of clear and unambiguous situations of emergency, akin to 'Locke's prerogative'.¹⁹¹ But in any event, would not all these circumstances be covered by the existing emergency prerogatives relating to war, defence, the preservation of the polity as well as those express constitutional provisions which may provide for this?¹⁹² If so, this would reinvigorate an approach which resorts principally to 'traditional conceptions', which were clearly able to settle this case quite

¹⁹¹ John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press, 1988) 375.

¹⁹² See eg, s 119 and also those Commonwealth institutions, departments, courts, installations the protection of which may be authorised by the maintenance limb of s 61: Aroney et al, above n 4, 433-4.

comfortably. But if that is so, why did his Honour not just deal with the precise issue of executive detention and deprivation of liberty, without first examining, as he did, questions of a far more general nature, and in historical context, in the sections on ‘the Executive Government in the Constitution’ and ‘the Nature of Executive Power’? Was he attempting to indicate that the traditional approach is the most efficacious and accurate approach to these questions, the one most attune to Australian constitutional principles and history, to the broader tradition of constitutionalism to which Australia’s belongs? Whatever else one may say, the approach certainly runs counter to any more recent attempts to downplay and discount ‘traditional conceptions’ and the common law to determine the content and ambit of s 61 executive power. Whether this may be reflective of a possible future trend in the High Court’s jurisprudence, it is too difficult to tell. But it may at least be a signpost in that direction.