

Chapter 2

The French Court, the Nature of the Executive Power and its Reconciliation with the Expenditure Power

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Introduction

One of the biggest legacies of the High Court under Chief Justice French is its development of executive power, particularly through the *Pape*¹ and *Williams*² cases. In this area, more than any other, it has reshaped constitutional law. These cases are destined to be taught and referred to for a long time. They now displace from the canon those old staples, the *Pharmaceutical Benefits Case*³ and the *AAP Case*.⁴ They are the new 'Genesis' when it comes to executive power.

As with all new starting points, *Pape* and the *Williams* cases open up more questions than they resolve. Greater development and refinement of the principles needs to take place before the true import of these cases can be seen. It is claimed that Zhou Enlai, when asked in 1972 about the impact of the French Revolution, replied that it was too early to tell. If so, then it is certainly too early to judge the French Court's revolution when it comes to the executive power.

This chapter commences with the judgment in *Pape*, discussing a potential anomaly which might arise through the Court's separation of the source of power for appropriations from that for expenditure. It next proceeds to discuss the development and the limitation of the nationhood power, including the lack of clarity about the need to apply a proportionality test. The third part of the chapter addresses the much larger issue of how executive power is to be classified in Australia. In doing so, it seeks to reallocate the nationhood power within existing, better established categories of executive power, thereby making clearer the limits on the scope of the power which are derived from its source. The final part of the chapter seeks to marry the categories of executive power with the categories identified in the *Williams* cases of expenditure

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1 *Pape v Commissioner of Taxation* ('*Pape*') (2009) 238 CLR 1.

2 *Williams v Commonwealth* ('*Williams* (No 1)') (2012) 248 CLR 156; *Williams v Commonwealth* ('*Williams* No 2') (2014) 252 CLR 416.

3 *Attorney-General (Vic) v Commonwealth* ('*Pharmaceutical Benefits Case*') (1945) 71 CLR 237.

4 *Victoria v Commonwealth and Hayden* ('*AAP Case*') (1975) 134 CLR 338.

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