SIR OWEN DIXON AND THE CONCEPT OF "NATIONHOOD" AS A SOURCE OF COMMONWEATLH POWER[+]

*Peter Gerangelos**

I INTRODUCTION

[p 56] Sir Owen Dixon was a puisne justice on the High Court when it heard those important Cold War-era cases concerned with the constitutional validity of Commonwealth anti-sedition[1] and anti-subversion laws; the latter seeking, effectively, to ban the Communist Party of Australia and otherwise provide civil disabilities for communists and those associated with the party.[2] In this stream of cases Dixon J made reference to an inherent Commonwealth power, beyond any express constitutional power or head of power, to protect the *Constitution* and the polity. The power was vested in the Commonwealth by virtue of it being the polity established by the *Constitution*. While Dixon J was concerned with the ambit of the Commonwealth's *legislative* power in those cases, his reasoning cannot be entirely divorced from considerations relating to executive power. For it may have influenced the development of notions of inherent *executive* power along these lines as has emerged in recent High Court jurisprudence and as will be seen below. To the present writer, this development is somewhat troubling. This is not simply because it is most unlikely that Dixon J actually had in mind a non-statutory *executive* nationhood power, but also because of the serious problems attending such a notion: its vagueness, its lack of definition and, if history be any guide, the potential for its misuse in the hands of an overzealous executive.

When reference is made to such power, whether legislative or executive, it is referred to as a "nationhood" power because, generally speaking, it is based on the Commonwealth's

[+] Published in J Eldridge and T Pilkington, *Sir Owen Dixon's Legacy*, (Sydney: The Federation Press, 2019), Chapter 4, pp 56-79.
**FAAL*, Professor of Constitutional Law, The University of Sydney.
[1] *R v Sharkey* (1949) 79 CLR 121; *Burns v Ransley* (1949) 79 CLR 101.
[2] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 188 ('*Communist Party case*').

P A Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in J Eldridge and T Pilkington, *Sir Owen Dixon's Legacy*, (Sydney: The Federation Press, 2019), Ch. 4, pp 56-79.

status as a polity, its role as the representative of the Australian nation in both domestic and international affairs. While "nationhood", at least as a legislative power, figured prominently in the reasoning of Dixon J, and those who agreed with him, in these Cold War-era cases, a second stream of cases may be regarded as a "more proximate" source of "nationhood" power.[3] Here too the reasoning of Dixon J was at the forefront. These were not so much concerned with protecting the *Constitution* and the polity as with actions undertaken by the Commonwealth to foster and advance **[p 57]** the polity, with initiatives undertaken for the benefit of its people. The two leading cases involved the provision of pharmaceutical benefits by way of subsidies for prescription medicines[4] and the establishment of a scheme to facilitate regional and social development and social welfare programs.[5]

While this chapter will analyse both streams of cases, its principal focus is to trace from the reasoning of Dixon J, and those whom he influenced, the High Court's evolving jurisprudence with respect to this concept of "nationhood" as a source of power. To what extent has their respective influence, and that of Dixon J within each, together with the nature of the very issues on which they were based, come together to influence the outcome of what is often regarded as the most seminal case on executive power in recent years: *Pape v Commissioner of Taxation*?[6] In that case, for the first time, a majority of the High Court gave recognition to an inherent non-statutory *executive* power based on "nationhood", incorporated in s 61 of the *Constitution* which vests the "executive power of the Commonwealth in the Queen", made "exercisable by the Governor-General" and "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." This was despite the fact that the Court had never authoritatively accepted the existence of *legislative* power based on national considerations beyond the express heads

[3] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983), p 41.
[4] *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('*Pharmaceutical Benefits case*').
[5] *Victoria v Commonwealth* (1975) 134 CLR 338 ('*AAP*').
[6] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*').

of power plus incidental power, albeit it had been endorsed by individual justices.[7] Although the Court in *Pape* eschewed the term "nationhood", generally speaking, the majority indicated that the substantive content of this power was to be derived from the status of the Commonwealth as the government of an independent federal nation in circumstances where only the national government is able efficaciously to undertake action for the benefit of the nation.[8] No more precise general definition of this power was attempted beyond its application to the particular facts in that case.

This development has not been without its critics, including the present writer.[9] There are two broad bases for the criticism. First, the step taken by the *Pape* majority was an entirely novel, unprecedented and unwarranted step and not the crystallisation of evolving High Court principle in this regard. Secondly, in addition to its vagueness, the concept of inherent national executive power does not furnish legally-discernible **[p 58]** criteria, beyond subjective and policy considerations, to enable a court to determine the constitutional validity of non-statutory executive action. Moreover, it runs the risk of permitting the Executive Government a self-defining power – it would be very difficult for a court to second-guess an insistent government appealing to considerations of national emergency or necessity – with all the dangers this represents to the maintenance of representative and responsible government and to civil liberties more generally.

---

[7] In *Davis v Commonwealth* (1988) 166 CLR 79, while Mason CJ, Deane and Gaudron JJ (at 93) accepted the existence of a legislative nationhood power, it was expressly rejected by Wilson and Dawson JJ (at 103-104) and Toohey J (agreeing, at 119). Such a power has not received unequivocal authoritative acceptance.

[8] *Pape* (2009) 238 CLR 1 at [95], [131]-[132] (French CJ); [228] ("That formulation should be accepted") (Gummow, Crennan and Bell JJ); [329], [345] (Hayne and Kiefel JJ); [511], [568] (Heydon J, assuming for the sake of argument, but not deciding correctness).

[9] See Peter Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry'(2018) 37 *University of Queensland Law Journal* (forthcoming). Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle, Interpretation* (Cambridge University Press, 2015), pp 434-442, 451-459; Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

Given the centrality of Dixon J's reasoning in the cases upon which reliance was placed in *Pape*, discerning his precise meaning becomes very important. It is the main question considered in this chapter and a critical aspect of Dixon's legacy. In addressing it, it will be possible to determine whether his reasoning actually supports the final outcome in *Pape*, arguably one of the most important developments in Australian constitutional law in recent years.

II THE NON-STATUTORY EXECUTIVE POWER OF THE COMMONWEALTH AND *PAPE*

The precise point of departure of this chapter must be the currently pressing, yet vexed, question of the ambit of the Commonwealth's general non-statutory executive power provided for in s 61. There is no precise definition provided for "executive power", nor for "the executive power of the Commonwealth" and there is no further elaboration on the meaning of the words in the text beyond their extension by reference to the "execution" and "maintenance" limbs of s 61. To add to the difficulty, it is not possible to give content to the term "executive power" purely by reference to abstract conceptual notions. There is no need to rehearse again the chorus of references in this context to "mystery", to the "futility" of attempting definition by "allusion to abstract notions", to the "barren ground" and "trackless waste" of conceptual analysis.[10] Leslie Zines' conclusion, albeit more prosaic, stated the point rather well:

> The principle that the executive government has no power at common law to levy a tax is not derived from contemplating the concept of executive power. It is because of the English historical development, particularly the struggles of the 17th century. If the executive power in Britain and Australia includes the declaration of war, it is because the English Parliament was prepared to leave this power with the King,

[10] See the various references in this regard in Nicholas Aroney, Peter Gerangelos et al, above n 9, p 385.

content with the control it had of the standing army and the appropriation of money to conduct the war.[11]

As will be seen, attempts have been made to interpret s 61 consistently with the form of representative and responsible government provided for by the *Constitution*, as well as the federal structure for which it provides, as well as the common law. Thus, in addition to the execution of the *Constitution* and Commonwealth laws, the substantive content **[p 59]** of this power in the "maintenance" clause has been variously interpreted to include the executive prerogatives and capacities of the Crown recognised by the common law, even following the *Pape* development. Thus, in *Cadia Holdings Pty Ltd v New South Wales*, French CJ interpreted s 61 to "include … the prerogative powers accorded the Crown by the common law" and approved of Dixon J's reference to the "common law prerogatives of the Crown of England" being "carried into the executive authority of the Commonwealth".[12] This echoed Mason J in *Barton v Commonwealth* who had stated that s 61 "includes the prerogative powers of the Crown … [recognised] by the common law."[13] And in relation to the provenance of these powers, reference has been made by Australian courts to English constitutional history and related common law developments, the 1688 settlement and the Bill of Rights, the historical subjection of common law powers and capacities to Parliament, and to Lord Diplock's *dictum* that "[i]t is 350 years and a civil war too late for the Queen's

[11] Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279. See also in this regard, the universality of this principle: Jenny S Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115 *Yale Law Journal* 2480 at 2483: "These comparative examples [UK, Germany, France, Mexico and South Korea] suggest that there is nothing inherent or fixed about the scope of executive power; instead, executive power is highly contingent, shaped by political context and the path-dependent evolution of particular legal systems."
[12] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226, citing *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 304. See also *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 at [22] (French CJ).
[13] *Barton v Commonwealth* (1947) 131 CLR 477 at 498. See also Winterton, above n 3, pp 23-24; Zines, above n 11 at 280.

courts to broaden the prerogative."[14] The common law in this area contains a substantial body of principles – some well-established – and precedents established over a long period of time and shared with comparable polities such as the United Kingdom, Canada and New Zealand.

The more established prerogatives include conducting foreign relations, executing treaties, declaring war and peace, defending the nation including in circumstances of rebellion, subversion etc, coining money, conferring honours, and certain proprietary prerogatives. Excepting emergencies, such as war, invasion and other extreme events, the prerogative does not generally support the use of coercion and the courts have generally tended to avoid giving recognition to a prerogative which may interfere with the life, liberty or property of the subject.[15] In addition, there is recognised those non-prerogative executive capacities to refer to those non-statutory capacities which are not necessarily unique to the Executive Government and which, generally speaking, it may share with natural persons by virtue of the Commonwealth's legal personality or – more controversially – simply because it is not prohibited by law from acting: for example, to enter into contract, create a trust, incorporate a company, dispose of property, to sue and be sued, and to undertake general administrative actions such as making enquiries, keeping a directory, adopting policies etc.[16] And, of course, in *Pape,* s 61 was held to incorporate an executive power derived from the status of the Commonwealth government as national government, the so-called inherent "nationhood power".[17] Although an executive power, and while it is important not to neglect the distinction **[p 60]** between the two, it is not entirely unrelated to a notion of legislative

---

[14] *British Broadcasting Corporation v Johns* [1965] Ch 32 at 79. See, e.g., *Ruddock v Vadarlis* (2001) 110 FCR 491 at 501 (Black CJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [115]ff (Gageler J).

[15] See *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75; *A v Hayden* (1984) 156 CLR 532. A very useful and extensive catalogue was provided by the United Kingdom Ministry of Justice in *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (United Kingdom Ministry of Justice, 2009).

[16] Zines, above n 11 and James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 2015), pp 374-375. See also Gerangelos, above n 9.

[17] *Pape* (2009) 238 CLR 1.

power along these lines. This will become increasingly apparent as the chapter progresses. The point to note about this new power is the fact that it replaces the common law as the ambit of the power, yet without the clear limitations imposed on the common law prerogatives: their inherent subjection to legislative control (being common law), the fact that they constitute a mere residue and the fact that they can probably be lost as a result of desuetude. By contrast, it is not so certain that a "nationhood" executive power will be completely subject to legislative control, it being directly derived from a constitutional provision, its independence reinforced by a legal separation of power, its content not being a residue and thus capable of development and expansion in each case; and, in the absence of clear definition, susceptible to self-definition by the government itself.

To what extent, therefore, can it be said that inherent executive power can be derived from the *Constitution*? If it can be, is it derived from the text of s 61 or, rather, is it simply implied from the mere fact of the establishment of the Commonwealth by the *Constitution* and its evolution from British dominion to complete legal independence as a federal nation? And what difference would it make whether it was one or the other? If implied from the former, that is directly from s 61, to what extent can s 51(xxxix) – the express legislative incidental power – be relied on to provide the Executive Government, when exercising this power, with legislative support to facilitate its exercise and indeed, to control it? If implied from the latter, can such a power nevertheless be said to be incorporated in s 61 as an inherent "nationhood" executive power? And, in this case, would it not follow that this supports the existence of an inherent *legislative* power to protect, foster and advance the nation?

The answers to these questions touch upon very pressing issues presently confronting Australian constitutional law; and Owen Dixon's reasoning within the two streams of cases above-mentioned is central to their resolution. This will be best appreciated when working back from the starting point of the *Pape* case,[18] in particular, the fact that the majority reasoning indicated that the content of this inherent national executive power was to be

[18] Ibid.

derived from the status of the Commonwealth Government as an independent national federal government, rendering it peculiarly adapted to undertake action for the benefit of the nation in circumstances where only it could do so efficaciously – a proposition supported by subsequent decisions of the Court.[19] In doing so, as indicated, the *Pape* majority replaced the common law prerogatives and capacities of the Crown with this new inherent executive power as the ultimate ambit of non-statutory executive power in s 61, although without denying that the common law continues to act as a source of power.

These defining criteria for the valid exercise of the power can be traced to the words of Mason J in the *AAP* case, hereinafter "the Mason implication". It is not clear, however, whether Mason J was unambiguously supportive of such a power or whether he was simply broadening the sphere in which the common law executive powers could be exercised, as has been argued elsewhere:[20] **[p 61]**

> There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) [the incidental legislative power] and 61 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 the nation.[21]

Beyond the "peculiarly adapted" formula, including the requirement of the sole efficacy of national action for the nation's "benefit", there was no attempt to provide a more exhaustive definition. The majority in *Pape* preferred a deductive approach based on the facts of each case. Although, with respect, this was very sensible and prudent, it does not

---

[19] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 126; *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.
[20] Gerangelos, above n 9.
[21] *AAP* (1975) 134 CLR 338 at 397. These criteria resonated in the reasoning of the majority in the *Pape* case (2009) 238 CLR 1 at 23-24 (French CJ), 99 (Gummow, Crennan and Bell JJ).

presently provide great assistance given that the Court has not been required to decide a case on this precise issue since *Pape.*

In any event, in *Pape*, French CJ held that s 61 validated the Commonwealth's fiscal stimulus – essentially a payment of money directly to individual taxpayers whose income was below a certain tax threshold – in response to the "Global Financial Crisis" in 2008. This was on the grounds that it was within the scope of s 61 for the Government to spend money "to support a short-term fiscal stimulus strategy to offset the adverse effects of a global financial crisis on the national economy."[22] The other justices in the majority stated similarly, though more expansively, that "the Executive Government is the arm of government capable of and empowered to respond to a crisis, be it war, natural disaster or financial crisis on the scale here."[23] Hence the legislation which facilitated the payment was held valid by virtue of the incidental legislative power in s 51(xxxix) supporting inherent executive power in s 61 based on the Mason implication.

Of course, the difficulty which immediately presents itself is the subjectivity of such a determination. The majority judgements were able to rely on the fact that it was not contested that the financial crisis was very exceptional in its global seriousness. But if this had been contested, on what basis would they have been able to decide on the exceptional nature of the crisis, that it was an emergency, and whether the national government alone was able to take efficacious action for the benefit of the nation? Indeed, was there in fact a "crisis" at all? The relevant constitutional fact — the sufficiency of the financial crisis to invoke a successful application of the implied national power — is rendered extremely difficult for judicial determination in the absence of more precise legally discernible criteria. Indeed, even on these apparently agreed facts, the minority of three justices were not able to accept that the magnitude of the crisis warranted executive action pursuant to the nationhood power.

---

[22] *Pape* (2009) 238 CLR 1 at [9].

[23] Ibid at [299].

The novelty of this approach lies in the recognition of *inherent* content to executive power, yet without providing clearly defined criteria in its determination beyond "nationhood" considerations. If there is such inherent content to s 61 beyond the common law, and which is not *per se* subject to legislation, it becomes an issue, as above-indicated, whether such inherent content is immune from parliamentary control, being sourced directly in the constitutional text and vested exclusively in the Executive Government. Given its *direct* constitutional source, will not the separation of **[p 62]** powers intervene to protect such executive power from legislative regulation, control, interference or usurpation?

The answer to this question depends, first, on how successfully the position can be maintained that "executive power" can be defined meaningfully, at a purely conceptual abstract level, either alone or at least by reference to the Anglo-Australian historical and constitutional context. The efficacy of such an undertaking is a pre-requisite to any meaningful discussion of *inherent* executive power. Secondly, if it can, then to what extent do the principles of responsible government and Anglo-Australian constitutional history since 1688, which require parliamentary supremacy over the Executive, override the demands of a legal separation of powers between the political branches?

Given the very influential nature of the Mason implication toward the development of such a power, it becomes imperative to determine its precise meaning. In doing precisely this, it then becomes necessary to highlight, and indeed maintain, the important distinction between the "depth" and the "breadth" of the Commonwealth's executive power. Having originally been devised by George Winterton[24] to refer to the separation of powers and federalism *dimensions* of executive power respectively, these have become terms of art in contemporary constitutional discourse: "depth" refers to the precise actions which the Executive Government may undertake without statutory authorisation reflective of the relationship between the Executive Government and Parliament in a system of responsible

[24] Though not necessarily his precise view on the content and ambit of each.

government. “Breadth” refers to the sphere in which this action may be undertaken having regard to the division of power between the Commonwealth and States by reference to the extent of the Commonwealth’s legislative competence. It is concerned with the subject matters in respect of which the Executive Government can take action as set out in the *Constitution* and “having regard to the constraints of the federal system.”[25]

Critically for present purposes, was Mason J in fact referring, or at least alluding, to the *depth* of the power, as appears to have been assumed by the majority in *Pape*? Only if this was so, it could then be said that the Mason implication would tend to support the reasoning of the majority decisions. In other words, was Mason J actually adding to the *depth* of Commonwealth executive power when he referred to a “capacity” *beyond* those common law powers and capacities hitherto recognised to be incorporated in the “maintenance” clause of s 61, and beyond the provision for, and the protection of, Commonwealth institutions and interests, to a capacity derived rather from Australian “nationhood”? For if, on the other hand, he was rather referring to the *breadth* of the power, then the Mason implication cannot stand as the direct ancestor of the inherent executive power found to exist in *Pape*. This would be the case if he was simply seeking to extend the *sphere* in which the Commonwealth could operate by extending its *legislative* power pursuant to national considerations and doing so by reference to a power to *legislate* that could be derived from s 51(xxxix) – the express incidental legislative power – when combined with the general executive power in s 61. Whatever that “capacity” might otherwise be – and in relation to which he was not deciding – it **[p 63]** could be exercised within a *sphere* (breadth) determinable by reference to national considerations, a national sphere of operation in which only the national government could exercise its capacities efficaciously for the nation’s benefit.

[25] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [130] (Gageler J) who expressly adopted this terminology from Winterton in Winterton, above n 3, pp 29-30, elaborated upon in Ch 2-3.

If indeed this latter interpretation is correct, the Mason implication could only be relied on to extend the breadth of the power beyond the express heads of Commonwealth legislative power (ss 51, 52, 122) based on "nationhood" considerations, thus also expanding *the sphere – but not the substantive content* – of the Executive's capacity to act without statutory authorisation. If this was his meaning, and because breadth is measured by legislative competence, then the necessary corollary of this position is that the powers of the Commonwealth Parliament include a *legislative* "nationhood" power. This, however, is a very different concept to an inherent *executive* nationhood power. It is at this precise point that the legacy and influence of Owen Dixon makes its entrance.

III DISCERNING THE MEANING OF THE MASON IMPLICATION BY HIS REFERENCES TO DIXON J'S JUDGMENTS

The import of the Dixon legacy here stems from the fact that Mason J placed express reliance on an important passage in the reasoning of Dixon J in the *Communist Party* case to support his proposition and thus becomes key in determining the precise meaning of the Mason implication. This is not a straightforward exercise, however. For there are aspects to that passage that also contain their own Delphic elements. It is necessary, however, first to consider the precise context in which Mason J drew out his implication in the *AAP* case in order to appreciate the reasoning of Dixon J to which express reference was made.[26] This case, along with the *Pharmaceutical Benefits* case, belongs to that second, more proximate, strand of cases relating to the use of national powers to foster and advance the polity.

The case was concerned with the validity of a Commonwealth scheme for regional development and related activities, involving the establishment of regional councils by the Commonwealth. The scheme was not supported by any legislation beyond the appropriation of funds. At issue was the precise meaning of s 81 of the *Constitution* which provides for the establishment of a Consolidated Revenue Fund from "all revenues or moneys raised or received" by the Government and for the appropriation of such funds "for the purposes of

[26] *AAP* (1975) 134 CLR 338.

the Commonwealth", which appropriation, pursuant to s 83, must be "by law". Did s 81 alone provide authority to the Government to spend money on such a scheme without the need for further statutory authorisation? If it did, then the issue became whether the phrase in that section, "for the purposes of the Commonwealth", constituted words of limitation, that is, limiting the Commonwealth to its legislative heads of power, or whether the phrase simply referred to any purpose decided upon by the Government. If, on the other hand, s 81 was held merely to authorise appropriation but not actual expenditure, then, there being no other legislation authorising the AAP scheme, the focus shifted to the extent to which non-statutory authority to expend appropriated funds could be derived from s 61 and thus introducing the issue of the content of the Commonwealth's executive power.

[p 64] While the challenge to the scheme was dismissed on issues relating to standing, no clear position emerged from the various judgments on the meaning of "for the purposes of the Commonwealth". It was not until the *Pape* case that the matter was finally settled: s 81 authorises appropriation but does not confer a substantive spending power. A power to spend appropriated monies had to be found elsewhere in the *Constitution* or in statutes made pursuant to it. Appropriation had the effect simply of earmarking funds for expenditure. In *AAP*, Mason J's nuanced position was that while s 81 alone may authorise expenditure "for the purposes of the Commonwealth", these not being words of limitation, it cannot be so relied upon when the Executive Government *itself* engaged in the activities being funded, as was the case on the facts. Hence, he was required to consider whether reliance could be placed on s 61 to authorise the Government's involvement in the scheme and related activities, there being no other statutory authorisation. In so doing, he had to consider the ambit of the Commonwealth's non-statutory executive power.

Justice Mason concluded that the Commonwealth's involvement in the regional development scheme stood "largely, if not wholly, *outside the boundaries* of the executive power of the Commonwealth."[27] This suggests that he may have been emphasising the

[27] Ibid at 401 (emphasis added).

breadth dimension of Commonwealth power, not that of depth. That is, he was referring only to the sphere in which the Commonwealth may exercise its power. It was not so much that the Commonwealth could not engage in such activities per se; in this case setting up administrative mechanisms to implement its regional development policies. It was rather that they crossed the boundary (breadth) of Commonwealth power into areas that were the responsibility of the States and their governments:

> Nowhere in the documents is it suggested that the scheme is to be administered by or through the States. … [T]he establishment of regional councils … [is] a deliberate step in a social welfare scheme which calls for the setting up of regional councils throughout Australia, operating not under the aegis of the States, but independently of and perhaps in competition with them and their institutions.[28]

The execution of the Australian Assistance Plan was thus "outside *the realm*" of Commonwealth executive power.[29]

If it is correct – likely in my opinion given the context – that references to the Commonwealth acting outside its "realm" or its "boundaries" are suggestive that the concern is principally with breadth, then Mason J's reference to the Executive Government's "*capacity* to engage in enterprises and activities peculiarly adapted to the government of a nation etc"[30] is to be read, in my submission, as simply stating as follows: that its *existing* powers and capacities (determinable by reference to the common law prerogatives and capacities as well as express grants of power in the *Constitution*) may operate in a sphere determinable by reference to these national considerations and are not strictly limited to the subject matters of the express heads of Commonwealth legislative power. Indeed, the whole context in which the Mason implication was drawn is indicative of a concern to limit the

[28] Ibid at 400.
[29] Ibid at 401 (emphasis added).
[30] Ibid at 397 (emphasis added).

sphere of the existing power without unduly hindering beneficial national initiatives **[p 65]** which the Federal Government alone could efficaciously undertake. To recognise that the Commonwealth may engage in "activities appropriate to a national government" did not mean, he reasoned, that these can be engaged in "outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government."[31] To illustrate his point, he indicated that the Executive Government "may expend money on inquiries, investigation and advocacy in relation to matters affecting public health" without statutory authorisation.[32] It is noted that expending money, making inquiry, advocacy etc could already be encompassed within the *depth* of Commonwealth executive power by reference to the Crown's common law powers it shared with natural persons, and/or from its ability to engage in activities not prohibited to it by law (the "residual freedom" basis).[33]

It is, however, conceded that, at least on its face, the Mason implication may possibly be interpreted to suggest that it conflated the depth and breadth dimensions to devise a new inherent national *executive* power, albeit vague and not readily definable, thus expanding both the depth and breadth of executive power. Given the orthodoxies of the era, where the depth of s 61 was determinable almost exclusively by reference to the common law prerogatives and capacities of the Crown, this conclusion can certainly be questioned.[34] But that it is a possibility cannot be denied.

> Which is the more accurate view? In attempting to ascertain "the scope" of s 61 power, Mason J did not state clearly whether he meant the scope in either the depth or breadth dimension or both.[35] This is understandable in light of then existing orthodoxies where it would most likely have been easily implied that he was referring

[31] Ibid at 398.
[32] Ibid.
[33] A discussion of the "residual freedom" argument is beyond the scope of this chapter.
[34] See above nn 12–16 and accompanying text.
[35] *AAP* (1975) 134 CLR 338 at 397.

to the breadth of Commonwealth legislative competence. First, he noted that s 51(xxxix) "adds a further dimension to what may be achieved by the Commonwealth in the exercise of other specific powers", referring in particular to s 61.[36] But being an incidental legislative power, this was simply explaining the incidental scope of the legislative power, albeit taking into account executive power, and thus also indicating an addition to the breadth dimension of the power. This is reinforced by the fact that he cited the cases of *R v Sharkey*[37] and *Burns v Ransley*[38] (discussed below) which were not concerned with the validity of Commonwealth *executive* action, but rather the validity of Commonwealth anti-sedition laws on the basis, *inter alia*, of the ss 51(xxxix) and 61 combination. This did not itself expand the ambit of executive power which may be exercised *without statutory authorisation*, i.e. in the depth dimension of the power.

Secondly, Mason J proceeded to make a statement referring to *additional* powers of an ambiguous nature: "the Commonwealth enjoys, *apart* from its specific and enumerated powers, certain *implied powers* which stem *from its existence and character as a polity*."[39] What is the nature of these implied powers? Were they legislative **[p 66]** or executive, or both? Whence was the implication precisely to be drawn? Was he indeed stating that the power derived from the fact of the Commonwealth's existence established by the *Constitution*, and not the precise terms and provisions in the *Constitution*? Moreover, if – and this is not clear – these "national" powers were indeed *legislative* powers only, this would support the view that the Mason implication was not referring to a nationhood executive power, that it was not suggesting additional depth to Commonwealth executive power, merely expanding the breadth of the power by reference to national considerations.

---

[36] Ibid.
[37] (1949) 79 CLR 121 ('*Sharkey*').
[38] (1949) 79 CLR 101 ('*Burns*').
[39] *AAP* (1975) 134 CLR 338 at 397 (emphasis added).

The key to answering these questions lies in the fact that Mason J, to make precisely this point, cited that passage from Dixon J's reasoning in the *Communist Party* case which will now be considered. More particularly, he made specific reference at this point to the three Cold War-era cases above-mentioned, and in which the reasoning of Dixon J was prominent, by reference to which he stated: "So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion."[40] For present purposes, there is more significance to this statement than may appear to be the case. Justice Mason was there referring to an absence of any suggestion of an implied *legislative* power because all these cases were concerned with the validity of Commonwealth laws, not non-statutory executive action. Given the context, it was not necessary for him expressly to state that he was not referring to non-statutory executive power in this regard. Nevertheless, Mason J's reference to the passage in the judgment of Dixon J in the *Communist Party* case[41] in support of his implication needs to be examined; albeit the *AAP* case belonged to the national advancement, as opposed to preservation, stream of cases.

a) *Justice Dixon and the anti-sedition and anti-subversion cases*

The relevant passage from Dixon J's reasoning referred to in the preceding section, cited by Mason J, is central to his legacy in this area. Justice Dixon there stated:

> [T]he power *to legislate* against subversive conduct has a source of principle that is deeper or wider than a series of combinations of the words of s 51 (xxxix) with those of other constitutional powers.[42]

That reliance could be placed on s 51(xxxix) *to legislate* incidentally in order to facilitate the exercise of executive power in s 61 is not being denied. It is being suggested, rather, that this

[40] Ibid.
[41] *Communist Party* case (1951) 83 CLR 1 at 188.
[42] Ibid (emphasis added).

does not itself provide guidance as to the substantive content of s 61, let alone endorse the existence of an executive nationhood power: s 51(xxxix) simply may authorise legislation incidentally to facilitate the exercise of the Commonwealth's executive power, *whatever* its substantive content might otherwise be. Moreover, it is clear that Dixon J was referring to another source "deeper or wider" than the ss 51(xxxix) and 61 combination. And, given that the issue was the validity of laws, not of executive action per se, he was envisaging a source of *legislative* power. While it cannot be positively asserted that he did not envisage an executive power determinable by reference to nationhood, this is the most likely conclusion based on the issues in the case and the **[p 67]** context in which this statement was made. Even if it is suggested that he simply did not turn his mind to executive power, this reinforces an interpretation that it simply did not cross his mind that a non-statutory executive national power could be so derived.

Be that as it may, it cannot be denied that Dixon J's reasoning encouraged an expansion of legislative power in its *breadth* dimension on the basis of nationhood. It was a power that could be exercised beyond any express head of legislative power (including ss 51(xxxix) and 61), that authorised the Commonwealth Parliament to legislate to protect itself from subversion and insurrection; that is, an inherent self-preservation legislative power derived from the Commonwealth's status as a polity established by the *Constitution*.

This can be confirmed by reference to Dixon J's statements in the earlier cases of *Sharkey*[43] and *Burns*,[44] both cases concerning the validity of Commonwealth anti-sedition laws and, generally speaking, being within the same strand as the *Communist Party* case.

In the *Sharkey* case, Dixon J approved of the following statement by Quick and Garran:

---

[43] (1949) 79 CLR 121 at 151, Dixon J referring to the discussion of these issues previously in John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901), ch 3, pt IV.3, in relation to the "legislative" aspect of the implied "nationhood" power.
[44] (1949) 79 CLR 101.

> If … domestic violence within a State is of such a character as to interfere with the operation of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. … [T]he Executive Government [may] interfere to suppress by force a rebellion which cripples its powers.[45]

When it came to *Commonwealth* interests, the Commonwealth could act to protect these from domestic violence even within a State. Examples included the "carriage of the federal mails", "inter-state commerce", "the right of an elector to record his vote at federal elections". In such instances and others of similar nature, "the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself."[46]

Justice Dixon did not there state precisely whence this power arose, whether it was a non-statutory executive power found in the maintenance limb of s 61, or whether it was that combined with an exercise of the incidental legislative power in s 51(xxxix). Nevertheless, it cannot be denied that he was at least envisaging a power to protect Commonwealth interests which could be based on a textual interpretation of the maintenance limb of s 61 and which related to Commonwealth interests expressly provided for by the *Constitution* as opposed to a broader, more nebulous basis in the Commonwealth's status as the national polity.

However, even beyond these constitutional provisions, it was his view that *legislative* power can be found to support protective laws beyond the express heads of legislative power: he did "not doubt" that the Commonwealth had the legislative competence to enact anti-sedition laws that prohibited and punished speech or writing that "arouses resistance to the law", that "excites insurrection against the Commonwealth **[p 68]** Government", and that "is

---

[45] Quick and Garran, above n 43, p 964.

[46] *Burns* (1949) 79 CLR 101 at 151, quoting Quick and Garran, above n 43, p 964.

reasonably likely to cause discontent with and opposition to the enforcement of Federal law or to the operations of the Federal Government."[47] He continued:

> The power is *not expressly given* but *it arises out of the very nature and existence of the Commonwealth as a political institution,* because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter incidental to the exercise of its powers. But the legislative power is in my opinion still wider.[48]

In support of his position, he referred to the constitutional law of the United States to similar effect, including to laws prohibiting and punishing publications "directed to bringing 'into contempt scorn contumely or disrepute' the constitution, the form of government or the flag."[49] And, he added, not even the First Amendment may constrain the latter in time of war: "The prevention of attempts to excite hostility where obedience is necessary for the effective working of government appears to be recognised as a proper purpose of the legislation of the Government concerned."[50]

On this basis, Dixon J was able to sustain the anti-sedition laws in issue pursuant to what may be referred to as a legislative nationhood power derived not merely from the express heads of power plus incidental power, but from an inherent *legislative* power to make laws with respect to the preservation of the Commonwealth and its form of government derived from the mere establishment and existence of the Commonwealth as a polity.

That Dixon J was unequivocally adopting such a position may be confirmed by reference to his judgment in the other anti-sedition case decided the same year, *Burns*. He there made reference to the difficulty in ascertaining "the extent" of incidental powers,

[47] *Sharkey* (1949) 79 CLR 121 at 148.
[48] Ibid (emphasis added).
[49] Ibid.
[50] Ibid.

possibly suggesting a degree of vagueness in the ambit s 51(xxxix).[51] On the other hand, he did "not suppose that it would be denied" that Commonwealth legislative power extended to "measures for the suppression of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or effecting a revolutionary change in the form of government." This he did not regard as vague. He added, similarly, that the Commonwealth's legislative power authorised "measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom." As a change to "our institutions" could be effected peaceably by validly enacted laws, it "follow[ed] *almost necessarily from their existence* that to preserve them from violent subversion is a matter within the *legislative* power." Moreover, this power "must extend much beyond inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change." Indeed, Dixon J was "unable to see why it should not include the suppression of actual incitements to an antagonism to constitutional government, although the antagonism is not, and may never be, manifested by any overt acts of **[p 69]** resistance, or by any resort to violence." Dixon J thus found the validity of anti-sedition and anti-subversion laws to be located in the capacity of the Commonwealth Parliament to preserve itself and its institutions and thus it is clear that he recognised an inherent legislative power with respect to the preservation of the polity.

Thus, in both *Sharkey* and *Burns*, Dixon J was unequivocally invoking an inherent legislative power to preserve the polity beyond that which is expressly authorised by the *Constitution*, including the combination of ss 51(xxxix) and 61. That he was referring to a legislative power distinguishes the power he was envisaging from that which is referred to as "Locke's prerogative". Very reluctantly made, that latter power has been devised from an argument based on necessity. In Locke's words:

---

[51] (1949) 79 CLR 101 at 116. All the quotations from Dixon J which follow in this paragraph are from this case at 116.

> [I]t is impossible to foresee, and so by laws to provide for, all accidents and necessities … [and] therefore there is a latitude left to the executive power, to do many things … without the prescription of the law, and sometimes even against it.[52]

In Locke's conception, the exercise of such a power would (or should) arise only in very exceptional circumstances difficult to foresee, but would certainly encompass external invasion and internal rebellion threatening the constitutionally prescribed form of government itself. But it is not without its obvious problems: it could only ever be regarded as "valid" (but if purely discretionary, by what standard?) when exercised unambiguously (by which criteria?) "for the public good" (according to whom?). This "prerogative" aspect to the power, permitting of some virtually unreviewable discretion in those who wield it, will continue to ensure the elusiveness of any precise definition, especially, but not exclusively, in exceptional circumstances which may require government action. At the very least, it should only be regarded as an absolute last resort, it being a purely *executive* prerogative power to preserve the polity in the absence of express legal authority to do so that arises from the mere existence of the polity.

Dixon's inherent power, however, is not this power. It is rather one which derives from a power vested in a representative legislature in a Westminster system subject to political sanction. And, it is submitted, this is the nature of the power Dixon J was referring to in the *Communist Party* case – a legislative power – and upon which Mason J expressly relied in *AAP* when making his implication. It is noted that not even Latham CJ gave recognition to such an inherent legislative power, despite being the only justice to uphold the validity of the legislation impugned in the *Communist Party* case and who was generally most solicitous of Commonwealth power. Indeed, in all these three cases, Latham CJ ventured no further than the heads of legislative power, including the combination of ss

---

[52] John Locke, *The Second Treatise of Government* (1690) in Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press, 1988), p 375.

51(xxxix) and 61. There is no other hint of support in his reasoning for any broader national power. Rather, it is very much a consequence of Dixon J's reasoning, and his alone – his legacy.

In *Sharkey*, Webb J was the only justice to concur with the position taken by Dixon J. He accepted the submission that "stressed the necessity for a power to nip in the bud the tendency to undermine the State" and agreed with "the Chief Justice [who] suggested that in order to protect the Government against violent overthrow it might be necessary to prevent the incitement of feelings that may lead to that."[53] But again, **[p 70]** he was referring to a legislative power in this regard, not an executive one. H P Lee described the *Communist Party* case as "the high point in the emergence of the inherent power doctrine" and Dixon J as the doctrine's "most outspoken champion".[54] Although not quite managing a majority on this precise point, he did manage in the *Communist Party* case to garner further support for it. It is, therefore, useful to examine this case in more detail.

b) The Key Passage in the Communist Party case

In support of the validity of the *Communist Party Dissolution Act 1950* (Cth), designed to ban the Communist Party and associated bodies, as well as to impose civil disabilities on persons declared by the government to be, whether actually or potentially, communists, it was submitted in argument that legislative power could be derived from a power, *in addition to the defence power*, to make laws with respect to the maintenance of the *Constitution* and/or the execution of Commonwealth laws. The source of this power was submitted to be twofold: either the combination of s 51(xxxix) with s 61, or a power which comes or arises from the very existence of the Commonwealth itself as a body politic. This thus put squarely in issue the question of the existence or otherwise of an inherent legislative power based on nationhood considerations.

---

[53] *Sharkey* (1949) 79 CLR 121 at 163.

[54] H P Lee, *Emergency Powers* (LawBook Co, 1984), p 124.

While Latham CJ, who alone of the justices upheld the Act, and Williams J[55] limited themselves to the defence power and incidental power, Kitto J at least considered Dixon J's inherent legislative power proposition from *Sharkey* and *Burns* and appeared to give it some support. He referred to "the limited power of making laws for the protection of the Commonwealth against subversion."[56] It was Fullagar J, however, who more emphatically endorsed Dixon J's proposition: "it cannot … be doubted that there exists also a *legislative* power in the Parliament, which it is not easy to define in precise terms, to make laws for the protection of itself and the Constitution against domestic attack."[57] This power of the Commonwealth to protect itself "may well be found to depend really on an essential and inescapable implication which must be involved in the legal constitution of any polity."[58]

Justice Dixon himself confirmed that he was referring to a legislative power that "forms part of a paramount authority to preserve both [the Commonwealth's] own existence and the supremacy of its laws necessarily implied in the erection of a national government"[59] and to "an implied power to legislate for the protection of the Commonwealth against subversive action and preparation."[60] Hence Dixon J's remark that "constitutional support for the law must be sought not within what may be called the substance of any power *but in the authority of the Parliament to enact* what is ancillary or calculated to bring about an end *within its legislative competence*."[61] And it **[p 71]** was precisely at this point that Dixon J made his remark that "textual combinations", such as ss 51(xxxix) and 61, have "an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to the subvert the Constitution", thus suggesting their inadequacy.

[55] *Communist Party* case (1951) 83 CLR 1 at 141-142 and 230-231 respectively.
[56] Ibid at 277.
[57] Ibid at 260 (emphasis added).
[58] Ibid.
[59] Ibid at 175.
[60] Ibid at 184.
[61] Ibid (emphasis added).

Even though Dixon J was proclaiming the existence of such an inherent legislative power, or perhaps for the very reason he was doing so, it was at this precise point that he made his famous statement relating to the potential dangers to democratic government arising from an abuse of *executive* power, that history "and not only ancient history" illustrate that in situations where "democratic institutions have been unconstitutionally superseded", this has been done "not seldom by those holding executive power".[62] Why the shift in the reasoning here in order to make reference to *executive* power? Although his passage may be oft-quoted as a warning about the potential abuse of executive power, it is submitted that its full import has not been appreciated, especially as it is often quoted not quite in context. The point is that this statement was not simply a general warning about the potential abuse of executive power and the need to protect democratic institutions. It was much more than that. So to read it renders it a mere aside reflective of his general erudition. His precise point, rather, was not that democratic institutions need to be protected, but that they need to be protected *from themselves*, especially from the exercise of executive power, that is, "from dangers likely to arise from within the institutions to be protected", as historical experience has amply taught.[63] In other words, he was making a point about the inadequacy of placing sole reliance on s 61 upon which to enliven the incidental legislative power in s 51(xxxix) to protect the Commonwealth and its institutions because *the very executive power for which s 61 provides* may itself be abused to undermine the very polity of which it is an integral part. Accordingly, there needs to be a source of power *in the Parliament*, beyond one defined by executive power and its incidentals, to protect the polity, to protect the system of representative and responsible government for which the *Constitution* provides. Moreover, only Parliament will undoubtedly be able to control and regulate executive action through its legislative power. When this is appreciated, so then can the true significance of the statement which followed:

[62] Ibid at 187.
[63] Ibid at 175.

> In point of constitutional theory the power *to legislate* for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate *only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.*[64]

Expressly confirming the position he adopted in *Burns* and *Sharkey*, it is significant that it was at this point that he made the statement that "the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of words of s. 51(xxxix.) with those of other constitutional powers."[65] This he followed with the statement of the view he "preferred" from an American text on **[p 72]** constitutional law:

> [I]t is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government …[66]

Justice Dixon explained that this power in the United States is to be deduced both from "what is inherent in the establishment of a polity" and:

> from the character of the polity set up and more particularly from the power of Congress to make laws which shall be necessary and proper for carrying into execution the powers vested in Congress by the Constitution and in the Government or in any Department or officer thereof.[67]

---

[64] Ibid at 187-188 (emphasis added).
[65] Ibid at 188.
[66] Ibid; quoting from Black's *American Constitutional Law* (2nd edn, 1910), p 210.
[67] *Communist Party* case (1951) 83 CLR 1 at 188.

He concluded that "considerations giving rise to the implied power exist in the Commonwealth Constitution."[68] Placing it beyond doubt, Dixon J indicated that the view he took "embodies a somewhat different principle" to the other views presented relating to the source of power.[69]

Nevertheless, although such a power existed in his view, the legislation in issue could not be saved. For, at least in times of peace, the legislature cannot itself declare a particular organisation to be a serious threat to national security and thus take action against it. Neither could it leave entirely to the discretion of the Executive whether any person or organisation posed such a threat and thus proscribe them. For this would be to deem the constitutional fact which may bring the subject matter into power, a determination which may only be made by the court on objective facts which the court can accept on judicial notice. To use Dixon J's own words:

> The extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper the vague formula of sub-ss. (2) relating to prejudice to the maintenance and execution of the Constitution **[p 73]** and the laws, and by applying it to impose the consequences which under the Act would ensue.[70]

Although this is a related, though discrete, aspect of the case, and even though it is often referred to as "the doctrine in the *Communist Party* case", it is not the case that this principle emerged from the reasoning of Dixon J. The maxim which is manifested in the principle, "the stream cannot rise above its source" was referred to

[68] Ibid.
[69] Ibid.
[70] Ibid.

as early as 1914 by Griffith CJ in *Heiner v Scott*,[71] and also expanded upon in some detail in the *Communist Party* case in the judgment of Fullagar J.[72]

The more important question for present purposes is the fact that *Dixon J was clearly referring to an inherent legislative power in that passage upon which express reliance was placed in support of the Mason implication in AAP*. Such a power alone was needed to curb the overbearing use of executive power and its potential to undermine democratic institutions. It must surely follow that he was not advocating the existence of an *executive* nationhood power at all. That Mason J was simply referring to an inherent nationhood concept in the *legislative* sense in the *AAP* case in order to expand the breadth of Commonwealth executive power, and not to add to its depth, is amply supported.

And indeed it was an inherent national legislative power upon which Dixon J relied to test the validity of the Act, concluding that even this broader source of power would not:

> extend to a law like the present Act, using as it does, the legislature's characterization of the persons and bodies adversely affected and not factual tests of liability and containing no provision which independently of that characterisation would amount intrinsically to an exercise of the power. To deal specifically with named or identifiable bodies or persons independently of any objective standard of responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending on different considerations.[73]

---

[71] (1914) 19 CLR 381 at 393.
[72] (1951) 83 CLR 1 at 253.
[73] Ibid at 194.

c) Confirmation of Dixon's Meaning from the "National Advancement" Strand of Cases

Further confirmation of Dixon's meaning can be derived from the "national advancement" strand of cases. As indicated, Dixon J had earlier made reference to a "nationhood power" in the *Pharmaceutical Benefits* case[74] in which was impugned a Commonwealth legislative scheme that provided for the subsidisation of prescription medicine. The case bears further scrutiny at this point. One issue was whether the scheme could be authorised by a combination of s 81, the appropriation "power", and s 51(xxxix). Thus the meaning of "purposes of the Commonwealth" in s 81 became an issue. The wider interpretation favoured by Latham CJ[75] and McTiernan J[76] would permit the Commonwealth Parliament to appropriate money for any purpose it wished with the result that this may include subject matter normally outside the heads of Commonwealth legislative power. However, the other judges,[77] who adopted the narrower approach to s 81, and thus held that the words "purposes of the Commonwealth" were words of limitation, did not themselves limit this phrase to the enumerated legislative purposes in ss 51, 52 and 122 of the *Constitution*. Although Dixon J (Rich J concurring) did not regard it as necessary to reach a final decision on the ambit of s 81 for the purposes of the case, he, along with these judges held that s 81, in addition to those purposes derived from the express heads of power, included those purposes which were "incidental to the existence of the Commonwealth as a state and to the exercise of the functions of national government."[78]

[p 74] Taken alone, this would have meant that the case provided support for an *appropriations* power, the ambit of which was determinable by national considerations: it

[74] *Pharmaceutical Benefits* case (1945) 71 CLR 237.
[75] Ibid at 253-256.
[76] Ibid at 273-274.
[77] Ibid at 266 (Starke J), 269, 271-272 (Dixon J, Rich J concurring), 282 (Williams J).
[78] Ibid at 269 (Dixon J). See Starke J at 266, Rich concurring with Dixon, and Williams J later stating that he concurred with the view of Starke J, stating this in *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 285.

could not be said that this alone supported a general legislative power based on nationhood considerations. However, it was Dixon J's subsequent *obiter dictum* which were suggestive of the latter:

> Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes *whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government.* These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day. There is no reason why such matters should be taken to fall outside the province of Federal appropriation though ascertained and defined by reference to the legislative power of the Commonwealth.[79]

This clearly provides support for a legislative nationhood power. The precise source of the power was not specified to be the text of the *Constitution*, but rather, it would appear, the mere existence of the Commonwealth as a national state.

Therefore, Mason J's express reliance on the *dicta* from Dixon J when formulating his implication in *AAP*, together with the conclusions drawn above from the sedition cases and the *Communist Party* case, strongly supports the proposition that the Mason implication does not directly support the existence of a nationhood *executive* power. That is, it did not add any depth to the power based on national considerations. At most, it extended the *breadth* of executive power by reference to national considerations. This is also confirmed by the position taken by the other main judgements in the case. Chief Justice Barwick and Gibbs J went only so far as to state that "purposes of the Commonwealth", being limited to the

[79] *Pharmaceutical Benefits* case (1945) 71 CLR 237 at 269 (emphasis added).

P A Gerangelos, "Sir Owen Dixon and the Concept of 'Nationhood' as a Source of Commonwealth Power" in J Eldridge and T Pilkington, *Sir Owen Dixon's Legacy*, (Sydney: The Federation Press, 2019), Ch. 4, pp 56-79.

express heads of power, also included such power as was incidental to the functions of a national government and thus enabled a general power to legislate in this regard.[80]

IV CONCLUSIONS RELATING TO DIXON'S LEGACY AND "NATIONHOOD"

It can be said that there are two aspects to Dixon's legacy which emerge from these cases: the first is his advocacy of an inherent *legislative* power to preserve and protect the polity based on the very establishment of the Commonwealth by the *Constitution*. The second, and discrete from the first, is his support for the combination of ss 51(xxxix) and 61 to permit legislation to support the executive power in the execution and maintenance limb of s 61. Both extend the breadth of Commonwealth legislative competence beyond the express heads of power provided for in the *Constitution*. The former quite broadly to include national considerations; the latter more narrowly to those aspects which are incidental to the exercise of executive power. While these were influential in the extension of the breadth of Commonwealth executive power, this did not mean that the Executive Government could now undertake activities without statutory authorisation which it could not previously undertake. Rather, in addition to the broadening of the **[p 75]** legislative competence of Parliament, *the sphere* in which the Executive Government could exercise such powers was broadened.

What has been the fate of the implied legislative nationhood power? Despite Dixon J's considerable prestige and intellectual leadership of the Court, supported on this issue by Fullagar J, and despite the impetus that may be given to such a power that might arise from the landmark *Communist Party* case, it has not received authoritative judicial support by any majority in the High Court. To that extent, it may be said that Dixon's legacy here is a qualified one. Be that as it may, this is not to say that it will not eventually be given authoritative recognition, and if it is, this will be largely due to the work done by Dixon J in particular in the cases above-mentioned.

---

[80] *AAP* (1975) 134 CLR 338 at 363, 375.

The ambit of this power is another matter. While it would not be objectionable to limit its ambit to extraordinary, emergency situations relating to the preservation of the polity and protecting the Commonwealth, to rely on it as a more general source of legislative power based on national considerations in a more general sense, on vague notions of advancement of the nation etc, would be, in the respectful opinion of the present writer, not so desirable – especially as the *Constitution* delineates the heads of power which reside in the Commonwealth, with incidental power, both in relation to domestic and external affairs. But this is beside the point for present purposes.

More importantly, was it ever used as the basis for the development of an *executive* nationhood power? The answer to this second question is not entirely clear. Important in answering both questions is the *Davis* case[81] decided some years after *AAP* and which related to the Commonwealth's plans to celebrate the Bicentenary of the first European settlement in Australia. *Davis* is also important because of its possible influence on the *Pape* majority.

The precise issue resolved in *Davis* was whether the executive power extended to *the incorporation of a company* to celebrate the Bicentenary in 1988. It was not the more general question whether the Commonwealth's executive power extended to the celebration of the Bicentenary. If the focus shifts to the latter question, which is then examined in isolation, there is the danger of reading this case as being concerned with the depth of executive power: that is, the Commonwealth has a power to do whatever is necessary and appropriate to celebrate the national milestone. Winterton apparently did so when he criticised the Court for not limiting itself to the prerogative in considering this question and thus adding depth to the power by reference to national considerations.[82] Zines, with whom I concur on this point, expressly warned against such an approach here, emphasising it was the narrower question which was at issue; and that was only concerned with breadth: because *incorporating a*

---

[81] *Davis v Commonwealth* (1988) 166 CLR 79 ('*Davis*').
[82] George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) *Adelaide Law Review* 21 at 31-32.

company was within the non-prerogative capacities of the Executive Government, depth was satisfied. Thus, the issue was rather whether the subject matter of the corporation's purpose and activities – celebrating the Bicentenary – came within the sphere of Commonwealth legislative competence, ie breadth, and thus did not require statutory authorisation.[83]

[p 76] This is how those judicial statements therein, making reference to national considerations, are, in my submission, more accurately to be read: thus, Mason CJ, Deane and Gaudron JJ stated that the executive power extends to the incorporation of a company "for carrying out and implementing a plan or programme for the commemoration."[84] When referring to depth, they simply stated that s 61 confers on the Commonwealth all the prerogative powers of the Crown.[85] They made no reference to an inherent national *executive* power. They relied upon the *AAP* case to support a view that the *breadth* of the power is determinable by reference to the character and status of the Commonwealth as a national polity. The *legislative* power, they stated, may extend beyond the express heads of legislative power in the *Constitution* to include "such powers as may be deduced from the establishment and nature of the Commonwealth as a polity."[86] The influence of Dixon here is not expressly stated, but it clearly underscores such statements. Breadth is thus extended by the simple fact that *legislative* nationhood increases the subject matters in respect of which the Executive Government may exercise its various capacities. But given that the existence of an implied legislative nationhood power remains presently uncertain – it was expressly rejected by

[83] This is the view represented by Mason CJ, Deane and Gaudron JJ: *Davis* (1988) 166 CLR 79 at 94. Wilson and Dawson JJ agreed with these conclusions. It is the view of the writer that the divergence of opinion between Winterton and Zines may be attributed to their different approaches to the term "prerogative", Winterton preferring the Diceyan, Zines the Blackstonian, terminology.
[84] *Davis* (1988) 166 CLR 79 at 94. That being the case, their Honours also accepted that s 51(xxxix) enabled the Commonwealth to legislate in aid of an exercise of the executive power such as to regulate the administration of the Bicentennial Authority and defining its powers. See also at 101 where further statements are made supporting that the enquiry is concerned with breadth.
[85] *Davis* (1988) 166 CLR 79 at 93.
[86] Ibid.

Wilson, Dawson and Toohey JJ[87] – and to the extent that the Mason implication relies on it, it is thereby not as expansive in its reach.

Justice Brennan in *Davis* envisaged a yet more expansive conception, stating that the Commonwealth's executive power "extends to the advancement of the nation whereby its strength is fostered" and, expressly quoted the Mason implication from *AAP*.[88] This conception was more akin to the reasoning of Jacobs J in *AAP* which he adopted,[89] but again national considerations were referred to in order to extend the breadth of the Executive Government's existing powers, not to recognise a new inherent national executive power. "The prerogative", Jacobs J had stated, is "exercisable … on all matters which are the concern of Australia as a nation."[90] Note, first, that depth ("the prerogative") is kept distinct from breadth ("all matters which are the concern of Australia as a nation"). He did not say that from national considerations can be derived a nationhood executive power, but rather that national considerations determine the breadth dimension in which the common law prerogatives of the Crown may operate.

A degree of uncertainty may arise because Jacobs J then referenced "breadth" back to the words of the "maintenance" limb in s 61 in which "lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between [the Commonwealth government and the State governments]."[91] **[p 77]** While some commentators have suggested that this supported the expansion of the depth of executive power beyond the prerogative to include executive power based on "nationhood",[92] it is submitted that this is not the case. As

[87] Ibid at 103-104 (Wilson and Dawson JJ), 119 (Toohey J agreeing) (emphasis added).
[88] Ibid at 111.
[89] Ibid at 109; quoting from *AAP* (1975) 134 CLR 338 at 405-406.
[90] *AAP* (1975) 134 CLR 338 at 405-406.
[91] Ibid at 406.
[92] Geoffrey Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government', unpublished Octagon Lecture, The University of Western Australia (1976), p 10; cited in George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421

Winterton noted, "[c]ertainly this *dictum* is not an unequivocal assertion that the 'maintenance of this Constitution' clause of s 61 adds depth to federal executive power."[93] Justice Brennan expressly agreed with the above statements of Jacobs J but he did not expressly address this specific question.[94] But given that the case was concerned with breadth, it remains doubtful whether he too envisaged an expansion of the depth of executive power. Thus, it is probably safer to say that his Honour held that *if a power or capacity came within the depth dimension* of s 61, then it could be utilised to take action with respect to "the symbols of nationhood – a flag or anthem, eg" and to benefit "many national initiatives in science literature and the arts".[95]

Nevertheless, given the reliance on the *AAP* case, it is necessary to examine it further to see if an executive nationhood power can be derived from it. In that case, Barwick CJ and Gibbs J adopted the more limited interpretation of "purposes of the Commonwealth" as did the majority in the *Pharmaceutical Benefits* case[96] discussed above and adopted the line taken by Dixon J in that case: that is, that "purposes of the Commonwealth", including purposes incidental to the purposes of a national government, was synonymous with "purposes in respect of which Parliament has power to make laws."[97] As Winterton noted: "But this is, really, the full extent to which the *AAP* case might be said to recognise a general power to legislate with respect to the functions appropriate to a national government, hardly a firm foundation on which to build optimistic prophecies of a great new power."[98]

---

at 430-431. Sawer was not sympathetic to the notion of inherent executive power, preferring it to be confined to powers conferred by statute: Advisory Committee to the Constitutional Commission, *Report of the Executive Government Advisory Committee to the Constitutional Commission* (Australian Constitutional Commission, 1987), p 55; cited in Winterton, above n 82 at 33.

[93] Winterton, above n 3, p 229.

[94] *Davis* (1988) 166 CLR 79 at 94, 110.

[95] Ibid at 111.

[96] (1975) 134 CLR 338 at 362-363 (Barwick CJ), 374-375 (Gibbs J).

[97] Ibid at 363, 375.

[98] Winterton, above n 3, p 42.

However, it cannot be entirely denied that the *dicta* in the *AAP* case spilled over into considerations relating to executive power. But did this mean that it can be interpreted as adding depth to executive power beyond the common law prerogatives and capacities? The difficulty in answering this question in the affirmative is the language used in the case, in particular, the word "activities". That is, the only power recognised by the case, as is indicated in the Mason implication, is a power in the executive to engage in, and Parliament to authorise, *activities* of a national nature such as exploration, research, national celebrations and so on.[99] There is nothing to suggest, however, that such activities can exceed what is otherwise permitted by the prerogative powers and **[p 78]** capacities recognised by the common law, and thus the more accurate interpretation, it is submitted, is that the reference to national considerations simply expands the sphere (breadth), in which these *activities* may be undertaken. And this is reinforced by the fact that the judges who spoke of these activities were concerned far more with the limits to the sphere in which these activities may operate, as opposed to limits upon what these activities might actually be, it being assumed that this is determined by reference to that which is otherwise permitted to the Executive Government by the common law prerogatives and the *Constitution* itself. They imposed severe limits in the breadth dimension because "the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution."[100] Moreover, "to say that a matter or situation is of national interest or concern does not … attract any power to the Commonwealth."[101] While Barwick CJ and Gibbs J sought to emphasise the limits on breadth based on national interest, Mason J was even more severe in this regard, the severity emerging within his implication: the power to engage in *activities* being restricted *only* to those which could be undertaken by a national government for the nation's benefit.

[99] *AAP* (1975) 134 CLR 338 at 362 (Barwick CJ), 397 (Mason J), 413 (Jacobs J).
[100] Ibid at 378 (Gibbs J) and, similarly, 398 (Mason J).
[101] Ibid at 362 (Barwick CJ), and, similarly at 364 (Barwick CJ), 378 (Gibbs J), 398 (Mason J).

V PAST DEVELOPMENTS AND THEIR INFLUENCE ON CURRENT POSITIONS

Where then have the above-mentioned positions adopted by Dixon J relating to nationhood led the Court's jurisprudence? First, they can at least be said to constitute the backdrop to the *Pape* decision in which recognition was given to an executive nationhood power, albeit, as has been argued herein, these *dicta* do not provide support for such a view beyond the recognition of an expansion of breadth based on national considerations. That is, at least four judges have recognised a Commonwealth power, based on "nationhood", to engage in *activities* which only a national government could undertake effectively for the nation's benefit. No judge denied the existence of such a power. But, it is highly unlikely that High Court decisions prior to *Pape*, and certainly none of the decisions of Dixon J, relied on nationhood to add depth to the power beyond the expansion of its sphere of operation (breadth) on national grounds.

This brings us back precisely to Dixon's legacy: from where precisely in the *Constitution* can a nationhood power be derived, irrespective of whether one thinks it adds depth and breadth to executive power or merely breadth. In the *AAP* case, Mason and Jacobs JJ suggested a possible basis in s 61,[102] from the maintenance clause therein. But this is not explained adequately beyond reference to "the idea of Australia as a nation within itself and in its relationship with the external world."[103] Justice Mason in his implication referred to a combination of ss 61 and 51(xxxix). However, Mason J also referred simply to an implied legislative power based on nationhood when he referred to executive power to engage in activities appropriate to a national government "arising … from an implication drawn from the Constitution and having no counterpart, **[p 79]** apart from the incidental power, in the expressed heads of legislative power."[104] This comes closest to the view expounded by Dixon J. And, therefore, to this extent, Dixon's influence has been profound in influencing

[102] Ibid at 397 (Mason J), 405-406 (Jacobs J).
[103] Ibid at 406 (Jacobs J).
[104] Ibid at 398.

the development of the Mason implication even if the latter is read more restrictively, as respectfully submitted herein, to refer to an expansion of the breadth of executive power.

Although Dixon's influence may be said to have given impetus to nationhood legislative power, his was also a very powerful influence restraining overly liberal interpretations of the executive power. Winterton concurred with the subtle rationale for Dixon's preference for an implied legislative power based on nationhood considerations as opposed to grounding these in ss 61 and 51(xxxix). That is, *because the executive power needs to have limits imposed upon it from sources outside itself*, incidental legislation controlling its own exercise of power being deficient in this regard, the existence of a legislative power based on grounds relating to the preservation and protection of the polity becomes essential. But note, this is achieved consistently with the overall tradition of Anglo-Australian constitutionalism: by reliance on parliamentary supremacy consistently with the principles of responsible government and federalism. Section 61, especially in light of its vagueness, cannot provide such a source and hence the import of Dixon's implication of a national legislative power based on the existence of the Commonwealth as a polity. Winterton, conscious of the dangers in permitting a self-defining executive power based on the maintenance clause in s 61, stated that:

> [I]t would be less dangerous to base an executive power to engage in "national" activities on legislative power to authorize them, than to derive the legislative power from executive power via s 51 (xxxix). … [I]f legislative power is the source of executive power, it will satisfy only the "breadth" component for the exercise of executive power, the aspect of "depth" will still depend on whether or not the particular "national" activity falls within the prerogative. This is much safer for the future of democratic government than according recognition to a necessarily vague executive power to engage in "national" activities. Where such a power might lead has already been foreshadowed by the "siege of Bowral", and by a suggestion

> that the Governor-General might dissolve Parliament under a "national" power, even when the requirements of s 57 have not been met.[105]

Winterton proposed that legislative power authorising "national" activities – and any power there might be to legislate with respect to matters of "national" concern – "should be grounded, in domestic matters, in s 51(xxxix) and, in foreign affairs in s 51(xxix)."[106] He added that a possible further source might be covering cl 3, supported by the Preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp), a view with which Campbell concurred.[107] This simply confirms the equivocal reception of Dixon's view that it can be based on the mere existence of the Commonwealth as a polity. The High Court itself has yet definitely to decide the point. Whatever the outcome may be, the starting point must be the reasoning of Sir Owen Dixon.

---

[105] Winterton, above n 3, p 44.
[106] Ibid, p 44.
[107] Ibid, p 45.