PANDEMICS, PRIVACY AND PRESSING CONSTITUTIONAL LIMITS — THE COMMONWEALTH'S USE OF THE NATIONHOOD POWER TO FACILITATE COVIDSAFE

SAMANTHA GATES*

The advent of COVID-19 saw the Commonwealth Government launch the voluntary contact tracing app – COVIDSafe. Accompanying the launch of the app, the Commonwealth inserted Part VIIIA into the Privacy Act 1988 (Cth) ('Privacy Act'). Part VIIIA put in place a scheme of privacy protection for users of COVIDSafe to increase public trust in the app, and therefore its uptake. What is remarkable about Part VIIIA is its constitutional basis. While the constitutional validity of the Privacy Act is sourced in the external affairs power, the Commonwealth instead relied on the amorphous nationhood power to support Part VIIIA. The aim of this article is to examine Part VIIIA and determine whether it can truly be said to be a law with respect to the nationhood power. This will carry implications for future uses of the nationhood power by the Commonwealth in the realm of privacy protection.

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I INTRODUCTION

Digital technologies have been marshalled across the globe to manage the COVID-19 pandemic. This has principally been in the form of mobile applications ('apps') to facilitate contact tracing.[1] Australia was no exception to this trend, the Commonwealth Government launching the voluntary contact tracing app COVIDSafe on 26 April 2020.[2] COVIDSafe formed part of the Commonwealth's national response to the pandemic through assisting the contact tracing efforts of State and Territory health authorities.[3] The app did this by way of automating the process of identifying close contacts.[4] Following the launch of COVIDSafe, the Privacy Amendment (Public Health Contact Information) Bill 2020 ('Public Health Contact Information Bill') was introduced to insert a new Part VIIIA into the *Privacy Act 1988* (Cth) ('*Privacy Act*'). Part VIIIA, in short, put in place a scheme

* JD UWA.
[1] See generally Davis Watts, 'COVIDSafe, Australia's Digital Contact Tracing App: The Legal Issues' (2020) *SSRN* 1, 2.
[2] Scott Morrison et al, 'COVIDSafe: New App to Slow the Spread of Coronavirus' (Media Release, Department of Health, 26 April 2020).
[3] Ibid; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 98 of 2019–20, 12 May 2020) 2 ('Privacy Amendment Bills Digest').
[4] Morrison et al (n 2).

of privacy protections for users of COVIDSafe to increase public trust in the app, and therefore its uptake.[5]

The focus of this article is Part VIIIA's constitutional basis. While the constitutional validity of the *Privacy Act* is sourced in the external affairs power contained in s 51(xxxix) of the *Commonwealth Constitution* ('*Constitution*'),[6] Parliament designated a different constitutional basis for Part VIIIA. They instead relied on the amorphous nationhood power.[7]

In *Victoria v Commonwealth and Hayden* ('*AAP Case*')[8] four Justices of the High Court affirmed that from s 61 of the *Constitution* stemmed an implied executive power derived from the existence and character of the Commonwealth as a national government.[9] This is now referred to as the nationhood power.[10] Mason J in that case provided 'the precise formulation'[11] of the power which now characterises the approach of the High Court.[12] His Honour described it as a 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of a nation'.[13] While the nationhood power is an implied executive power,[14] it 'triggers a capacity to legislate'[15] through s 51(xxxix). Section 51(xxxix) is the express head of incidental legislative power which allows Parliament to legislate with respect to

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[5] See Explanatory Memorandum, Privacy Amendment (Public Health Contact Information) Bill 2020 (Cth) 2 ('Privacy Amendment Explanatory Memorandum'). See also *Privacy Act 1988* (Cth) s 94B ('*Privacy Act*').

[6] This is because the *Privacy Act* was intended to give effect to Australia's international obligations concerning privacy under the *International Covenant on Civil and Political Rights*, as well as the Organisation for Economic Co-operation and Development's *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report 108, 12 August 2008) 195–6. See also *Privacy Act* (n 5) s 2A(h).

[7] *Privacy Act* (n 5) s 94C(1).

[8] (1975) 134 CLR 338 ('*AAP Case*').

[9] Ibid 362 (Barwick CJ), 375 (Gibbs J), 397 (Mason J), 412 (Jacobs J).

[10] See Peta Stephenson, 'Nationhood and Section 61 of the *Constitution*' (2018) 43(2) *University of Western Australia Law Review* 149, 151; *Williams v Commonwealth* (2012) 248 CLR 156, 267 [240] (Hayne J) ('*Williams (No 1)*'); *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 454 [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Williams (No 2)*'); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 568 [150] (Hayne and Bell JJ), 596 [260] (Kiefel J) ('*CPCF*').

[11] Stephenson (n 10) 151.

[12] See *Commonwealth v Tasmania* (1983) 158 CLR 1, 108–9 (Gibbs CJ), 321–3 (Dawson J) ('*Tasmanian Dams Case*'); *Davis v Commonwealth* (1988) 166 CLR 79, 93–95 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 23 [8], 50 [95], 60–1 [128], 63 [133] (French CJ), 87–8 [228], 91–2 [242] (Gummow, Crennan and Bell JJ) ('*Pape*'); *Williams (No 1)* (n 10) 250–1 [196] (Gummow and Bell JJ), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J).

[13] *AAP Case* (n 8) 397 (Mason J).

[14] All justices in *Davis* (n 12) were of the view that the nationhood power was sourced in s 61. However, Mason CJ, Deane and Gaudron JJ did note that an implied legislative nationhood power may also exist: at 93.

[15] Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3(1) *Journal of Commonwealth Law* 55, 66 ('Prerogatives and the Courts').

'matters incidental to the execution of any power vested by this *Constitution* in the…Government of the Commonwealth'. As s 61 of the *Constitution* vests executive power in the Commonwealth, it follows that s 51(xxxix) allows the Parliament to legislate with respect to matters 'incidental to the execution' of that executive power,[16] which includes the nationhood power. This article will refer to ss 61 and 51(xxxix) together as the 'legislative nationhood power'.[17]

Notwithstanding the guidance the Mason J formulation provides when determining whether a law is with respect to the nationhood power, its scope remains unclear.[18] It is particularly murky with respect to the types of actions it may authorise. Whether the nationhood power may only authorise facultative activities, or whether it can be exercised coercively, has not been settled in the case law.[19]

While questions concerning the power's scope remain, at least one point is clear; the nationhood power is one which is capable of responding to national emergencies.[20] This has been the result of *Pape v Federal Commissioner of Taxation* ('*Pape*'),[21] where a majority of the High Court[22] found that the Commonwealth could enact financial stimulus measures in response to a national emergency on the basis of the nationhood power. Accordingly, the COVID-19 pandemic presented ripe circumstances for the Commonwealth's exercise of the nationhood power. A search of the Federal Register of Legislation[23] revealed that most of the legislation made with respect to the nationhood power during COVID-19 fell squarely within the known bounds of the power as established by *Pape* —

[16] See *Plaintiff M68* (2016) 257 CLR 42, 93 [122] (Gageler J).
[17] Although note this is different to a potential 'implied legislative nationhood power': see nn 14.
[18] Melissa Castan and Sarah Joseph, *Federal Constitutional Law* (Thomson Reuters, 5th ed, 2019) 173.
[19] Twomey, 'Prerogatives and the Courts' (n 15) 64–5; Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 338 ('Pushing the Boundaries of Executive Power').
[20] See *Pape* (n 12) 60 [127], 63 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ); *Williams (No 1)* (n 10) 235 [146] (Gummow and Bell JJ), 250–1 [196], 267 [240] (Hayne J), 346–7 [499] (Crennan J), 362 [599] (Kiefel J); *CPCF* (n 10) 568 [150] (Hayne and Bell JJ), 596 [260] (Kiefel J); Stephenson (n 10) 177–8. With respect to pandemic emergencies, see: Christopher Reynolds, 'Quarantine in Times of Emergency: The Scope of s 51(ix) of the Constitution' (2004) 12(2) *Journal of Law and Medicine* 166, 176; Scott Guy and Barbara Hocking, 'Times of Pestilence: Would a Bill of Rights Assist Australian Citizens who are Quarantined in the Event of an Avian Influenza (Bird Flu) Epidemic?' (2006) 17(3) *Current Issues in Criminal Justice* 451, 458–9. See generally Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 64, 190–203; Michael Eburn, Cameron Moore and Andrew Gissing, 'The Potential Role of the Commonwealth in Responding to Catastrophic Disasters' (Report No 530, Bushfire and Natural Hazards Cooperative Research Centre, May 2019) 11–14; Joe McNamara, 'The Commonwealth Response to Cyclone Tracy: Implications for Future Disasters' (2012) 27(2) *Australian Journal of Emergency Management* 37, 39, 40; *Constitutional Framework for the Declaration of a State of National Emergency* (Issues Paper, 8 May 2020) 8 [28].
[21] *Pape* (n 12).
[22] The majority consisted of French CJ, Gummow, Crennan and Bell JJ.
[23] A search of the Federal Register of Legislation was conducted for all legislation containing the phrases 'peculiarly adapted to the government of a nation' and 'COVID-19'.

being financial stimulus measures to mitigate the negative economic effects of the pandemic.[24] Part VIIIA was the exception.

Using the legislative nationhood power to support Part VIIIA represents an entirely novel use of the power. While the object of Part VIIIA is expressed as combatting COVID-19 through providing privacy protections to users of COVIDSafe, which pays heed to the authority supplied by *Pape*, imposing a scheme of privacy protection is very different to offering a financial stimulus payment. That is to say, it is a coercive, as opposed to facultative law. Accordingly, questions arise as to whether Part VIIIA can be supported by the nationhood power.

While the merits of the app[25] and its associated privacy protections[26] have

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[24] The principal kind of legislation made with respect to the nationhood power were instruments amending Schedule 1AB of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth). See, eg, *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021* (Cth); *Financial Framework (Supplementary Power) Amendment (Prime Minister and Cabinet Measures No. 4) Regulations 2021/ No.2* (Cth); *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 1) Regulations 2022* (Cth). However, there were also instruments made under s 33 of the *Industry Research and Development Act 1986* (Cth). These included: *Industry Research and Development (COVID-19 Consumer Travel Support Program) Instrument 2020* (Cth); *Industry Research and Development (National Communications Campaign to Support Small Business Programs) Instrument 2020* (Cth); *Industry Research and Development (Eat Seafood Australia Program) Instrument 2020* (Cth); *Industry Research and Development (Supporting Agricultural Showmen and Women Program) Instrument 2021* (Cth). The most notable piece of legislation made with respect to the nationhood power was the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth), also known as the JobKeeper Act.

[25] See, eg, Danielle Currie et al, 'Stemming the Flow: How Much can the Australian Smartphone App Help to Control COVID-19?' (2020) 30(2) *Public Health Research & Practice* 1; Hafiz Syed Mohsin Abbas,
Xiaodong Xu, and Chunxia Sun, 'Role of COVIDsafe App and Control Measures in Australia in Combating COVID-19 Pandemic' (2021) 15(4) *Transforming Government: People, Process and Policy* 708; Turki Alanzi, 'A review of Mobile Applications Available in the App and Google Play Stores Used During the COVID-19 Outbreak' (2021) 14 *Journal of Multidisciplinary Healthcare* 45; Fan Yang, Luke Heemsbergen, and Robbie Fordyce, 'Comparative Analysis of China's Health Code, Australia's COVIDSafe and New Zealand's COVID Tracer Surveillance Apps: A New Corona of Public Health Governmentality?' (2021) 178(1) *Media International Australia* 182; Bronwyn Howell and Petrus H Potgieter, 'A Tale of Two Contact-Tracing Apps—Comparing Australia's CovidSafe and New Zealand's NZ Covid Tracer' (2021) 23(5) *Digital Policy, Regulation and Governance* 509; Roba Abbas and Katina Michael, 'COVID-19 Contact Trace App Deployments: Learnings from Australia and Singapore' (2020) 9(5) *IEEE Consumer Electronics Magazine* 65. Concerning media scrutiny of COVIDSafe, see, eg: Tom Stayner, 'Two years on and $21 million Spent, the COVIDSafe App is Dead', *SBS News* (online, 10 August 2022) < https://www.sbs.com.au/news/article/two-years-and-21-million-years-on-covidsafe-is-dead/7986eoyly>; Paul Karp, 'Australia retires $21m CovidSafe Contact-Tracing App that Found Just Two Unique Cases', *The Guardian* (online, 10 August 2022) < https://www.theguardian.com/australia-news/2022/aug/10/australia-retires-covidsafe-contact-tracing-app-that-was-barely-used>.

[26] See, eg, Watts (n 1); Graham Greenleaf and Katharine Kemp, 'Australia's "COVIDSafe" Law for Contact Tracing: An Experiment in Surveillance and Trust' (2021) 11(3) *International Data Privacy Law* 257; Jiesen Lin, Lemuria Carter and Dapeng Liu, 'Privacy Concerns and Digital Government: Exploring Citizen Willingness to Adopt the COVIDSafe App' (2021) 30(4) *European Journal of Information Systems* 389. Concerning media scrutiny of the Commonwealth's privacy protections, see, eg: David Crowe, 'Privacy Advocates Raise New Concerns With COVIDSafe App', *Sydney Morning Herald* (online, May 11 2020) < https://www.smh.com.au/politics/federal/privacy-advocates-raise-new-concerns-with-covidsafe-app-20200511-p54rwb.html?js-chunk-not-found-refresh=true>; Lesley Seebeck, 'App is no Silver Bullet for Virus, Yet a Honey Pot for the Malign', *Financial Review* (online, 29 April 2020) <

received substantial attention in the literature, there has been no consideration of Part VIIIA's constitutional basis at the time of writing.[27] Therefore, the aim of this article is to examine Part VIIIA and determine whether it can truly be said to be a law with respect to the legislative nationhood power. This will carry implications for future uses of the nationhood power by the Commonwealth in the context of privacy protection.

This article begins by providing an overview of the case law with respect to the legislative nationhood power in Part II. This overview is conducted with a particular focus on how the case law may apply to laws responding to public health emergencies like COVID-19. This article will also take a position on some unsettled aspects of the case law, including the nature of the nationhood power and the scope of the incidental legislative power to enact laws with respect to the power. In light of the findings made in Part II, Part VIIIA will then be examined to determine whether it can be supported by the legislative nationhood power in Part III. As will be seen, this article considers that Part VIIIA can be supported by ss 61 and 51(xxxix) to an extent. This article will query the validity of some offences created by the Part as pressing the nationhood power to its outer constitutional limits, or potentially going beyond them. Part IV then concludes.

Before continuing, this article seeks to emphasise its confined scope. The purpose of this article is to examine the express use of the legislative nationhood power by the Commonwealth to support Part VIIIA. To undertake this examination, it adopts the accepted, albeit uncertain, contours of the nationhood power as articulated by the High Court.[28] Consequently, this article does not seek to engage in the vexed questions surrounding the power's merit. This has been adequately considered elsewhere.[29]

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https://www.afr.com/policy/health-and-education/app-is-no-silver-bullet-for-virus-yet-a-honey-pot-for-the-malign-20200429-p54o5k>.

[27] This article was written in October 2022.

[28] *Tasmanian Dams Case* (n 12) 108–9 (Gibbs CJ), 252–3 (Deane J), 321–3 (Dawson J); *Davis* (n 12) 93–5 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J); *Pape* (n 12) 23 [8], 50 [95], 60–1 [128], 63 [133] (French CJ), 87–8 [228], 91–2 [242] (Gummow, Crennan and Bell JJ); *Williams (No 1)* (n 10) 250–1 [196] (Gummow and Bell JJ), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J). See generally Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2016) 39 *Melbourne University Law Review* 385, 391–6.

[29] See, eg, Twomey, 'Pushing the Boundaries of Executive Power' (n 19); Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279; Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, "Nationhood" and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97; Peter Gerangelos, 'Sir Owen Dixon and the Concept of "Nationhood" as a Source of Commonwealth Power' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 56; George Winterton, 'The Limits and Use of Executive Power by the Government' (2003) 31(3) *Federal Law Review* 421; Twomey, 'Prerogatives and the Courts' (n 15); Stephenson (n 10); Condylis (n 28); Catherine Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the

II NATIONHOOD: STATE OF THE CASE LAW

Following the Mason J formulation, determining whether a law is with respect so ss 61 and 51(xxxix) involves three inquiries. Firstly, whether the executive enterprise or activity that underpins that law is peculiarly adapted to the government of a nation; secondly, whether it cannot otherwise be carried on for the benefit of a nation; and thirdly, whether the law made with respect to the executive enterprise or activity is incidental to the execution of that executive power. The case law with respect to these three inquiries will be explored in turn.

A Peculiarly Adapted to the Government of a Nation

1 Approach of the High Court

The first limb of the Mason J formulation requires that an enterprise or activity must be 'peculiarly adapted to the government of a nation'.[30] This means that such an activity must be necessary for a national government to undertake.[31] Mason J in the *AAP Case* provided examples of activities that could be considered 'peculiarly adapted', rather than specific criteria to be applied.[32] For example, this included the establishment of the CSIRO 'to undertake scientific research on behalf of the nation'.[33] The High Court over the years has alluded to other kinds of activities which could potentially fall within the nationhood power, including: the establishment of national initiatives in literature, sport and the arts,[34] the exploration of technology and science,[35] and creating symbols of nationhood such as a flag or anthem.[36] However, such examples are not exhaustive and the kinds of activities the power can support remains uncertain.[37] As suggested by Mason J,[38] and Brennan J,[39] the functions appropriate to a national government will vary overtime. Accordingly, there is no precise test which may be applied. Although, we do know

Future of the Prerogative' (2020) 43(3) *University of New South Wales Law Journal* 893; Duncan Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law' (2009) 28(2) *University of Tasmania Law Review* 145, 174; Simon Evans 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94 ('MV Tampa').

[30] Stephenson (n 10) 175.

[31] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 335; Twomey, 'Prerogatives and the Courts' (n 15) 55, 64.

[32] Stephenson (n 10) 175.

[33] *AAP Case* (n 8) 397 (Mason J).

[34] *Davis* (n 12) 111 (Brennan J). See also *Tasmanian Dams Case* (n 12) 253 (Deane J).

[35] *AAP Case* (n 8) 362 (Barwick CJ).

[36] *Davis* (n 12) 111 (Brennan J).

[37] James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 449.

[38] Stephenson (n 10) 175.

[39] *Davis* (n 12) 111 (Brennan J)

that national need or mere convenience of national administration is not enough to bring an activity within power.[40]

As prefaced in Part I, a significant factor that the High Court now takes into account when determining whether a law is 'peculiarly adapted to the government of a nation' is whether it is being used to respond to a national emergency.[41] In *Pape*, French CJ and Gummow, Crennan and Bell JJ, upheld the impugned *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('*Bonus Act*') pursuant to ss 61 and 51(xxxix). The *Bonus Act* provided a one-off payment to low- and middle-income individuals to help stimulate the economy in response to the Global Financial Crisis ('GFC').[42] What is significant about this case is that the joint judgment, consisting of Gummow, Crennan and Bell JJ, considered that responding to a national crisis was an activity that concerned Australia as a nation and therefore fell within the executive nationhood power.[43] While French CJ confined his reasons to the economic crisis at hand,[44] his Honour still highlighted the national character of the emergency, finding that the executive power extended to meet adverse economic conditions 'affecting the nation as a whole'.[45]

Following *Pape,* the High Court has referred to the nationhood power as one which can respond to national emergencies.[46] At most, the High Court could be seen as treating the existence of a national emergency as an essential element in exercising the power.[47] A good illustration is in *Williams v Commonwealth*[48] where the Commonwealth tried to raise the nationhood power as potentially supporting its expenditure on a school chaplaincy program. This line of argument was denied by a majority of the High Court as the case did not involve 'a natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response.'[49] This kind of reasoning is indicative that the

[40] Stellios (n 37) 417.
[41] Stephenson (n 10) 177.
[42] *Pape* (n 12) 89 [233] (Gummow, Crennan and Bell JJ).
[43] Ibid 89 [232]–[233]. However, Hayne and Kiefel JJ and Heydon J were critical of using the existence of a national emergency as a basis on which to determine constitutional validity: at 121–3 [345]–[353] (Hayne and Kiefel JJ), 193 [552] (Heydon J).
[44] Ibid 23 [8] (French CJ).
[45] Ibid 63 [133] (French CJ).
[46] See *Williams (No 1)* (n 10) 235 [146] (Gummow and Bell JJ), 250–1 [196], 267 [240] (Hayne J), 346–7 [499] (Crennan J), 362 [599] (Kiefel J); *CPCF* (n 10) 568 [150] (Hayne and Bell JJ), 596 [260] (Kiefel J).
[47] Vincent Goding, 'COVID, Crisis, and Unordinary Order: A Critical Analysis of Australia's JobKeeper Wage Subsidy Scheme as an Exceptional Measure' (2022) 12 *Jindal Global Law Review* 39, 52.
[48] *Williams (No 1)* (n 10).
[49] Ibid 235 [146] (Gummow and Bell JJ), 250–1 [196], 267 [240] (Hayne J), 346–7 [499] (Crennan J), 362 [599] (Kiefel J).

existence of a national emergency is at least influential for the Court in applying the 'peculiarly adapted' test.[50]

2 *Can a Public Health Emergency Enliven Activities Peculiarly Adapted to the Government of a Nation?*

The question arises as to whether activities directed towards combatting a public health emergency, like COVID-19, may be considered peculiarly adapted for a national government to undertake. It is clearly an uncontroversial proposition that COVID-19 is an emergency on a national, as well as international scale.[51] Many statements made by international organisations, as well as the reaction of the Australian government, is reflective of this fact. On 30 January 2020 the Director-General of the World Health Organisation declared that the outbreak of COVID-19 was a 'public health emergency of international concern' pursuant to the *International Health Regulations*.[52] The United Nations emphasised that a 'large-scale, coordinated and comprehensive multilateral response' was required to tackle this 'truly global' crisis.[53] Accordingly, on 18 March 2020 the Governor-General declared that a 'human biosecurity emergency existed' under the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*'),[54] the legislative scheme which allows the Commonwealth to respond to national pandemic emergencies. The Governor-General may declare that such an emergency exists if the Health Minister is satisfied that a listed human disease[55] 'is posing a severe and immediate threat, or is causing harm, to human health *on a national significant scale'*.[56] It is therefore clear that COVID-19 is an emergency of national character. It follows that a national response is expected.[57] Activities directed toward this end, on the basis of

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[50] Stephenson (n 10) 178.
[51] Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *University of New South Wales Law Journal* 357, 385. See also Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions', *Australian Public Law* (Blog Post, 13 May 2020) <https://www.auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19>.
[52] International Health Regulations (2005) Emergency Committee, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)', *World Health Organization* (Web Page, 30 January 2020) < https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)>.
[53] United Nations, *Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19* (Report, March 2020) 1.
[54] *Biosecurity Act 2015* (Cth) s 475 (*'Biosecurity Act'*); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).
[55] A 'listed human disease' is a human disease determined by the Director of Human Biosecurity that may be communicable and cause significant harm to human health. *Biosecurity Act* (n 54) s 9, s 42, s 475(3)(a).
[56] Ibid s 475(1)(a) (emphasis added).
[57] Gray (n 51) 385.

the majority judgment of *Pape*, would satisfy the test of being 'peculiarly adapted to the government of a nation'.

B Cannot Otherwise be Carried on for the Benefit of the Nation

1 Approach of the High Court

The second limb of the Mason J formulation requires that activities cannot fall within the legislative or executive competencies of the States.[58] This limb ultimately acts as a safeguard to the expansion of the nationhood power beyond the federal distribution of powers.[59] An assessment of whether an activity cannot otherwise be 'carried on for the benefit of a nation' requires the identification a comparator,[60] or in other words, the court must consider the 'sufficiency of the powers of the States to engage effectively in the enterprise or activity'.[61]

In *Pape* this second limb of the Mason J formulation was not strictly applied by the majority.[62] This was subject to criticism by the dissenters in *Pape*[63] and also by Twomey.[64] However, it could be argued that the majority did turn their minds to this question, but rather focussed on the practical capacities of the States to implement fiscal stimulus measures in response to the GFC.[65] The majority considered they could not by virtue of two dimensions — scale and time.[66] Ultimately, only the Commonwealth could respond to the GFC on a national scale, and within an expedient time-frame, as exemplified by the *Bonus Act*.[67] This meant the GFC was not only a national emergency, but one only the Commonwealth had the capacity to respond to.[68]

2 Can the States Engage Effectively in an Enterprise or Activity Responding to a Public Health Emergency like COVID-19?

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[58] *AAP Case* (n 8) 398 (Mason J); *Tasmanian Dams Case* (n 12) 252 (Deane J); *Davis* (n 12) 94 (Mason CJ, Deane and Gaudron JJ); *Pape* (n 12) 90 [239] (Gummow, Crennan and Bell JJ).
[59] Stephenson (n 10) 178–9; Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 327 citing *AAP Case* (n 8) 364 (Barwick CJ), 379 (Gibbs J), 398 (Mason J).
[60] Stellios (n 37) 455.
[61] *Davis* (n 12) 111 (Brennan J).
[62] Stellios (n 37) 455.
[63] *Pape* (n 12) 123–4 [355]–[356] (Hayne and Kiefel JJ); 178–9 [513] (Heydon J).
[64] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 330.
[65] Gabrielle Appleby and Stephen McDonald, 'The Ramifications of *Pape v Federal Commissioner of Taxation* for the Spending Power and Legislative Powers of the Commonwealth' (2011) 37(2) *Monash University Law Review* 162, 179. See also Daniel Goldsworthy, 'Glory without Power: The Nationhood Power and Commonwealth Spending on Sport' (2021) 95 *Australian Law Journal* 274, 283.
[66] *Pape* (n 12) 23 [8] (French CJ), 91 [241]–[242] (Gummow, Crennan and Bell JJ).
[67] Ibid.
[68] HP Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2018) 75.

While this is a question that must be answered on a case-by-case basis, Gray has opined that if the majority in *Pape* considered that the States lacked the capacity to provide a financial stimulus package on par with that of the Commonwealth during the GFC, it follows that the States will unlikely have sufficient capacity to respond to COVID-19 which has involved a crisis 'on both the health and economic fronts'.[69] While this conclusion may apply to economic measures, it cannot extend to all measures required during a pandemic. Public health emergencies are ultimately different to economic emergencies. While the Commonwealth has aggregated fiscal power to respond to the latter,[70] the power to respond to public health emergencies has traditionally been an area of State responsibility.[71] Each State and Territory also has their own legislative scheme to manage public health emergencies.[72] Accordingly, many kinds of measures used to respond to a public health emergency will be within the executive and legislative competencies of the States to undertake. Therefore, any examination of the Commonwealth's use of the nationhood power to respond to public health emergencies, like COVID-19, must be careful to consider whether its use competes with the competencies of the States. Following *Pape*, the practical capacities of the States must also be borne in mind, including the factors of scale and time, when undertaking such an examination.

C Incidental to the Execution of Executive Power

While this article so far has explored the scope of the Mason J formulation, how the High Court determines whether a law with respect to the nationhood power is validly supported by s 51(xxxix) must also be considered. As s 51(xxxix) is an incidental legislative power, as opposed to being substantive, the exact nature of the nationhood power will limit the kinds of laws it may support.[73] By way of illustration, if the nationhood power is facultative in nature, it is unlikely it could be 'transformed' into a coercive legislative power through s 51(xxxix).[74] However, whether the nationhood power is facultative or coercive in nature has not been resolved in the case law.[75]

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[69] Gray (n 51) 390.
[70] See *Pape* (n 12) 91 [242] (Gummow, Crennan and Bell JJ).
[71] Lee et al (n 68) citing Christopher Reynolds, 'Public Health and the Australian Constitution' (1995) 19(3) *Australian Journal of Public Health* 243, 243.
[72] *Public Health Act 2016* (WA); *Public Health Act 2011* (SA); *Public Health Act 2010* (NSW); *Public Health and Wellbeing Act 2008* (Vic); *Public Health Act 2005* (Qld); *Notifiable Diseases Act 1981* (NT); *South Australian Public Health Act 1997* (Tas); *Public Health Act 1997* (ACT).
[73] Twomey, 'Prerogatives and the Courts' (n 15) 66; Stephenson (n 10) 164.
[74] Ibid.
[75] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 338; Twomey, 'Prerogatives and the Courts' (n 15) 64–5.

This section will first provide an overview of the case law with respect to the nature of the nationhood power. As will be seen, the nationhood power has been largely supported as a facultative, rather than coercive power. The nature and scope of s 51(xxxix) will then be examined. While the facultative nature of the nationhood power will implicate s 51(xxxix)'s scope, there is still potential for the incidental power to support coercive legislation to a limited extent.

1 Nature of the Nationhood Power: Facultative or Coercive?

Other than in circumstances where a settled prerogative power operates, such as the war prerogative,[76] the courts will not allow coercive exercises of non-statutory executive power.[77] This includes imposing obligations, interfering with rights such as life, liberty and property,[78] and creating offences.[79] Consistent with this approach, the nationhood power has been treated in the case law as a facultative power.[80] This is a power that facilitates activities, such as government expenditure on a national activity,[81] as opposed to controlling and regulating behaviours.[82] From its first (contemporary) iteration by Mason J, the nationhood power was framed as a '*capacity* to engage in *enterprises and activities*',[83] indicating its facultative nature. Accordingly, most laws upheld pursuant to the power following the *AAP Case* have been non-coercive,[84] and were deemed invalid if they were so.[85] Further, as was described above,[86] many of the obiter examples of nationhood contained in the case law reflect a facultative, nation-building power.[87] For these reasons, this article considers the nationhood power to be purely facultative.

However, there is an argument that the executive nationhood power does contain a coercive aspect. The *AAP Case* was not the first time an implied nationhood power had been recognised by the High Court. There was originally another stream of authority which suggested the existence of a coercive power of

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[76] Twomey, 'Prerogatives and the Courts' (n 15) 67; Zines (n 29) 287.
[77] Twomey, 'Prerogatives and the Courts' (n 15) 64–5; Zines (n 29) 287.
[78] Twomey, 'Prerogatives and the Courts' (n 15) 59; Zines (n 29) 286; Stellios (n 37) 374–5.
[79] *Case of Proclamations* (1611) 77 ER 1352 ('*Case of Proclamations*'); *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 258 (Latham CJ); *Davis* (n 215) 112 (Brennan J); *R v Hughes* (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Hughes*').
[80] Twomey, 'Prerogative and the Courts' (n 15) 85; Moore (n 20) 72.
[81] Moore (n 20) 73.
[82] See Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 338.
[83] *AAP Case* (n 8) 397 (Mason J) (emphasis added).
[84] See *Davis* (n 12); *Pape* (n 12). Cf *Ruddock v Vadarlis* (2001) 110 FCR 491 ('*Tampa Case*').
[85] See *Davis* (n 12) 100 (Mason CJ, Deane and Gaudron JJ), 116–17 (Brennan J); *Tasmanian Dams Case* (n 30) 103–4 (Wilson J), 253 (Deane J); *Hughes* (n 79) 188–9 (Kirby J).
[86] See above Part II(A)(1).
[87] Stellios (n 37) 449.

national self-protection.[88] This understanding of the nationhood power was 'crystallised'[89] by Dixon J in *Australian Communist Party v Commonwealth*,[90] stating that the Parliament had an inherent legislative power (as opposed to executive power) to 'legislate against subversive or seditious courses of conduct'.[91] This particular passage was endorsed by Mason J in the *AAP Case* and was the basis upon which His Honour formulated the current approach to the power.[92] Despite this, it does not follow that the nationhood power retains any coercive aspect. As noted in the preceding paragraph, Mason J specifically formulated the nationhood power as a facilitative power to engage in 'enterprises and activities'.[93] His Honour did not refer to a power to control the actions of others.[94] Further, the Mason J formulation now reflects the approach of the High Court, there being no contemporary jurisprudence which has relied on the national self-protection stream of authority.[95]

However, it must be conceded that Mason J did articulate the current formulation as extending 'beyond' the power of national self-protection.[96] Brennan J in *Davis v Commonwealth* ('*Davis*')[97] also considered that 'if the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered'.[98] It therefore appears that the facultative, nation-building aspect of the nationhood power could co-exist with this other protective aspect. However, even if this was so, the potential existence of a power of national self-protection would

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[88] See *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J) ('*Burns*'); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–8 (Dixon J) ('*Communist Party Case*'). See also Justice Michelle Gordon, 'Communist Party Case: Core Themes and Legacy' (2021) 32 *Public Law Review* 291, 307 citing Cheryl Saunders, 'Nationhood Power' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 495, 495.
[89] Gordon (n 88) 307.
[90] *Communist Party Case* (n 88).
[91] Ibid 188 (Dixon J).
[92] *AAP Case* (n 8) 397 (Mason J).
[93] Ibid (emphasis added). See Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 338; Stellios (n 37) 451.
[94] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 338; Stellios (n 37) 451.
[95] See *Tasmanian Dams Case* (n 12) 108–9 (Gibbs CJ), 252–3 (Deane J), 321–3 (Dawson J); *Davis* (n 12) 93–5 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 111 (Brennan J); *Pape* (n 12) 23 [8], 50 [95], 60–1 [128], 63 [133] (French CJ), 87–8 [228], 91–2 [242] (Gummow, Crennan and Bell JJ); *Williams (No 1)* (n 10) 250–1 [196] (Gummow and Bell JJ), 342 [485], 346 [498], 348 [503] (Crennan J), 370 [583], 373 [594] (Kiefel J). However, note that the self-protective stream may have supported Commonwealth military action in the Bowral Call-Out of 1978 and the Commonwealth Heads of Government Meeting in 2002. See Moore (n 20) 197, 199, 203.
[96] *AAP Case* (n 8) 398 (Mason J).
[97] *Davis* (n 12).
[98] Ibid 110 (Brennan J).

not be relevant in the context of a public health emergency which does not involve subversion or sedition against the Commonwealth government.[99]

An argument in support of a coercive nationhood power may also be mounted on the authority of *Ruddock v Vadarlis* ('*Tampa Case*').[100] In that case, French J (with Beaumont J agreeing) held that the Commonwealth could prevent the entry of non-citizens into Australia, and effect their expulsion, as an incident of the nationhood power.[101] French J deduced from Australia's status as a sovereign nation 'the power to determine who may come to Australia'.[102] Notwithstanding that the case stands for the proposition that the nationhood power may be used in a coercive manner, it remains that the decision has been highly criticised,[103] and has not been subsequently followed.[104] Any potential weight that the *Tampa Case* may provide to support the existence of a coercive nationhood power must also be considered in light of the general approach of the High Court towards the power. In short, the High Court has shown immense trepidation in allowing a coercive operation of nationhood power,[105] emphasising that coercive laws would need to be supported by a head of power.[106] Absent such support, any question of constitutional validity will be answered 'conservatively'.[107]

2 *Nature of Section 51(xxxix)*

Although the nationhood power is facultative, there may still be limited scope for s 51(xxxix) to support coercive legislation with respect to the power. This gained support from a majority of the High Court in *Davis*, although the approach of Brennan J and the joint judgment (consisting of Mason CJ, Deane and Gaudron JJ) differed.

In *Davis,* the executive nationhood power allowed the executive to engage in the 'activity of organising the commemoration of the Bicentenary'.[108] This

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[99] Cf Gray (n 51) 385–6; Smith (n 51).
[100] *Tampa Case* (n 84).
[101] Ibid 543 [193] (French J, Beaumont J agreeing at 514 [95]).
[102] Ibid.
[103] See, eg, Evans (n 29); Winterton (n 29); Zines (n 29) 292; Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15(2) *International Journal of Refugee Law* 159; George Duke, 'Popular Sovereignty and the Nationhood Power' (2017) 45(3) *Federal Law Review* 415.
[104] *CPCF* (n 10) 564–8 [137]–[151] (Hayne and Bell JJ); 595–603 [258]–[293] (Kiefel J). Cf the judgment of Keane J, who thought the *Tampa Case* (n 84) was rightly decided: at 647–51 [476]–[495]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 158 [372] (Gordon J).
[105] *Tasmanian Dams Case* (n 12) 203–4 (Wilson J) 253 (Deane J); *Hughes* (n 79) 188–9 (Kirby J); *Pape* (n 12) 24 [10] (French CJ). See also Twomey, 'Prerogative and the Courts' (n 15) 85; Moore (n 20) 72–3.
[106] Ibid.
[107] *Pape* (n 12) 24 [10] (French CJ).
[108] *Davis* (n 12) 113 (Brennan J).

executive activity was the 'lynchpin'[109] for s 51(xxxix) to support the *Australian Bicentennial Authority Act 1980* (Cth) ('*ABA Act*'). This act established the Australian Bicentennial Authority ('ABA') for the purpose of organising the commemoration. While the executive nationhood power, and the resulting act, was non-coercive, it did have a coercive aspect. The *ABA Act* made it a criminal offence to use prescribed expressions and symbols associated with the Bicentenary without the permission of the ABA. This aspect was challenged in *Davis*. Brennan J, while recognising that the exercise of the prerogative power had not been capable of creating a new offence,[110] was prepared to accept that s 51(xxxix) could create offences 'to protect the efficacy of the execution' of executive power.[111] This was because such a law would still fall within the scope of s 51(xxxix) as being 'incidental to the *execution*' of executive power.[112] Brennan J gave the example of using an offence to 'suppress fraud, deceit or the misapplication of Commonwealth funds' in relation to the Bicentenary.[113] Such an offence would prevent the executive's power from being 'frustrated or impaired' and therefore be incidental to its proper execution.[114] However, an offence could not supplement what the executive was trying to do.[115] The joint judgment on the other hand started from the position that the Parliament, through s 51(xxxix), could enact coercive laws.[116] Applying a proportionality analysis, the joint judgment considered whether regulating the freedom of expression was reasonably appropriate and adapted to achieve the constitutionally legitimate end of commemorating the Bicentenary.[117] Despite the difference in approach, both Brennan J and the joint judgment came to the same conclusion — that the offence did not protect the commemoration of the Bicentenary and was therefore not incidental.[118]

Twomey considers that there are two explanations of the joint judgement's use of proportionality in *Davis*.[119] Either, the nationhood power was considered to be a purposive power, or the proportionality test was being used to determine the incidental connection between the *ABA Act* and the nationhood power.[120] While some scholars refer to a purposive nationhood power as a given,[121] this article

[109] See ibid 107 (Brennan J).
[110] Ibid 112 citing *Case of Proclamations* (n 79).
[111] Ibid 113.
[112] Ibid 111 (emphasis added).
[113] Ibid 116.
[114] Ibid 112.
[115] Ibid.
[116] Ibid 99 citing *Burns* (n 88).
[117] Ibid 100.
[118] Ibid 100 (Mason CJ, Deane and Gaudron JJ), 116 (Brennan J).
[119] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 340–1.
[120] Ibid.
[121] See, eg, Moore (n 20) 73; Gray (n 51) 389; Castan and Joseph (n 18) 183.

prefers the latter view. This is because it is now (largely)[122] accepted by the High Court that both the scope of the implied and express incidental powers is determined by a proportionality analysis.[123] Also, in retrospect, the joint judgement in *Davis* has been treated as using the proportionality test to determine the incidental connection, particularly by Mason CJ himself who formed part of the joint judgment.[124] Therefore, such a view is consistent with both the current approach of the High Court and the dominant treatment of *Davis*.

The majority in *Pape* did not provide clarity on the extent to which s 51(xxxix) could support the coercive operation of the nationhood power, nor the approach to determining the incidental connection that should be adopted.[125] This was despite the *Bonus Act* arguably being regulatory in nature.[126] Although the *Bonus Act* supported Commonwealth spending, which is a facultative activity, it also *regulated* this spending.[127] It conferred rights on taxpayers to receive the bonus payment, conferred a duty on the Commissioner of Taxation to pay those amounts and imposed an obligation on recipients to restore overpayments.[128] While it did appear at one point that French CJ incorporated some form of proportionality reasoning in analysing the *Bonus Act*,[129] this has not been clarified.[130] The approach of the joint judgement in *Pape* on the other hand appeared to reflect that of Brennan J in *Davis*. Their Honours established that the *Bonus Act* could be incidental to the exercise of the executive nationhood power as the imposition of rights and obligations were '*incidental to the effectuation* of the fiscal stimulus policy'.[131] The coercive aspects of the *Bonus Act*, being the imposition of rights and obligations, therefore fell within the limited scope of s 51(xxxix).

It has been recognised in both *Davis* and *Pape* that there is some limited scope for s 51(xxxix) to support coercive legislation with respect to the nationhood power. So long as such legislation is incidental to the execution of an executive enterprise or activity, it will be considered to fall within this scope. Notwithstanding

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[122] See Carmel McLure, 'Proportionality: The New Wave' (2017) 13(3) *The Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 301, 305.
[123] *Spence v Queensland* (2019) 268 CLR 355, 406–7 [59]–[69] (Kiefel CJ, Bell, Gageler and Keane JJ), 463–4 [222] (Gordon J), 510 [349] (Edelman J) ('*Spence*'); *McCloy v New South Wales* (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 296 (Mason J), 319 (Brennan J) ('*Cunliffe*').
[124] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29–31 (Mason CJ); *Cunliffe* (123) 296 (Mason CJ). See also McLure (n 122) 306.
[125] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 341.
[126] Ibid 339, 341; Castan and Joseph (n 18) 181.
[127] Castan and Joseph (n 18) 181 citing *Pape* (n 12) 182–3 [522] (Heydon J).
[128] *Pape* (n 12) 92 [243] (Gummow, Crennan and Bell JJ); 182–3 [522] (Heydon J).
[129] Ibid 63 [133] (French CJ).
[130] Appleby and McDonald (n 65) 171.
[131] *Pape* (n 12) 92 [245] (emphasis added).

that no clear test emerges for determining whether a coercive law is valid with respect to the nationhood power, there being no attempt in *Pape* to apply the joint judgment's proportionality approach in *Davis*,[132] it remains that this is now the dominant approach of the High Court when applying the express incidental head of power. It is therefore the approach this paper will adopt.

III ANALYSIS OF PART VIIIA

This next Part will consider whether Part VIIIA of the *Privacy Act* can be said to be a law with respect to the legislative nationhood power. Section A will first provide some context to Part VIIIA; including a brief description of how COVIDSafe operated and the genesis of Part VIIIA's inclusion into the *Privacy Act*. Section B will provide an outline of the Part's contents. Section C will then examine whether Part VIIIA can be supported by ss 61 and 51(xxxix).

A Background to Part VIIIA

The introduction of COVIDSafe was an integral part of the Commonwealth's response to COVID-19. The Australian Health Protection Principal Committee recommended to the National Cabinet that a contact tracing app would be required as a condition precedent to gradually re-opening Australia from the extensive lockdowns imposed in early 2020.[133] Enter COVIDSafe — a proximity app to automate the identification of close contacts of COVID-19. The app automated this process by using Bluetooth connectivity to detect other mobile phones within its vicinity with the app installed.[134] When another mobile phone was detected, a digital handshake would occur which would record the date, time, distance and duration of the contact with the other device.[135] This information was encrypted and stored in COVIDSafe for a rolling 21 day period.[136] If a user of COVIDSafe tested positive to COVID-19, they would then consent to this encrypted information contained in the app to be uploaded to the National COVIDSafe Data Store ('Data Store').[137] The Data Store was operated by the Digital Transformation Agency, an executive agency within Services Australia,[138] and hosted by Amazon Web Services.[139] After the encrypted information was uploaded to the Data Store, only

[132] See Appleby and McDonald (n 65) 171; Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 341.
[133] Senate Select Committee on COVID-19, Parliament of Australia, *First Interim Report* (December 2020) 42.
[134] Morrison et al (n 2).
[135] Ibid.
[136] Ibid.
[137] Privacy Amendment Bills Digest (n 3) 2.
[138] Watts (n 1) 3.
[139] Privacy Amendment Bills Digest (n 3) 2.

the relevant State or Territory health authority would have access to the close contacts registered by the app.[140] This included COVIDSafe users who spent over 15 minutes, and were within 1.5 metres, of the COVID-19 positive user.[141]

After the launch of COVIDSafe, privacy safeguards for users of the app were initially provided for in the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020* ('COVIDSafe Determination'). The COVIDSafe Determination was a type of legislative instrument[142] made by then Health Minister Greg Hunt pursuant to his pandemic emergency powers conferred by s 477 of the *Biosecurity Act*. However, concerns were raised about such privacy safeguards stemming from a piece of delegated legislation which was susceptible to 'unilateral executive amendment or repeal'.[143] Privacy safeguards contained in primary legislation were ultimately required, leading to the insertion of Part VIIIA into the *Privacy Act*. The COVIDSafe Determination ceased on 16 May 2020 when the *Privacy Act* was formally amended. The substance of the new Part VIIIA was largely elevated from the COVIDSafe Determination, albeit with some additional privacy measures.[144]

B Outline of Part VIIIA

Part VIIIA is split into five divisions. Each division will be briefly summarised in turn.

1 Division 1—Preliminary

Division 1 provides for preliminary matters of the Part, including its objects[145] and constitutional basis.[146]

The object of Part VIIIA is to —

> assist in preventing and controlling the entry, emergence, establishment or spread of the coronavirus known as COVID-19 into Australia or any part of

[140] Morrison et al (n 2).
[141] Privacy Amendment Bills Digest (n 3) 2.
[142] *Biosecurity Act* (n 54) s 477(2).
[143] Privacy Amendment Bills Digest (n 3) 4 citing Pauline Wright, 'Tracing App Has Been Released but Privacy Concerns Still Exist', (Media Release, Law Council of Australia, 26 April 2020).
[144] Ibid 4; Privacy Amendment Explanatory Memorandum (n 5) 2. These additional measures included oversight by the Office of the Australian Information Commissioner, allowing individuals affected by a data breach to seek a remedy, and clarifying that the State and Territory health authorities were subject to the restrictions imposed on COVIDSafe data.
[145] *Privacy Act* (n 5) s 94B.
[146] Ibid s 94C.

> Australia by providing stronger privacy protections for COVID app data and COVIDSafe users in order to:
>
> (a) encourage public acceptance and uptake of COVIDSafe; and
> (b) enable faster and more effective contact tracing.[147]

COVID app data refers to data that has been collected or generated through the operation of COVIDSafe.[148]

While the Part's principal constitutional basis is expressed as relying on the legislative nationhood power,[149] the Part also relies on other heads of power including the quarantine power;[150] the postal, telegraphic, telephonic and other like services power;[151] and the external affairs power.[152] However, these heads of power only provide additional constitutional support with respect to references to 'COVID app data'. What this article considers this to mean is that if a constitutional challenge was successful in invalidating the nationhood power as the Part's constitutional basis, the provisions of Part VIIIA which refer to COVID app data would operate to the same effect as they had done previously. However, the constitutional validity of any provision which did not operate by reference to COVID app data may be called into question.

2 Division 2—Offences relating to COVID app data and COVIDSafe

Division 2 is the main operative provision of Part VIIIA as it sets out the privacy safeguards afforded to users of COVIDSafe. The Division does this by providing for several serious offences.

It is an offence to collect, use or disclose COVID app data in a way not permitted by s 94D.[153] Broadly speaking, the collection, use or disclosure of such data is only permitted to facilitate contact tracing by State or Territory health authorities;[154] contact tracing being defined as 'the process of identifying persons who have been in contact with a person who has tested positive for…COVID-19'.[155] COVID app data may also be collected, used or disclosed to ensure the proper functioning of COVIDSafe, the Data Store or Part VIIIA.[156] For example,

[147] Ibid s 94B.
[148] Ibid s 94D(5).
[149] Ibid s 94C(1).
[150] Ibid s 94C(3); *Commonwealth Constitution* s 51(ix).
[151] *Privacy Act* (n 5) s 94C(4); *Commonwealth Constitution* s 51(v).
[152] *Privacy Act* (n 5) s 94C(5); *Commonwealth Constitution* s 51(xxix).
[153] *Privacy Act* (n 5) s 94D(1).
[154] Ibid ss 94D(2)(a)–(b).
[155] Ibid s 94D(6).
[156] Ibid ss 94D(2)(d)–(g); Privacy Amendment Explanatory Memorandum (n 5) 2.

such data may be used for the purpose of investigating and prosecuting an offence against Part VIIIA.[157]

Division 2 also makes it an offence to upload COVID app data to the Data Store without consent of the COVIDSafe user,[158] to retain or disclose COVID app data outside Australia,[159] decrypt COVID app data stored in COVIDSafe,[160] and require another to use COVIDSafe.[161]

All offences established by Division 2 attract serious, criminal penalties. Committing an offence attracts a maximum penalty[162] of 5 years imprisonment, or 300 penalty units ($66,000), or both.

3 Division 3—Other obligations relating to COVID app data and COVIDSafe

Division 3 imposes further obligations relating to COVID app data and COVIDSafe. This namely concerns the deletion of COVID app data. For example, the Division requires that COVID app data must not be retained by COVIDSafe for more than 21 days,[163] and that a COVIDSafe user has the right to request their data to be deleted from the Data Store.[164] Division 3 further provides for protocols that must be followed once the 'COVIDSafe data period' has ended. The end of the COVIDSafe data period refers to the date on which the Health Minister, by notifiable instrument, determines that COVIDSafe is no longer required, or likely to be effective in preventing or controlling the spread of COVID-19 in Australia.[165] Once this period has ended, all COVID app data must be deleted from the Data Store,[166] all COVIDSafe users must be informed that such data has been deleted, and that they should delete the app from their devices.[167]

4 Division 4—Application of general privacy measures

Division 4 provides that the general privacy law established by the *Privacy Act* applies to Part VIIIA.[168] COVID app data is deemed to be 'personal information' under the *Privacy Act.*[169] This allows the Office of the Australian Information

[157] *Privacy Act* (n 5) s 94D(2)(e).
[158] Ibid s 94E.
[159] Ibid ss 94F(1), (2).
[160] Ibid s 94G.
[161] Ibid s 94H.
[162] See *Crimes Act 1914* (Cth) s 4D(1)(a).
[163] *Privacy Act* (n 5) s 94K.
[164] Ibid s 94L.
[165] Ibid s 94Y.
[166] Ibid s 94P(2).
[167] Ibid s 94P(3).
[168] See ibid ss 94Q–94S.
[169] Ibid s 94Q; Privacy Amendment Explanatory Memorandum (n 5) 3.

Commissioner ('OAIC') to investigate complaints about potential breaches of Part VIIIA and also assess compliance with Part VIIIA.[170] The Information Commissioner's ('Commissioner') role in relation to Part VIIIA includes conducting assessments of entities or State or Territory health authorities in relation to their compliance with the Part,[171] conducting investigations and referring matters to the Commissioner of Police or Director of Public Prosecutions to investigate breaches against Division 2,[172] transferring complaints to State or Territory privacy authorities,[173] and sharing information with those authorities.[174] Division 4 also ensures the *Privacy Act* applies to State and Territory health authorities in relation to COVID app data.[175]

5 Division 5—Miscellaneous

Division 5 provides for various miscellaneous provisions. This includes, for example, when the Health Minister may determine the end of the COVIDSafe data period.[176] It also puts in place reporting requirements. The Health Minister must prepare a report every six months on the operation and effectiveness of COVIDSafe and the Data Store.[177] It also requires that the Commissioner prepare a report every six months on the performance of the Commissioner's functions, and exercise of the Commissioner's powers during that respective period.[178]

6 Conclusion

In sum, Part VIIIA provides a comprehensive regime of privacy protection for users of COVIDSafe.

C Is Part VIIIA a Law with Respect to ss 61 and 51(xxxix)?

1 Approach

To determine whether Part VIIIA is a law with respect to ss 61 and 51(xxxix), it is first necessary to identify the executive activity or enterprise the government is engaging in. This is the basis upon which the legislative power to support Part VIIIA depends. Identifying the relevant executive activity is not a straightforward

[170] Privacy Amendment Explanatory Memorandum (n 5) 3.
[171] *Privacy Act* (n 5) s 94T.
[172] Ibid s 94U; Privacy Amendment Explanatory Memorandum (n 5) 3.
[173] *Privacy Act* (n 5) s 94V.
[174] Ibid s 94W.
[175] Ibid s 94X.
[176] Ibid s 94Y.
[177] Ibid s 94ZA.
[178] Ibid s 94ZB.

task.[179] For example, in *Pape* the joint judgment described the relevant executive activity as 'determining that there is the need for an immediate fiscal stimulus to the national economy' in the circumstances of the GFC.[180] However, this was not the only way the executive activity could have been articulated. Twomey observes that it may have also been described as 'the act of expending appropriated money by the making of grants to taxpayers'.[181] Consequently, the executive activity which underpins Part VIIIA may be described in a multitude of ways. However, this article seeks to articulate just one.

Turning to consider Part VIIIA, what the Part may be described as doing is providing a scheme of privacy protection for users of a voluntary Commonwealth mobile app. However, providing a scheme of privacy protection is not an independently permissible facultative activity which could be supported by the executive nationhood power alone; compared to the act of expenditure in *Pape* which is a well-established facultative activity. Alternatively, the executive activity on which Part VIIIA depends could be articulated to the effect of — facilitating the effectiveness of a voluntary Commonwealth mobile app directed to combatting a national public health emergency. Framed in this way, this may constitute a facultative executive activity which provides the 'lynchpin'[182] for s 51(xxxix).

For the activity of facilitating the effectiveness of a Commonwealth app to come within the executive nationhood power, it must be an activity which is peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation. If it can be characterised as such, it must then be ascertained whether s 51(xxxix) supports Part VIIIA as a law incidental to that exercise of executive power.[183]

2 Does the Executive Activity Satisfy the Mason J Formulation?

If it is accepted that the existence of a national emergency is a relevant criterion to determining whether an activity is peculiarly adapted to the government of a nation, facilitating the effectiveness of a Commonwealth app directed to tackling a national emergency is an executive activity that would likely satisfy this test. As established above,[184] COVID-19 is an emergency which concerns Australia as a nation, and which necessarily requires a national response. Facilitating the effectiveness of

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[179] See, eg, Brennan J's reasoning: *Davis* (n 12) 113.
[180] *Pape* (n 12) 89 [232] (Gummow, Crennan and Bell JJ).
[181] Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 338.
[182] *Davis* (n 12) 107 (Brennan J).
[183] This is broadly the approach taken by Gummow, Crennan and Bell JJ in determining the validity of the *Bonus Act* in *Pape* (n 12): at 89 [232].
[184] See above Part II(A)(2).

COVIDSafe, an app which aids the prevention and control of COVID-19 throughout the country, is an activity that a national government should be empowered to undertake. The activity easily satisfies the first limb of the Mason J formulation.

The question then arises as to whether it is within the capacity of the States or Territories to engage in such an activity. Looking to contact tracing apps more generally, the creation and control of such apps are clearly within the executive and legislative competency of the States and Territories. In exercising their power over public health emergencies during COVID-19, all States and Territories implemented and regulated their own contact tracing apps,[185] including Western Australia.[186] If one considers that the States and Territories already had in place apps similar to COVIDSafe,[187] there could be a real question as to whether the ability of the Commonwealth to facilitate the effectiveness of a contact tracing app satisfies the second limb of the Mason J formulation. This may constitute the nationhood power being used for the mere convenience of national administration, as opposed to being an area which necessarily requires Commonwealth involvement.[188] However, it must be recalled that the executive activity the subject of this article's inquiry is whether facilitating the effectiveness of a *Commonwealth app* falls within the executive nationhood power. It is apparent when framed in this way, that it would only be within the competency of the Commonwealth government to facilitate the effectiveness of its own app, such as putting in place privacy protections. Applying the approach of the majority in *Pape*, the activity is on a *scale* which does not fall within the competencies of the States or Territories.

A further circumstance where there may be no competition with State or Territory executive or legislative competency is when an agreement exists with the

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[185] The contact tracing apps implemented by the States and Territories are as follows: Queensland, Check In Qld; New South Wales, Service in NSW; Australian Capital Territory, Check in CBR; Victoria, Service Victoria; South Australia, mySAGOV; Northern Territory, Territory Check In; Tasmania, Check in Tas.

[186] The Western Australian contact tracing app was known as Safe WA. See Western Australia Government, 'Maintaining Contact Registers, a Requirement to Keep WA Safe' (Media Statement, 25 November 2020) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/Maintaining-contact-registers-a-requirement-to-keep-WA-safe.aspx>. WA regulated SafeWA's privacy through the *Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021* (WA).

[187] Although, it is noted that the State and Territories used attendance apps, as opposed to proximity apps. Attendance apps recorded the date and time a user visited locations on scanning a QR code. This article considers that the difference in how COVIDSafe functioned in comparison to the attendance apps adopted by the States and Territories is not a material consideration when determining whether the Commonwealth has circumvented the federal distribution of powers.

[188] See *AAP Case* (n 8) 398 (Mason J). See generally Stephanie Brenker, 'An Executive Grab for Power During COVID-19?', *Australian Public Law* (Blog Post, 13 May 2020) <https://www.auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/>. Brenker stated it was not clear that the federal executive's leadership in the COVID-19 crisis was necessary, as opposed to being merely convenient.

Commonwealth concerning an activity.[189] Ultimately, it was agreed by the National Cabinet, which includes all Premiers and Chief Ministers of the States and Territories, that COVIDSafe was a tool required to combat COVID-19.[190] The Commonwealth accordingly entered into bilateral agreements with all State and Territory health authorities concerning the use of COVID app data to assist in their contact tracing efforts.[191] It was also stated in the media release accompanying the introduction of COVIDSafe that the app had received 'strong support' from the State and Territories as a tool to respond to local outbreaks.[192] It follows that such State and Territory consent may evidence that the executive activity, at least in these circumstances, does not circumvent the federal distribution of powers. Part VIIIA therefore satisfies the second limb of the Mason J formulation.

3 *Is Part VIIIA Supported by s 51(xxxix)*?

As facilitating the effectiveness of an app like COVIDSafe may be characterised as falling within the executive nationhood power, for Part VIIIA to be a valid law with respect to such an executive activity, it must be supported by s 51(xxxix).

Because the executive nationhood power is facultative in nature, the power to legislate with respect to matters incidental to the execution of that power does not occasion a wide scope to create coercive laws.[193] Part VIIIA however is coercive legislation, or at minimum, could be characterised as being regulatory. To facilitate the effectiveness of COVIDSafe, Part VIIIA creates an entire scheme of privacy protection. This includes, but is not limited to, imposing rights on citizens who downloaded COVIDSafe to have their data protected; conferring a corresponding duty on the Commonwealth, its agencies, and the relevant State and Territory health authorities, to uphold those protections; and prohibiting citizens from coercing others to use the app. Failure to comply with the scheme is a criminal offence, attracting significant penalties. The question arises as to whether the authority to enact this kind of law can be supplied by s 51(xxxix)?

(a) Divisions 3–5

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[189] Gray (n 51) 390 referring to *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J).
[190] Senate Select Committee on COVID-19, Parliament of Australia, *First Interim Report* (December 2020) 42.
[191] 'Bilateral Agreements On Collection, Use and Disclosure of COVIDSafe Data' *Department of Health and Aged Care* (Web Page) <https://www.health.gov.au/resources/publications/bilateral-agreements-on-collection-use-and-disclosure-of-covidsafe-data>.
[192] Morrison et al (n 2).
[193] *Davis* (n 12) 113 (Brennan J).

Many aspects of Part VIIIA could be characterised as being incidental to the execution of the executive power to facilitate the effectiveness of COVIDSafe. This includes Divisions 3 to 5 which impose obligations, predominantly on the Commonwealth, the State governments and their respective agencies, in relation to the operation of COVIDSafe and the Data Store. In short, establishing protocols for the deletion of COVID app data,[194] allowing the OAIC to exercise its oversight functions in relation to COVIDSafe,[195] and providing for reporting requirements in relation to the scheme's operation and effectiveness,[196] are measures 'incidental to the effectuation'[197] of the executive activity. That is to say, the activity of facilitating the effectiveness of COVIDSafe necessarily requires such measures. For example, the government could not ensure the effectiveness of an app if they could not exercise oversight over its operations, as provided for in Division 4. This conclusion, that Divisions 3 to 5 are likely incidental to the executive nationhood power, is also supported by the fact that such Divisions are not overly coercive as they only place obligations on the government itself.[198] Therefore, the measures contained in the Divisions are unlikely to fall outside the limited scope of s 51(xxxix).

(b) Division 2

The more controversial aspect of Part VIIIA is Division 2. This is because the Division establishes several serious offences relating to COVID app data and COVIDSafe. Per *Davis*, s 51(xxxix) can create offences so long as they are necessary, or proportionate, to protect the integrity of the executive's execution of its powers.[199] To recall the test of proportionality used by the joint judgment in that case, it must be satisfied that the terms of Part VIIIA are reasonably appropriate and adapted to achieving its purpose, being to facilitate the effectiveness of COVIDSafe by providing genuine privacy safeguards to encourage public acceptance of the app, which is an end that lies within the scope of the nationhood power. An argument may be mounted either way as to whether Division 2 can be validly supported by s 51(xxxix).

(i) Division 2 is Proportionate to the Purpose of Part VIIIA

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[194] *Privacy Act* (n 5) div 3.
[195] Ibid div 4
[196] Ibid s 94ZA.
[197] *Pape* (n 12) 92 [245] (Gummow, Crennan and Bell JJ).
[198] Castan and Joseph (n 18) 181. See also Twomey, 'Pushing the Boundaries of Executive Power' (n 19) 341.
[199] *Davis* (n 12) 98–9 (Mason CJ, Deane and Gaudron JJ), 112 (Brennan J).

It could be argued that the offences created by Division 2 are proportionate to achieving Part VIIIA's purpose. It would be trite to say that without the creation of an offence, and the imposition of an associated penalty, the privacy safeguards provided by the Part would be toothless. It follows that the Part's purpose, to facilitate the effectiveness of COVIDSafe by providing privacy safeguards and increasing its public acceptance, would be frustrated if the public did not trust that such safeguards could be enforced by the government.

Considering *Davis* is the only case in the jurisprudence which examines whether a criminal offence fell within s 51(xxxix), it is important to consider the approach of the joint judgment in that case.[200] It appears that in determining proportionality, their Honours focussed on the practical implications of the offence and whether it did in fact protect the integrity of the executive's power to commemorate the Bicentenary. Ultimately, criminalising the use of the prescribed expressions implicated behaviour that could not 'conceivably prejudice the commemoration of the Bicentenary or the attainment by the Authority of its objects'.[201] For example, the joint judgment considered that many people and organisations had occasion to use the prescribed expressions for purposes unrelated to the Bicentenary, but would nonetheless commit an offence under the *ABA Act*.[202] This led to their conclusion that the offence was grossly disproportionate to the need to protect the commemoration and the ABA.[203] Applying this approach to Part VIIIA, the offences created by Division 2 only implicate a class of persons, either being the Commonwealth or State governments and their respective agencies, or Australian citizens, who engage in behaviour that directly relates to COVIDSafe and COVID app data. In contrast to *Davis*, the offences are not so wide as to risk capturing behaviour which would not 'conceivably prejudice' the integrity of the scheme.

However, a unique issue posed by Division 2 is the extent of the penalties which could be imposed if an offence was committed. In contrast to *Davis*, where the maximum penalty was $2000 for a natural person and $4000 for a body corporate, the penalties imposed by Division 2 are significantly more serious, including a potential term of imprisonment. While the Court in *Davis* did not consider the nature of the penalties imposed by the *ABA Act* in their analysis, this article submits that the extensive nature of the penalties imposed by Division 2 warrant consideration when determining the scheme's proportionality.

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[200] See generally ibid 98–100. Brennan J focussed on the offence's infringement of the freedom of expression, which does not provide guidance to this analysis: at 113–17.
[201] Ibid 99–100.
[202] Ibid 99.
[203] Ibid 100.

The explanatory memorandum to the Public Health Contact Information Bill expressly states that the penalties imposed by Division 2 were considered 'proportionate in light of the Bill's objective to provide genuine privacy safeguards and build confidence in the COVIDSafe app'.[204] The explanatory memorandum however does not elaborate further as to why this was so. Looking to the Commonwealth's guidelines on drafting offences, relevant considerations to the imposition of a penalty includes whether it would provide an effective deterrent, reflects the seriousness of the offence within the legislative scheme, and for a higher penalty, whether it is justified based on the consequences of the offence's commission.[205] Looking to these considerations in turn, the explanatory memorandum does state in relation to offences which could be imposed on citizens (as opposed to government authorities) that such penalties provide 'strong incentives against' engaging in the prohibited conduct.[206] This includes imposing requirements on the download and use of COVIDSafe,[207] and decrypting COVID app data.[208] Therefore, the extent of the penalties may be characterised as being proportionate in terms of deterring behaviour which would frustrate Part VIIIA's purpose. It is also clear that the penalties are intended to reflect the seriousness with which the Commonwealth views non-compliance with the scheme; the Commonwealth wanting to convey to the community that misuse of COVID app data will be treated severely.[209] One may also surmise that such penalties could reflect the level of harm posed by non-compliance with Division 2. For example, if COVIDSafe data was to be unlawfully accessed, such data could be used (at worst), for identity theft or to commit financial crimes.[210] Therefore, the penalties may also be proportionate to the risk posed to individuals in providing their data to COVIDSafe. Although, the level of harm posed to users of COVIDSafe in the event of a data breach could be queried if the only information users were required to provide was their name, age range, mobile number and postcode.[211] In sum, while the penalties imposed by Division 2 are stringent, they could be considered proportionate to protecting the privacy scheme established by Part VIIIA in terms

[204] Privacy Amendment Explanatory Memorandum (n 5) 5.
[205] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Power* (September 2011) 38 < https://www.ag.gov.au/sites/default/files/2020-03/A%20Guide%20to%20Framing%20Cth%20Offences.pdf> ('Guide to Framing Commonwealth Offences').
[206] Privacy Amendment Explanatory Memorandum (n 5) 6–7.
[207] Ibid 6.
[208] Ibid 7.
[209] See ibid 13.
[210] See, eg, 'What is a Notifiable Data Breach', *Office of the Australian Information Commissioner* (Web Page) <https://www.oaic.gov.au/privacy/data-breaches/what-is-a-notifiable-data-breach>.
[211] 'Background to COVIDSafe', *Australian Government* (Web Page) <https://covidsafe.gov.au/background.html>.

of deterrence, reflecting the seriousness of the offences and potentially the level of harm that may ensue on commission of an offence.

(ii) Division 2 is Not Proportionate to the Purpose of Part VIIIA

There is however a strong opposing argument that the penalties imposed by Division 2 are too extreme and are disproportionate to Part VIIIA's purpose. The penalties imposed by Division 2 were transferred from the original COVIDSafe Determination. Non-compliance with all determinations made by the Health Minister under s 477 of the *Biosecurity Act* attracted such penalties.[212] In the explanatory memorandum to the *Biosecurity Act*, the Commonwealth justified the extent of these criminal penalties, which are higher than the maximum penalties stipulated in government guidelines,[213] by the fact that non-compliance with determinations made during an emergency could result in serious human biosecurity risks, such as causing potential damage to health and the economy.[214] The penalties therefore reflected the high level of physical and economic harm posed by non-compliance with a determination.[215] The same cannot be said for Part VIIIA. As observed in the preceding paragraph, the exact level of harm occasioned by a breach of Division 2 may not be overly damaging compared to the kinds of harm that could occur in contravention of the *Biosecurity Act*. By way of illustration, requiring that an individual download COVIDSafe as a condition of their employment[216] is prohibited conduct which does not pose the same level of physical harm as a person entering a remote Indigenous community who had not undergone 14 days isolation,[217] being the type of conduct targeted under the *Biosecurity Act*. However, both acts could attract a sentence of imprisonment. This may indicate that the penalties imposed by Division 2 are disproportionate to Part VIIIA's purpose; going beyond what is necessary to protect the integrity of the scheme. Of course, the level of harm risked by non-compliance is not the only consideration. As detailed above, the extent of the penalties imposed by Part VIIIA may simply reflect the seriousness of which the Commonwealth takes breaches of privacy and are imposed to ensure compliance with the scheme. However, due to the seriousness of such penalties, this article queries whether they can be adequately framed as protecting the efficacy of the execution of executive power, or whether

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[212] *Biosecurity Act* (n 55) ss 479(1), (3).
[213] Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 295 referring to Guide to Framing Commonwealth Offences (n 205).
[214] Ibid 296.
[215] Ibid.
[216] *Privacy Act* (n 5) s 94H(2)(a).
[217] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth) s 5(2).

the imposition of such penalties may lean more towards supplementing what the executive is trying to do.[218]

(iii) Conclusion

There is ultimately no manifest answer as to whether the offences contained in Division 2, and their associated penalties, can be considered proportionate to Part VIIIA's purpose. However, in reaching a conclusion, it is important to have regard to the immense precaution the High Court takes in allowing coercive uses of the legislative nationhood power. Notwithstanding whether the Division 2 offences could be considered proportionate to Part VIIIA's purpose or not, the High Court is yet to allow ss 61 and 51(xxxix) to support an offence, let alone a serious criminal offence which can attract a penalty of imprisonment. One may ask whether a penalty, such as a term of imprisonment, could ever be proportionate to aid the execution of a facultative executive power? The stronger answer on the weight of the case law is likely to be no. Consistent with the precautionary approach of the High Court, this article considers that the Division 2 offences and their associated penalties to be outside the narrow scope afforded by s 51(xxxix).

4 The Role of Other Supporting Heads of Power

However, the fact Division 2 may not be supported by s 51(xxxix) might not be material to a conclusion of validity. As is noted in s 94C, there are additional heads of legislative power which support Part VIIIA, including ss 51(ix), 51(v) and 51(xxix). This means that any question of Division 2's validity may not have to be 'answered conservatively',[219] as such offences may be supported by substantive heads of legislative power. However, the additional support these heads of power provide is limited to references to COVID app data. This suggests that ss 51(ix), 51(v) and 51(xxix) may only provide additional support to the Division 2 offences relating to COVID app data. This would cover a majority, but not all offences.[220]

Division 2 also contains offences which do not operate by reference to COVID app data. This includes s 94H(1)[221] which prohibits a person coercing another to download COVIDSafe,[222] or to have COVIDSafe in operation.[223] This also applies to s 94H(2) which provides that a person commits an offence if they

[218] See *Davis* (n 12) 112 (Brennan J).
[219] *Pape* (n 12) 24 [10] (French CJ).
[220] Offences which refer to COVID app data include: *Privacy Act* (n 5) ss 94D, 94E, 94F, 94G.
[221] However, note that ibid s 94H(1)(c) refers to COVID app data.
[222] Ibid s 94H(1)(a).
[223] Ibid s 94H(1)(b).

refuse to employ another,[224] allow them to enter a premises,[225] participate in an activity,[226] receive or provide goods or services,[227] on the grounds that a person has not downloaded COVIDSafe,[228] or does not have COVIDSafe in operation.[229] These offences consequently may have to be supported by s 61 and 51(xxxix) alone. In light of this article's adherence to the High Court's precautionary approach, it doubts whether ss 94H(1) and (2) can be validly supported by the legislative nationhood power.

IV CONCLUSION

Part VIIIA can ultimately be said to be a law with respect to ss 61 and 51(xxxix) — at least to an extent. This article is satisfied that facilitating the effectiveness of a voluntary app directed towards combatting a national public health emergency is an activity that falls within the executive nationhood power. Part VIIIA is largely supported by s 51(xxxix) as a law incidental to the execution of that executive power. This includes Divisions 3 to 5, and the offences provided for in Division 2 which relate to COVID app data. Even if the Division 2 penalties are considered too extreme, or disproportionate, to be supported by ss 61 and 51(xxxix) alone, other substantive heads of legislative power are available to support their coercive nature. However, this is not the case for the offences created in ss 94H(1) and (2). As such offences must solely rely on support from ss 61 and 51(xxxix), this article queries their validity.

Of course, there is no bright line as to whether the Division 2 offences can be considered proportionate to Part VIIIA's purpose so as to fall within s 51(xxxix). When it comes to determining whether a law is incidental, different minds will see the boundaries of constitutional power as differently located.[230] However, it remains that contemporary jurisprudence supports the nationhood power as a purely facultative power. Until questions concerning the extent to which the legislative nationhood power can support coercive measures are ventilated by the High Court, it is best to approach the power 'conservatively',[231] as this article has done.

On 31 July 2022, Health Minister Mark Butler determined that COVIDSafe was no longer required to prevent or control the spread of COVID-19 in

[224] Ibid ss 94H(2)(a), (b).
[225] Ibid s 94H(2)(c).
[226] Ibid s 94H(2)(d).
[227] Ibid ss 94H(2)(e), (f).
[228] Ibid s 94H(2)(g).
[229] Ibid s 94H(2)(h). However, note s 94H(2)(i) refers to COVID app data.
[230] *Leask v Commonwealth* (1996) 187 CLR 579, 636–7 (Kirby J). See also *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ).
[231] *Pape* (n 12) 24 [10] (French CJ).

Australia.[232] This marked the end of the COVIDSafe data period and signalled the end of the use of COVIDSafe by the Australian public.[233] While the threat of COVID-19 may have eased, the spread of infectious diseases is only set to increase in the coming years.[234] Notwithstanding the colossal failure of COVIDSafe,[235] the Commonwealth may seek to implement contact tracing apps in the future to deal with such infectious diseases. It is therefore critical to understand the powers the Commonwealth has available with respect to facilitating the effectiveness of such apps. This article concludes that the nationhood power can support the Commonwealth in such endeavours, including through the provision of privacy protection schemes. However, absent the support of other substantive heads of legislative power, stringent criminal penalties to enforce such schemes may be pressing the nationhood power beyond its constitutional limits.

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[232] *Privacy Act* (n 5) s 94Y(1)(a); *Privacy (Public Health Contact Information) (End of the COVIDSafe data period) Determination 2022* (Cth).
[233] Mark Butler, 'Failed COVIDSafe App Deleted' (Media Release, Department of Health and Aged Care, 10 August 2022) < https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/failed-covidsafe-app-deleted#:~:text=The%20Hon%20Mark%20Butler%20MP,-10%20August%202022&text=The%20former%20Government%20wasted%20more,found%20by%20manual%20contact%20tracers.>.
[234] See generally Oliver Milman, '"Potentially Devestating": Climate Crisis May Fuel Future Pandemics', *The Guardian* (online, 28 April 2022) <https://www.theguardian.com/environment/2022/apr/28/climate-crisis-future-pandemics-zoonotic-spillover>; 'Reduce Risk to Avert "Era of Pandemics", Experts Warn in New Report', *UN News* (Web Page, 29 October 2020) <https://news.un.org/en/story/2020/10/1076392>; Rachel Baker et al, 'Infectious Diseases in an Era of Global Change' (2022) 20(4) *Nature Reviews Microbiology* 193; Guy and Hocking (n 24) 451 citing Tony McMichael 'Rise of Deadly Disease is a Cultural Thing', *The Sydney Morning Hearld* (Sydney, 17 October 2005) 11.
[235] Health Minister Mark Butler described COVIDSafe as a colossal waste of taxpayer money: Butler (n 233). See generally Stayner (n 25); Karp (n 25).