

# EXPLORING THE ALTERNATIVES: THE ADMINISTRATION OF GOVERNMENT AS AN ANSWER TO THE WILLIAMS DECISIONS

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*The Pape and Williams decisions changed the legal landscape of Commonwealth Executive spending powers dramatically. This article concerns the capacity and scope of the Commonwealth Executive to contract and spend in the absence of Commonwealth legislative authority, and without reliance on the nationhood aspect of section 61 executive power. In the search for a new avenue for Commonwealth Executive contracting and spending competence, this article draws upon *Bardolph v New South Wales* (1934) 52 CLR 455 and explores the potential source, scope and limitations of executive contracting and spending in pursuance of the ‘ordinary and recognised functions of government’.*

## I INTRODUCTION

*Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (*‘Pape’*) diverged from over a century of High Court authority and constitutional practice concerning the use of sections 81 and 83 of the *Commonwealth Constitution* (*‘the Constitution’*) as a source of Commonwealth Executive spending power.<sup>1</sup> It set the scene for *Williams v Commonwealth* (2012) 248 CLR 156 (*‘Williams [No 1]’*), where the commonly understood scope of this power<sup>2</sup> was obliterated. Just as older judicial authorities on executive spending ‘must be read in light of *Pape*,<sup>3</sup> so too must the Executive’s ability to contract in the administration of its own departments be reviewed for compatibility with the new *Pape-Williams* framework.

In general terms, *Pape* and *Williams [No 1]* indicate that the Commonwealth Executive cannot contract and spend without the power to do

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<sup>1</sup> See, e.g., *A-G (Vic) v Commonwealth* (1945) 71 CLR 237 (*‘Pharmaceutical Benefits Case’*), *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 (*‘AAP Case’*), *Combet v Commonwealth* (2005) 224 CLR 494.

<sup>2</sup> See generally: *Williams [No 1]* (2012) 248 CLR 156, 301–308 (Heydon J).

<sup>3</sup> Shipra Chordia, Andrew Lynch and George Williams, *‘Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism’* (2013) 37(1) *Melbourne University Law Review* 189, 208.

so arising under a valid Commonwealth Act or a direct source in the *Constitution*. On its face, this appears at odds with dicta in *Bardolph v New South Wales* (1934) 52 CLR 455 (*'Bardolph'*), which concerned the New South Wales Executive and the administration of State government departments. Despite its State government focus, *Bardolph* has been recognised for its potential to apply to the Commonwealth Executive.<sup>4</sup> Given the increasing influence of minority parties and political impasse slowing or preventing the passage of legislation through the Senate,<sup>5</sup> the Commonwealth Government will naturally be drawn to the prospect of exploring non-statutory means of contracting and spending.

This paper examines the applicability of the *Bardolph* principles to the Commonwealth Executive in light of this changed legal landscape for Commonwealth Executive action after *Pape* and *Williams [No 1]*. One conclusion emerges: s 64 of the *Constitution*, read in conjunction with *Bardolph*, should enable the Commonwealth Executive to contract and spend without resort to the settled area of power derived from executing Commonwealth statutes and without invoking the 'nationhood aspect' of Commonwealth Executive Power. It is within this context that an endeavour will be made to establish a constitutionally viable source and scope for Commonwealth Executive spending outside of the *Pape-Williams* framework.

This paper commences by introducing *Bardolph* and its key principles. Part III details the post *Pape* and *Williams [No 1]* framework for Commonwealth Executive contracting and spending. Part IV demonstrates that the *Bardolph* principles can be translated to the Commonwealth Executive through sections 61 and 64 of the *Constitution*. It also explores the difficulty in formulating a legal test for the scope of the power, but even so, suggests potential criteria and details their operation. The paper concludes by raising issues of compatibility with responsible government and federal balance, and the inherent difficulties that the Commonwealth Executive and High Court will in the future confront concerning this aspect of Commonwealth executive power.

<sup>4</sup> *Pape* (2009) 238 CLR 1, 40 [62] (French CJ).

<sup>5</sup> Since the Abbott Government came into power, 15 bills that have been passed by the House of Representatives have been rejected by the Senate, see; Parliament of Australia, *Bills laid aside or negatived, their history and status as possibility of meeting the requirements of section 57 of the Constitution [44<sup>th</sup> Parliament]* (3 September 2014) <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/triggers44#](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/triggers44#)>. See further, the Senate–House of Representatives deadlock concerning the Petroleum and Minerals Authority Bill 1973 (Cth): *Victoria v Commonwealth and Connor* (1975) 134 CLR 81.

## II BARDOLPH

### A *Background*

Kenneth Bardolph was the proprietor of *Labour Weekly*, a newspaper circulated in New South Wales. In 1931 Bardolph entered into a contract to supply the NSW Government Tourist Bureau with advertising space in his publication. Bardolph was duly paid. In April 1932, the advertising contract was renewed. The Superintendent of Advertising executed the advertising contract on behalf of the NSW Government under the authority of Premier Jack Lang's departmental Under Secretary. The contract was not otherwise authorised by statute or recorded in any Order in Council.

The Lang administration ended on 13 May 1932 because of the Premier's dismissal by Governor Phillip Game.<sup>6</sup> The incoming Stevens administration sought to terminate Bardolph's services. Bardolph did not accept the termination of the advertising contract and issued High Court proceedings<sup>7</sup> against the State to recover a sum of money owing under that contract.<sup>8</sup>

The tumultuous period of the Lang government meant that no ordinary Appropriation Act was passed for 1931-1932. Instead, five temporary Supply Acts were enacted<sup>9</sup> providing for the appropriation and expenditure of money from Consolidated revenue to 'defray the expenses of the various departments and services of the State'.<sup>10</sup> Papers tabled in NSW Parliament and referred to in these Supply Acts provided estimates for 'functions of the Department,' 'Government Advertising and the issue of Government Publications' and 'Publicity for all Departments.'<sup>11</sup>

### B *First Instance*

Evatt J heard the matter at first instance. The State contended that the advertising contract was invalid on two main grounds. Firstly, that the Superintendent lacked the authority to execute the contract as he was not authorised by any NSW Minister of the Crown.<sup>12</sup> Secondly, that the NSW Parliament had not appropriated any money from consolidated revenue for the

<sup>6</sup> As to the Lang dismissal see generally, Bethia Foott (ed), *Dismissal of a Premier: the Phillip Game papers* (Morgan Publications, 1968).

<sup>7</sup> *Commonwealth Constitution* s 75(iv) confers original jurisdiction of the High Court to hear matters between a State and a resident of another State. Bardolph was a resident of South Australia.

<sup>8</sup> Pursuant to *Judiciary Act 1903* (Cth) s 58, which provides a right to take action against a State for breach of contract.

<sup>9</sup> No 46 of 1931; No 58 of 1931; No 1 of 1932; No 8 of 1932; No 11 of 1932.

<sup>10</sup> *Bardolph* (1934) 52 CLR 455, 463.

<sup>11</sup> *Ibid*, 463-464.

<sup>12</sup> *Ibid*, 462 (Evatt J).

purpose of meeting the sum under the advertising contract.<sup>13</sup> The latter submission was based on the facts that Supply Acts throughout 1931 and 1932 did not specifically refer to government advertising expenses, and that no ordinary Appropriation Act was passed during the period in question.<sup>14</sup>

Evatt J found little substance in the argument that there was no authority to make the contract. His Honour found the contract was for ordinary purposes, and essential to the proper functioning, of the Executive Government of NSW.<sup>15</sup> His Honour drew this conclusion on the basis of past appropriations for advertising and the existence of the Office of the Superintendent of Advertising.<sup>16</sup> A chain of authority was traced from the Superintendent to the Premier. This chain, coupled with the contract's nature and purpose, answered the question of the Superintendent's legal authority to enter the advertising contract affirmatively.<sup>17</sup>

Rejecting the State's main contention, Evatt J enunciated three propositions. First, a general appropriation by reference to a government service was a necessary condition to an enforceable Crown contract, but of itself did give rise to a valid contract.<sup>18</sup> Second, a valid contract required the subject matter to be within the 'ordinary and necessary course of government administration,'<sup>19</sup> and authorised by a responsible Minister of the Crown.<sup>20</sup> Third, the enforceability (as distinct from validity) of such a contract was dependent on Parliament authorising the Executive to pay.<sup>21</sup> Such authorisation could be by direct NSW legislation or the appropriation of funds,<sup>22</sup> but was not dependent on explicit legislative references to each contract relating to the ordinary administration of government.<sup>23</sup>

An important corollary emerges from these propositions: the NSW Executive was capable of entering *some* contracts, for example advertising or

<sup>13</sup> Ibid, 463.

<sup>14</sup> Ibid, 464

<sup>15</sup> Ibid, 462.

<sup>16</sup> Ibid. Though unclear from the judgment, it appears that the Office was set up under the Premier's department, as an exercise of executive power rather than supported by legislation.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, 468-9, referring to *Commonwealth v Colonial Ammunition Co* (1924) 34 CLR 198 ('*Colonial Ammunition Case*').

<sup>19</sup> Such as advertising, purchasing texts for the Attorney-General's library, or leasing premises: *Bardolph* (1934) 52 CLR 455, 471-472.

<sup>20</sup> *Bardolph* (1934) 52 CLR 455, 474. The reference to a 'responsible Minister' appears to import the concept of Ministerial responsibility for executive action. See further, Dixon J's dicta extracted at fn 45.

<sup>21</sup> Ibid 474.

<sup>22</sup> Ibid, 469 referring to *Commonwealth v Colonial Combing, Spinning and Weaving Co* (1922) 31 CLR 421 ('*Wool Tops Case*'); cf *Pape* 23 (French CJ), 73-74 (Gummow, Crennan and Bell JJ), 104 (Hayne and Kiefel JJ),

<sup>23</sup> *Bardolph* (1934) 52 CLR 455, 471.

the purchase of texts for departments,<sup>24</sup> in the absence of Parliamentary authority. To require, as a matter of law, specific Parliamentary authority for *all* government contracts would represent an inefficient allocation of parliamentary time, and would effectively place government administration in the control of the Parliament, depriving Ministers of their allocated functions and responsibilities.<sup>25</sup> While responsible government involves Executive accountability to the Parliament for government administration, it does not require absolute Parliamentary control, to the point where the Executive is unable to act without prior Parliamentary sanction.<sup>26</sup> Satisfied that the advertising contract was incidental to an ordinary function of government, and that the Superintendent was duly authorised, Evatt J concluded that the contract was valid, and the State liable for the money owing under the advertising contract (subject to appropriation of funds, which his Honour also accepted had occurred).<sup>27</sup>

### C Appeal

The State appealed to the Full Court. The Court unanimously held that the advertising contract was valid and bound the State.<sup>28</sup> Rich J noted that the presence or absence of statutory authority does not determine the question of the State Executive's capacity to enter contracts.<sup>29</sup> His Honour noted that the State Executive had constitutional power to act independently of statute to make contracts for the public service that were '*incidental to the ordinary and well recognised functions of government.*'<sup>30</sup> Dixon J, with whom Gavan Duffy CJ agreed, adopted almost identical language.<sup>31</sup> Arguably, Starke and McTiernan JJ offered more liberal approaches, requiring only that a contract be entered into in the 'established course of authority and duty of the Crown'<sup>32</sup> or 'in performance of an administrative act incidental...to one of [the Government's] functions'<sup>33</sup> to fall within the scope of the non-statutory executive spending power. Despite these slightly different expressions of principle, all Justices had regard to the long standing practice of government advertising,<sup>34</sup> its recognition in past appropriations,<sup>35</sup> and the fact that the contract fell within the scope of

<sup>24</sup> *Bardolph* (1934) 52 CLR 455, 471-472.

<sup>25</sup> *Ibid*, 471.

<sup>26</sup> *Ibid*, 509 (Dixon J), extracted below at fn 45.

<sup>27</sup> *Ibid*, 490.

<sup>28</sup> *Ibid*, 493 (Gavan Duffy CJ), 498 (Rich J), 503 (Starke J), 510 (Dixon J), 531-532 (McTiernan J).

<sup>29</sup> *Ibid*, 495-496.

<sup>30</sup> *Ibid*, 496 (emphasis added).

<sup>31</sup> *Ibid*, 508.

<sup>32</sup> *Ibid*, 502 (Starke J).

<sup>33</sup> *Ibid*, 521 (McTiernan J).

<sup>34</sup> *Ibid*, 462 (Evatt J), 496 (Rich J), 507 (Dixon J).

<sup>35</sup> *Ibid*, 462 (Evatt J), 496 (Rich J), 507 (Dixon J).

the ordinary functions of an advertising branch of the NSW Government.<sup>36</sup>

As to constitutional principles arising out of the judgments relevant to the modern context of the question of the Commonwealth Executive's capacity to contract, four observations can be made: Firstly, the Executive may enter valid contracts without Parliamentary approval (in the form of substantive legislation or appropriation).<sup>37</sup> Secondly, executive power to enter contracts without Parliamentary approval is most certain where the contract concerns an ordinary and recognised function of government.<sup>38</sup> Thirdly, whether a contract concerns an ordinary and recognised function of government is determined by reference to the factual circumstances in an individual case.<sup>39</sup> Finally, absence of appropriation goes to the question Crown liability, rather than the validity of a contract.<sup>40</sup> The first three of these propositions constitute the legal foundation of this paper's formulation of the area of non-statutory Commonwealth Executive contracting and spending competence.

Given the premium placed on responsible government and the relationship between the Commonwealth Parliament and the Executive in *Williams [No 1]*,<sup>41</sup> it is important to note Dixon J's dicta on this subject, albeit in a State, rather than Commonwealth, context:

Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. *But the principles of responsible government do not disable the Executive from acting without prior approval of Parliament*, nor from contracting for the expenditure of money conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.<sup>42</sup>

<sup>36</sup> *Ibid*, 496 (Rich J), 503 (Starke J), 521 (McTiernan J).

<sup>37</sup> *Ibid*, 496 (Rich J), 502 (Starke J), 509 (Dixon J), 523 (McTiernan J), unless a statute provides otherwise: see, e.g., the prohibition on contracting to borrow funds without express statutory authorisation: *Public Governance, Performance and Accountability Act 2013* (Cth) s 56(1).

<sup>38</sup> *Ibid*, 471 (Evatt J), 496 (Rich J), 503 (Starke J), 508 (Dixon J).

<sup>39</sup> Such as the character of the person entering the contract, the character of the transaction, and Constitutional practice: *Bardolph* (1934) 52 CLR 455-502-503 (Starke J), 510 (Dixon J), 517 (McTiernan J); the period of time that the activity has been practiced by the Executive, and prior recognition by Parliament: *id* at 496 (Rich J), 507 (Dixon J).

<sup>40</sup> *Bardolph* (1934) 52 CLR 455, 474 (Evatt J), 498 (Rich J), 502 (Starke J), 514-515 (Dixon J), 523 (McTiernan J).

<sup>41</sup> See below at Part IV: 'Translating *Bardolph* to the Commonwealth Executive: A Source of the Power,' see e.g., *Williams [No 1]* (2012) 248 CLR 156, 271 [252] (Hayne J), 344-345 [489]-[490] (Crennan J); see also, Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through High Court's New Spectacles (2013) 35 *Sydney Law Review* 253, 270-271; Geoffery Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth After the *Williams* Case' (2013) 39 *Monash University Law Review* 348, 383.

<sup>42</sup> *Bardolph* (1934) 52 CLR 455, 509 (emphasis added).

This dicta provides important judicial guidance for the assessment of Commonwealth Executive spending, as this paper proposes that one of the primary sources of the concept of responsible government is also the source of the non-statutory Commonwealth executive power to spend in relation to the administration of functions of government.

### III THE MODERN FRAMEWORK FOR EXECUTIVE POWER

#### A *Appropriations are not a source of substantive spending power*

*Pape* concerned a challenge to the constitutional validity of Commonwealth government 'stimulus payments' made pursuant to the *Tax Bonus For Working Australians Act (No 2) 2009* (Cth). The Plaintiff was unsuccessful in so far as having the payments declared invalid. However, he obtained an authoritative statement of the nature of ss 81 and 83 of the *Constitution*. Despite being split four to three on other issues, all seven Justices agreed that sections 81 and 83 were *not* sources of a substantive Commonwealth executive power to spend, but rather they merely served as a source the Commonwealth Parliament's power to regulate executive spending.<sup>43</sup> Consequently, the substantive power to spend Commonwealth appropriated moneys must be found in ordinary Commonwealth statutes, or derived directly from the *Constitution* (other than sections 81 and 83).<sup>44</sup>

All Justices were prepared to hold that the grant of executive power in s 61 of the *Constitution* was one source of this power to spend.<sup>45</sup> In *Pape*, the 'nationhood aspect' of section 61 executive power was in issue, and the expenditure was supported by Commonwealth legislation. Therefore, the issue for determination was: could the Tax Bonus legislation be supported by the incidental power in s 51(xxxix)? Answering that question required an examination of the scope of the nationhood power and its limitation by reference matters of distinctly national concern. A majority of the Court found that the payments could be supported by the nationhood aspect<sup>46</sup> of s 61 in combination with s 51(xxxix).

For reasons that will emerge, it is important to note that s 61 is not the only reference to Commonwealth executive powers and functions in the

<sup>43</sup> *Pape* (2009) 238 CLR 1, 55 [111] (French CJ), 72 [176] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210 [600] (Heydon J).

<sup>44</sup> *Ibid*, 55-56 [113] (French CJ), 73 [178] (Gummow, Crennan and Bell JJ), 111 [316] (Hayne and Kiefel JJ), 210 [601] (Heydon J), see also, *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 (French CJ, Gummow and Crennan JJ).

<sup>45</sup> *Ibid*, 56 [114] (French CJ), 87 [228] (Gummow, Crennan and Bell JJ),

<sup>46</sup> Though the Court refrained from using the terminology of 'nationhood,' see: Anne Twomey, 'Pushing the boundaries of executive power – *Pape*, the prerogative and nationhood powers' (2010) 34(1) *Melbourne University Law Review* 313, 317.

*Constitution*. Specifically, the Chief Justice noted s 64,<sup>47</sup> which deals with the administration of the departments of the State of the Commonwealth. The Chief Justice also referred to *Bardolph*<sup>48</sup> and that since *Bardolph* the Court had acknowledged that the validity of Commonwealth Crown contracts without prior Parliamentary appropriation was “well settled.”<sup>49</sup>

### B *Executive’s power to spend is limited*

*Pape* set the framework for the Court’s assessment of the National School Chaplaincy Program (‘the Program’) in *Williams [No 1]*,<sup>50</sup> which concerned a challenge to the constitutional validity of that program. The Plaintiff opposed the deployment of Chaplains in secular schools and challenged the validity of the agreements and payments for the program on several constitutional grounds:

1. that the agreements were beyond the executive power of the Commonwealth;<sup>51</sup>
2. that the agreements could not be supported by any legislative head of power in s 51;<sup>52</sup>
3. that there was no valid appropriation for the payments;<sup>53</sup> and
4. that the agreements introduced a religious test for an office of the Commonwealth, contrary to s 116.<sup>54</sup>

The parties conducted their arguments on a shared understanding: the scope of the Commonwealth Executive’s power to spend extended to matters of potential legislative competence (‘the Common Assumption’).<sup>55</sup>

The Commonwealth adopted the Common Assumption, as well as advancing a broader submission: the Commonwealth Executive’s capacity to contract and spend was essentially unlimited.<sup>56</sup> However, the common assumption was

<sup>47</sup> *Pape* (2009) 238 CLR 1, 56 fn 250.

<sup>48</sup> *Ibid*, 39 [62].

<sup>49</sup> *Ibid*, 40 [62] referring to *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.

<sup>50</sup> *Williams [No 1]* (2012) 248 CLR 156.

<sup>51</sup> Ronald Williams, ‘Plaintiff’s Amended Submissions’, Submission in *Williams v Commonwealth*, S307 of 2010, 28 June 2011, [27].

<sup>52</sup> *Ibid*, [31], [37].

<sup>53</sup> *Ibid*, [62],

<sup>54</sup> *Ibid*, [84]. The Court did not accept this submission, see: *Williams* (2012) 248 CLR 156, 182 [9] (French CJ), . 222-223 [107]–[110] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [476] (Crennan J), 374 [597] (Kiefel J). As this ground falls outside of the scope of this paper, the reasons will not be discussed.

<sup>55</sup> *Williams [No 1]* (2012) 248 CLR 156, 295-296 [341]–[342] (Heydon J).

<sup>56</sup> Commonwealth of Australia, ‘Submissions of First, Second and Third Defendants’, Submission in *Williams v Commonwealth*, S307 of 2010, 11 July 2011, [20], [41], [47].

undermined on the first day of argument.<sup>57</sup>

Six justices found that the Program was beyond the Commonwealth's executive power.<sup>58</sup> Even so, their reasons varied as to the scope of executive power and for finding the Program beyond Commonwealth Executive power. French CJ, Gummow and Bell, and Crennan JJ held that the executive power was not unlimited, nor was its scope coextensive with the section 51 Commonwealth legislative powers.<sup>59</sup> Hayne and Kiefel JJ rejected the Commonwealth's broader submission,<sup>60</sup> but did not express a concluded view on the common assumption, because they held that the section 51 legislative powers asserted by the Commonwealth did not support the Program. Heydon J dissented, accepting the common assumption<sup>61</sup> and finding that the payments could be supported by s 51(xxiiiA).<sup>62</sup> Importantly, several Justices acknowledged the possibility of the existence of an area of independent executive power relating to the administration of government departments.

For example, French CJ noted that the Program did not involve questions of executive contracting and spending in the administration of departments of State pursuant to section 64 of the *Constitution*.<sup>63</sup> Subsequently, his Honour noted that there were 'undoubtedly significant fields of executive action which do not require express statutory authority,' including the administration of departments of State under section 64 and activities properly characterised as falling within the 'nationhood power.'<sup>64</sup> The Chief Justice, in obiter, dealt with *Bardolph*, accepting its applicability to the Commonwealth.<sup>65</sup> While expressing the view that *Bardolph* did not support the existence of a general contracting and spending power in the absence of statute, his Honour noted that, in so far as contracting and spending in the ordinary course of administering a recognised function of government, there existed power to contract and spend without statutory authority.<sup>66</sup> His Honour then considered the academic debate surrounding the principles derived from *Bardolph*, and the difficulties in determining what would activities would constitute administering a department of the State of the Commonwealth.<sup>67</sup>

Gummow and Bell JJ took a markedly different view of section 64. For

<sup>57</sup> See, Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) (French CJ).

<sup>58</sup> *Williams [No 1]* (2012) 248 CLR 156, 179 [4] (French CJ), 239 [161] (Gummow and Bell JJ), 281 [289]-[290] (Hayne J), 337 [457] (Crennan J), 374-375 [598] (Kiefel J).

<sup>59</sup> *Ibid*, 205 [60] (French CJ), 233 [137] (Gummow and Bell JJ), 357-358 (Crennan J).

<sup>60</sup> *Ibid*, 271 (Hayne J), 366 (Kiefel J).

<sup>61</sup> *Ibid*, 319.

<sup>62</sup> *Ibid*, 333.

<sup>63</sup> *Ibid*, 180.

<sup>64</sup> *Ibid*, 191.

<sup>65</sup> *Ibid*, 211 [74], but note, further comments doubting its applicability at 214 [79].

<sup>66</sup> *Ibid*, 211-212 [74].

<sup>67</sup> *Ibid*, 212-215. Detailed below at 'B Scope of the Power'.

their Honours, section 64's primary role was to create responsibility for Commonwealth Ministers to account to the Commonwealth Parliament for the administration of Commonwealth departments.<sup>68</sup> Their Honours recounted the Plaintiff's submission and acceptance that the ordinary course of administering a recognised part of Government referred to in section 64 could extend to the funding of activities in which departments engage or consider engaging.<sup>69</sup> The Plaintiff conceded that this could be done without legislative authority beyond an appropriation.<sup>70</sup> This was taken no further in their Honours' reasons. The Plaintiff's concessions do not of themselves create law, but they do demonstrate that the principles were commonly accepted.<sup>71</sup>

Hayne J rejected the Commonwealth's submission that *Bardolph* stood for an unlimited executive capacity to contract and spend.<sup>72</sup> However, his Honour accepted that the Executive could enter 'at least some contracts without statutory authority.'<sup>73</sup> By referring to the common thread of 'ordinary and well recognised functions of government,'<sup>74</sup> it is apparent that Hayne J also accepted the premise that the Commonwealth Executive may contract and spend without legislative approval in this sphere administering ordinary functions of the Commonwealth government.

Crennan J accepted that the Commonwealth Executive could contract and spend in the ordinary course of administering a recognised part of the Commonwealth Government.<sup>75</sup> However, by reference to the Plaintiff's submissions, her Honour adopted a slightly different formulation of the area of executive competence espoused in *Bardolph*.<sup>76</sup> To her Honour, the Executive did not need statutory authority where the contracts concerned 'the ordinary annual services of government,' which she equated with the *Bardolph* Court's statements of principle.<sup>77</sup> Of course, the 'administration of functions of Government' invites consideration of section 64. However, the 'ordinary annual services of government' would draw upon judicial, political and academic understandings of the meaning of sections 53 and 54, which deal with Appropriation Bills. The sections 53 and 54 have been the subject of greater judicial consideration,<sup>78</sup> but a frequent difficulty is faced in attempting to define

<sup>68</sup> Ibid, 232.

<sup>69</sup> Ibid, 233

<sup>70</sup> Ibid.

<sup>71</sup> Cf the Court's readiness to challenge the common assumption.

<sup>72</sup> *Williams [No 1]* (2012) 248 CLR 156, 255.

<sup>73</sup> Ibid, 257 [212].

<sup>74</sup> Ibid, 256 [209]

<sup>75</sup> Ibid, 342 [484].

<sup>76</sup> Ibid, 345 [493].

<sup>77</sup> Ibid, 353-354 [527]-530].

<sup>78</sup> See, e.g., *Combet v Commonwealth* (2005) 224 CLR 494; *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Second Native Title Act Case*'); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; *Brown v West* (1990) 169 CLR 195.

a justiciable issue as to what activities constitute the ordinary annual services of government, which the High Court considers a question for Houses of Parliament.<sup>79</sup> The potential content of ‘ordinary annual services’ and ‘administration of Government’ is explored in greater detail below.<sup>80</sup>

Kiefel J referred to Dixon J’s statement in *Bardolph* that the principles of responsible government do not disable the Executive from acting without prior Parliamentary approval<sup>81</sup> before accepting that executive power extends to the power to ‘carry out essential functions and administration of a constitutional government.’<sup>82</sup> That statement appears to be her Honour’s conception of the area of non-statutory Commonwealth Executive contracting and spending relating to administration of government, though her Honour made no explicit reference to *Bardolph* to support that proposition.

Heydon J was doubtful *Bardolph*’s application at Commonwealth level.<sup>83</sup> In any event, his Honour only dealt with *Bardolph* for the purpose of rejecting the argument that *Bardolph* stood for the proposition that the Executive must point to a law, a provision of the *Constitution* or an inherent power before may contract and spend.<sup>84</sup>

From the above dicta, at least one clear proposition emerges: there was concurrence among a majority of the Justices that it would be open for the Commonwealth Executive, independent of legislation, to contract to spend on activities arising in the ordinary course of administering a well-recognised function of government.

Consequently, it is necessary to confront some obvious, but unresolved questions: what is the precise source of the executive power to spend in the ordinary course of administering recognised functions of government at the Commonwealth level, what is the scope of activities that power will support, and what, if any, limitations fetter the scope of its application?

#### IV TRANSLATING BARDOLPH TO THE COMMONWEALTH EXECUTIVE

##### A *Source of the Power*

Constitutional power for the Commonwealth Executive to enter into contracts and spend appropriated money must be derived from an Act of Parliament (other than an Appropriation Act) or from within the *Constitution* (other than

<sup>79</sup> *Combet v Commonwealth* (2005) 224 CLR 494, 525 (Gleeson CJ); *Second Native Title Act Case* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>80</sup> See below ‘B *Scope of the Power*’.

<sup>81</sup> *Williams [No 1]* (2012) 248 CLR 156, 369-370 [580].

<sup>82</sup> *Ibid*, 370 [582].

<sup>83</sup> *Ibid*, 314 [391].

<sup>84</sup> *Ibid*.

in sections 81 and 83).<sup>85</sup> In searching for a non-statutory<sup>86</sup> source of Commonwealth executive spending power, regard must be had to the *Constitution's* text to locate an express or implied grant of power to the Executive to engage in these activities. In this context, the focus is to find a provision or provisions which confer a power or duty tied to the administration of government.

As *Bardolph* was the original manifestation of the principle, the *New South Wales Constitution 1902* ('*NSW Constitution*')<sup>87</sup> is a natural starting point. Section 36 of the *NSW Constitution* states:

The Governor may authorise any Executive Councillor to exercise the powers and perform the official duties and be responsible for the obligations appertaining or annexed to any other Executive Councillor in respect to the administration of any department of the Public Service, where such powers, duties or obligations were created by virtue of the terms (express or implied) of any Act or are sanctioned by official or other custom...<sup>88</sup>

McTiernan J recognised these words as the source of the NSW Executive's power to contract and spend in the administration of its departments, as an incident of a lawful exercise by the NSW government of one of its functions.<sup>89</sup> Section 36 also appears to be the basis of the dicta in *Bardolph* relating to the executive spending power being confined to the administration of functions of government.

While more commonly acknowledged as the embodiment of the notion of responsible government,<sup>90</sup> it is suggested the section 64 of the *Commonwealth Constitution* may accommodate the *Bardolph* result. A similar textual basis for finding a power to contract in the administration of government in the section 36 of the *NSW Constitution* is in section 64, which states

<sup>85</sup> See discussion of *Pape* above from fn 46–47.

<sup>86</sup> But note, there is a view that the *Commonwealth Constitution* is a mere statute, as a schedule of an Act of the UK Parliament, see: Geoffrey Lindell, 'Why is Australia's Constitution binding? – The reasons in 1900 and now, and the effect of independence' (1986) 16 *Federal Law Review* 29, 32–33 (citing Sir Owen Dixon). This view would support the position that executive contracting and expenditure pursuant to a provision of the *Commonwealth Constitution* is the exercise of a statutory power. This view is less likely to stand in light of the *Statute of Westminster 1931* (Imp), *Statute of Westminster Adoption Act 1942* (Cth), *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

<sup>87</sup> *Constitution Act 1902* (NSW) ('*NSW Constitution*').

<sup>88</sup> *NSW Constitution* s 36 (emphasis added).

<sup>89</sup> *Bardolph* (1934) 52 CLR 455, 521.

<sup>90</sup> See generally, Alysia Blackham and George Williams, 'The appointment of Ministers from outside of Parliament' (2012) 40 *Federal Law Review* 254.

The Governor-General may appoint *officers to administer such departments of State of the Commonwealth* as the Governor-General in Council may establish...<sup>91</sup>

Unlike section 61's 'arcane nature',<sup>92</sup> section 64 sets out in precise terms the function conferred on the Governor-General and his appointed officers. Like section 61 however, the powers conferred to carry out the function of administration by section 64 are not expressly set out.<sup>93</sup> As section 64 contemplates the existence of departments of State, it is submitted that Commonwealth Ministers necessarily require an implied grant of executive power to contract and spend to give effect to the function of administration conferred upon them. That is, the power to contract and spend is a necessary incident of administering the functions of departments of State. Importantly, in *Williams [No 1]* French CJ accepted two propositions: that executive action under section 64 fell within the area of non-statutory executive competence<sup>94</sup> and that the State executive powers considered in *Bardolph* could be considered analogous to the powers of the Commonwealth Ministers.<sup>95</sup>

Support for section 64 as conferring a non-statutory power on Commonwealth Ministers to administer Commonwealth departments of State can also be derived from the *Constitution's* structure. Its location in Chapter II of the *Constitution* indicates that section 64 constitutes an aspect of Commonwealth executive power that falls within the domain of the Commonwealth Executive government without dependence on Commonwealth legislation, unlike powers conferred on the Commonwealth Executive by legislation passed under section 51. The primary legislative power that touches on the execution of powers vested by the *Constitution*, including the administration of Government departments, is section 51(xxxix).<sup>96</sup> This power extends only so far as supporting legislation dealing with matters *incidental* to an exercise of executive power. That is, this incidental power can be used to support or regulate exercises of executive power.<sup>97</sup> However, section 51(xxxix) does not confer such a complete power that its mere existence denies the Executive the power to act. To suggest otherwise gives greater width to section 51(xxxix) than its language permits.

If the power to contract and spend is not considered inherent in the

<sup>91</sup> Emphasis added

<sup>92</sup> Leigh Sealy, 'Adrift on the "Sea of Faith" – Constitutional Interpretation and the School Chaplains Case' (Paper presented at the 2013 Constitutional Law Conference, Sydney, 15 February 2013) 5.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Williams [No 1]* (2012) 248 CLR 156, 191 [34].

<sup>95</sup> *Ibid.*, 212 [74].

<sup>96</sup> But note s 52(ii), which grants exclusive legislative powers in respect departments transferred to the Commonwealth Executive by s 69.

<sup>97</sup> *Davis v Commonwealth* (1998) 166 CLR 79, 95 (Mason CJ, Deane and Gaudron JJ).

function of government administration, section 64 may be interpreted in conjunction with section 61 in a manner that recognises the power to contract and spend in administering departments of the Commonwealth as an aspect of a broader conception of Commonwealth executive power. That is, section 61's terminology of 'execution...of this Constitution' extends to the execution of the functions conferred by section 64,<sup>98</sup> such that the power to spend in executing the function of administration can be characterised as 'the doing of something immediately prescribed or authorised'<sup>99</sup> by the *Constitution*. While the Court has avoided giving an exhaustive definition of section 61's content<sup>100</sup> or the circumstances in which section 61 will support executive contracting and spending in the absence of Commonwealth legislation,<sup>101</sup> it is clear that section 61 is capable of supporting contracting and spending that is directly referable to a grant of Commonwealth Executive function in the *Constitution*.<sup>102</sup>

Use of section 64 as a source of power provides for Ministerial responsibility to Parliament. Section 64 requires Ministers to sit in Parliament, and many Ministers do so as Senators.<sup>103</sup> Thus, the Senate retains significant power to hold the Executive Government to account.<sup>104</sup> This, to some extent, addresses the concerns in *Pape* and *Williams [No 1]* about executive action bypassing scrutiny by the Senate. As party interests are now more significant than State interests in the Senate,<sup>105</sup> federal considerations are unlikely to be a critical element of debates in the Senate. Responsible government is a concept based in law, convention and political practice. It is not immutable, and is

<sup>98</sup> As it involves the execution of a function conferred by the *Commonwealth Constitution: Wool Tops Case* (1922) 31 CLR 421, 461 (Starke J).

<sup>99</sup> *Wool Tops Case* (1922) 31 CLR 421, 431-432 (Knox CJ and Gavan Duffy J).

<sup>100</sup> See, e.g., *Williams [No 1]* (2012) 248 CLR 156, 226 [121] (Gummow and Bell JJ) and the cases there cited at fn 262.

<sup>101</sup> See, e.g., *Williams [No 1]* (2012) 248 CLR 156, 179-180 [4] (French CJ).

<sup>102</sup> *Williams* (2012) 248 CLR 156, 191 [33] (French CJ) citing *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 455 (McHugh J).

<sup>103</sup> Commonwealth Ministers currently sitting in the Senate include: Senator Brandis (Attorney-General and Minister for Arts), Senator Abetz (Minister for Employment and Minister Assisting the Prime Minister for the Public Service), Senator Scullion (Minister for Indigenous Affairs), Senator Johnston (Minister for Defence), and most relevantly, Senator Cormann (Minister for Finance).

<sup>104</sup> By sitting in the Senate, Ministers are subject to scrutiny by other Senators in the form of questioning and criticism of the exercise of executive power; see *Williams* (2012) 248 CLR 156, 317 (Heydon J). When the Senate is not controlled by the same party that has the confidence of the House of Representatives, there is also potential for Fiscal Bills to be deferred or rejected by the Senate, preventing the Executive from spending. See e.g. Professor Winterton's discussion of the Senate's power to defer or reject Fiscal Bills in the context of the 1975 Constitutional Crisis in George Winterton, *Parliament, the Executive and the Governor General: A Constitutional Analysis* (Melbourne University Press, 1983), 8-11, 146-147. See also Professor Winterton's criticisms of responsible government: id at 11-12.

<sup>105</sup> *Williams [No 1]* (2012) 248 CLR 156, 205-206 [61] (French CJ).

certainly capable of accommodating the Executive Government's arrangements.<sup>106</sup> The acceptance of an executive contracting and spending powers sourced in section 64 should not be hindered by a desire for greater Commonwealth Parliamentary scrutiny of executive action, as section 64 is the source of Ministerial responsibility itself.

In *Pape*, French CJ referred to Professor Campbell's proposition that the powers and functions of government administration in section 64, if not expressed, would have been 'read into s 61 as inherited royal prerogatives.'<sup>107</sup> When Executive contracting and spending in the administration of Government departments is characterised as an exercise of a quasi-prerogative power<sup>108</sup> it becomes clearer that no Parliamentary approval is required before the Executive may act in that regard.<sup>109</sup> The express inclusion of the function of administering departments of State, rather than the function being left for implication into section 61, provides further support that the power to contract and spend in government administration was, from an originalist interpretative perspective, intended by the Constitution's Framers to exist and be exercised by the Commonwealth Executive without resort to Parliamentary authority.

Given the textual basis in section 64, alone or in conjunction with section 61, for recognising the existence of the power contract and spend in the administration of departments, the principles expressed in *Bardolph* are likely to be able to extrapolated with relative ease from section 64, and applied to the Commonwealth Executive. The concerns regarding the applicability of principles arising out of a unitary State constitutional case at Commonwealth level advanced French CJ<sup>110</sup> and Heydon J<sup>111</sup> are, with respect, unwarranted. While federal considerations may affect the scope of the Executive's power to contract and spend in reliance on s 64, they do not inform an understanding of the source of the power when it is recognised as an implication derived from the *Constitution's* text.

<sup>106</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 403 [17] (Gleeson CJ).

<sup>107</sup> *Pape* (2009) 238 CLR 1, 56 [114] at fn 250 citing Enid Campbell, 'Parliament and the Executive' in Leslie Zines (ed), *Commentaries on the Australian Constitution: a tribute to Geoffrey Sawer* (Butterworths, 1977). Campbell states: 'Some of the royal prerogatives which might have been encompassed by section 61 have been reproduced, sometimes in modified form, in other sections of the *Commonwealth Constitution*, e.g. sections 5, 28, 32, 56, 62, 64, 67, 68, 70 and 72.'

<sup>108</sup> In the sense that the power is traditionally prerogative in nature, but is now expressed as a positive grant of power rooted in the text of the *Commonwealth Constitution*.

<sup>109</sup> *AAP Case* (1975) 134 CLR 338, 406 (Jacobs J), as the prerogative powers are an incident of the common law (cf statute): *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

<sup>110</sup> *Williams [No 1]* (2012) 248 CLR 156, 214 [79].

<sup>111</sup> *Ibid*, 314 [391].

## B Scope of the Power

Chapter II powers are expressed in a form that allows flexibility for the executive government to develop and adapt to the changing functions of administration.<sup>112</sup> The need to interpret the concept of administration of departments of State widely has been recognised by some Justices as a practical necessity in order to accommodate efficient and effective government administration, and to ensure those functions are capable of responding to change.<sup>113</sup> But this cannot be taken to mean that Commonwealth Executive powers are unlimited. Indeed, that was expressly indicated in *Williams [No 1]*.

Determining the scope of activities that section 64 may support, by reference to *Bardolph*, involves consideration of the meaning of ‘recognised functions of government.’ Having regard to Crennan J’s dicta in *Williams [No 1]*, the meaning of ‘ordinary annual services of government’ must also be explored. The difficulties associated with determining what is and is not a recognised function have not gone unnoticed, and they have been the basis of academic criticism of the *Bardolph* principles.<sup>114</sup> The administration of government arguably includes the basic financial costs of keeping departments functioning, such as leasing premises, and manning and equipping government departments.<sup>115</sup> However, it is likely that the Commonwealth Executive, in the search for non-statutory executive powers, would seek to enlarge the boundaries of the ‘administration of recognised functions of government.’

One starting point is the criteria expressed and utilised by *Bardolph*. As a bare minimum, it appears that the contract must relate to a function overseen by a responsible Minister.<sup>116</sup> This is necessarily the case at Commonwealth level, as section 64 not only provides for Ministers to administer departments of States: it requires Minister to sit in Parliament if they are to continue hold office for more than three months. However, Ministers are responsible for large areas of Government activities, and the character of the person making the contract cannot be the sole determinant of the existence of a capacity to contract and spend.<sup>117</sup> The meaning of ‘recognised functions of government’ must also be

<sup>112</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 401 [11], 402-403 [14] (Gleeson CJ).

<sup>113</sup> *Ibid*, 403 [15] (Gleeson CJ), 460 [211] (Gummow and Hayne JJ).

<sup>114</sup> See, e.g., Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14, 14-16; Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5<sup>th</sup> ed, 2013) 67-68; Christos Mantziaris, ‘The Williams Litigation: The Commonwealth and the Chaplains’ (Paper presented at the Gilbert + Tobin Centre of Public Law Conference, Sydney, 17 February 2012) 9; but note the new found support in response to *Pape* and *Williams*: Appleby and McDonald, above n 44, 262; Lindell, above n 44, 373-373; Anne Twomey, ‘Post *Williams* Expenditure – when can the Commonwealth and States spend public money without Parliamentary authorisation?’ (2014) 33 *University of Queensland Law Journal* 9, 18.

<sup>115</sup> See e.g. *Combet v Commonwealth* (2005) 224 CLR 494, 524 (Gleeson CJ).

<sup>116</sup> *Bardolph* (1934) 52 CLR 455, 462, 464 (Evatt J), 508 (Dixon J)

<sup>117</sup> *Bardolph* (1934) 52 CLR 455 502 (Starke J)

considered.

In *Bardolph*, reliance was placed on the fact that the NSW Parliament had previously voted money for advertising and the existence of an officer dealing with the subject matter.<sup>118</sup> This proposition requires analysis in light of *Pape*. As Commonwealth Appropriation Acts are no longer considered a source of executive spending power, there is force to the argument that appropriations form an insufficient basis to upon which to demonstrate that a particular activity is considered a recognised function. However, when section 64 is relied on as a *source* of the power to spend, an appropriation does not need to serve as a source of such power. Instead, appropriations mark out activities for which Parliament has made moneys lawfully available.<sup>119</sup> This informs the *scope* of activities that the Executive may apply the funds so appropriated. Once funds are appropriated for a particular purpose, the Executive, in reliance on the power provided by section 64 (alone or in combination with section 61), may lawfully spend that appropriated money on that recognised purpose. The need for some sort of Parliamentary sanction for executive spending about which *Williams [No 1]* was clearly concerned is found previous appropriations, not by *empowering*, but by *permitting*, executive expenditure for the purpose of the appropriation. Support for the view that prior appropriations may form a basis for determining what is a recognised function of government is, for example provided in *Pape*, where French CJ raised the possibility that constitutional support for executive spending

may arguably extend to a range of subject areas reflecting the established practice of the national government over many years, which may well have relied on sections 81 and 83 of the Constitution as a source of substantive spending power.<sup>120</sup>

*Bardolph* also rested on the character of the function as having been carried out by the NSW Government for an extended period of time.<sup>121</sup> That consideration had two distinct aspects: the long-standing function of the NSW Tourist Bureau, and the long-standing practice of NSW government advertising. The Commonwealth Government exercises similar functions and, at the very least, government advertising has been accepted as a ‘purpose of the Commonwealth’ in *Combet*.<sup>122</sup> This criterion elucidates what can be a ‘well recognised’ function. However, it does not indicate how a function may be designated as ‘ordinary.’

<sup>118</sup> *Bardolph* (1934) 52 CLR 455 462 (Evatt J), 507 (Dixon J).

<sup>119</sup> *Pape* (2009) 238 CLR 1, 55 [111] (French CJ), 105 [295] (Hayne and Kiefel JJ).

<sup>120</sup> *Pape* (2009) 238 CLR 1, 24 [9] (emphasis added).

<sup>121</sup> *Bardolph* (1934) 52 CLR 455, 496 (Rich J), 502-503 (Starke J), 510 (Dixon J), 517 (McTiernan J). Note the similarity to French CJ’s dicta (extracted above at fn 123): ‘established practice of the national government over many years.’

<sup>122</sup> *Combet v Commonwealth* (2005) 224 CLR 494, 561 (Gummow, Hayne, Callinan and Heydon JJ).

Government advertising is an uncontroversial example of an aspect of the ordinary functions of government. A different and more difficult example is the 'Safer Suburbs Plan,' which involves grants to local governments and not-for-profit organisations for community safety, and has no statutory basis beyond the *Financial Management (Supplementary Powers) Regulations 1977* (Cth) ('the FM Regulations').<sup>123</sup> This is the same subsidiary legislation that contains the School Chaplaincy Program. Applying the above criteria,<sup>124</sup> the Safer Suburbs Plan could be considered a recognised Commonwealth Government function. It has existed since 2007 and is administered by the Minister for Justice through the Attorney General's Department.<sup>125</sup> Money has been voted by the Commonwealth Parliament for its establishment and continuance. However, local community safety would appear to be far removed from the ordinary functions of a national government department dealing with, *inter alia*, crime prevention. Even the broadest conceptions of community safety would seem to fall within the ambit of State powers and relationships between State and Local Governments.<sup>126</sup> As the Commonwealth Minister for Finance determines the FM Regulations, expenditure on the Safer Suburbs Plan has not been expressly approved by Parliament.<sup>127</sup> This demonstrates that using the regularity of occurrence and Parliamentary recognition of an undertaking as the only two criteria will not produce satisfactory results, especially given the Court's elevated concern with the Commonwealth Executive encroaching on areas of State competence without the use of a section 96 grant of financial assistance to States. Consequently, there must be other criteria to limit the reach of the Commonwealth executive power to contract and spend in the administration of functions of government. For the power to be constrained, there must be, as highlighted by Counsel in *Combet v Commonwealth* (2005) 224 CLR 494 (in relation to ss 81 and 83),

some legally ascertainable standard or criterion sufficient to constitute a discernable and enforceable standard on Executive conduct.<sup>128</sup>

Another criterion may introduce an assessment the *essentiality* of a contract

<sup>123</sup> *Financial Management (Supplementary Powers) Regulations 1997* (Cth) sch 1AA pt 4.

<sup>124</sup> The character of the person authorising the contract, recognition in past Appropriation Acts and long standing practice.

<sup>125</sup> Attorney General's Department, Australian Government, *Safer Suburbs Program* <<http://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Pages/Safersuburbs.aspx>>.

<sup>126</sup> The use of Executive Power to interfere in areas of State legislative and executive competence without Commonwealth legislation or the use of s 96 was a concern in *Williams [No 1]*, see: Sealy, above n 95, 9-10.

<sup>127</sup> Parliament holds the power to disallow Regulations, but has not. This may be considered implicit approval of the *FM Regulations*.

<sup>128</sup> Transcript of Proceedings, *Combet v Commonwealth* (High Court of Australia, Stephen Gageler SC, 29 August 2005) 8, cited in Gabrielle Appleby, 'There must be limits: the Commonwealth spending power' (2009) 37 *Federal Law Review* 39, 122.

and expenditure to the functioning of government. This would engage with Crennan J's use of 'ordinary annual services' as a standard, which invites consideration of sections 53 and 54 of the *Constitution*. However, determining what constitutes ordinary annual services is a matter that has largely been left to the Senate and House of Representatives.<sup>129</sup> This position respects the political questions involved in determining what functions a government ought to engage in,<sup>130</sup> and the Compact of 1965, an internal political agreement relating to what is considered an ordinary annual service and what is not.<sup>131</sup> The latter includes new policies not authorised by special legislation,<sup>132</sup> which appears to return to the criteria of regular engagement and prior Parliamentary recognition. This is especially so when it is noted that in 1999 the Senate resolved that all continuing activities for which past appropriations had been made were to be considered part of the ordinary services.<sup>133</sup> It is unlikely that the High Court will countenance any submission that questions of whether certain contracting and spending relates to ordinary or recognised functions of government is non-justiciable. To do so would judicially endorse a wide view of non-statutory expenditure powers, contrary to the *Williams [No 1]* dicta, and the criticisms directed toward the Commonwealth in *Williams [No 2]*.<sup>134</sup> It would also create an area of Commonwealth executive action completely out of the reach of the High Court's supervisory jurisdiction. This position is not inconsistent with past dicta, for example:

It is for each chamber by its own internal procedures and regulation to provide systems which facilitate the accountability of Ministers for the particular form of administration of the department of State.<sup>135</sup>

While *Williams [No 1]* elevated the emphasis on the Senate's function as the States' House, it did not reduce the Houses' capacity to determine their own internal regulations or agreements. Thus, the internal agreements of the Houses of Parliament may at least inform an understanding of what is considered an ordinary function of government. For the High Court to have regard to such agreements and Parliamentary conventions is consistent with the notion that it

<sup>129</sup> *Combet v Commonwealth* (2005) 224 CLR 494, 525 (Gleeson CJ).

<sup>130</sup> As to distinguishing between governmental and non-governmental functions, see *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208 ('*Ex parte Engineers Association*'), 276-277 (Windeyer J), where his Honour considered it fallacious to consider it possible to draw such a distinction.

<sup>131</sup> See: *Combet v Commonwealth* (2005) 224 CLR 494, 573 (Gummow, Hayne, Callinan and Heydon JJ).

<sup>132</sup> Harry Evans and Rosemary Lang (eds), *Odgers Australian Senate Practice* (Department of the Senate, 13<sup>th</sup> ed, 2012), 370.

<sup>133</sup> *Ibid*, 371, and reaffirmed in 2010: Evans and Lang, 372-373.

<sup>134</sup> *Williams v Commonwealth (No 2)* [2014] HCA 23 ('*Williams [No 2]*'), [69] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>135</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 464 [220] (Gummow and Hayne JJ).

is the province of the Parliament to determine what activities are functions of government, and prevents the Court from engaging in political questions by undertaking the task of distinguishing between the essential and non-essential, or normal from abnormal, functions of government.<sup>136</sup>

A fourth criterion, which is comports with the Court's concerns about the use of government contracting as a tool of regulation is to focus on the *administration* aspect of 'ordinary administration of recognised government functions.' This invites judicial consideration of whether a contract is one to actively participate in regulation, or simply 'mere spending' to facilitate a program. Professor Winterton developed the distinction between mere spending on and actual participation in matters beyond Commonwealth legislative competence.<sup>137</sup> The distinction highlights that while the Commonwealth Government cannot engage in activities beyond its powers, it may contract with others on matters touching those areas beyond competence.<sup>138</sup> This proposition needs refinement in light of *Williams [No 1]* to accommodate the High Court's conclusion that Commonwealth Executive power is not unlimited. The High Court is likely to hold unconstitutional, attempts to 'regulate by contract' subject matters beyond Commonwealth legislative competence. If so, mere spending – that is, spending that facilitates existing programs, or programs that are not initiated by the Government, that do not attempt to impose conditions that can be seen as regulating a field of activities may fall within the meaning of ordinary administration. This reasoning could arguably support 'mere expenditure' on third party programs, notwithstanding that the Commonwealth Government finances certain programs to pursue policy objectives without legislative authority. However, this would be conditioned by a need to establish a nexus between the expenditure and subject matter of a department of State, so as to fall within at least a general conception of the functions of government as determined by the Governor-General's decision, acting on Ministerial advice, to establish a Commonwealth department dealing with that subject matter.

The scope of the Governor-General's power to establish the departments of State must also be considered, because the subject matter of those departments define the functions of the government, and the contracts necessary to administer them. Gummow and Bell JJ accepted the Plaintiff's concession in *Williams [No 1]* that any power under section 64 would include 'the funding of activities in which the departments [of State] engage...'<sup>139</sup> This would support a

<sup>136</sup> *South Australia v Commonwealth* (1942) 65 CLR 373, 423 (Latham CJ) cited in Renfree, *The Executive Power of the Commonwealth of Australia*, 471

<sup>137</sup> George Winterton, *Parliament, the Executive and the Governor General: A Constitutional Analysis* (Melbourne University Press, 1983) 46.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Williams [No 1]* (2012) 248 CLR 156, 233 [139].

wide contracting and spending power if, as Renfree suggests, that the existence and functions of the Departments of State are matters for determination by the Governor-General.<sup>140</sup> That would seem to suggest that the Government, by its Ministers advising the Governor-General, would have the power to determine what is ordinary – ‘executive authority by prescription.’<sup>141</sup> This position avoids two important questions: firstly, are there any limits to the nature and subject matters of the departments that the Governor-General may establish? Secondly, even if there are limits, does the Court have jurisdiction to enforce them?

Quick and Garran note that the authority of the Governor-General is restricted to departments transferred from the States to the Commonwealth, and such others as may be necessary for the maintenance of the *Constitution* and the execution of laws of the Commonwealth.<sup>142</sup> This aligns with the general scope of the executive power of the Commonwealth in section 61. However, it does little to inform this scope beyond what can be gleaned from section 64’s use of ‘administration of departments of State,’ which has already been suggested as being an aspect of the maintenance and execution of the *Constitution*.<sup>143</sup>

As the power to establish departments of State in section 64 is exercisable by the Governor-General acting on Commonwealth Ministerial advice, rather than by the Governor-General alone,<sup>144</sup> the establishment of departments is an exercise of general executive power, not an exercise of reserve powers. As an executive act, the establishment of Departments of State is likely to be reviewable by the Court in its supervisory jurisdiction under section 30(a) of the *Judiciary Act 1903* (Cth)<sup>145</sup>. It has been suggested that

[w]hat activities the executive government should engage in is the province of the executive. What is normal or not will depend partly on

<sup>140</sup> H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 471.

<sup>141</sup> Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14,15.

<sup>142</sup> Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (Angus and Robertson, 1901) 708-709.

<sup>143</sup> See above, text accompanying fn 101-105.

<sup>144</sup> cf Peter Gerangelos, ‘Parliament, the Executive, the Governor-General and the Republic: the George Winterton Thesis’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 213-214, where Gerangelos suggests that s 64 is the source of the reserve power to appoint and dismiss Ministers. But note that the power to establish departments of State is exercisable in Council, as opposed to the power to appoint or dismiss, which is not conditioned on the advice of the Executive Council.

<sup>145</sup> Which confers original jurisdiction on the High Court in all matters arising under the *Commonwealth Constitution*, enacted pursuant to *Commonwealth Constitution* s 76(i). Depending on the nature of the parties or subject of a particular matter, there may also be scope for jurisdiction under *Commonwealth Constitution* s 75(iii)-(v).

what policies and activities have in the past been pursued and for what length of time...<sup>146</sup>

However, it is unlikely that the Court will take a stance that allows the establishment of departments dealing with matters clearly outside of Commonwealth Executive competence. As *Williams [No 1]* held that Executive power does not follow Commonwealth legislative power, it is unlikely that Commonwealth departments can be confined by mere analogy to areas of Commonwealth legislative competence. Instead, questions of established practice, combined with consideration of whether the function can 'be characterised as deriving from the character and status of the Commonwealth as a national government'<sup>147</sup> ought to inform the scope of the departments, and therefore the nature of 'recognised functions,' that the Governor-General, acting on Ministerial advice, may establish.

Enquiries as to the essential or ordinary functions of government are unproductive in the abstract.<sup>148</sup> Patent difficulties of developing a broad legal test of general application to determine whether a contract is within the course of ordinary administration of recognised functions of Government suggest that the High Court may refrain from articulating definite boundaries for section 64 supported contracting and expenditure. As Starke J anticipated in *Bardolph*, situations where it is unclear as to whether a contract falls within an ordinary function of government may need to be assessed on a case-by-case basis by reference to surrounding factual circumstances.<sup>149</sup> *Williams [No 1]* and *[No 2]* appear to have adopted this approach: many Justices emphasised that their focus was only on the National School Chaplaincy Program, not the validity of Commonwealth government administered programs at large.<sup>150</sup> Consequently, the question of what contracts fall within the scope of ordinary administration of recognised functions of government remains largely unanswered, except that the National School Chaplaincy Program does not fall within that area of recognised functions.

## V CONCLUSION

The Commonwealth Executive is likely to utilise any opportunity to expand its non-statutory contracting and spending powers by exploiting dicta in *Bardolph*,

<sup>146</sup> *Williams [No 1]* (2012) 248 CLR 213, [76] (French CJ) citing Leslie Zines, *The High Court and the Constitution* (Butterworths, 5<sup>th</sup> ed, 2008) 349-350, see also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87 (Murphy J).

<sup>147</sup> *Williams [No 1]* (2012) 248 CLR 156, 191 [34] (French CJ).

<sup>148</sup> *Ex parte Engineers Association* (1959) 107 CLR 208, 277 (Windeyer J).

<sup>149</sup> *Bardolph* (1934) 52 CLR 455, 503.

<sup>150</sup> *Williams [No 1]* (2012) 248 CLR 156, 179-180 [4] (French CJ), 234 [141]-[143], 235 [146] (Gummow and Bell JJ), 240-241 [172] (Hayne J); *Williams [No 2]* [2014] HCA 23, [64] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

*Pape and Williams [No 1]*. While there is a very real probability that the source of the power to contract and spend in the administration of government can be identified with reasonable precision, it remains difficult to determine what boundaries exist, and how the Court may attempt to reign in this Commonwealth executive power. Development by the Court of 'ordinary administration of well recognised functions of government' as an exception to the narrowed scope of Commonwealth Executive competence is very much a matter for speculation for constitutional lawyers and academics. Given the significant judicial engagement with questions of Commonwealth executive spending powers over the last five years, it is unlikely that the Court will eschew the opportunity to articulate a test for what constitutes the ordinary functions of government by holding this issue to be non-justiciable. The Court will have to grapple with the difficulties highlighted – especially the development of a clear, judicially assessable standard of what has traditionally been the domain of Parliamentary and Executive determination.

The High Court will not only need to be satisfied of a workable criteria for distinguishing between the ordinary and extraordinary functions government, but also that any Commonwealth Executive power recognised is compatible with the principles of Ministerial responsibility to the Commonwealth Parliament, and the States through the Senate. Whether or not federal balance considerations are judicially deployed to limit the Executive will indicate the Court's attitude towards Commonwealth executive action and tensions between the federal system and responsible government. Regrettably, there is only one certainty: the Commonwealth Government, irrespective of the political party constituting the Commonwealth Executive, will continue to seek out and exploit possible exceptions to *Williams [No1]*'s principles.