What is the Relevance of *Williams and Plaintiff M61* for the Exercise of State Executive Power?

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The High Court's decision in Williams v Commonwealth is a landmark case concerning the executive power of the Commonwealth. This paper considers its relevance for the exercise of state executive power, with particular focus on the Court's treatment of the 'natural person' analogy. The paper asks whether Williams represents a trend in the Court's thinking about executive power, and argues that Williams (and an earlier decision of the Court, Plaintiff M61/2010E v Commonwealth) indicate a concern about the unconstrained exercise of non-statutory executive power.

INTRODUCTION

This article considers the relevance of two landmark decisions of the High Court of Australia: *Williams v Commonwealth*[1] and *Plaintiff M61/2010E v Commonwealth*[2] for the exercise of state executive power. Each case is well known, both within legal circles and in the public domain. *Williams* (the 'School Chaplains' case) drew a good deal of public interest because it involved the controversial subject of the federal government's facilitation of religious education in public schools. *Plaintiff M61* received widespread attention for the blow it dealt the federal government's offshore processing scheme for asylum seekers. While both cases are recognised as important decisions and, in the case of *Williams*, was immediately acknowledged as a significant case concerning Commonwealth executive power, little consideration has been given to their relevance to the exercise of state executive power.

In this article I contend that *Williams* raises real questions about the executive power of a state to contract and to spend. In particular, the majority's reasoning

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1 (2012) 86 ALJR 713 ('*Williams*').

2 (2010) 243 CLR 319 ('*Plaintiff M61*').

casts doubt upon any approach to the executive power of a state which seeks to draw an analogy with the powers of other legal persons such as natural persons or corporations. At a higher level, I argue that *Williams* represents a trend in the way the High Court is thinking about and treating non-statutory executive power - a trend that is also evident in *Plaintiff M61*. *Plaintiff M61* is not the most obvious choice for an article about executive power, but nevertheless I aim to demonstrate that it is a useful example of a trend in the way in which the High Court is approaching the exercise of non-statutory executive power. Although both cases involved the executive power of the Commonwealth, they reveal a concern on the part of the High Court about the negative consequences of unconstrained executive power. This concern should not be viewed as applicable only to the executive power of the Commonwealth, but is something to be taken into account when advising a state in relation to its exercise of executive power.

A Preliminary Issue – Differences Between Commonwealth and State Executive Power

First, it is necessary to briefly raise a preliminary question: what is the difference between the executive power of the Commonwealth and the executive power of the states? This question has received little attention from the courts or the legal academy. Indeed, executive power itself (let alone the differences between Commonwealth and state executive power) receives much less interest than the legislative and judicial powers.[3] Although my paper is not directed to the complex question of the distribution of executive power in the Australian federation, before addressing *Williams* and its possible relevance to the states it is important to canvass at least some of the issues arising from that question.

As noted by Gummow, Crennan and Bell JJ in *Pape v Federal Commissioner of Taxation*,[4] the text of the *Commonwealth Constitution* 'assumes the existence and conduct of activities of government' by what the *Constitution* describes as 'the Executive Government of the Commonwealth' and the 'Executive Government of the State'.[5] Nevertheless, as their Honours observed, the text of the *Constitution* does not attempt to deal with the relationship between those executive governments,[6] giving rise to the following question: 'what are the respective spheres of exercise of executive power by the Commonwealth and state governments?'[7]

When considering the executive power of the Commonwealth, the starting point is s 61 of the *Constitution*. It provides:

> The executive power of the Commonwealth is vested in the Queen and is

3 This point is made in relation to Commonwealth powers by George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 421.
4 (2009) 238 CLR 1 ('*Pape*').
5 Ibid 83 [214].
6 Ibid 84 [217].
7 Ibid 85 [220].

> exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

In *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd*, Isaacs J held that 'the domain of the Commonwealth executive power … is described but not defined in s 61'.[8] As Professor Leslie Zines observes, '[t]hese meagre words give very little idea of the content of the power unless regard is had to both the common law and to the federal system within which the Commonwealth operates'.[9] In this article, I do not propose to go into detail about the High Court's treatment of s 61 over time. For present purposes, it is convenient to refer to the following passage from the reasons of French CJ in *Williams* as providing a non-exhaustive summary of the aspects of executive power recognised by the High Court as conferred by s 61:

- powers necessary or incidental to the execution and maintenance of a law of the Commonwealth;
- powers conferred by statute;
- powers derived by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;
- powers defined by the capacities of the Commonwealth common to legal persons; •inherent authority derived from the character and status of the Commonwealth as the national government.[10]

A basic but important difference between Commonwealth executive power and state executive power is that there is no equivalent to s 61 in the state constitutional instruments. In the former case, the analysis begins with and must be anchored in the text and structure of the *Constitution*, primarily s 61. In the latter case, a different approach is required. But what is that approach, and how exactly does it differ from the approach to be taken when dealing with the executive power of the Commonwealth? A significant difference is that unlike state executive power, Commonwealth executive power 'enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it', including (for example) 'the protection of the body politic or nation of Australia'.[11] Another difference is that while the Commonwealth may affect a state's executive capacity through the exercise of its legislative powers, the states have no such power.[12] Beyond these matters, how does one go about understanding state executive power?

In 1907, Sir Littleton Groom (then Attorney-General for the Commonwealth)

8 (1922) 31 CLR 421, 440 (Isaacs J). See also, Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 315.

9 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 342.

10 (2012) 86 ALJR 713, 723 [22].

11 (2009) 238 CLR 1, 83 [214]-[215] (Gummow, Crennan and Bell JJ).

12 Ibid 86 [223] (Gummow, Crennan and Bell JJ), citing *Commonwealth v Western Australia* (1999) 196 CLR 392, 471 [229].

said:

> It must be taken to be settled law that the executive power of the Commonwealth is coextensive with the whole range of its legislative powers, whether those powers are exercised or unexercised: and, further, that there is vested in the Governor-General under section 61 of the *Constitution* the whole undefined mass of executive powers which are necessarily implied in the creation of a new political entity, sovereign within its own sphere. These general propositions are of course subject to the limitation that where the matter is one which is governed by a State law which has not been displaced by a law of the Commonwealth, the State executive power under the State law still remains.[13]

Over a century later, Professor Anne Twomey described what had (by that time) become the orthodox view in the following way:

> The *Constitution* distributes legislative power between the Commonwealth and the states by giving express but limited powers to the Commonwealth, most of which are concurrent in nature, and plenary residual powers to the states. *It has generally been accepted that executive power follows legislative power*.[14]

It is important to note, however, that the proposition that executive power follows legislative power could never completely answer the conundrum of the division of executive power in the federation. This point is made clear by reference to Evatt J's discussion of the royal prerogative in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd*.[15] Noting the 'general rule that the division of *legislative* power as between Commonwealth and State may determine the authority which is capable of exercising a relevant prerogative of the King',[16] his Honour went on to say:

> What is, however, frequently overlooked in the discussion of these difficult questions is the fact that the royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects and thereby to determine whether they are exercisable by the Commonwealth Executive or that of the State or by both or by neither.17

As will be discussed later in this article, the proposition that Commonwealth executive power follows Commonwealth legislative power is unsustainable in

13 'Executive Power of Commonwealth – Whether Co-extensive with Legislative Power' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service, 1981) 358, 360 quoted in *Williams* (2012) 86 ALJR 713, 789 [353] (Heydon J).

14 Twomey, above n 8, 321 (citations omitted) (emphasis added).

15 (1940) 63 CLR 278, 320.

16 Ibid (emphasis in the original).

17 Ibid.

light of the reasoning of a majority of the Court in *Williams*.[18] While this fact is significant in and of itself, it also raises new questions about the allocation of executive power between the Commonwealth and the states in the Australian federation. If it is not the case that executive power follows legislative power (at least in the federal sphere), then how else to understand the allocation of executive power in the federation? With these issues in mind, I now turn to *Williams*.

Williams v Commonwealth

Williams involved a challenge to the Commonwealth's National School Chaplaincy Programme (NSCP). The plaintiff was a father of children enrolled in a State school in Queensland.[19] The school received chaplaincy services from Scripture Union Queensland (SUQ) as part of the NSCP.[20]

Although the NSCP operated through Commonwealth funding, it was not established pursuant to specific legislation.[21] Rather, it operated nationally through a 'series of funding arrangements for particular schools'.[22] Thus, SUQ (like other providers throughout Australia),[23] received funding from the Commonwealth for providing its chaplaincy services pursuant to a contract with the Commonwealth.[24] Funding for the NSCP was said by the Commonwealth parties to have been appropriated from the consolidated revenue fund pursuant to certain Appropriation Acts.[25]

As already mentioned, the challenge to the NSCP drew much attention because of public interest in the question of whether religious education should be provided in public schools. For the federal government, however, the case was significant for a different reason. The NSCP was not the only national scheme being operated in this way. In fact, there were hundreds of other national programmes being funded without any specific statutory footing.[26] The stakes for the Commonwealth were high.

The plaintiff challenged the Commonwealth's provision of funding pursuant to the

18 (2012) 86 ALJR 713, 735 [60] (French CJ), 750-1 [135]-[137] (Gummow and Bell JJ), 822 [544] (Crennan J). Hayne J (at 760 [194]) and Kiefel J (at 826 [569]) considered it unnecessary to decide this issue.

19 Ibid 720 [5].

20 Ibid 720-1 [5].

21 Ibid 742 [88].

22 Ibid 744 [101].

23 For example, chaplaincy services in Western Australia were provided by way of an identical arrangement between the Commonwealth and the Churches' Commission on Education Incorporated, which appeared as amicus curiae in *Williams*.

24 (2012) 86 ALJR 713, 720-1 [5].

25 Ibid 811 [474].

26 As much is made clear by the remedial legislation passed in the wake of *Williams*: *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). See also Andrew Lynch, *School Chaplains Decision Opens Can of Worms for Federal Funding* (3 July 2012) The Australian <http://www.theaustralian.com.au/national-affairs/opinion/school-chaplains-decision-opens-can-of-worms-for-federal-funding/story-e6frgd0x-1226415000753>.

NSCP on the basis that it was without authority under the *Constitution*.[27] At the outset, it is important to note that the plaintiff's case built upon the High Court's decision in *Pape* in which it was held that those sections of the *Constitution* which provide for parliamentary appropriation are not sources of a spending power.[28] Because of *Pape*, the Commonwealth defendants had no option but to rely on s 61 of the *Constitution* as the source of power to enter into the funding agreement with SUQ and to make payments to SUQ pursuant to that agreement. By a majority of six, the High Court rejected this contention.[29] For the states, an important question arising from *Williams* is whether (and if so, to what extent) the majority's reasoning applies to state executive power.

The Commonwealth defendants put their case in various ways. Of relevance to this paper is the Commonwealth's submission (described by Gummow and Bell JJ as the 'ultimate submission') that 'because the capacities to contract and to spend moneys lawfully available for expenditure do not "involve interference with what would otherwise be the legal rights and duties of others" which exist under the ordinary law, the executive government in this respect possesses these capacities in common with other legal persons'.[30] As a result, so it was contended, the executive's capacity to contract and to spend was derived from the general law.[31] The High Court's treatment of this argument is of particular relevance to the states, and is considered in detail below.

The Executive as a Person

The drawing of an analogy between 'the executive' and a person is not a new concept. As Dr Nicholas Seddon observed, '[h]istorically, the government was equated with the Crown which, in turn, related back to the person of the sovereign'.[32] In *Clough v Leahy*,[33] a 1904 decision of the High Court involving the executive power of the states, Griffith CJ (Barton and O'Connor JJ agreeing) described the power of the executive to undertake inquiries as 'a power which every individual citizen possesses'.[34] In an oft-cited passage from *New South Wales v Bardolph* (to which I will return later in this article) Evatt J said that 'the general capacity of the Crown to enter into a contract should be regarded from the same point of view as the capacity of the King' and that the King 'never seems to have been regarded as being less powerful to enter into contracts than one of his

27 (2012) 86 ALJR 713, 742 [85].

28 (2009) 238 CLR 1, 55 [111]-[112] (French CJ), 73 [178] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel J), 210-1 [601]-[602] (Heydon J).

29 (2012) 86 ALJR 713, 741-2 [83]-[84] (French CJ), 751 [138], 752-4 [150]-[161] (Gummow and Bell JJ), 778 [286], [289] (Hayne J), 820 [534] (Crennan J), 830-1 [595]-[597] (Kiefel J).

30 As described by Gummow and Bell JJ: (2012) 86 ALJR 713, 752 [150].

31 Ibid.

32 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 55.

33 (1904) 2 CLR 139.

34 Ibid 156 quoted in *Williams* (2012) 86 ALJR 713, 735 [63] (French CJ).

subjects'.[35]

However, reviewing the Commonwealth defendants' outline of written submissions in *Williams*, it is apparent that the proposition that the executive government possesses capacities 'in common with other legal persons' was not supported by very much authority.[36] Apart from *Clough v Leahy*, the only case cited by the Commonwealth defendants was *Lockwood v Commonwealth*.[37] However, *Lockwood* contains no more than Fullagar J's remark that his Honour could 'think of no sound reason why the Commonwealth should not make an inquiry into any subject matter which it may choose'.[38] Additional authorities (including Evatt J's reasons in *Bardolph*)[39] were relied upon by the Solicitor-General for the Commonwealth in oral argument,[40] but it is fair to say (and easy to say in hindsight) that the case law did not provide the Commonwealth defendants' argument in this regard with a terribly solid foundation. Moreover, there existed authority to the contrary.[41]

A majority of five members of the Court rejected the argument entirely.[42] Chief Justice French said: '[t]he Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity. The government contract "is now a powerful tool of public administration"'.[43] Chief Justice French's reasons demonstrate a concern about the executive power of the Commonwealth to contract, in its impact upon both individuals and also on the executive power of the states.[44] As to the latter point, issues of federalism loom large in French CJ's reasons.

Justices Gummow and Bell also rejected the Commonwealth defendants' submission, principally on the basis that there is a significant difference between (on the one hand) the Commonwealth spending public money and (on the other hand) a private person spending private money.[45] Their Honours explained: '[t]he law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government. Where public moneys are involved, questions of contractual capacity are to be regarded "through

35 (1934) 52 CLR 455, 474-5 ('*Bardolph*').
36 First, Second and Third Defendants, 'Submissions of First, Second and Third Defendants', Submission in *Williams*, No S307 of 2010, 11 July 2011, [41].
37 (1954) 90 CLR 177, cited by the Commonwealth Defendants at n 81 of their Outline of Submissions.
38 (1954) 90 CLR 177, 182.
39 (1934) 52 CLR 455.
40 See, eg, [2011] HCATrans 199 (10 August 2011) 130-1 (Mr Gageler SC).
41 See, eg, *A-G (Vic) v Commonwealth* (1934) 52 CLR 533, 562 (Rich J).
42 (2012) 86 ALJR 713, 727-8 [37]-[38] (French CJ), 752-4 [150]-[159] (Gummow and Bell JJ), 762 [204], 763 [207], 765 [215]-[216] (Hayne J), 818-9 [518]-[524] (Crennan J).
43 Ibid 728 [38] (French CJ) citing Seddon, above n 32, 65.
44 (2012) 86 ALJR 713, 728 [38], 734-5 [59].
45 Ibid 752 [150], citing the observation made by Dixon CJ, Williams, Webb, Fullagar and Kitto JJ in *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461.

different spectacles"'.[46] Like French CJ, their Honours also observed that the Commonwealth defendants' submission was based on the mistaken treatment of the executive as having a legal personality distinct from that of the legislature.[47]

Similarly, Hayne J's rejection of the Commonwealth's submission was based upon the conclusion that '[t]here is no basis in law for attributing human attitudes, form, or personality either to the federal polity … or … to one branch of the government of that polity – the Executive'.[48] In Hayne J's view, the Commonwealth's power to make contracts and dispose of property is to be determined by interpreting the *Constitution*, not through the making of assumptions about its 'capacities' based on 'analogies or otherwise'.[49]

Justice Crennan gave several reasons why the analogy between the Commonwealth executive and other legal persons is imperfect. Her Honour pointed to the following matters (all of which are in contrast to the position in relation to other legal persons): the funds available to the Commonwealth are public funds;[50] the Commonwealth's capacities are limited by s 81, which requires that moneys appropriated must be for some governmental purpose;[51] and, the Commonwealth's capacities to contract and spend 'are capable of being utilised to regulate activity in the community in the course of implementing government policy'.[52]

Before turning to the next section, it is important to note the position of Kiefel J. Although her Honour comprises part of the majority in terms of the decision in *Williams*, on the question of the executive power of the Commonwealth to contract her Honour took a different approach. Justice Kiefel, like Hayne J, saw the relevant question as whether the executive had power to act, not whether there was capacity to contract.[53] However, unlike Hayne J, Kiefel J did not adopt an analysis which required her to decide upon the correctness of the 'natural person' analogy. Her Honour considered that the analogy was simply not to the point.[54] The issue was one of power, and '[a]n activity not authorised by the *Constitution* could not fall within the power of the [Commonwealth] Executive'.[55]

Relevance for the States

As set out above, a majority of five justices rejected the proposition that the Commonwealth's executive power to contract and to spend is analogous to that of

46 (2012) 86 ALJR 713, 752-3 [151] (citation omitted).
47 Ibid 753 [154].
48 Ibid.
49 Ibid 763 [206].
50 Ibid 818 [519].
51 Ibid 818 [520].
52 Ibid 818 [521].
53 Ibid 830 [595]. In relation to the distinction between capacity and power, see: ibid 762 [201]-[203] (Hayne J).
54 Ibid 830-1 [595].
55 Ibid.

other legal persons. The question arising for the states is whether the majority's reasoning applies to state executive power. Before proceeding any further, however, it is important to note that although I do not attempt in the following analysis to deal with any differences that might arise between the states, the position of one state – Queensland – is (relevantly) unique. Section 51(1) of the *Constitution of Queensland 2001* (Qld) provides that 'the Executive Government of the State of Queensland … has all the powers, and the legal capacity, of an individual'.[56] By virtue of this provision, the issues I consider below are not relevant to the executive power of the state of Queensland.

It is my contention that, post-*Williams*, there is a need to reconsider the limits of state executive power to enter into contracts and to spend money.

As stated above, a theme running through the reasoning of five members of the majority was a rejection of the Commonwealth defendants' attempt to draw an analogy between the executive government of the Commonwealth and other legal persons. Although there are certainly aspects of the majority's reasoning that do not readily translate to the exercise of state executive power, much of it is applicable (to varying degrees) to the states. Just like the Commonwealth, when a state expends moneys it is public moneys that are involved.[57]

Moreover, although the Commonwealth's financial resources are far greater than those of any state, state executive power to contract and to spend is (like that of the Commonwealth) 'capable of being utilised to regulate activity in the community in the course of implementing government policy'.[58]

More importantly, when one stands back from the detail of the various judgments, what is left is a clear impression that the analogy which formed the basis of the Commonwealth defendants' argument is inapt. In my view, it would be surprising if the majority justices, having found the analogy unhelpful in the federal context, were to be untroubled by its use in the state context.

Thus, it is my contention that the reasoning of a majority of justices in *Williams* supports the conclusion that any determination of the limits of state executive power to contract should not be made on the basis of an analogy between the power or capacity of a state executive and those of other legal persons.
The relevance of this issue for the exercise of state executive power is made clear by reference to *Bardolph*.[59] Prior to *Williams*, the following passage from Evatt J's reasons was relied upon as providing an answer to the question of the scope of

56 This does raise the possibility that other states might seek to amend their respective *Constitution Acts* to insert a similar provision, and the more complex question of what limits might apply to a state legislature wishing to alter the powers of its executive government.

57 To adopt the language of *Australian Woollen Mills Pty Ltd v Commonwealth*, quoted by Gummow and Bell JJ in *Williams* (2012) 86 ALJR 713, 752-3 [151].

58 (2012) 86 ALJR 713, 818 [521] (Crennan J).

59 (1934) 52 CLR 455.

state executive power to contract:

> Under a constitution like that of New South Wales where the legislative and executive authority is not limited by reference to subject matter, the general capacity of the Crown to enter into a contract should be regarded from the same point of view as the capacity of the King would be by the Courts of common law. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects.[60]

In a post-*Williams* world, Evatt J's reasoning in this regard (based as it is on the natural person analogy) can no longer provide a foundation for an understanding of the scope of state executive power to contract.

This raises the obvious next question: what is the scope of state executive power to contract? Although a majority in *Williams* rejected the proposition that the executive power of the Commonwealth to contract is the same as that of other legal persons, the reasons do not provide very much by way of an explanation of the scope of that power. They tell us what the power is not, but do not tell us what the power is. That fight, no doubt, is for another day. In relation to state executive power, however, Hayne J's reasons suggest that *Bardolph* may nevertheless provide an answer (or part of an answer).[61] As noted by his Honour, in *Bardolph* Dixon J (Gavan Duffy CJ agreeing) said:

> No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown.[62]

Similarly, Rich J stated that 'the Crown has a power independent of statute to make such contracts for the public service as are incidental to the ordinary and well-recognized functions of Government'.[63]

In this regard, it is useful to refer to the decision of the Court of Appeal of the Supreme Court of Western Australia in *Tipperary Developments Pty Ltd v Western Australia*.[64] *Tipperary* raised an issue about the authority of the Premier of Western Australia to bind the state in contract (specifically, a guarantee which committed the State to potentially pay $50 million). Applying *Bardolph*, the Court proceeded on the basis that no statutory authorisation was required for the Premier to make

60 Ibid 474-5.
61 (2012) 86 ALJR 713, 763-4 [208]-[209].
62 (1934) 52 CLR 455, 508 (Dixon J). See also 493 (Gavan Duffy CJ).
63 Ibid 496. See also 502-3 (Starke J), 518 (McTiernan J).
64 (2009) 38 WAR 488 ('*Tipperary*').

a contract that was incidental to the ordinary and well recognised functions of government.[65] However, Wheeler JA and McLure JA (in separate judgments) noted that the parties had not challenged the correctness of *Bardolph*, despite the existence of strong academic criticism of this aspect of the case.[66]

In my view, the proposition arising from *Bardolph* that no statutory authority is required for the exercise of state executive power to make a contract in the ordinary course of administering a recognised part of government is unaffected by *Williams*. In this regard, I note that in *Williams* French CJ distinguished *Bardolph* on the basis that it concerned 'the power of the executive in a setting analogous to that of a unitary constitution'.[67]

A different question, however, is whether the reasoning in *Bardolph* is sound.[68] As already noted, *Bardolph* has been strongly criticised on various grounds by several leading academics – a fact noted not just in *Tipperary* but in *Williams* as well.[69] In light of such criticism, it would be unsurprising if the High Court's further development of its jurisprudence in relation to executive power did not revisit this aspect of *Bardolph*.

Putting *Bardolph* aside, another possible answer involves turning to the issues raised earlier in this paper concerning the distribution of executive power between the Commonwealth and the states. In this regard, Dr Seddon expressed the view (albeit prior to *Williams*) that 'the only limits to a State or Territory's power to make contracts are those that arise from the division of powers between the Commonwealth on the one hand and the States and Territories on the other'.[70] Whether or not this view will find favour with the Court will remain to be seen.

Before concluding this section of the paper, I wish to touch upon two matters. First, the critique of the 'executive as a natural person' analogy raises questions concerning other capacities or powers the executive has been thought to possess by reason of that analogy (for example, the power to undertake inquiries). I consider that, post-*Williams*, any capacity or power of a state executive that has been founded upon the natural person analogy will need to be revisited, and consideration given to whether there is an alternative foundation for its existence.

Second, I wish to address the argument that the subject-matter limits imposed on Commonwealth legislative power by the *Constitution* mean that the federal government has greater reason to seek to rely on non-statutory executive power than does a state government. As a result, so the argument goes, the states have

65 Ibid 493 [3] (Wheeler JA), 510-2 [86]-[94] (McLure JA) (Newnes JA agreeing).
66 Ibid 493 [3] (Wheeler JA), 511-2 [94] (McLure JA) (Newnes JA agreeing).
67 (2012) 86 ALJR 713, 740 [79].
68 See, eg, E Campbell, 'Commonwealth Contracts' (1970) 44 Australian Law Journal 14, 14-6; Zines, above n 9, 349-50.
69 (2012) 86 ALJR 713, 739-40 [75]-[79] (French CJ).
70 Seddon, above n 32, 81.

little to fear from *Williams*. While I accept the basic point, it is nevertheless not uncommon for a state government to find itself in a political climate that makes the passage of legislation difficult. In such circumstances, a state government may wish to rely more heavily upon non-statutory executive power. Indeed, cases such as *Tipperary* demonstrate that questions concerning the scope of executive power do arise in the state context and fall for consideration by the courts. Such cases may be rare, but that does not diminish their importance (a point also demonstrated by *Tipperary*). For these reasons, in my view, the question of the relevance of *Williams* for the states is a real one.

Understanding *Williams* – Relevance of *Plaintiff M61*

Williams was quite the constitutional bombshell. The outcome may not have been a surprise, but the reasoning adopted by the majority was certainly unexpected. In trying to understand what the High Court did in *Williams* and whether it is part of a greater trend in the High Court's constitutional jurisprudence, an obvious line of enquiry is the role of federalism. However, of interest to me is the possibility that *Williams* suggests another undertone, namely, a concern on the part of the majority justices about the dangers of unconstrained executive power. In this regard, I consider it useful to consider the High Court's earlier decision in *Plaintiff M61*.

Plaintiff M61 and Unconstrained Executive Power

At issue in *Plaintiff M61* was a scheme established by the Commonwealth for the processing of asylum seekers who entered Australian territory in what was described in the *Migration Act 1958* (Cth) as an 'excised offshore place'. So-called 'offshore entry persons' were not entitled to apply for protection visas under the *Migration Act*, and therefore could not avail themselves of the relevant statutory provisions which would oblige the Minister to consider their application and (if satisfied of the applicable criteria) grant the visa.[71] Of relevance here is the fact that the Commonwealth chose to process the asylum claims of 'offshore entry persons' through a scheme that it described as a 'non-statutory process'.[72] The 'Refugee Status Assessment' (RSA) process and the process for reviewing RSA decisions (the Independent Merits Review (IMR) process) were not provided for in legislation, but in 'procedural manuals' developed by the Department.[73] Thus, what the High Court was confronted with was a process for determining the claims of a class of asylum seekers that the Commonwealth sought to characterise as a non-statutory executive process.

Immediately, a key similarity with *Williams* is apparent. Both cases involved a public scheme of considerable magnitude that was carried out (in the case of

71 (2010) 234 CLR 319, 333 [2].
72 Ibid 343 [42].
73 Ibid 342 [38].

Williams) or said to be carried out (in the case of *Plaintiff M61*) outside of a statutory framework.

There are other similarities, perhaps less obvious. As already discussed, in *Williams*, the Commonwealth relied on contracts with third parties to provide the chaplaincy services to schools. The implementation of the offshore processing scheme also involved a contractual mechanism. The IMR process was conducted by persons engaged by an entity called Wizard People Pty Ltd ('Wizard').[74] The Commonwealth entered into a contract with Wizard pursuant to which Wizard would ensure that specified persons would be available to undertake reviews of RSA decisions.[75] The Court assumed for the purposes of the matters before it that neither Wizard nor any of its reviewers was an officer of the Commonwealth.[76]

A critical issue in *Plaintiff M61* was the nature of the power being exercised by the departmental officer who undertook the RSA assessment and the independent contractor who reviewed the RSA decision.[77] The Commonwealth defendants contended that the power was 'no more than a non-statutory executive power to inquire'.[78] Plaintiff M61 contended that the power was statutory, sourced in s 46A or s 195A of the *Migration Act*.[79]

The Court rejected the Commonwealth defendants' argument. One of the factors identified by the Court as carrying particular weight was that if the Commonwealth defendants' argument were accepted, it meant that the detention of each of the plaintiffs was prolonged as a result of 'inquiries' which were without statutory basis.[80] The Court said:

> It is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.[81]

This extract is telling. In my view, a real issue for the Court was a concern about 'unconstrained' executive power, particularly when the liberty of persons in the position of each of the plaintiffs was at stake. As noted by the Court, a consequence of the Commonwealth defendants' argument was that 'the period of an individual's detention would be wholly within the control of the Executive'.[82] Ultimately, the Court decided that the source of the power was statutory.[83] For the purposes of this paper, I do not need to delve deeper into the Court's reasoning

74 Ibid 344-5 [50].
75 Ibid.
76 Ibid 345 [51].
77 Ibid 345 [52].
78 Ibid.
79 Ibid. *Plaintiff M69* contended that s 46A was invalid, and as a result, the exercise of power was non-statutory.
80 Ibid 348 [63].
81 Ibid [64].
82 Ibid 349 [65].
83 Ibid 350-1 [69]-[71].

which led to that conclusion. What is relevant here is the Court's desire to reign in non-statutory executive power, particularly in a context where the executive's decision-making had real consequences for the personal liberty of the plaintiffs and others like them.

The Court's holding in relation to the source of power for the RSA and IMR processes changed the shape of the parties' arguments concerning whether the requirements of procedural fairness applied.[84] If the source of the power was non-statutory, a real question would have arisen about whether the requirements of procedural fairness applied at all.[85] Rather, having found that the source of power was statutory, the Court applied well-established principles and held that the RSA and IMR processes needed to be procedurally fair and free from relevant legal error.[86] In the result, the Court found that Plaintiff M61 and Plaintiff M69 were denied procedural fairness, and that in each case the IMR reviewer erred in law.[87]

Thus, this is a case where the Court's reasoning would have taken a very different turn (and the result may well have been different) if the Court had accepted the Commonwealth defendants' argument that the RSA and IMR processes involved the exercise of non-statutory executive power.

In my view, the path chosen by the Court in *Plaintiff M61* to resolve the questions presented in the case suggests an underlying (but important) reservation about the exercise of non-statutory executive power. The same reservation is evident in stronger terms in *Williams*. Analysis of other recent High Court decisions may provide further support for the proposition. In this regard, Professor Geoffrey Lindell has asked whether *Williams* and the *Malaysian Solution Case*[88] 'mark a certain distrust of the Executive'.[89]

Relevance for the States?

If I am correct that *Plaintiff M61* and *Williams* suggest a concern on the part of the High Court about the exercise of non-statutory executive power and a willingness to reign in such exercises of power, what are the implications for the states? In my view, there is no reason why the High Court would be any less worried about the exercise of non-statutory executive power in the state context. The Court's principal concern, namely the uncertainties involved in the exercise of non-statutory executive power, apply equally to the exercise of state non-statutory executive power.

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84 Ibid 351-2 [73].
85 Ibid.
86 Ibid 353-4 [78].
87 Ibid 355-7 [86]-[91], 358 [96]-[98].
88 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
89 Geoffrey Lindell, '*Williams v Commonwealth* – How the School Chaplains and Mr Pape destroyed the 'common assumption' regarding executive power' (unpublished paper dated 22 August 2012).

Indeed, one might argue there are reasons why the Court would be more likely to adopt a restrictive approach to executive power in the state context if an issue about the unconstrained nature of its exercise arose in a given case. The Commonwealth is a body politic created by the *Constitution* and enjoys 'capacities superior to that of a mere aggregation of the federating colonies'.[90] As noted earlier, the Commonwealth's executive power has been understood as involving the concept of the protection of the nation of Australia[91] – a consideration that does not arise when dealing with state executive power. A state seeking to defend an exercise of non-statutory executive power must do so without resorting to arguments based upon the national interest. Without this line of defence, a state is arguably more vulnerable than the Commonwealth in defending an exercise of non-statutory executive power.

In advising a state, *Plaintiff M61* and *Williams* suggest that the High Court is more comfortable with the exercise of executive power that has a statutory basis. It is reluctant to permit spheres of power that are unconstrained and uncertain.

Conclusion

Concern about the potential for abuse of executive power is not new. In *Australian Communist Party v Commonwealth*, Dixon J stated:

> History … shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions needed to be protected.[92]

Particular concerns arise in relation to the exercise of non-statutory executive power. When executive power is exercised pursuant to statute, the limits of the power are capable of ascertainment by looking to the statute and relevant case law. Not so, when the executive power is non-statutory. It can be a difficult task to determine what the source of the power is, and the terms upon which it is being exercised.

Even if it is known that relevant obligations are contained (for example) in a private contract rather than sourced in a statute, accessing such documents can be very difficult. While members of the public can readily access legislation to determine the limits of an exercise of statutory executive power, in the case of non-statutory executive power it can be a difficult task for lawyers (let alone members of the public) to access the material necessary to identify the parameters within which the exercise of executive power is working. All of this makes a non-statutory exercise of executive power less transparent, and less accountable.

In discussing the prerogative powers, Professor Simon Evans observes that

90 *Pape* (2009) 238 CLR 1, 85 [222].
91 Ibid 83 [215].
92 (1951) 83 CLR 1, 187 ('*Communist Party Case*').

'enacting legislation requires greater openness, scrutiny and democratic deliberation than the exercise of prerogative powers'.[93] The same observation applies when comparing the exercise of executive power pursuant to legislation with the exercise of non-statutory executive power. In the latter case, there is a lack of accountability on several levels. Because it is not sourced in a statute, the accountability that is a necessary part of the parliamentary process in order to obtain the successful passage of legislation is avoided. If the High Court is indicating a preference for the exercise of statutory executive power, the Court is ensuring greater accountability of the executive to the legislature, and (therefore) to the electors.

Moreover, accountability through the judicial process is more difficult in the case of non-statutory executive power. Looking at *Williams* and *Plaintiff M61* through this lens, there is an argument that the High Court is seeking to increase the scope of judicial scrutiny and oversight of the exercise of executive power. On this approach, it will be difficult (if not impossible) for the executive to mark out fields of power as immune from judicial scrutiny simply by relying on non-statutory exercises of power (through, for example, the making of contracts).
Of course, accountability is integral to the rule of law. As stated by Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission*:[94]

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.

If my analysis is correct, an important question is raised concerning what *Williams* might mean for the exercise of prerogative powers (of course, uncertainty has been a hallmark of the prerogative). This is a question for another day.

There is no doubt that *Williams* raises more questions than it provides answers. Before blaming the *Williams* majority for this uncertainty, however, it is worth noting French CJ's conclusion in *Williams* that 'there is little evidence to support the view' that there existed at the time of federation 'a clear common view of the working of executive power in a federation'.[95] Certainly, since federation, comparatively little judicial and academic time has been spent considering the nuances of executive power in the Australian federation. Perhaps that is one of the reasons *Williams* is so significant – arguably it heralds a new era of interest by the High Court in understanding the nature of executive power, and how executive power is distributed in the Australian federation.

93 Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94, 99.

94 (2000) 199 CLR 135, 157 [56].

95 *Williams* (2012) 86 ALJR 713, 733 [56].