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HERESY IN THE HIGH COURT?
FEDERALISM AS A CONSTRAINT ON COMMONWEALTH POWER

David Hume,* Andrew Lynch** and George Williams***

ABSTRACT
Williams v Commonwealth of Australia is a landmark decision of the High Court on the scope of federal executive power in s 61 of the Constitution. The decision is also important for the interpretive methodology adopted by the Court. Notably, each judge based their understanding of s 61 upon federal readings of the Constitution. This methodology raises fresh questions about how the Constitution is to be interpreted, and whether Williams marks a break from orthodox understandings of that task. This article assesses the significance of Williams for constitutional interpretation in Australia, and whether it lays the foundation for a more robust protection of state interests by the High Court.

I INTRODUCTION
It was famously said during the Convention Debates that 'either responsible government will kill federation, or federation ... will kill responsible government'. One could only wonder, with two such deadly foes, what would happen if they joined forces. In Williams v Commonwealth of Australia ('Williams'), we learnt that the two, together, could kill the common assumption that Commonwealth executive power follows the contours of Commonwealth legislative power. This was an assumption

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held by all the parties and interveners to the case and acted on by the Commonwealth for many years.³

At issue in Williams was the validity of a contract, and payments under this contract, between the Commonwealth and a private entity for the purpose of providing chaplaincy services to a school operated by the Queensland State Government. The payments were supported by a valid Appropriation Act.⁴ There was no express statutory authority for the Commonwealth to enter into the contract and make payments under it. Mr Williams challenged the validity of the contract and payments supporting the provision of chaplaincy services at the school attended by his children. All the states intervened.

The Court, by 6:1, upheld the challenge. Four of the judges (French CJ, Gummow and Bell JJ, and Crennan J) held that the Commonwealth's power to enter contracts and spend money was not coextensive with the potential scope of Commonwealth legislative power, and that the contract and payments at issue were not authorised by any residual classes of executive power empowering extra-statutory conduct.⁵ This meant that the contract and payments could only have been supported by executive action authorised by legislation passed under a head of federal power. Hayne J and Kiefel J found it was unnecessary to decide generally whether or not the power to contract and spend conformed to the scope of Commonwealth legislative power, since in their view the contract and expenditure in question could not have been authorised

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⁴ In Pape v Federal Commissioner of Taxation (‘Pape’) (2009) 238 CLR 1, the High Court held that the enactment of an Appropriation Act did not in itself confer power to spend: 36 [53], 55–6 [111]–[113] (French CJ), 72 [176], 72 [178], 74 [180], 74–5 [183]–[184] (Gummow, Crennan and Bell JJ), 100-1 [283], 105 [296], 113 [320] (Hayne and Kiefel JJ), 210 [600], 213 [607] (Heydon J).

⁵ These may include contracting and expenditure with respect to the administration of Departments of State pursuant to s 64 of the Constitution; contracting and expenditure in the execution and maintenance of the laws of the Commonwealth; contracting and expenditure in the exercise of prerogative powers attributable to the Commonwealth; or contracting and expenditure in the exercise of inherent authority derived from the character and status of the Commonwealth as the national government: Williams [2012] HCA 23, [4] (French CJ), [146] (Gummow and Bell JJ). See also Pape (2009) 238 CLR 1, 63-4 [133] (French CJ), 90 [236] (Gummow, Crennan and Bell JJ). See further Cheryl Saunders, ‘The Sources and Scope of Commonwealth Power to Spend’ (2009) 20 Public Law Review 256.
by such a power. In dissent, Heydon J held that the power to contract and spend conformed at least to Parliament's heads of legislative power.

The majority judges relied on a number of factors to support their position, particularly: representative and responsible government, the unmanageability of a criterion which would authorise extra-statutory power if it could be supported by a hypothetical law, and the inaccuracy of the proposition that the Commonwealth is a juristic person with all the capacities of an ordinary juristic person. The judges also relied on a broad range of federal considerations.

The purpose of this article is not to examine and critique all of the many factors on which the majority relied in Williams. Our focus is more selective. Specifically, we examine the degree to which federalism was an influence upon the way members of the Court read the Constitution in this case, before considering the potential significance of this for future decisions. We examine both the substantive conceptions of federalism that underpinned some judgments and also the federalism-protecting interpretive choices that are observable in respect of all of them. In focusing on federalism, we do not suggest that federalism factors are wholly distinct from the other factors in Williams. The federal aspects of the composition of Parliament, for example, mean that there is no clear separation between representative and responsible government, on the one hand, and federalism, on the other.

We argue that Williams marks an important retreat from the principles which saw Commonwealth power expand dramatically over the course of the 20th century. These principles derive ultimately from the watershed 1920 decision of Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers Case"). The High Court in that case rejected interpretive theories, such as that of reserved state powers, that were based upon conceptions of federalism protective of the position of the states. The approach to constitutional interpretation laid down in the Engineers Case has since been accepted as

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6 Williams [2012] HCA 23, [252], [288] (Hayne J). While agreeing with that conclusion, Kiefel J appeared more willing to accept, albeit without conclusively deciding, that the power to contract and spend extended to 'subject matters of express grants of legislative power in ss 51, 52 and 122': Williams [2012] HCA 23, [594].

7 Ibid [403].

8 Ibid [60]–[61] (French CJ), [136], [145] (Gummow and Bell JJ), [252] (Hayne J), [487], [515]–[517], [527]–[530], [532], [544] (Crennan J). The general theme was that the exercise of extra-statutory power undermines the legislative predominance which is essential for responsible government.

9 Ibid [27], [36], [38] (French CJ), [288] (Hayne J).


11 (1920) 28 CLR 129. See generally Keven Booker and Arthur Glass, 'The Engineers Case' in HP Lee and George Winterton (eds), Australian Constitutional Landmarks (Cambridge University Press, 2003) 34; Michael Coper and George Williams (eds), How Many Cheers for Engineers? (Federation Press, 1997).

12 See, eg, R v Barger; Commonwealth v McKay (1908) 6 CLR 41.
orthodoxy by the High Court. Hence, when in *Victoria v Commonwealth* ('Payroll Tax Case') Windeyer J noted 'some distant echoes and muffled undertones of a conflict' between 'centralism' and 'State rights', he observed that '[t]o return today to [such] discarded theories would indeed be an error and the adoption of a heresy.'

The orthodox approach to constitutional interpretation reached its zenith in *New South Wales v Commonwealth* ('Work Choices Case'). In that decision, a majority of the High Court reached a broad construction of the Commonwealth's corporations power in s 51(xx) of the Constitution. This enabled the federal Parliament to enact a general scheme of industrial relations regulation for constitutional corporations, as well as to enact general schemes of regulation in a variety of other fields. In doing so, the High Court rejected the use of conceptions such as the 'federal balance' to restrict the scope of federal legislative power. In response, Callinan J in dissent warned that '[t]he reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned.'

By contrast, the Court's methodology in *Williams* is characterised by considerations of constitutional structure and coherence and a willingness to read limitations into generally expressed powers absent a clearly articulated source for that limitation. This approach is federalism-reinforcing. Although traceable in the very early constitutional decisions of the High Court and then occasionally through minority opinions in later federal conflicts, this is a methodology that appears to have secured a beachhead in s 61 following *Williams*. The advent of this interpretive federalism may even lay the foundation for an era distinguished by the application of more robust protections for state interests, rather than the familiar picture of ever-expanding Commonwealth power at the states' expense. It is this proposition we seek to assess in this article.

II FEDERALISM AND EXECUTIVE POWER

Justice Isaacs once observed in *Le Mesurier v Connor* that 'executive power', when used in Chapter II of the Constitution, was a 'generic term'. Therefore, '[i]t is specific
limits have to be determined *aliunde*; that is, from outside s 61. The High Court under Chief Justice French has, starting with *Pape v Federal Commissioner of Taxation* (*Pape*), through *Cadia Holdings Pty Ltd v State of New South Wales* (*Cadia*) and culminating in *Williams*, accepted that federalism was one of the concepts external to s 61 which determines the scope of executive power. As we note below, there are, of course, antecedents to this view, but we recap here its trajectory and prominence in recent cases.

In *Williams*, French CJ held that the scope of executive power must ‘be understood by reference to the [concept of a] “truly federal government”’. This reflected comments he had made in *Cadia* that ‘[f]ederation may be seen as informing, or forming part of, the content of the executive powers of the Commonwealth and the States according to their proper functions’. In *Williams*, Gummow and Bell J J said that ‘when ascertaining the limits of the executive power of the Commonwealth, attention is to be paid … to the position of the States in the federal system’, while Hayne J observed more precisely that ‘federal considerations’ impose ‘limits on the Commonwealth's power to spend’. This echoed the joint judgment of Hayne and Kiefel JJ in *Pape*, in which they held that the executive's spending power was limited by the 'structural considerations which informed and underpinned the decision in *Melbourne Corporation v the Commonwealth* [*Melbourne Corporation*]. In *Williams*, Crennan J referred to the need to assess the question in light of:

- the text and structure of the Constitution …; the distribution of executive powers between the Commonwealth and the States as polities; and financial relations between the Commonwealth and the States.

In *Pape*, Heydon J, the dissentient in *Williams*, referred to the fact that Australia was a ‘federation’ as a reason for rejecting or doubting the majority’s proposition that the Commonwealth executive had a power to deal with national fiscal emergencies.

It should not, however, be taken for granted that federalism per se would be perceived to be relevant to the scope of Commonwealth executive power. Section 61 is expressed in general terms; it is not inherently constrained by specific language like

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20 Ibid 514. Section 61 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’.


25 [2012] HCA 23, [89]. See also [2012] HCA 23, [143], referring to ‘considerations of federalism’.

26 Ibid [192], [199].

27 *Pape* (2009) 238 CLR 1, 118 [335].

28 (1947) 74 CLR 31.

29 [2012] HCA 23, [495].

30 See (2009) 238 CLR 1, 180-1 [519], 190 [541], 193 [551].

the heads of legislative power in s 51. The conferral of executive power by s 61, unlike the conferral of power by s 51, is also not expressed to be 'subject to this Constitution'. Additionally, s 61 concerns only the executive power of the Commonwealth, whereas s 51 lists legislative powers held both by the Commonwealth and the states.

Even so, it is clear that federalism must be relevant in some sense to the scope of the Commonwealth's executive power. The Constitution creates an 'indissoluble Federal Commonwealth'. But how exactly does recognition of this fact assist the interpretive task? If the inquiry is into the meaning of s 61, to say that 'federalism' is relevant to that inquiry is only helpful if there is first a conception of what is denoted by the term 'federalism'. Otherwise, the statement is as specious as saying that 'the Constitution' is relevant to the meaning of s 61. For, as the High Court has often remarked in relation to other such high-level concepts, 'federalism' is a term of conclusion, not a premise for reasoning. What, then, did the judges mean when they referred to 'federalism' in these cases? We turn to this in the next part.

III SUBSTANTIVE CONCEPTIONS OF FEDERALISM IN WILLIAMS

Before we can appreciate the use of federalism and federalism-reinforcing doctrines as interpretive tools for most of the judges in Williams, it is necessary to illuminate the substantive conceptions of the kind of federalism which the Constitution creates that underlay some of those interpretive uses. In this part we consider these substantive conceptions held by different members of the Court, before moving on in Part IV to the way in which these informed their interpretation of the Constitution.

A Federalism and State Responsibilities, Competencies and Authority

Several of the judges in Williams appeared to conceive of the states as having powers, responsibilities, competencies or authorities under the Constitution which were either absolutely or presumptively constitutionally protected, or at least constitutionally cognisable.

1 Presumptive State Authority

Across the Court, it was the Chief Justice who appeared to most strongly adhere to a view of the states as enjoying areas of authority insulated from interference. He conceived of states as having 'fields ... [of] competence' and as having 'authority ... in their fields of operation'. For French CJ, this was a reason to reject a construction of executive power that would intrude on those fields. Here, the Chief Justice appears to have conceived state 'competence' and state 'authority', within certain fields, as

32 See the Preamble and cl 3 of the Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict.
34 See, eg, Miller v Miller (2011) 242 CLR 446, 454 [13], 468–469 [59]–[60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Equuscorp Pty Ltd v Haxton (2012) 86 ALJR 296, 320 [94], 325 [114] (Gummow and Bell JJ).
35 Williams [2012] HCA 23, [37].
presumptive; something more was needed before Commonwealth power could lawfully enter those fields. French CJ also appears to have conceived of Commonwealth and state executive powers as existing in a hydraulic relationship: expanding the scope of Commonwealth power necessarily diminishes that of states. Quoting Alfred Deakin, French CJ identified as one of the ‘essential and distinctive feature[s]’ of federalism that ‘wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced’. Far from being conceived as some abstract or metaphysical reduction in power, the Chief Justice emphasised this was a real, ‘practical’ diminution.

Two comments may be made about French CJ’s stance. First, his language sails uncomfortably close to adopting a view of state power of the kind that provided a platform for the doctrine of reserved state powers employed by the original High Court bench to determine the limits of Commonwealth power. While French CJ’s approach need not sustain the kind of ‘absolute’ prohibition associated with some forms of the reserved state powers doctrine, it has the undeniable potential to support an interpretive presumption against Commonwealth power extending into vaguely defined areas of state responsibility. The choice of language is, however, important. French CJ did not talk just of state powers. Talk of ‘powers’ is, whether fairly or not, tainted in the area of federalism because of Dixon J’s dictum in Melbourne Corporation (relied on in Work Choices to reject the concept of a ‘balance’ of Commonwealth and state powers) that the ‘framers … do not appear to have considered that power itself forms part of the conception of a government’. Rather than talking of powers, French CJ couched his federalist position in terms of state authority, which arguably evokes a sense of sovereignty in a way that mere ‘power’ does not. He referred also to state ‘competence’ and ‘competencies’. This terminology suggests a sense of expertise and existing capacity in a way that does not arise when one talks simply of ‘power’. Dixon J’s influential remark presented ‘power’ as a fairly neutral concept — hence its location was an unreliable guide to defining the relative capacities of governments in the federation. By contrast, an emphasis upon ‘competence’ directs the mind to which level of government is the most appropriate repository of a particular function.

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36 Ibid [1]. See also ibid [352] (Heydon J).
37 Ibid [37], [83].
40 Melbourne Corporation (1947) 74 CLR 31, 82.
2 Historical State Responsibilities as a Limit on Commonwealth Executive Power

Several members of the High Court considered whether the chaplaincy scheme could be supported under the extra-statutory executive power that authorises the executive 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' or are 'peculiarly within the capacity and resources of the Commonwealth Government'.

Although the 4:3 majority in *Pape* upheld the tax bonus payment on this basis, it was not found applicable by any member of the Court in *Williams*. In explaining why that was so, the reasoning of several judges employed a conception of Australian federalism that looked to state activity in determining the scope of Commonwealth executive power. For example, Gummow and Bell JJ observed that the states 'have the legal and practical capacity to provide for' schemes like the chaplaincy scheme and that the conduct of the Queensland public school system was the 'responsibility' of Queensland. Hayne J was even more direct in stating that it was not possible to satisfy this criterion as 'Queensland [had], itself, carried on a program very similar to that impugned'. Keifel J concurred, concluding that the provision of support for schools was 'the province of the States' and 'not within a discernible area of Commonwealth responsibility'. Crennan J, in applying this criterion, required evidence that the Commonwealth was the level of government 'exclusively, best or uniquely authorised' to engage in the particular activity.

These statements reflect the Court's attempt to grapple with the test that applies when the Commonwealth seeks to rely on that aspect of its executive power that inheres in its character and status as the national government. The statements should be understood as reflecting the boundary placed by Mason J in *Victoria v Commonwealth* ('AAP Case') on the extra-statutory executive power contained in s 61, as limited to the 'area of responsibilities allocated to the Commonwealth by the Constitution'. Additionally, they reflect the statement of Mason CJ, Deane and Gaudron JJ in *Davis v Commonwealth* that Commonwealth power will be clearest where it 'involves no real competition with State executive or legislative competence'.

More recently, Gummow, Crennan and Bell JJ in *Pape* confirmed that attention must be directed to 'the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question'.

The remarks in *Williams* must be understood in the context of the preceding jurisprudence. Therefore the significance of references to state 'responsibilities' or what is within the 'province' of the states should not be overstated. In this respect, the tenor

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42 See *Pape* (2009) 238 CLR 1, 63 [133] (French CJ), 91–2 [241–242] (Gummow, Crennan and Bell JJ).
43 *Williams* [2012] HCA 23, [146].
44 Ibid [196]. See also: ibid [497–499] (Crennan J).
46 Ibid [503].
47 See Twomey, above n 10.
48 (1975) 134 CLR 338.
49 Ibid 396. See also *Pape* (2009) 238 CLR 1, 83 [214] (Gummow, Crennan and Bell JJ).
51 (2009) 238 CLR 1, 91 [239], quoting ibid 389 (Brennan J).
of the judgments of Gummow and Bell JJ, Hayne J, Crennan J and Kiefel J is different from that of French CJ. However, the reasoning nonetheless places a significant check on the expansion of extra-statutory Commonwealth executive power, and unquestionably adopts the historical exercise of state responsibilities as a determinant of the expansion of that power. Hayne J, Crennan J and Kiefel J, and to some extent Gummow and Bell JJ, all considered that it was fatal in this case to the existence of the Pape-style extra-statutory executive power that Queensland was providing, and had historically provided, services which were essentially the same as those of the Commonwealth's own scheme. As a matter of law, that fact negated any contention that the subject was peculiarly adapted to being undertaken by the Commonwealth.

3 **Section 96 and State Autonomy**

A further substantive conception of the Constitution's federal structure underpinned the reliance by several judges on s 96 as a reason to read down the s 61 executive power. In this regard, Barwick CJ's assessment in the AAP Case of the important role of s 96 was influential. He had said:

>a grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect.52

While in Williams Gummow and Bell JJ and Crennan J referred approvingly to this passage,53 Hayne J pointedly emphasised its significance. He contrasted the 'consensual aspect' of s 96 grants with the coercive capacity of Parliament under s 51(xxxix) of the Constitution to enact laws incidental to the exercise of the executive power to spend and contract.54 Hayne J stated that the effect of the latter course would be that 'the basic considerations of federal structure which yielded the decision in Melbourne Corporation would fall squarely for consideration'.55 Those were, as Dixon CJ had made clear in Victoria v Commonwealth ('Second Uniform Tax Case'),56 simply avoided by the exercise of s 96.57

In their embrace of the importance ascribed by Barwick CJ to the 'consensual aspect' of the operation of s 96, the judgments in Williams display a clear conception of federalism involving state sovereignty and dignity concomitant with possessing sufficient autonomy to determine on which occasions and conditions states will participate in Commonwealth schemes. This was most explicitly stated by Hayne J, in the direct connection he made to the Melbourne Corporation principle and the constitutional requirement that the states continue to exist as independent entities. A state without choice lacks the independence which the Constitution predicates.

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52 AAP Case (1975) 134 CLR 338, 357. In Pape Heydon J similarly remarked that '[t]he making of s 96 grants depends on consultation with, and the cooperation of, the States': (2009) 238 CLR 1, 208 [597].
54 Ibid [248].
55 Ibid.
56 (1957) 99 CLR 575, 609-10.
57 Williams [2012] HCA 23, [248].
B The Role of the Senate

Two judges in *Williams* considered the federalism-protecting role of the Senate and how that related to the scope of executive power in s 61. However, despite a shared commitment to seeking to appraise the institution as it functions in practice, the two assessments reached very different conclusions.

French CJ referred to the Senate as being part of a ‘federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power’.58 He acknowledged that the role of the Senate as a ‘chamber designed to protect the interests of the States’ was, because of the rise of the party system, now ‘vestigial’.59 But this was not, he said, a reason to think that executive power had inflated in proportion to that of the House of Representatives.60 French CJ pointed to the weakness of the Senate in the appropriation process.61 In particular, s 53 of the *Constitution* provides that an Appropriation Bill cannot originate in the Senate and that the Senate cannot amend Bills ‘appropriating revenue or moneys for the ordinary annual services of the Government’. This ‘federal conception’ was put forward as a reason to hold that the Commonwealth executive did not have plenary extra-statutory contracting and spending power coextensive with the heads of legislative power in s 51. That would mean there was no *ex ante* role for the Senate.

Several observations may be made of the Chief Justice’s approach to this issue. First, it is a process of reasoning which assumes, without reference to constitutional text, that the Senate is a protector of state interests. Secondly, it takes a practical, real world approach to the power of the Senate. One could not divine from the mere text of the *Constitution* (and indeed, an American would be surprised at) the weakness of the Senate, which is caused by the bicameral entrenchment of the party system and party solidarity. Thirdly, it observes that there are constitutionally prescribed weaknesses in the Senate’s power over appropriations. Finally, it views both this practical and constitutionally prescribed weakness as a reason to read down the separately conferred constitutional power in s 61.

Heydon J also expressed a view as to the Senate’s position. But in contradistinction to the Chief Justice, Heydon J saw the Senate as wielding real power and he relied on this to refute the argument that an assertion by the executive of an extra-statutory power to contract absent a law other than an Appropriation Act would undermine the Senate. Heydon J referred to the Senate’s ‘very active role in controlling and monitoring executive expenditure’.62 This role manifests in the seeking of information and criticism of proposals by Senate committees during the estimates process, correspondence with responsible Ministers, debate on Appropriation Bills and questioning of Ministers or their representatives in the Senate. Heydon J referred to the absence of a constitutional prohibition on the Senate returning Appropriation Bills to

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58 Ibid [60].
59 Ibid [61].
60 Ibid.
61 Ibid [60]. Gummow and Bell J also referred to the weakness of the Senate in the appropriation process, though, for them, this was an issue of representative government, not federalism: ibid [136], [145].
62 Ibid [396].
the House for amendment or, in the last resort, rejecting them. He referred also to the possibility of the Senate operating as a ‘platform ... from which critics of how the executive power has been wielded can build up that corrosive dissatisfaction which eventually leads to a change of government after an election’. Unlike the Chief Justice, Heydon J did not refer to the Senate’s state-protecting role.

What unites Heydon J’s approach and that of the Chief Justice is an appreciation of the way in which the institutions of Commonwealth governance operate in practice. This is part of a broader move towards considering the practical effect of Commonwealth conduct on the position of the States, as reflected in the observation in *Clarke v Commissioner of Taxation* that questions of the application of the Melbourne Corporation doctrine require consideration of the ‘actual operation’ of the relevant law. While the consistent trajectory of that general approach may be seen as part of the larger interpretive trend in recent decades to favour substance over form, the debate in *Williams* also highlights that, even on what many might perceive to be relatively straightforward matters, stark disagreement as to the constitutional realities is possible.

**C  Federalism and Liberty**

Crennan J, and possibly Kiefel J, displayed a concern for avoiding the liberty-denying consequences which can arise when different levels of government impose conflicting obligations. This should be understood in the context of the High Court’s decision in *Dickson v The Queen* and Hayne J’s judgment in *Momcilovic v The Queen*, which emphasise the practical, liberty-denying consequences for individuals which may result from contrariety in Commonwealth and state laws. Unlike in those cases, these liberty considerations were used by Crennan J not to wind back the operation of state laws through s 109 of the *Constitution*, but, rather more unusually, to inhibit Commonwealth executive power. This was not a significant factor in the reasons offered by the majority overall in *Williams* but nevertheless it appears that concerns about the liberty of individuals caught between the competing requirements or overlapping operation of Commonwealth and state schemes continue to be an element in the Court’s conception of the federal division of power.

**D  Implications of the Substantive Conceptions of Federalism in *Williams***

In Part IV, we discuss the interpretive methodology adopted in *Williams* and its broader implications. We consider this to be the most significant development in the case. Before doing so, it is worthwhile commenting more broadly on the implications of the substantive conceptions which appeared in the judgments as just discussed. First, French CJ’s views are of a discernibly different order to those of his colleagues. In

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63 Ibid. Crennan J also referred to the role of Select Committees of both Houses of Parliament: ibid [515].
64 Ibid [396].
67 (2011) 245 CLR 1, 124 [284], 133 [313].
Williams, he appears to have laid the foundations, even if he has not constructed the edifice, for a robust vision of a federal Commonwealth of Australia. That vision involves states having presumptive areas of responsibility, with careful scrutiny required for Commonwealth intrusion upon those areas. That heightened scrutiny stems, at least in part, from recognition of the growing weakness of state-protecting governmental institutions such as the Senate as a matter of constitutional reality. Precisely what the presumed areas of state responsibility are is unclear; what is clear is that they exist. To be sure, none of French CJ's language is as direct and blunt as we here put it. There is more than enough textual wriggle room for him to retreat from this vision. Further, they are the views of one judge. Their significance should therefore not be overestimated. Even so, French CJ's language will no doubt be quoted for years to come in cases involving federal issues by those supporting a narrow view of Commonwealth power. The fact that such a strong federal vision is articulated in a majority opinion, rather than, as is more typically the case, emanating from the minority, is just one reason why this can be expected.

Secondly, common to the Court was a methodology for approaching federalism issues that involved recognising the actual, real-world state of the exercise of power within the federation. French CJ was mindful of the practical diminutions in state authority; those judges who considered whether the chaplaincy program was supportable by the extra-statutory executive power in Pape had regard to services which the states actually provided; and French CJ and Heydon J dueled over their differing perceptions as the way in which the Senate operates in the modern Australian polity. Although the general shift to examining substance over form was noted earlier, these signs in Williams are especially significant since they represent the spread of that approach to the core constitutional question of delineating Commonwealth power. In so doing, the Court appears to have taken a step back from the high orthodoxy of the far more abstract Engineers Case and Work Choices approach, which looks to the text of a legislative grant of power while turning a blind eye to the consequences of its exercise. This emerging methodology may be applied by the Court only in cases of executive power where attention is necessarily directed to the sufficiency of state power. However, if it were to mark a broader trend, this would have important ramifications for federalism jurisprudence generally, and would tend to favour a narrower scope for Commonwealth power in a broader range of areas.

Thirdly, even in the present context, the regard given to historical exercises of state power in a field marks an important qualification on the Engineers Case methodology. The sense that there were powers historically exercised by the states, intrusion on which required careful scrutiny, was an important element of the reserved state powers mindset. This appears from the state interveners' argument in the Engineers Case. Sir Mitchell KC argued that the correct approach to constitutional construction was as follows: ‘when the validity of a State law is attacked, the first inquiry is where is the power to enact it. If the answer is that the State had it before Federation, then the next question is whether the Commonwealth Constitution has taken the power away’. The cognitive effect of this kind of reasoning is important. It directs attention to a status quo characterised by state power, placing the onus on the Commonwealth to show why that status quo should be disturbed.

69 Engineers Case (1920) 28 CLR 129, 135.
Fourthly, the robust vision of state autonomy manifested in the commentary on s 96 may have important consequences. *Williams* was handed down on 20 June 2012. Eight days later, the United States Supreme Court handed down its decision in *National Federation of Independent Business v Sebelius* (*Sebelius*),\(^{70}\) in which it held for the first time that a grant to a State purportedly under Congress' spending power was invalid because the State was impermissibly compelled to accept the grant. Although this is not the occasion to explore the potential utility of that decision in the High Court's jurisprudence, we simply note that the decision in *Sebelius* was influenced by considerations of federalism\(^{71}\) and representative government\(^{72}\) which may conceivably take root in Australia. In *Williams*, the High Court sent a clear message that s 96 is a far more certain way for the Commonwealth to fund services at the limits of its legislative power. But *Williams*, seen through the prism of *Sebelius*, might also be seen as laying the foundations for a view of s 96 in which the Commonwealth cannot steamroll the states into implementing Commonwealth-formulated and Commonwealth-desired policy. Only time will tell.

### IV INTERPRETIVE FEDERALISM AND THE ROLLING BACK OF THE WORK CHOICES CASE PARADIGM

#### A Interpretive Federalism in *Williams*

In *Williams*, federalism and federalism-reinforcing principles of constitutional interpretation were used in the following ways. First, some judges noted federalism as what we might call a 'cognitive checkpoint' in the process of constitutional construction. Gummow and Bell JJ said it was 'important to bear in mind that, when ascertaining the limits of the executive power of the Commonwealth, attention is to be paid by the Court both to the position of the States in the federal system established by the Constitution and to the powers of the other branches of the federal government'.\(^{73}\) Although references of this kind to the 'federal system' might be viewed as, in a sense, platitudinous, they nevertheless do provide evidence of a general mindset of constitutional construction respectful of federal concerns.

Secondly, for some judges federalism was not just a verbal checkpoint, but rather a positive consideration militating against a particular construction of Commonwealth power. Thus, French CJ was clear that 'consequences for the Federation' were a 'reason not to accept' a broad contention as to the scope of Commonwealth executive power.\(^{74}\) The specific consequences to which he referred were the 'dimin[ution]' in a 'practical way ... [of] the authority of the States in their fields of operation'.\(^{75}\) Thus, he relied on the scheme of federalism embodied in the *Constitution* as a limiting factor. Justice Hayne adopted a similar approach when observing that because a particular understanding of Commonwealth power 'would work a very great expansion in what hitherto [had] been understood to be the ambit of Commonwealth legislative power' there was a 'need to pause before concluding that the premise which underpins it is

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\(^{71}\) Ibid 31–2 (Scalia, Kennedy, Thomas and Alito JJ).

\(^{72}\) Ibid 48 (Roberts CJ), 34–5 (Scalia, Kennedy, Thomas and Alito JJ).

\(^{73}\) *Williams* [2012] HCA 23, [89].

\(^{74}\) Ibid [37].

\(^{75}\) Ibid.
sound’.76 Similarly, Hayne J referred to the ‘federal considerations’ underlying the Melbourne Corporation doctrine as ‘point[ing] directly against reading’ the power to spend as extending to all cases in which there was a valid appropriation.77

Justice Hayne,78 and possibly Crennan J,79 further held that the ‘federal considerations’ underpinning the Melbourne Corporation doctrine limited Commonwealth executive power. Hayne and Kiefel JJ had made the same point in Pape.80 Crennan J’s adoption of the statement of Gummow, Crennan and Bell JJ in Pape that the source of restraints on Commonwealth executive power was ‘the position of the Executive Governments of the States’ also seems to have been motivated by those kinds of considerations.81 These should not be understood as references to the principle in Melbourne Corporation, most recently applied in Clarke v Commissioner of Taxation, as constituting a positive limitation on Commonwealth executive power. Rather, these should be understood as references to the underlying considerations which necessitate the specific implication that constitutes that principle. Namely, the fact that the Constitution predicates the States’ ‘continued existence as independent entities’ and that the Constitution assumes that there are ‘a central government and a number of State governments separately organized’.82

This chain of reasoning is not a conventional application of the Melbourne Corporation principle. That principle is a positive limitation which is normally seen as applying after a law falls within a power positively conferred on the Commonwealth. Thus, in Melbourne Corporation, Dixon J accepted that the law prima facie fell within the banking power. In Williams, the considerations underlying the Melbourne Corporation principle are applied to read down a positively conferred power. In other words, the considerations in Melbourne Corporation become an interpretive principle in Williams, not just the source of a positive limitation on Commonwealth power.

Thirdly, a majority of the judges applied federalism-reinforcing structural principles of interpretation. At the most general level, constitutional structure featured prominently in the Court’s reasoning. Crennan J referred to the need to assess the scope of Commonwealth executive power by reference to the ‘structure’ of the Constitution.83 This reflected the comments of Hayne and Kiefel JJ in Pape that ‘the ambit of the Commonwealth executive power is to be identified having regard to the whole of the constitutional structure’.84 Gummow and Bell JJJ referred to ‘considerations of constitutional coherence’,85 which must be understood as a reference

76 Ibid [242].
77 Ibid [248].
78 Ibid [192]. See also ibid [248].
79 Ibid [495] (‘The Commonwealth defendants’ wider submission … must be assessed in light of … the distribution of executive powers between the Commonwealth and the States as polities [Melbourne Corporation (1947) 74 CLR 31, 82–3 (Dixon J)].’).
80 (2009) 238 CLR 1, 118–119 [335].
81 Williams [2012] HCA 23, [500], quoting ibid 85 [220].
82 Melbourne Corporation (1947) 74 CLR 31, 82 (Dixon J).
83 Williams [2012] HCA 23, [495].
84 (2009) 238 CLR 1, 119 [337]. See also (2009) 238 CLR 1, 117–118 [333], 118–119 [335], 120 [339], 124 [357].
85 Williams [2012] HCA 23, [157].
to constitutional structure, as pointing away from a broad spending and contracting power.

Further, both Hayne J and Kiefel J considered that it was relevant to the scope of s 61 whether a particular construction would render otiose s 96 of the Constitution.86 Hayne J went so far as to say that the latter provided an 'immediate textual foundation' for limiting s 61.87 Heydon J had made the same point in Pape, describing it as an issue of internal consistency within the Constitution, though he clearly felt differently disposed on this occasion.88 The idea is that if the Commonwealth executive had a general contracting and spending power, free of the requirements of s 96 (which are essentially that the grant be made by Parliament and voluntarily accepted by the state) then there would be no reason for the Commonwealth to utilise s 96. Gummow and Bell JJ were also alive to the potential 'by-passing' of s 96 which would result from a broader power to contract and spend.89 Crennan J too considered that it was relevant that there was no evidence as to why the Commonwealth had not used s 96,90 and referred to the need to assess the scope of Commonwealth executive power by reference to 'financial relations between the Commonwealth and States'.91 When applied to constitutional powers, the presumption against inutility is a potent federalism-reinforcing presumption. It necessarily directs the mind away from the particular provision at issue and towards structural features of the Constitution. It assumes that general words in a provision may be qualified by reference to those broader structural features. Unsurprisingly, the presumption played important roles in Callinan J’s dissent in the Work Choices Case,92 and also in Heydon J’s dissent in Pape.93

Section 96 also appeared in the application of a kind of expressio unius presumption; that is, that a positive conferral of power (in this case by s 96) carries a negative implication that a similar power or a power to achieve a similar outcome does not otherwise exist. In Williams,94 Hayne J and Crennan J applied Mason J’s statement in the AAP Case that the presence of s 96 in the Constitution ‘confirms … that the executive power is not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96’.95 The logic of the reasoning in Williams is that the positive conferral of the s 96 power entails the absence of power to achieve the same outcome by s 61. Again, expressio unius in this context tends to be a federalism-reinforcing presumption. It results in powers abstracting from each other and funnels the Commonwealth into the use of powers which are attended by particular limitations or must be exercised only by particular organs of the Commonwealth.

86 Ibid [247]–[248], [251], [284] (Hayne J), [592]–[593] (Kiefel J).
87 Ibid [251].
88 Pape (2009) 238 CLR 1, 199 [569].
89 Williams [2012] HCA 23, [143], [147].
90 Ibid [503].
91 Ibid [495].
93 (2009) 238 CLR 1, 160–1 [470].
95 AAP Case (1975) 134 CLR 338, 398.
Fourthly, Crennan J,96 and possibly Kiefel J,97 referred to the potential for the inconsistent exercise of Commonwealth executive power and state legislation as a reason for avoiding a broad construction of Commonwealth executive power. Crennan J hypothesised a situation in which state statute law obliged or forbade conduct and a Commonwealth contract required the converse conduct. In such a case, s 109 would not provide protection against the inconsistency as it only applies in respect of Commonwealth and state laws. It may be doubted that this is a true case of inconsistency. Either the state law would prevail over the contract,98 or the person could breach the contract with possible financial but not strictly coercive consequences.99 There is no more inconsistency in any strict sense then if two individuals contracted and a law, subsequently enacted, regulated some aspect of their contractual relations. Even so, the inconsistency hypothesised by Crennan J is inconsistency in a broad sense between Commonwealth executive power and state legislative power, and it appeared to play a role in her judgment.

Finally, and most importantly, underlying all of the majority judgments in Williams is an apparent acceptance that general words in the Constitution conferring power, such as those in s 61, may be cut down once regard is had to considerations of constitutional structure and the ‘fundamental constitutional doctrine’ of responsible government.100 To the extent that this was so in respect of the Constitution’s federal character, Williams presents as an occasion in which the Court invested that concept with a highly atypical degree of significance. It is difficult to discern any other majority decision of the Court since the Engineers Case—other than that in Melbourne Corporation and its progeny—that draws as directly upon federal considerations to inhibit the scope of Commonwealth power. We turn now to consider this point more fully as a matter of constitutional methodology.

**B Williams as a Retreat from the Work Choices Case**

The outcome in the Work Choices Case was a consequence of an elaborate constitutional epistemology, supported by precedent, which necessitated a broad view of Commonwealth legislative power. The majority’s decision rested on, and may be seen as the logical culmination of, a set of interpretive principles that were established by the Engineers Case and developed subsequently.101 Primary amongst these is that grants of federal legislative power are to be construed ‘with all the generality which the words used admit’.102 This principle is drawn from the dicta of O’Connor J in Jumbunna Coal Mine NL v Victorian Coal Miners’ Association, that:

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96 Williams [2012] HCA 23, [522].
97 Ibid [590].
98 The Commonwealth accepted that the executive’s power to contract could not displace the ordinary operation of state and territory laws: ibid [37] (French CJ).
99 Geoffrey Lindell has made this argument: Lindell, above n 3, 23.
101 See also Allan and Aroney, above n 15.
where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.103

These approaches mean that that one head of legislative power should not be read down to ensure that another has a separate and distinct field of operation.104 It also follows that grants of power are not to be construed on the basis of ‘extreme examples and distorting possibilities’ or the ‘possible social consequences’ that might flow if a power was exercised to its full extent.105

According to the majority in the Work Choices Case, for the expressio unius principle to apply, it is first necessary to identify the particular ‘order or form of things’ upon which the negative implication may then operate to exclude a matter.106 The fact that a power, if given its full meaning and exercised, would result in a substantially diminished role for the states compared to the role they enjoyed at Federation, is not in itself a reason for rejecting that construction of the power.107 As the majority in the Engineers Case declared, when dismissing such concerns as relevant to the task of interpreting Commonwealth power, ‘the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts’.108

To be sure, it has never been the case that constitutional structure is irrelevant to interpretation. The Court in the Work Choices Case expressly recognised that the Engineers Case did not forbid regard ‘to the general nature and structure of the constitutional framework which the Constitution erects’,109 before acknowledging that the ‘constitutional text must be treated as the one instrument of federal government’,110 and that it should ‘be read as a whole and as the one coherent document’.111 What the Court in the Work Choices Case did make clear, however, is that before regard may be had to constitutional structure and coherence, or notions of ‘federalism’, it is necessary to identify what the content of those notions consists of,112 and to identify the

103. (1908) 6 CLR 309, 368.
104. This was implicit in the majority’s rejection of the argument that s 51(xx) should be read down in light of s 51(xxxxv). See Work Choices Case (2006) 229 CLR 1, 71–2 [51], 123 [204], 124 [206], 128 [223].
111. Ibid 72 [52] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
112. Ibid 72 [52], 119–120 [194], 120–1 [196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
constitutional text upon which they are founded. If a provision is to be read in light of another provision in the Constitution, it should be read by reference to what that provision says and not some paraphrase of what that provision means. Construction of the Constitution by reference to inter-textual or structural considerations divorced from text carries an impermissible risk that constitutional power will be construed by reference to ‘a priori assumptions about division of power’. Hayne and Kiefel JJ cautioned similarly in Pape.

The approach to constitutional construction applied in the Work Choices Case, which was derived from the Engineers Case, is unequivocally centralising. It sees constitutional construction occurring in a sequenced way. Positively-conferred Commonwealth powers are read with full generality and without regard to the political and federal consequences of doing so. If a party to litigation contends that the power in question, so provisionally construed, should be cut down by reference to considerations of constitutional structure then they bear the onus of identifying the textual basis and nature of the structural principle said to justify the proposed reading down. As the Court said in the Engineers Case, ‘it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution’.

The difficulty of so doing reflects the fact that the Constitution is primarily concerned with the conferral of power on the institutions of the Commonwealth. By and large, the Constitution refers only generically to states’ lawmaking powers; lawmaking power is generally not conferred on states in positive terms. When the

113 Ibid 89 [94], 120–1 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Hayne J made the same point in APLA Limited v Legal Services Commissioner (NSW) (2005) 224 CLR 322, 453 [387] (‘the conclusion to be derived from structural considerations is reached only having first started by considering the relevant text’).

114 Work Choices Case (2006) 229 CLR 1, 71–2 [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). This approach may be likened to the insistence from McHugh J in McGinty v Western Australia (1996) 186 CLR 140, 231, that the implied freedom of political communication could not be derived solely from a free-standing conception of representative and responsible government but must find a secure a basis in the constitutional text which gave rise to it. That view was endorsed unanimously by the Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 566–7.


117 See Engineers Case (1920) 28 CLR 129, 148–151 (Knox CJ, Isaacs, Rich and Starke JJ), which sees constitutional construction as starting with the text of a power, construing the affirmative words, discarding considerations of the possible abuse of power, and then places the onus on a person wishing to restrict the power to identify its source in the Constitution. See also (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

118 See also Walker, above n 13.

119 Engineers Case (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

120 For example, s 109 refers generically to ‘law of a State’.

121 A number of legislative powers expressly conferred by the Constitution on state parliaments are now redundant (see, eg, ss 7, 9). Section 108 confers a power of alteration or repeal of state laws existing at Federation and ‘relating to any matter within the powers of the Parliament of the Commonwealth’. A number of provisions assume that the states have some kind of legislative power (see, eg, s 113, which assumes that states may have laws
Preamble to the Constitution refers to the 'federal' nature of the Commonwealth created by the Constitution,\(^{122}\) it does so at such a high level of abstraction as to render it incapable of forming a real part of any reasoning process seeking to identify limits on Commonwealth power. The absence of meaningful textual footholds for discerning limits on Commonwealth power means that the party who bears the onus of showing that the broad language with which that power is conferred should be read down will, for the most part, be unable to discharge that onus. The critical importance of onus is reflected in the submissions of Sir Edward Mitchell KC appearing as counsel for Victoria, South Australia and Tasmania intervening in the Engineers Case. Mitchell commenced his submissions with the contention that where 'the question of the validity of Commonwealth legislation is raised, the onus is upon the party who supports it to point out in the Constitution some power to legislate on the particular subject matter';\(^{123}\) only then does the onus switch to the opposing party to identify some limitation.

*Williams* marks an important winding back of this orthodox approach to constitutional interpretation, at least in the context of construing executive (rather than legislative) power. As enigmatic as it may seem when contrasted with the detail contained within the Constitution's grants of legislative power to the federal Parliament, s 61 is, all the same, a conferral of positive power upon the Commonwealth executive expressed in general terms. Yet, it was read by the majority in *Williams* as hedged with qualifications. It was not read with all the generality which the words used admit, nor was the wider meaning of the power chosen. This can be understood as a belated, and unexpected, victory for Callinan J's attack in the *Work Choices Case*,\(^{124}\) given further rigour by Heydon J in *Pape* on the traditional presumptions of constitutional construction as giving insufficient weight to constitutional structure and federalism.\(^{125}\)

Further, a majority of the Court was willing to refer to 'federalism' as a general consideration relevant to constitutional construction without clearly identifying the specific content of the concept being invoked, nor from where in the Constitution it derives its limiting force. Members of the Court, both in *Williams* and in earlier relevant authorities, have been content to simply state generally the proposition that executive power is confined at least by the Constitution's distribution of legislative power.\(^{126}\) But arguably the distribution of legislative power is just that: a distribution of legislative power. By what process of reasoning does that distribution of legislative power constrain an executive power which is not expressly constrained by the distinct heads

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\(^{122}\) *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict cl 3.

\(^{123}\) *Engineers Case* (1920) 28 CLR 129, 134–5.

\(^{124}\) (2006) 229 CLR 1, 316–317 [766], 336–7 [809].

\(^{125}\) (2009) 238 CLR 1, 140–3 [412]–[419].

of power? The answer must involve some assumption that executive power ought, for federal reasons, be constrained by the distribution of legislative power. Again, to the extent this influenced the Court’s approach, there is no identification of the content or source of those federal concerns. It is clear that the distribution of legislative power itself can supply neither without a resort to circularity.

Where the Work Choices Case offered strong confirmation of the principle that each conferral of power is to be read fully on its own terms, Williams may be understood as a case strongly animated by a concern for constitutional coherence. This same spirit was evident in the federalism-reinforcing dissenting judgments of Kirby J and Callinan J in the Work Choices Case,127 and Heydon J in Pape.128 It is a spirit that in Williams entered the mainstream of the Court. A majority of judges read down the power in s 61 in light of s 96, with two of them stating that if a construction of s 61 would render s 96 inutile then that was a reason for avoiding that construction. But neither the text nor nature of s 96 renders it equivalent to a ‘positive prohibition or restriction’.129 Section 96 is a surprising candidate for the principle voiced by Dixon CJ in Attorney-General (Cth) v Schmidt that one power may confine the ambit of others where the former is ‘subject to a safeguard, restriction or qualification’.130 In the Work Choices Case, the majority affirmed that principle and its subsequent endorsement in Bourke v State Bank of New South Wales,131 but rejected the attempt by Kirby J to apply it more expansively in order that the power in s 51(xxxv) was not ‘effectively rendered … irrelevant’.132 Yet in Williams, members of the Court abandoned this restraint and were willing to read one power down to ensure another retained some function. Also, some judges were willing to see the positive conferral of the s 96 power as carrying an implication that other powers should be understood not to authorise the same outcome, irrespective of whether any particular ‘order or form of things’ on which the negative implication would operate was identified.

Above all, the judgments in Williams are pervaded by a sense that the interpretive onus is not on those seeking to show that broadly-expressed Commonwealth power ought be subject to limits. The generally conferred power in s 61 was not taken on its face. The Court did not go so far as to suggest that the onus was on the Commonwealth to show why the positively conferred power should extend as far as was suggested. However, Heydon J’s account of the conduct of the case, 133 conveys a sense that the Commonwealth enjoyed little of the ease that might follow from the more usual insistence that the onus rests on the party seeking to limit a positive power to identify the nature and constitutional source of the limitation.

C Is Interpretive Federalism Here to Stay?

How significant is the High Court’s retreat from the interpretive principles adopted in the Work Choices Case? Does the interpretive federalism adopted by the Court in Williams signal a broader, pro-federalism shift in constitutional interpretation?

128 See, eg, (2009) 238 CLR 1, 199 [569].
131 (1990) 170 CLR 276.
There is a reasonable argument that s 61 is a special case and so Williams should not be taken to reflect a broader shift, especially when it comes to the construction of federal legislative powers. That argument might be made on a number of bases. First, s 61 is expressed so generally that, paradoxically, it is more readily read down than are the Commonwealth’s heads of legislative power. Similar to the greater willingness of courts to read down general words in statutory provisions so as to preserve their constitutional validity: generality begets constriction. However, it is worth observing that this is so only if one abandons the principle that powers should be construed with all the generality that the words used admit. Further, as Isaacs J said in the quote from Le Mesurier v Connor extracted in Part II, it is the very generality of the words in s 61 that necessitates the search for limiting factors from outside that provision. There is less need to search for limiting factors in the case of the heads of power: their limits are disclosed by the text of the powers themselves.

Secondly, executive power is itself a special kind of power, which the High Court has often suggested is in special need of circumscription. In the Communist Party Case, Dixon J famously linked executive power to unconstitutional usurpation of democratic institutions, stating that 'history and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power'. French CJ quoted these words in Pape. He has also spoken extra-curially of the perception that the executive is the ‘most dangerous branch’ of government because of its ‘vast array of powers … and its control of public finances’.

Thirdly, the construction of s 61, unlike that of the s 51 heads of power, is not weighed down by a rich body of jurisprudence. That body of jurisprudence brought about the decision in the Work Choices Case; and it, including now the Work Choices Case itself, will continue to weigh on future jurisprudence charting the limits of the heads of legislative power. In contrast, the Court can, to a significant extent, approach s 61 afresh and as a matter of first impression.

Fourthly, Williams must be understood as a case about both federalism and responsible government. In part, and although this is not a perfect explanation of the way the judges actually reasoned, the case can be understood on the basis that federalism dictated the conclusion that the executive’s at large extra-statutory power to spend and contract was constrained by the heads of legislative power; and then, in turn, responsible government dictated the conclusion that the power should be confined to circumstances where that legislative power has actually been exercised to support the executive action. Arguably, Williams was primarily about the latter restriction on power, not the former. To the extent that responsible government and not federalism was the dominant interpretive theme, the federalism-reinforcing aspects of the Williams methodology may be of less significance in the future.

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134 (1929) 42 CLR 481, 514.
135 Australian Communist Party v The Commonwealth (1951) 83 CLR 1, 187.
136 (2009) 238 CLR 1, 24 [10].
137 French, above n 31, 9. See also the factors identified by Jackson J of the United States Supreme Court in Youngstown Sheet & Tube Co v Sawyer 343 US 579, 654 (1952), in particular the rise of the party system which gives the executive significant, often overbearing, power in the legislature. See also Twomey, above n 10.
Fifthly, Williams can even be understood as a consequence of the Work Choices Case. By this we mean simply that the breadth of the legislative power recognised in the latter has the result that, if the executive did enjoy a general extra-statutory power to spend and contract so long as that conduct could be authorised by a hypothetical law, this would amount to a very broad power to spend and contract. Even relying on the corporations power alone, through appropriately framed contracts with or grants to corporations, there may have been little the executive could not achieve. The breadth of that potential power may have played on the Court’s mind in Williams, warranting the narrowing of executive power. If Williams is the consequence of broad Commonwealth legislative power, then it would be the tail wagging the dog for the Williams approach to then be applied to limit that broad legislative power.

On the other hand, while one might argue that the Williams methodology extends no further than s 61, there are some signs that it could mark a more general retreat from the high point of Commonwealth power reflected in the Work Choices Case. The most significant feature of Williams was the Court’s willingness to rely on considerations of constitutional structure and coherence in determining the ambit of Commonwealth power. This language in particular has the attraction of fitting rhetorically with the High Court’s recent general emphasis on ‘coherence’. References to ‘coherence’, rather than ‘structure’, may allow the Court to avoid the difficult debates around when a structural implication, as distinct from a textual implication, may be made. The language of coherence also has the attraction of sounding unequivocally like a good thing: of course constitutional law and the Constitution should be coherent, whenever possible. Considerations of structure and coherence cannot be cabined to s 61. They necessarily apply to the construction of each provision of the Constitution. It is conceivable that this spirit of constitutional coherence could have a life outside the context of executive power. Certainly, it is unclear why it should not. In that case, Williams may mark the beginning of a significant retreat from the high water mark of Commonwealth power manifested in the Work Choices Case.

V CONCLUSION

In Williams, the judges of the High Court referred to the Work Choices Case on four occasions. Three of those references were in the context of determining whether the program was supportable by the corporations power. On the fourth occasion, Hayne J said that the Commonwealth’s asserted view of executive power, when used in conjunction with the express incidental power, ‘would work a very great expansion in

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what hitherto has been understood to be the ambit of Commonwealth legislative power.141 Hayne J referred to the Work Choices Case to say that that observation could not conclude debate about whether the Commonwealth had the asserted power.142 He then continued: 'but it is an observation that suggests the need to pause before concluding that the premise which underpins it is sound'.143 This passage is indicative of the approach of the majority in Williams. Their methodology does not start from the position that there are absolute limits on Commonwealth power; but it is a methodology which supports strict scrutiny before Commonwealth power will be given a broad construction. This approach, if applied beyond s 61, would mean an end to the steady expansion of federal power, or even that the tide of Commonwealth power has begun to recede.

141 Williams [2012] HCA 23, [241]-[242].
142 Ibid [242].
143 Ibid.