

The Dangers of Excessive Executive Power and Possible Solutions

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Abstract: As a constitutional democratic country, Australia is based on the separation of powers, and the expansion of executive power poses a threat to the balance of power. This article explores the nature and sources of federal administrative power, and points out the problem of its blurred boundaries. Unrestricted administrative discretion carries risks such as weakened parliamentary oversight and weakened federalism. In this regard, reform measures such as limiting the breadth and depth of state power, strengthening judicial review, enhancing transparency and citizen participation can be taken to rebalance administrative power within the framework of the Australian Constitution, in order to maintain the separation of powers and democratic governance.

Keyword : Expansion of administrative power; Separation of powers; Constitutional ambiguity; Judicial review; Transparency reform

Introduction

Australia operates as a constitutional democracy grounded in the separation of powers doctrine, comprising distinct legislative, executive, and judicial branches. The equilibrium between these branches is fundamental for maintaining accountability and preventing the abuse of power. Consider specifying the source or context of this expansion (e.g., through emergencies, statutory delegation, or High Court deference), to make the statement more grounded. This development prompts a critical question: should Australians be concerned by this expansion, and if so, how should it be addressed?

This essay argues that the growing dominance of the Executive warrants significant concern. It will first examine the nature and sources of Commonwealth executive power, highlighting its uncertain boundaries. Second, it

will identify the risks posed by unchecked executive discretion, including reduced parliamentary oversight and weakened federalism. Finally, it will propose targeted reforms—judicial, legislative, and civic—that are essential for rebalancing executive authority within Australia’s constitutional framework.

1 Why Growing Executive Power Is a Concern

1.1 Constitutional Ambiguity and Resulting Uncertainty

Section 61 is the principal provision dealing with Commonwealth executive power in the Australian Constitution. It vests ‘the executive power of the Commonwealth’ in the queen and states that it is exercisable by the Governor-General as the Queen’s representative^[1].

It is commonly accepted that the meaning of ‘executive power’ in section 61 of the Australian Constitution is shaped by constitutional history and common law traditions, encompassing many powers exercised by the British Crown at the time of Australia’s federation. However, given significant constitutional differences between Australia and the United Kingdom, it cannot simply be assumed that the scope of executive power under section 61 mirrors the executive power in Britain. Instead, the nature and extent of the Commonwealth’s executive power must be determined by interpreting the language of section 61 within its broader constitutional context.

This interpretative approach has been affirmed by the High Court of Australia in several recent landmark decisions, notably *Pape v Federal Commissioner of Taxation*, *Williams v Commonwealth* [No 1], and *Williams v Commonwealth* [No 2]. These cases have provided clarity on the scope and character of the Commonwealth’s executive power. Specifically, they confirm that section 61, read within its constitutional framework, represents the primary source of the Commonwealth’s executive power, although the specific content of this power may be identified through various distinct ‘categories’.

In addition to executive powers explicitly granted to the Commonwealth government by the Australian Constitution and statutory laws, the High Court has recognised that Commonwealth executive power under section 61 also encompasses certain common law or ‘non-statutory’ Crown powers appropriate for Commonwealth use. Following a categorisation

originally developed by Sir William Blackstone—and subsequently endorsed in Australian judicial decisions—these non-statutory powers are generally divided into two types: prerogative powers, and other capacities that the Crown shares with ordinary legal persons^[2].

The High Court’s discussion of the executive nationhood power in *Pape v Commissioner of Taxation* was vague—almost to the point of abstraction. French CJ notably avoided using the term “nationhood”, instead asserting that the general executive power of the Commonwealth must be “capable of serving the purposes of a national government”. According to Gummow, Crennan and Bell JJ, it ‘enables the undertaking of action appropriate to the position of the Commonwealth as a policy created by the Constitution and having regard to the spheres of responsibility vested in it’.

Although such ambiguity was initially intended to maintain flexibility, it has led to considerable uncertainty. As Robert French highlights, this ambiguity complicates the judiciary’s task in determining the boundaries of executive actions, potentially increasing the risk of executive power abuse^[3].

1.2 Imbalance Between Executive and Legislation Branches

Executive dominance during emergencies is a common feature also in democratic regimes with strong and consolidated checks and balances. Swift and flexible executive action is essential during crises that threaten fundamental values. Such situations often involve high levels of uncertainty about how the crisis will evolve, and low predictability regarding the effectiveness of available responses.

Observations throughout the past COVID-19 pandemic underline this. Although emergencies may justify temporary deviations from established rights and procedures, the fundamental role of parliaments in scrutinising, amending, and rejecting executive initiatives is crucial for democratic accountability—thereby creating a constitutional paradox during crises: while potentially hindering swift executive action, it is all the more important to maintain basic democratic standards when governments are granted exceptional powers to restrict fundamental rights and violate otherwise constitutionally guaranteed protections^[4-5].

Consequently, crucial oversight mechanisms within democratic systems are eroded, potentially leading to reduced transparency and democratic accountability in executive decision-making.

2 How Should the Growing Power of the Executive be Addressed?

2.1 Limits to the Breadth of the Nationhood Power

In *Davis v Commonwealth* Mason CJ and Deane and Gaudron JJ acknowledged the federal limitation that applied to the nationhood power. Mason CJ and Deane and Gaudron JJ held that the existence of the nationhood power would be clearest where it ‘involves no real competition with State executive or legislative competence’. They recognised that the nationhood power was subject to limits derived from federalism. The majority in *Pape* also relied on ‘federal considerations’ to limit the scope of the nationhood power. While French CJ accepted that ‘short-term fiscal measure to meet adverse economic conditions affecting the nation as a whole’ were, in the circumstance of a national

financial crisis, ‘peculiarly within the capacity of the Commonwealth’, he cautioned that this conclusion did not mean that the Commonwealth enjoyed a broad executive power to ‘manage the national economy’ or deal with matters arising under the ‘general rubric such as “national concern” or “national emergency”’. As French CJ explained, ‘the exigencies of “national government” cannot be invoked to set aside the distribution of powers between Commonwealth and States’. The Commonwealth’s position in *Pape* was peculiar because only the Commonwealth had the resources to respond effectively to the crisis, and the measure was temporary in nature. As such, it did not interfere with the federal balance. The short-term nature of the measure in *Pape* was significant for French CJ because this meant that the exercise of executive power would not, ‘in any way’, interfere with the federal distribution of powers between the Commonwealth and the States. By imposing these limitations on the scope of the nationhood power, French CJ prevented a significant expansion of the ‘breadth’ of Commonwealth executive power that would undermine the federal system established by the Constitution.

Consistently with the majority judgments in *Pape*, the limits of the nationhood power are to be ascertained by reference to the federal system established by the Constitution. *Pape* demonstrated that the nationhood power will be enlivened in circumstances giving rise to a national emergency, where only the Commonwealth has the resources and capacity to adequately respond, and where the exercise of executive power will not interfere with the federal distribution of powers.

2.2 limits to the Depth of the Nationhood Power

In addition to these limits on the breadth of the nationhood power, there were limits on the type of executive action that the Commonwealth can undertake ‘for the benefit of the nation’ pursuant to the nationhood power. The implementation of certain initiatives, enterprises and activities that are ‘peculiar’ to the position of the Commonwealth as the national government, and which are of national benefit. In the AAP case several judges remarked that the nationhood power extended to exploration of foreign lands or seas, and in areas of scientific knowledge or technology. Justice Mason agreed and referred specifically to the establishment of the CSIRO. Similar reasoning would support Commonwealth spending on the national cultural and literature programmes and the establishment of national institutions to undertake these activities. These activities do not require the exercise of coercive power. They are not capable of producing legal effects and do not involve action aimed at preventing, prohibiting, controlling or regulating the action taken by others.

To the extent that these activities have involved coercive elements, they have been contained in legislation enacted under the incidental power in s 51(xxxix) of the Constitution. Section 51(xxxix) of the constitution confers power on the Federal Parliament to legislate on ‘matters incidental to the executive of any power vested by this Constitution... in the government of the Commonwealth.’ Therefore, once executive action finds its support in the nationhood power, it can be given legislative expression by the

operation of s 51(xxxix), which provides authority for legislation with respect to matters incidental to the exercise of the executive power in s 61. The High Court has, however, confirmed that there are limits on the scope of the incidental power when it is used in support of the nationhood power.

2.3 Reinforcing Judicial Review

Pape and Williams case tell us that the Executive Government of the Commonwealth cannot spend public money on anything without an appropriation and legal authority deriving from statute or otherwise from non-statutory executive power found in the Constitution. That said, few litigants are willing to bring a case solely to test the legality of a government payment. There are many more prepared to test the correctness of an action. There is no doubt that in theory the Williams cases have marked out legal boundaries for executive spending power albeit they are not bright line boundaries when it comes to non-statutory executive power. Glenn Ryall in a parliamentary Paper in 2014, said that ‘Williams ... can be viewed as ... a turning point for parliamentary accountability and federalism in Australia’. He said that while the legislative response to the decision might raise doubts about whether in a practical sense Williams can be considered a turning point for parliamentary accountability and federalism, those are ameliorated by the general consensus that if not all of the legislative response, at least certain spending schemes authorised under it remain invalid.

The legislation which responded to Williams(No 1) was an attempt at a global fix providing a legislated substitute for the common assumption. The judicial process is an ad hoc

mechanism of accountability. Judicial review mechanisms provide a critical safeguard against executive overreach by scrutinizing the legality of executive decisions. Broadening judicial oversight by ensuring courts have wider authority to review discretionary ministerial decisions—particularly in contexts such as immigration, national security, and administrative law—would significantly enhance legal accountability. Additionally, clearer legislative drafting is essential; legislation granting executive power must incorporate explicit criteria and limitations to minimize judicial ambiguity and reinforce the rule of law, with courts playing an active role in interpreting these legislative boundaries.

2.4 Enhancing Transparency and Civic Engagement

Enhancing transparency and accountability through robust mechanisms directly counters executive opacity by ensuring public access to critical governmental information. Strengthening Freedom of Information (FOI) laws to limit executive discretion in withholding documents significantly enhances oversight capabilities for both citizens and the media. Additionally, mandatory public disclosure requirements for major executive decisions, especially those affecting human rights or public finances, further promote governmental transparency. Complementing these transparency measures, fostering civic engagement and democratic participation provides essential external checks

on executive power. Implementing regular public consultation processes on significant executive actions or delegated legislation empowers citizens and civic groups, reinforcing democratic legitimacy. Furthermore, promoting civic education initiatives to broaden public understanding of governmental structures and accountability mechanisms encourages active public participation and sustained vigilance.

3 Conclusion

The expansion of executive power in Australia poses a significant constitutional and democratic concern. Rooted in ambiguities surrounding section 61 and amplified during times of national crisis, this trend risks undermining parliamentary accountability, judicial oversight, and federal balance. While judicial decisions—such as *Pape* and *Williams*—have begun to define the limits of executive authority, their scope remains narrow and reactive. Consequently, broader reforms are essential to restore institutional balance. Limiting both the breadth and depth of nationhood power, reinforcing judicial review mechanisms, and enhancing transparency through stronger FOI laws and public engagement are critical steps toward safeguarding democratic governance. Ultimately, a well-defined and restrained executive is indispensable to preserving the separation of powers and ensuring that Australia's constitutional democracy remains accountable, responsive, and just.

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