Defining the boundaries of non-statutory executive power in Australia: A migration law perspective

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[E]ven if it were to be accepted that it is necessary or appropriate (or even, if relevant, convenient) that the government have such a power, observations of that kind would not answer the questions about the scope of the power and the organ or organs of government which must exercise it.[1]

This article explores the boundaries of non-statutory executive power in the context of Australian migration law. Migration litigation has long been a vehicle for the development of administrative law in Australia. Controversy surrounding boat arrivals in the last two decades has continued this trend and makes it a helpful context in which to posit ideas as to how case law may develop in the future to clarify the scope and limits of non-statutory executive power.

At the outset, the article begins by reviewing the history of executive power in Australia, delineating between statutory and non-statutory powers. It explores some of the innate characteristics of non-statutory power and articulates common concerns about its exercise. The article then describes the recognition in *Ruddock v Vadarlis*[2] (*Tampa*) and subsequent cases of a non-statutory executive power to prevent the entry of non-citizens into Australia, with ancillary powers of detention and expulsion. The article discusses how the power has been described by courts and highlights the reasons for the lack of guidance about its limits.

The article addresses critics' comments that non-statutory power is unchecked, ever-expanding and at risk of undermining individuals' rights. It demonstrates the constraints on the power's expansion, including the government's preference to rely on powers conferred by legislation.

Several hypothetical scenarios are put forward to propose possible boundaries of non-statutory power. First, the article briefly examines how far the power extends to authorise patrolling Australia's border. Second, it considers whether the non-statutory executive power extends to authorise the detention of non-citizens and whether government contractors can validly exercise the power. Third, it explores whether the power can be relied upon to remove lawful non-citizens from Australia.

In conclusion, the article emphasises the importance of exploring the limits of non-statutory power. In recent years, the Commonwealth's position has been that this non-statutory power extends to the interception and prevention of entry, and detention and expulsion of non-citizens for that purpose. Given the flexibility afforded by the exercise of non-statutory executive power, one should expect the power to be used in future in those circumstances. The writer suggests it is possible the power would also authorise action beyond those limited circumstances. However, largely due to uncertainty as to the availability of the power, the executive government will prefer to rely on statutory powers. Therefore, the power's confines will be identified slowly over time.

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1 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 565–6 (Hayne and Bell JJ).

2 (2001) 110 FCR 491.

What is executive power anyway?

Prerogative powers

Historically, the sovereign, as the head of the British monarchy, also known as 'the Crown', exercised law-making, decision-making and adjudicating powers.[3] The Glorious Revolution in 1688–1689 and the years following saw 'a King … executed and a civil war … waged to limit the scope of the prerogative and to assert the supremacy of parliament'.[4] The responsibility for exercising power on behalf of the polity remained with the monarch as an executive body.[5] This 'residue of discretionary or arbitrary authority … legally left in the hands of the Crown' were non-statutory powers described as 'prerogative powers'.[6] Examples of prerogative powers include declaring war, conducting foreign relations, granting mercy, and bestowing honours.[7] These powers all entail the inherently 'executive' act of the polity taking action on behalf of, or protecting, the state.

Executive power in Australia

The *Australian Constitution* reflects the doctrine of the separation of powers by separating core government functions across different institutions.[8] Section 1 of the *Constitution* vests legislative power in the Parliament.[9] Section 61 vests executive power in the Queen, exercisable by the Governor-General.[10] Section 71 vests judicial power in the High Court of Australia and other courts created by Parliament.[11] While the separation of the judicial arm of government is strict, under Australia's system of responsible government 'the legislature and executive are effectively united'.[12]

For present purposes, it is fitting to more closely examine s 61, which provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.[13]

While the power to 'maintain' the *Constitution* was 'an exceptional innovation' at the time,[14] the phrase lacked precision in that it merely described, but failed to define, the nature of executive power.[15] As a result, it has been somewhat of a 'mystery', with 'debateable' boundaries.[16] The drafters of the *Constitution* considered executive acts would either be exercised by the prerogative or stem from statute.[17] That view was imported from Britain

3 D Meagher, A Simpson, J Stellios and F Wheeler, *Hanks' Australian Constitutional Law* (Lexis Nexis, 10th ed, 2016) 3, 737.
4 Chief Justice JJ Spigelman AC, 'Public Law and the Executive' (2010) 69(4) *Australian Journal of Public Administration* 345, 351.
5 Meagher et al, above n 3, 737.
6 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 354; George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 27; Meagher et al, above n 3, 801–2.
7 Winterton, ibid, 35.
8 Meagher et al, above n 3, 67.
9 *Constitution* s 1; Meagher et al, above n 3, 61, 67.
10 *Constitution* s 61; Meagher et al, above n 3, 67.
11 *Constitution* s 71; Meagher et al, above n 3, 68.
12 Meagher et al, above n 3, 68.
13 *Constitution* s 61.
14 Winterton, above n 6, 23, 35.
15 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437, 440 (Isaacs J); *Davis v Commonwealth* (1988) 82 ALR 633, 640.
16 See Winterton, above n 6, 21; and *R v Hughes* (2000) 202 CLR 535, 555 [39].
17 *Official Report of the Australasian Federal Convention Debates*, (Adelaide, 19 April 1897) (*Edmund Barton*); Spigelman, above n 4, 351.

into the Australian colonies[18] and consequently into s 61, which vests statutory power ('laws of the Commonwealth') and non-statutory power ('maintenance of this *Constitution*').

Non-statutory executive power

Development

The power to 'maintain' the *Constitution* tends to suggest the *Constitution* imported those residual, prerogative powers from Britain and has been 'interpreted to mean a power to act without legislative authorisation'.[19] Traditionally, it was thought that the power in s 61 to 'maintain' the *Constitution* was only to the extent allowed by the Crown's prerogative powers.[20] This orthodox view declined in popularity throughout the 20th century, as the High Court preferred what Condylis terms the 'inherent' view[21] — namely, that non-statutory executive power in s 61 is derived directly from the *Constitution* in light of Australia's status as a national government.[22] This acknowledged that, while non-statutory power in the *Constitution* had its history in the British prerogatives, s 61 had to be considered in light of the newly formed unique federal constitutional context.[23] This included that Australian executive power had derived at least in part from the powers transferred from the states to the Commonwealth at federation.[24] The shift began in the cases of *Barton v Commonwealth*[25] (*Barton*) and *Davis v Commonwealth*[26] (*Davis*).

Barton concerned the exercise of extradition powers by the executive in the absence of an extradition treaty between Australia and Brazil or legislative authority.[27] The High Court considered extradition was a 'purely executive act', part of the executive's 'inherent' prerogative power, and an 'essential attribute of … a sovereign nation'.[28] Justice Mason explained that s 61 enabled the executive to undertake all action for the Commonwealth which fell within the spheres of responsibility vested in it by the *Constitution*, including prerogative powers.[29] This explanation demonstrates that the Court considered prerogative powers comprised only *part* of the non-statutory power in s 61.[30]

As Parliament had legislated with respect to extradition, the application of which was limited to circumstances where there existed an extradition treaty with another nation state, the Court considered whether non-statutory power had been abrogated by legislation.[31] The Court found that Parliament had not evidenced a 'clear and unambiguous' intention to abrogate non-statutory executive power stemming from the prerogative.[32] That is, non-statutory power could coexist with legislation to the extent that it was not intended to be abrogated.

18 Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 321.
19 Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-statutory Executive Power' (2015) 39 *Melbourne University Law Review* 385, 386.
20 Ibid, 387–8; Winterton, above n 6, 30.
21 Condylis, above n 19, 387.
22 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 63–4 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).
23 Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 279; Winterton, above n 6, 26; Condylis, above n 19, 423–4.
24 Robert R Garran, *The Coming Constitution* (Angus and Robertson, 1897) 152.
25 (1974) 3 ALR 70.
26 (1988) 82 ALR 633.
27 (1974) 3 ALR 70, 79 (McTiernan and Menzies JJ), 80 (Mason J).
28 Ibid 79–80 (McTiernan and Menzies JJ), 83, 86–7 (Mason J), 92–3 (Jacobs J).
29 (1974) 3 ALR 70, 86 (Mason J).
30 The Hon Robert French AC, 'Executive Power in Australia — Nurtured and Bound in Anxiety' (2018) 43 *University of Western Australia Law Review* 16, 28.
31 (1974) 3 ALR 70, 93.
32 (1974) 3 ALR 70, 77 (Barwick CJ), 89 (Mason J), 95 (Jacobs J).

In *Davis*, 14 years later, the High Court again considered the nature and source of non-statutory executive power in s 61, this time in the context of the incorporation of a company to commemorate Australia's Bicentenary. The majority referred to Mason J's comments in *Barton* regarding non-statutory power extending to the spheres of responsibility under the *Constitution*.[33] The Court concluded that s 61 conferred all of the prerogative powers on the Commonwealth unless they had been allocated by the *Constitution* to the states.[34] Here, the commemoration of the Bicentenary fell 'fairly and squarely within the federal executive power'.[35] Justice Brennan, in a separate judgment, helpfully clarified that executive power can be exercised in one of three capacities: a 'statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity'.[36]

Today, the Court's view is that, in determining the ambit of non-statutory executive power in Australia, British usages of prerogative power should not be the starting point[37] but, rather, merely inform our understanding of the *Constitution*.[38] Executive power should be viewed from the context of Australia's independence as a modern polity with its own federal Constitution.[39] Despite its former prominence in Australia, 'the prerogative … is now only an "important" consideration when interpreting s 61'.[40]

Characteristics and concerns

Non-statutory power is quite attractive to the executive; it provides an ability to act responsively to serious issues with limited constraints or oversight. For this reason, some have expressed concern about the 'expansion' of executive power.[41] Zines went so far as to say that, 'if the existence of a coercive prerogative power is uncertain, it is better, in an "age of statutes" and vigorous parliamentary government, to deny the prerogative'.[42]

As discussed above, non-statutory executive power should be understood in the context of Australia's constitutional system but continues to be informed by its historical roots. As Lord Diplock remarked in respect of the expansion of prerogative power, '[i]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[43] While this is not directly translatable to non-statutory power in Australia, it seems unlikely that courts would permit non-statutory power to expand unchecked. The courts' identification of a 'nationhood power' in *Pape v Commissioner of Taxation*[44] (*Pape*) and the non-statutory power in *Tampa* are examples of courts applying existing concepts of inherent executive power linked to sovereignty and interpreting them in light of the *Constitution* and the fundamental assumptions underlying it, such as the rule of law and responsible government.[45] In the writer's view, it is more correct to say that new, limited circumstances will be identified in

33 (1988) 82 ALR 633, 640.
34 Ibid.
35 Ibid 641.
36 (1988) 82 ALR 633, 651–2.
37 French, above n 30, 29, 41; *Williams v Commonwealth* (No 2) (2014) 252 CLR 416; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 123.
38 Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power Through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 281.
39 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ); Condylis, above n 19, 396; see the Hon Duncan Kerr SC, 'Executive Power and the Theory of its Limits' (2011) 13(2) *Constitutional Law and Policy* 22, 26.
40 Condylis, above n 19, 409, citing *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 468–9 [80].
41 Pauline Maillet, Alison Mountz and Kira Williams, 'Exclusion Through *Imperio*: Entanglements of Law and Geography in the Waiting Zone, Excised Territory and Search and Rescue Region' (2018) 27 *Social and Legal Studies* 142, 144.
42 Zines, above n 23, 292.
43 *British Broadcasting Corporation v Johns* [1965] Ch 32.
44 (2009) 238 CLR 1.
45 Spigelman, above n 4, 351; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538.

the future where non-statutory executive power can lawfully be exercised where it has not been previously.

Another concern relating to the use of non-statutory executive power is that it reduces accountability in Australia's representative democracy; while the executive is answerable to Parliament for the exercise of the powers, it is not responsible for their existence.[46] Legislating also promotes 'greater openness, scrutiny and democratic deliberation' than non-statutory executive power.[47] However, legislation takes time to develop. Proposed legislation may be amended by Parliament, subject to criticism by the public and critique by the media. Non-statutory executive power, on the other hand, allows the executive to respond quickly and decisively to new issues or crises as they emerge, without public or political weigh-in.

Legislation also commonly prescribes the processes required validly to exercise a power. Absent legislative backing, 'legal limits to non-statutory powers are not as readily apparent'.[48] It can therefore be difficult to glean the subject-matter, purpose or scope of non-statutory powers.[49] Their exercise is also not a decision or conduct 'under an enactment', meaning that judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is unavailable.[50] Depending on the particular topic, judicial review *may* be available in the Federal Court and/or the High Court, which retains original jurisdiction under s 75(v) of the *Constitution*. However, being successful in such a review is more difficult, as the exercise of some non-statutory executive powers will not be justiciable.[51] This is because of the 'sensitive political and public policy considerations' which arise in matters relating to border protection, defence, and international relations.[52]

It appears the requirements of natural justice may apply to the exercise of non-statutory power.[53] However, the nature and scope of procedural fairness obligations will always depend on the circumstances. In the exercise of statutory power, this will include the relevant legislative context.[54] In *Plaintiff M61 of 2010 v The Commonwealth*,[55] in relation to a non-statutory scheme for decision-making in respect of protection visa applications on Christmas Island, the High Court held that the Minister had made a decision to consider the exercise of his non-compellable powers. In those circumstances, an obligation to afford procedural fairness attached to the non-statutory process. However, the High Court recently held that procedural fairness was not owed to an applicant in connection with the exercise of non-statutory power.[56] This is unsurprising, as it is not uncommon for exercises of power under the *Migration Act 1958* (Cth) and the *Australian Citizenship Act 2007* (Cth) expressly to exclude, or not provide for, procedural fairness in circumstances where those legislative schemes aim to protect the community from serious risks or preserve the Commonwealth's interests.[57]

46 Meagher et al, above n 3, 806.
47 Simon Evans, 'The Rule of Law, Constitutionalism and the MV *Tampa*' (2002) 13 *Public Law Review* 94, 99; see also Zines, above n 23, 293.
48 Aronson, Groves and Weeks, above n 37, 125.
49 French, above n 30, 16.
50 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5–6.
51 Aronson, Groves and Weeks, above n 37, 126; see Amanda Sapienza, 'Justiciability of Non-statutory Executive Action: A Message for Immigration Policy Makers' (2015) *AIAL Forum* 79, 70; Kerr, above n 39, 29.
52 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 654.
53 Aronson, Groves and Weeks, above n 37, 135–6.
54 Jamie Fellows, 'Non-statutory Executive Powers and the Exclusion of Procedural Fairness: When Procedural Fairness Doesn't Matter' (2016) <https://researchonline.jcu.edu.au/42886/>.
55 (2010) 243 CLR 319.
56 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 654–6 [508], [509], [513] (Keane J).
57 See, for example, s 501(1) of the Migration Act or s 45B of the *Australian Citizenship Act 2007* (Cth).

Excluding, detaining and expelling aliens

A non-statutory executive power identified in Australia is the power to prevent the entry of non-citizens into Australia, effect their removal and detain them to achieve that purpose. The exercise of this power was first considered by the Federal Court in 2001 in *Tampa* at a time when there was intense public debate about boat arrivals in Australia.[58] This section explores the use of the power by the executive, its consideration by the courts and the potential for its future use.

Tampa

These proceedings were commenced by a Melbourne lawyer on behalf of 433 asylum seekers who had been rescued from a fishing boat travelling to Australia from Indonesia by the MV *Tampa*, a Norwegian vessel, at the Australian Government's request.[59] The government directed the MV *Tampa* to return the asylum seekers to Indonesia, but when they protested the captain set course for Christmas Island.[60] The government sent troops to secure the vessel and provide humanitarian assistance to those on board.[61] It arranged for the port at Christmas Island to be closed. The government then boarded the MV *Tampa*, detained the asylum seekers, and steered the vessel away from Australia.[62] All the preceding actions were taken in the absence of legislative authority. The question before the Federal Court of Australia at first instance and Full Court on appeal was whether the executive had the power to do so.[63]

Justice North at first instance held the executive had engaged in an unlawful non-statutory process outside the powers contained in the Migration Act and made an order for the release of the asylum seekers.[64] On appeal, Black CJ found the power to exclude aliens, and the related powers of detention and expulsion, could be derived solely from statute, and the prerogative power to exclude aliens had likely been extinguished.[65] Justice French (with whom Beaumont J agreed) distinguished the 'gatekeeping cases' from the context of executive power under s 61 of the *Constitution*.[66] The Court referred favourably to the ratio in *Barton* and *Davis*, as well as Jacob J's remarks in *Victoria v Commonwealth*[67] (the *AAP case*) that 'maintenance of this *Constitution*' conjured up 'the idea of Australia as a nation within itself and in its relationship with the external world'.[68]

In the absence of a statutory power, the majority held that executive power extended to preventing non-citizens from entering Australia and the power to do things ancillary to that, including detaining and removing them.[69] This was because a nation's ability to determine who may enter its territory was 'so central to its sovereignty' that it could not be the case that the executive did not have the power under the *Constitution* to prevent the entry of non-citizens into Australia.[70] That was the case 'irrespective of whether there was a traditional common law prerogative in this respect'.[71]

58 Vaishakhi Rajanayagam, 'The Tampa Decision: Refugee Rights Versus the Executive's Power to Detain and Expel Unlawful Non-citizens' (2002) 22(1) *University of Queensland Law Journal* 142, 146.
59 *Ruddock v Vadarlis* (2001) 110 FCR 491, 522.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid 533.
64 Rajanayagam, above n 58, 143; *Ruddock v Vadarlis* (2001) 110 FCR 491, 532.
65 Rajanayagam, ibid; *Ruddock v Vadarlis* (2001) 110 FCR 491, 498–9.
66 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540–2.
67 *Victoria v Commonwealth* (1975) 134 CLR 338.
68 Ibid 406.
69 *Ruddock v Vadarlis* (2001) 110 FCR 491, 543.
70 Ibid.
71 Spigelman, above n 4, 351.

At that time, the Migration Act regulated the travel of non-citizens to Australia and provided powers to detain and remove non-citizens in Australia without a valid visa. The Court acknowledged that '[t]he executive power can be abrogated, modified or regulated by laws of the Commonwealth'.[72] Whether legislation displaced non-statutory power was a matter for statutory construction,[73] and clear legislative intent was necessary.[74] In this case, the mere fact that Parliament had legislated in the Migration Act in respect of the entry of persons into Australia did not make the non-statutory power inconsistent with the Migration Act; nor did it show Parliament's intention to abrogate the non-statutory power.[75]

Justice French suggested the power would extend to preventing a vessel from docking at an Australian port, restraining a person or vessel from entering Australia or compelling it to leave.[76] Aside from providing these examples, the Court did not identify the limits of the power, as it was unnecessary to do so.[77] It is noteworthy that in *Pape* French CJ similarly referred to *Davis* and analysed the breadth of non-statutory executive power. There, French CJ found that 'the executive power extends … to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government'.[78]

Following *Tampa*, the government legislated the 'Pacific Solution' to support the interception and tow-back of boats with legislation. This had the flow-on effect of denying the High Court the opportunity to consider the existence and parameters of the relevant non-statutory power.[79] It should be noted that Zines strongly disagreed with the majority's reasoning in *Tampa*. Zines' view is that s 61 does not confer on the executive inherent power beyond that already possessed by it at common law.[80] Specifically, he argued there is no inherent power to deport, extradite or detain aliens.[81] However, this mischaracterises the Court's interpretation of the power under s 61 in light of Australia's unique federal context. As Kerr explained in relation to the Court's findings in *Tampa*, it was 'immaterial whether or not a prerogative power to expel aliens had ever existed, still existed or had been lost through disuse. The prerogative did not constrain s 61's bounds'.[82]

CPCF

CPCF v Minister for Immigration and Border Protection[83] (*CPCF*) concerned the exercise of powers under the *Maritime Powers Act 2013* (Cth) (MPA). The MPA provided a legislative basis for Operation Sovereign Borders (OSB), a 'military-led border security operation',[84] giving effect to the coalition government's agenda of 'stopping the boats'.[85]

The MPA conferred maritime powers on maritime officers, granting them legal authority to do certain things at certain times.[86] The Australian Navy intercepted an Indian vessel in Australia's contiguous zone 16 nautical miles from Christmas Island. The vessel carried

72 *Ruddock v Vadarlis* (2001) 110 FCR 491, 539.
73 Ibid.
74 Ibid 540.
75 Ibid 540, 545.
76 Ibid 544; French, above n 30, 33.
77 *Ruddock v Vadarlis* (2001) 110 FCR 491, 544.
78 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60–4 — in particular, [127], [133]–[134].
79 Winterton, above n 6, 49–50.
80 Zines, above n 23, 281.
81 Ibid 286.
82 Kerr, above n 39, 24.
83 (2015) 255 CLR 514.
84 Department of Home Affairs, 'Operation Sovereign Borders (OSB)' *Department of Home Affairs* <https://osb.homeaffairs.gov.au/>.
85 Liberal Party of Australia, 'Our Plan — Issue 10: Securing Australia's Borders', *Liberal Party of Australia* <https://www.liberal.org.au/our-plan/border-protection>.
86 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 535–6, 620.

157 Sri Lankan asylum seekers heading for Australia.[87] The asylum seekers were taken on board the Australian Navy vessel and detained by maritime officers, and the vessel set course for India.[88] One of the asylum seekers, CPCF, argued his detention on the Navy vessel was unlawful.[89] The question for the Court was whether the executive's actions, including detention, were authorised by either the MPA or the non-statutory power under s 61.[90]

Justices Crennan and Gageler both acknowledged the MPA scheme was 'designed to ensure "flexibility" in the exercise of maritime powers and "to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations"'.[91] The chain of command for the exercise of the relevant powers in the MPA ultimately extended to the Governor-General, who exercised non-statutory executive power.[92] In practice, though, the powers were exercised by the relevant ministers and, in accordance with contemporary government practice, by the National Security Committee of Cabinet.[93]

On behalf of the Commonwealth it was submitted that, if the Court found the actions were not supported by legislation, they had nevertheless been authorised by non-statutory executive power.[94] The Commonwealth also submitted that the exercise of the non-statutory executive power was probably not amenable to judicial review.[95] If it was, the Court was unsuited to undertake such considerations because they involved sensitive political and public policy considerations.[96]

The majority of the High Court (French CJ and Crennan, Gageler and Keane JJ) held that s 72(4) of the MPA had authorised the detention of the Sri Lankans on the Commonwealth vessel at all material times and authorised their removal to India.[97] Because there was a legislative basis for the exercise of power, it was unnecessary for the Court to consider whether those actions would have been authorised by a non-statutory executive power.[98] Perhaps surprisingly, French CJ did not refer to his judgment in *Tampa* or speculate as to the availability of the non-statutory power in the circumstances of this case,[99] but his Honour did confirm that the history of prerogative powers informs the limits of non-statutory power under s 61 but does not do so comprehensively.[100]

Justice Keane, who was part of the majority, did consider whether, absent the MPA, the non-statutory power would have authorised the actions taken and concluded in the affirmative.[101] Justice Keane noted the power was 'an incident of Australia's sovereign power as a nation'.[102] Having been well accepted that non-statutory executive power extended to the power to declare war and to enter into agreements with other nation states, Keane J considered it would hardly be controversial to extend it to preventing non-citizens

87 Ibid 524, 630.
88 Ibid 524.
89 Ibid 525.
90 Ibid.
91 Ibid 581 (Crennan J) and 614 (Gageler J).
92 Ibid 620.
93 Ibid.
94 Ibid 564.
95 Ibid 654.
96 Ibid.
97 French, above n 30, 34.
98 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538–9 (French CJ); 587 [228] (Crennan J), 613 [336] and 630 [392]–[393] (Gageler J), 647 [476] (Keane J); French, above n 30, 34.
99 Amanda Sapienza, 'Chief Justice French on Non-statutory Executive Power: A Timely Reflection', *Australian Public Law* <https://auspublaw.org/2016/12/chief-justice-french-a-timely-reflection/>.
100 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538; Sapienza, ibid.
101 French, above n 30, 34; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 647.
102 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 647.

from entering Australian waters and authorising their removal.[103] Finally, neither the MPA nor the Migration Act was inconsistent with the non-statutory power and the power had not been abrogated.[104]

In dissent were Hayne, Kiefel and Bell JJ. In a joint judgment, Hayne and Bell JJ were critical of the idea that non-statutory executive power could support the action taken by the government in this case, noting that '[t]o hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head'.[105] Their Honours disagreed with French CJ that the content of non-statutory executive power could be gleaned by reference to the royal prerogative.[106]

Justice Kiefel referred to Black CJ's 'detailed analysis' in *Tampa* as to whether there existed a prerogative power to expel, deport or detain.[107] Her Honour identified that for some time legislation had conferred on the executive powers of expulsion and detention and referred to the 'constitutional principle that any prerogative power is to be regarded as displaced, or abrogated, where the Parliament has legislated on the same topic'.[108] Here, Kiefel J considered the MPA regulated the relevant powers;[109] however, her Honour ultimately found the Commonwealth's expulsion and detention of CPCF had not been authorised by the MPA.[110]

As is evident from the High Court's 4:3 split and the delivery of six separate judgments, *CPCF* was a complex case. The judgment contains divergent views on non-statutory executive power. As the majority ultimately found CPCF's detention was authorised by the MPA, the judgment provides no definitive position on the breadth or exercise of the power.

The limits of non-statutory executive power

Border patrol

The non-statutory power articulated by French J in *Tampa* envisages that it be used in the context of patrolling Australia's extra-territorial borders. However, does it make a difference which body within the executive exercises the power? In *Tampa*, it was the Australian Navy that boarded the vessel and detained the asylum seekers.[111] In *CPCF*, the maritime officers (including members of the Australian Defence Force (ADF), Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police officers) would have exercised the power had the MPA not authorised the action taken.[112] If, for example, the ADF had not been involved, could the other executive officers exercise this inherently executive non-statutory power? Having regard to the fact that all of those agencies played a role in patrolling Australia's borders to protect Australia's sovereignty as part of OSB, it is likely they could do so here under s 61. It seems as if the involvement of the ADF is not necessary, although they are obviously equipped with good resources to assist operations.

It is also worth considering how far from Australia's coast the non-statutory power under s 61 would give the executive the power to patrol. It is potentially 'helpful and informative' to

103 Ibid.
104 Ibid 651.
105 Ibid 568 [150].
106 Ibid.
107 Ibid 597 [266].
108 Ibid 600 [277], [279].
109 Ibid 601–2 [280]–[285].
110 Ibid 610 [323].
111 *Ruddock v Vadarlis* (2001) 110 FCR 491, 524.
112 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526.

consider constitutional powers in the context of norms of international law.[113] It seems the power would extend, at the very least, to patrolling within Australia's contiguous zone under international law, which is presently 24 nautical miles from the coast.[114] If that definition as agreed by nation states changes at the international level, it is reasonable to expect that the area in which the executive would be authorised to patrol under the non-statutory power correspondingly would grow or contract.[115]

Regardless of the source of the power to patrol Australia's borders, the importance of maintaining an awareness of the location of the border was highlighted following an incident between Australia and Indonesia. Between 1 December 2013 and 20 January 2014, ADF and ACBPS vessels inadvertently entered Indonesian waters while patrolling Australia's borders.[116] This occurred due to a miscalculation of the Indonesian maritime boundaries by Australian crew and breached the executive's OSB policy and operational instructions.[117] As a result, international relations were adversely affected.[118] The Senate inquiry launched after the events found that there was a possible breach of international law.[119] If non-statutory power had been relied upon, and the borders were similarly encroached, it seems clear that those actions would have been beyond power. If the exercise of non-statutory executive power involved towing asylum seeker vessels or the use of orange lifeboats to return asylum seekers to Indonesia, possible consequences of an incursion on the border could theoretically include a successful action in wrongful imprisonment for the period they were in Indonesian waters or a challenge to the validity of the whole operation, requiring the detainees to be returned to Australia (presumably then to be removed once more).

Government contracting

If the executive contracted with a third party — for example, Wilson or Broadspectrum — to conduct patrols of the Australian border, could the third party exercise the non-statutory power in s 61? In the context of appropriation of moneys, the High Court has held that there must be legislative support for a contract; the executive cannot simply rely on ss 81 and 83 of the *Constitution* to authorise appropriation under the contract.[120] In *Williams v Commonwealth (No 2)*[121] (*Williams No 2*), the High Court held that executive power did not extend 'to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys'.[122]

In this example, the third-party contractors would in all probability not be Commonwealth officers and therefore would be unable to exercise executive power under s 61 of the *Constitution*. They would also be providing a service to the government under contract rather than exercising any pure executive power as their main function. As the actions would have the potential to affect the rights of individuals, any such government contract would likely need to be supported by legislation,[123] which could then confer powers to the contractors.

113 Michael Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?' (Speech delivered at the twenty-ninth annual Philip A Hart Memorial Lecture, Georgetown University Law Center, 16 April 2009) 441–2; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 627 [385] (Gageler J) and the cases cited therein.

114 Geoscience Australia, 'Maritime Boundary Definitions', *Geoscience Australia* <http://www.ga.gov.au/scientific-topics/marine/jurisdiction/maritime-boundary-definitions>.

115 See Maillet, Mountz and Williams, above n 41.

116 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Breaches of Indonesian Territorial Waters* (2014) 23.

117 Ibid 2, 16.

118 Lenore Taylor, 'Indonesia Demands Suspension of Australia's Asylum Operations', *The Guardian* <https://www.theguardian.com/world/2014/jan/17/australia-apologises-patrol-boats-indonesian-waters>.

119 Senate Foreign Affairs, Defence and Trade References Committee, above n 116, 24.

120 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 42; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 [87].

121 *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

122 Ibid 470.

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

The delegation of non-statutory power under s 61 to private contractors does not seem tenable. It appears the High Court's findings in *Pape* and *Williams No 2* have implications for the scope and constraints of non-statutory executive power more broadly than the appropriation of moneys.[124]

Power to detain offshore

The non-statutory executive power to prevent the entry of non-citizens into Australia includes the power to detain for an ancillary purpose. The Full Federal Court in *Tampa* emphasised the executive's role in protecting Australia's sovereignty as a nation state.[125] Could the detention aspect of the power be used by itself? For example, could it authorise large-scale detention of asylum seekers offshore — that is, regional processing? In *M68 of 2015 v Minister for Immigration and Border Protection*,[126] the plaintiff argued their detention on Nauru, provided for by a memorandum of understanding (MOU), was not authorised by any valid law or non-statutory executive power.[127] The Commonwealth argued s 198AHA of the Migration Act contemplated the executive entering into an MOU with Nauru regarding the processing of asylum seekers, but in any event the executive was authorised by s 61 of the *Constitution* to enter into the MOU.[128] The Court agreed it was within the scope of the executive power relating to aliens for it to enter into the MOU.[129]

In respect of the plaintiff's detention, because the Court found s 198AHA authorised the plaintiff's detention, it was unnecessary for it to consider 'the hypothetical question' of whether detention would have been authorised by non-statutory power under s 61.[130] The Court confirmed Brennan J's tripartite categorisation in *Davis* when it stated that '[n]on-prerogative executive capacities … are within the non-statutory executive power of the Commonwealth which is constitutionally conferred by s 61 of the *Constitution*'.[131] The Court explained that non-statutory power in s 61 was limited by the *Constitution*, which was 'to be understood … in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and in light of constitutional history and the tradition of the common law'.[132]

Hypothetically, could detention of asylum seekers on Nauru be authorised by the non-statutory power? The essence of the power is protecting Australia's sovereignty from the entry of non-citizens into the territory. Justice French, in *Tampa*, suggested detention of non-citizens was *ancillary* to the prevention of entry. Here, it could be said that an offshore detention arrangement would principally be calculated to achieve the purpose of deterrence and that preventing the entry of non-citizens was secondary. It may be less likely that the power would extend to authorise offshore processing arrangements in these circumstances.

Power to detain onshore

The recent Federal Court decision of *Tanioria v Commonwealth (No 3)*[133] (*Tanioria No 3*) provides some useful commentary on the interaction of s 61 with legislative power. In *Tanioria No 3*, the plaintiff claimed false imprisonment on the basis of his detention by Serco

124 French, above n 30, 21.
125 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540.
126 (2016) 90 ALR 297.
127 Ibid 374.
128 Ibid 375.
129 Ibid [163], [355].
130 Ibid 378.
131 Ibid 400.
132 Ibid.
133 *Tanioria v Commonwealth of Australia (No 3)* (2018) 162 ALD 176.

officers.[134] The Commonwealth submitted that Serco officers kept the plaintiff in detention on behalf, and at the direction, of Commonwealth officers and that, where an action was authorised by legislation, no further authorisation was needed from s 61.[135] Under s 189 of the Migration Act, the executive was required to detain the plaintiff if he did not hold a valid visa. Conversely, the applicant contended there was an implied limitation in s 61, which limited the exercise of that power to officers of the Commonwealth.[136] Because the Court accepted the Commonwealth's submission that in this case the statutory executive power had been exercised by an officer of the Commonwealth, it was unnecessary for the Court to determine whether s 61 of the *Constitution* contained the implied limitation as contended by the applicant.[137] Nevertheless, in the event his Honour was wrong, Thawley J went on to address the Commonwealth's arguments and find that there was no such implied limitation in s 61.[138]

The Commonwealth also submitted that, if the plaintiff's detention had involved the power under s 61, there was nothing preventing legislation from separately conferring the power to detain on a person who was not an officer of the Commonwealth — here, Serco.[139] This is illuminating, as it raises two points: first, the Commonwealth's view that non-statutory executive power and legislation on the same subject-matter can coexist; and, second, that non-statutory executive power likely cannot be delegated to private contractors.

The legislative regime for managing the detention and removal of unlawful non-citizens in the Migration Act is complex and unlikely ever to be entirely repealed. In those circumstances, it appears there will be little for the non-statutory under s 61 to do and the executive is more likely to rely on legislative powers. Further research is required to consider whether the non-statutory power articulated in *Tampa* would permit the detention of non-citizens who have already entered Australia, as opposed to detaining persons to *prevent* entry.

Removal of non-citizens from Australia

The last issue for discussion is whether the non-statutory power identified in *Tampa* extends to authorise the removal of non-citizens from Australia. While the Migration Act comprehensively regulates the grant and cancellation of visas, that does not necessarily mean that it and non-statutory power cannot peacefully coexist.

It may seem a stretch to consider the power's application here, but the idea of the protection of sovereignty ties closely to the removal of non-citizens who are no longer wanted in the Australian community, such as character cancellations under s 501 of the Migration Act or the power to cancel dual citizens' Australian citizenship while overseas under foreign fighters legislation.[140] Picture a situation where there has been a terrorist incident in an Australian capital city. The Department of Home Affairs, in connection with other central executive agencies, has intelligence that the person responsible is a non-citizen. Ordinarily, under the Migration Act, the Minister for Home Affairs or the delegate would need to cancel the non-citizen's visa if they wished to remove the person from Australia. What if the ongoing threat posed by the person were so extreme that giving the person notice of the cancellation of their visa, or procedural fairness in the case of cancellation by a delegate, would place Australia at risk? If the security of the nation is within the spheres of responsibility vested in the non-statutory executive power in s 61,

134 Ibid 177 [1].
135 Ibid 181 [28].
136 Ibid 181 [27].
137 Ibid 187 [54].
138 Ibid 187–8 [55], [59].
139 Ibid 181 [28].
140 See Liberal Party of Australia, above n 85.

could the executive use the power to detain and remove the person while they held a valid visa and were a lawful non-citizen under the Migration Act?

These questions would also arise in a different scenario involving national security. For example, imagine that a network of lawful non-citizens resident in Australia are members of the Islamic State of Iraq and the Levant / Islamic State of Iraq and Syria (Islamic State). They perpetrate a cyber attack on the Department of Defence, bringing down its information technology systems. The systems have not yet been reinstated and there is intelligence that the perpetrators have links overseas who are awaiting a signal to launch further attacks on other federal government agencies. It is arguable that non-citizens posing a security threat to the nation would no longer be friendly aliens. It could be argued that these circumstances would enliven the non-statutory power to expel the persons from Australia in order to maintain the *Constitution*. For incidents involving a national security element such as these and, in a time of emergency, it would potentially be open to the executive to utilise the 'nationhood power'.[141] Where there is overlap between the protection of the border and sovereignty and protection of the nation's interests, reliance on the nationhood power, which has only recently been articulated, and in more detail than the power in *Tampa*, seems more likely.

Supposing that the Migration Act intends to cover the field of the removal of aliens from Australia.[142] A real barrier to the removal of lawful non-citizens from Australia under non-statutory executive power in these scenarios is that to do so would be inconsistent with the Migration Act. That legislation only provides for the detention and removal of *unlawful* non-citizens — that is, persons without a valid visa in effect. In the absence of statutory authority to do so, the writer considers the executive could not detain or remove a person relying on non-statutory executive power without first following the procedures under the Migration Act to cancel their visa. Of course, the counterargument to this is that, because the Migration Act is silent on the removal of *lawful* non-citizens, there could be room for the non-statutory executive power to operate. This issue merits further exploration.

Where to next?

To an extent, it is unknown how non-statutory executive power might be exercised in the future in the migration context. While in several cases the Commonwealth has submitted the power is available, the executive's infrequent reliance on the power in practice has made it unnecessary for the courts clearly to determine the power's ambit. In light of the division of the High Court in *CPCF* as to the existence of the non-statutory power, many questions remain.[143]

There have been a number of changes to the composition of the High Court in recent years. Since *CPCF* was decided in 2015, French CJ, Hayne and Crennan JJ have retired; Nettle, Gordon and Edelman JJ have been appointed in their place; and Kiefel CJ has been appointed Chief Justice.[144] In respect of these recent changes, two points are noteworthy. First, in *CPCF* Kiefel J did not accept the existence of the non-statutory power. Second, having regard to his age at the time of his appointment, Edelman J may remain on the bench of the High Court until 2044.[145] This places Edelman J in a prime position to be at the forefront of the future development of Australian constitutional law.[146] At the time of

141 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1; French, above n 30, 35–6, 39.
142 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 599 [271] (Kiefel J).
143 Anna Olijnyk, 'Public Law Blog: *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1', *University of Adelaide* <https://blogs.adelaide.edu.au/law/2015/03/02/cpcf-v-minister-for-immigration-and-border-protection-2015-hca-1/>.
144 High Court of Australia, 'About the Justices' <http://www.hcourt.gov.au/justices/about-the-justices>.
145 *Constitution* s 72.
146 Julian R Murphy, 'Justice Edelman's Originalism, or Hints Of It' *Australian Public Law* <https://auspublaw.org/2017/11/justice-edelmans-originalism/>.

writing, Edelman J has been a Justice of the High Court for two years and three months,[147] and early indications are that his Honour will take a conservative approach to constitutional construction. In his first year on the bench, Edelman J dissented in two constitutional cases: first, in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection*,[148] where the rest of the Court delivered a joint judgment; and, second, in *Brown v Tasmania*[149] (*Brown*).[150] The only other dissent of the Court in a 2017 constitutional case was Gordon J, also in *Brown*.[151] Justice Edelman's more conservative approach to constitutional interpretation tends to suggest his Honour may be less likely to identify new areas where non-statutory executive power could be relied upon.[152] On the other hand, one of the features of Kiefel CJ's Court has been to encourage agreement among the members of the bench, and the rate of dissent in constitutional cases in 2017 was the lowest since 2003.[153] It is clear that future changes to the composition of the bench of the High Court will undoubtedly affect whether the power continues to be articulated or its ambit is curtailed.

Further, given the level of uncertainty about the limits of this power, the executive will be very cautious to rely on it, preferring instead to legislate sources of power.[154] Therefore, its boundaries will be revealed gradually over time on a case-by-case basis as the executive exercises non-statutory power and the courts consider the availability of the power and validity of its purported exercise.[155] The confines of the power will continue to be informed by historical prerogative powers but will be interpreted in the context of the *Constitution* and come to be referred to just as 'executive power' over time.[156]

Concluding remarks

This article has considered the history of non-statutory executive power and its interpretation in the context of the *Australian Constitution*. The use of non-statutory executive power in the migration context has been discussed, including through the analysis of case law identifying the existence of a non-statutory executive power to prevent the entry into Australia of non-citizens and to detain and expel them for that purpose. The possible boundaries of the power were explored by hypothesising the potential future use of the power in the migration context. As the limits of the power identified in *Tampa* have not been articulated in detail by the courts, it is possible that the power will be able to be exercised in new circumstances in the future. Presently, the existence of legislation — namely, the Migration Act and MPA — is a barrier to the use by the executive and further articulation by the courts of the power in these situations. The presence of legislation will see the executive rely on statutory powers and, where powers are validly exercised under legislation, it will be unnecessary for the courts to consider if non-statutory power would have authorised the actions.

It appears unlikely that the executive will seek to rely frequently on the non-statutory power in the near future. Nevertheless, having regard to the Commonwealth's submissions in recent cases as to the existence of the power, and the reduced protections for individuals offered by non-statutory power when compared to legislation, continued efforts to articulate the power's existence, nature and ambit are warranted.

147 High Court of Australia, 'James Edelman' <http://www.hcourt.gov.au/justices/current/justice-james-edelman>.
148 [2017] HCA 33.
149 (2017) 261 CLR 328.
150 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *UNSW Law Journal* 1134.
151 Ibid.
152 Murphy, above n 142.
153 Lynch and Williams, above n 144.
154 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 599 [271] (Kiefel J).
155 Condylis, above n 19, 405; Spigelman, above n 4, 351; French, above n 30, 41; Kerr, above n 39, 29.
156 *Ruddock v Vadarlis* (2001) 110 FCR 491, 202; French, above n 30, 41; Spigelman, above n 4.