

Act of Grace Payments and the Constitution

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Abstract

This article focuses on a hitherto underexplored but increasingly important area of public expenditure: act of grace payments. Act of grace payments are voluntary, highly discretionary gifts of money made by the executive in the absence of any legal duty to do so. The expenditure on such payments in Australia has been significant, and a lack of transparency creates serious risks to integrity. Further, the cases of *Pape v Federal Commissioner of Taxation*, *Williams v Commonwealth* and *Williams v Commonwealth [No 2]* have transformed the constitutional framework for public expenditure. Accordingly, this article conducts a fine-grained analysis of the constitutional legality of act of grace payments at the Commonwealth, state and territory levels. The authors argue that there are significant constitutional issues with act of grace payments at the Commonwealth level, and that many state-based act of grace payments are likely to be illegal. To address these issues, and to reduce the risk that payments will be made illegally, the authors recommend several legislative and soft law changes.

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I Introduction

In the Australian federation, judicial review of both administrative and legislative action is axiomatic and fundamental to the constitutional assumption of the rule of law. But it is also well recognised that there are areas where judicial review cannot, or will not, go. One of the areas where in the 20th century the High Court went infrequently concerned the constitutionality of executive spending. In the Commonwealth sphere it was widely understood — as a result of the High Court’s equivocal and obscure 1975 decision in *Victoria v Commonwealth* (‘AAP Case’)¹ — that an appropriation Act enacted pursuant to ss 81 and 83 of the *Constitution* was effectively unchallengeable *and* that it conjunctively authorised spending by the Commonwealth executive of the appropriated moneys.² In the absence of any clear authority to the contrary it was assumed that the executive’s capacity to spend was either (1) constitutionally unlimited, like that of a natural person; or (2) slightly more narrowly confined only by the *scope* of the Commonwealth express legislative powers, such that the executive could spend money within the Commonwealth’s areas of legislative competence without specific legislative authority other than a facultative appropriation provision.³ That generous assumption was no doubt to the executive’s liking, but in the first two decades of the 21st century, things changed. Specifically:

- In 2009 in *Pape v Federal Commissioner of Taxation* (‘*Pape*’) the High Court rejected the Commonwealth’s submissions that s 81 gave the Commonwealth a power to spend and that an appropriation Act was sufficient legal authority for Commonwealth executive expenditure.⁴
- In 2012 in *Williams v Commonwealth* (‘*Williams No 1*’) the High Court rejected both (1) the Commonwealth’s submission that the Commonwealth executive has the capacity in common with other legal persons to spend, unrestricted by the contours of federal legislative power;⁵ and (2) the narrower assumption common to all the parties that the Commonwealth executive could spend appropriated moneys without specific statutory authority, provided that the Commonwealth Parliament *could* so legislate.⁶

¹ *Victoria v Commonwealth* (1975) 134 CLR 338 (‘AAP Case’).

² See Cheryl Saunders, ‘The Sources and Scope of Commonwealth Power to Spend’ (2009) 20(4) *Public Law Review* 256; Cheryl Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11(3) *Melbourne University Law Review* 369.

³ Shipra Chordia, Andrew Lynch and George Williams, ‘*Williams v Commonwealth*: Commonwealth Executive Power and Australian Federalism’ (2013) 37(1) *Melbourne University Law Review* 189, 190–1.

⁴ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 [111] (French CJ), 73–5 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon J) (‘*Pape*’); Peta Stephenson, *Nationhood, Executive Power and the Australian Constitution* (Hart Publishing, 2022) 54.

⁵ *Williams v Commonwealth* (2012) 248 CLR 156, 180 [4], 192–3 [35]–[37], 216 [83] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 258–9 [215]–[217], 271 [252]–[253] (Hayne J), 353 [524] (Crennan J), 368–74 [576]–[595] (Kiefel J) (‘*Williams No 1*’).

⁶ *Ibid* 179–80 [4], 187 [27], 192–3 [36]–[37], 216–17 [83] (French CJ), 232–3 [134]–[137] (Gummow and Bell JJ), 356–8 [539]–[544] (Crennan J). See also Stephenson (n 4) 28–31.

- In 2014 in *Williams v Commonwealth [No 2]* (*Williams No 2*) the Court rejected the Commonwealth's submission that the express incidental head of power, s 51(xxxix) of the *Constitution*, generally empowered the Parliament to legislate to authorise executive spending of appropriated moneys.⁷

These three High Court decisions have made assessing the lawfulness of spending by the Commonwealth executive more complex. Effectively they mean that, apart from limited exceptions, the Commonwealth executive can only spend money with specific, enacted statutory authority (in addition to a 'mere appropriation'), and that this authority must be characterisable as a law made with respect to a substantive head of Commonwealth legislative power. Furthermore, they have added to the uncertainty about the hitherto largely unexamined spending powers of the state executives.

Act of grace payments are voluntary, highly discretionary 'gifts of money'⁸ made by the executive 'out of grace' in the absence of any legal duty to do so. No payment sets a precedent for future decisions, and each 'responds to a particular case, not the generic claim'.⁹ They are akin to *ex gratia* payments, but the former are a 'last resort' concession to a specific person who has been unfairly disadvantaged by some government action,¹⁰ whereas the latter are governed by 'guidelines and rules developed for a group of individuals suffering a particular class of losses'.¹¹

Although act of grace payments 'should promote equal treatment of all members of the community and should not be used to advantage some people over others',¹² they — and the opacity which frequently attends decisions about who gets paid and how much — pose obvious risks for government integrity. The expenditure on such payments in Australia has been significant,¹³ and the lack of transparency that frequently attends such payments is a serious, aggravating problem. Moreover, payments are not necessarily confined to the impecunious and to obvious objects of sympathy, such as the welfare recipient who, relying on erroneous government advice, suffers a financial detriment which they can ill

⁷ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 469–70 [85]–[87] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (*Williams No 2*).

⁸ Commonwealth Ombudsman, *To Compensate or Not To Compensate? Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (Report, September 1999) 74 (*To Compensate*).

⁹ Stephen Winter, 'Australia's Ex Gratia Redress' (2009) 13(1) *Australian Indigenous Law Review* 49.

¹⁰ See *Butterworths Australian Legal Dictionary* (Butterworths, 1997) 'Act of grace payment'.

¹¹ *To Compensate* (n 8) 34. See also at 45, 76, 83, 88; Commonwealth Ombudsman, *Executive Schemes* (Report No 12, August 2009) 8. This distinction is not universally observed: see, eg, Treasury (NSW), *Ex Gratia Payments* (Circular, NSW TC 11/02, 1 February 2011) (*NSW Treasury Circular*).

¹² *To Compensate* (n 8) 37.

¹³ For example, in 2020–21 the Commonwealth government paid \$16 million in act of grace payments under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*), and \$45 million in 2019–20: Department of Finance, *Decisions Made on Waivers of Commonwealth Debts under Section 63 and Act of Grace Payments under Section 65 of the Public Governance, Accountability and Performance Act 2013 (PGPA Act)* (Report, 2021).

afford.¹⁴ Big companies may also apply for, and receive, large amounts of money. For example, in the ACT in 2019–20, act of grace payments worth \$1.033 million were made to Casino Canberra, as well as small- and medium-club gaming machine licensees as part of the economic survival package from the COVID-19 health emergency.¹⁵

While it is now well settled that act of grace decision-making is judicially reviewable, a *lis inter partes*¹⁶ is required before judicial power can be exercised, and it is rare for the legality of payments of government money to be challenged. Moreover, any *constitutional* challenge would almost inevitably work against the interests of a disappointed applicant for a payment, and no other persons (with the exception of the states) are likely to have standing to bring a judicial review application.¹⁷ Litigants such as Bryan Pape and Robert Williams who dispute the constitutionality of government payments that are ostensibly for their direct or indirect benefit are rare exceptions, and both may have been denied standing to litigate in any event, had their standing been vigorously contested.¹⁸ Unsurprisingly, the Commonwealth has blithely assumed it has the power to make act of grace payments since the first decade after Federation.¹⁹

It is taken as given that Australian governments have a “settled ethical” commitment²⁰ to spending public money lawfully, and Australian public service codes of conduct echo the High Court’s expectation that ‘discretionary powers must be exercised in accordance with any applicable law, including the *Constitution* itself’.²¹ Although the agencies comprising the so-called integrity arm of government — such as that of the ombudsman and the auditor-general — may be much better placed than the judiciary and legislature in combatting any unlawful maladministration of act of grace payment schemes, as well as promoting their good administration,²² the work of those agencies must be predicated on a sound understanding of the legal parameters within which act of grace decisions are made. The scarcity of ‘black letter’ legal scrutiny of the various act of grace

¹⁴ See, eg, *Pearce v Minister for Finance* (2020) 352 FLR 34.

¹⁵ ACT Gambling and Racing Commission, *Annual Report 2019–20* (Report, May 2019) 52–3.

¹⁶ Legal suit between parties.

¹⁷ Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power through the High Court’s New Spectacles’ (2013) 35(2) *Sydney Law Review* 253, 280.

¹⁸ *Pape* (n 4) 34–6 [45]–[53] (French CJ), 68–9 [150]–[159] (Gummow, Crennan, and Bell JJ), 98–9 [399]–[402] (Hayne and Kiefel JJ), 137–8 [271]–[274] (Heydon J); *Williams No 1* (n 5) 223–4 [111]–[112] (Gummow and Bell JJ), 288–93 [315]–[331] (Heydon J).

¹⁹ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 29 September 1910, 3947; Commonwealth, *Parliamentary Debates*, House of Representatives, 7 October 1909, 4275; Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1909, 3472; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 June 1908, 12197; Commonwealth, *Parliamentary Debates*, Senate, 2 April 1908, 10060; Commonwealth, *Parliamentary Debates*, Senate, 14 December 1907, 7496; Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1901, 1778.

²⁰ Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) 231, quoting Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, 3.

²¹ *Wotton v Queensland* (2012) 246 CLR 1, 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See *Public Service Act 1999* (Cth) s 13(4).

²² W Bateman (n 20) 267–7.

payment schemes in the Australian federation therefore seems to us to be an unfortunate deficiency, albeit a constitutionally and practically understandable one. This article is our modest contribution to remedying it.

Because constitutionality predicates *all* questions of legality — whether those questions arise during original decision-making, merits review, judicial review or the work of integrity agencies — the article contains a fine-grained analysis of the *constitutional legality* of these payments at the Commonwealth, state and territory levels. Specifically, Part II considers the constitutional validity of the two general Commonwealth act of grace payment schemes, the scheme under the *Public Governance, Performance and Accountability Act 2013* (Cth) (*‘PGPA Act’*) (*‘PGPA Scheme’*) and the non-statutory Compensation for Detriment Caused by Defective Administration scheme (*‘CDDA Scheme’*); and Part III considers the constitutional validity of the general schemes operating in the state and territory jurisdictions. Finally, it should be noted that, to confine this article’s length within publishable limits, we focus exclusively on the *general* act of grace payment schemes operating in the various Australian jurisdictions (in contrast to the range of subject-specific act of grace payment schemes),²³ although many of the arguments presented could be applied to those specialist schemes.

As our detailed analysis below shows, the Commonwealth’s general statutory act of grace provision, s 65 of the *PGPA Act*, is likely to be limited by the scope of Commonwealth executive power under s 61 of the *Constitution*. Thus, any payments under s 65 will need to arise in the course of (in terms of s 61) the exercise of ‘the executive power of the Commonwealth’ which ‘extends to the execution and maintenance of the *Constitution* [or] the laws of the Commonwealth’. Of greater concern, however, is our conclusion that the Commonwealth’s CDDA Scheme and several state-based act of grace payment schemes are on constitutionally shaky ground, meaning that many act of grace payments may be illegal. To ensure constitutionality, we argue that the Commonwealth and several states need to amend or enact legislation to put act of grace payments on firmer legal footing. Further, all Australian jurisdictions, including the ACT and the NT, should provide soft law instruments on act of grace decision-making which guide decision-makers on the constitutional constraints that must limit and inform their decisions. As it felicitously turns out, these changes are relatively small and achievable, although explaining why they need to be made requires the detailed and comprehensive analysis which this article undertakes.

II Two Commonwealth Act of Grace Payment Schemes

Of the two Commonwealth act of grace payment schemes, the PGPA Scheme is the older, broader and more centralised. Its statutory ancestry can be traced back to s 25 of the *Audit Amendment Act 1979* (Cth) which inserted a new s 34A,

²³ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (Report, December 2010) (*‘Review of Government Compensation Payments’*).

entitled ‘Act of grace payments’, into the (now repealed) *Audit Act 1901* (Cth).²⁴ Section 34A — like its successors, s 33 of the *Financial Management and Accountability Act 1997* (Cth) (‘*FMA Act*’) and s 65 of the *PGPA Act* — reposed act of grace decision-making power centrally in the Ministry of Finance (specifically in the Finance Minister, or persons authorised by that Minister).²⁵ By contrast, the CDDA Scheme was established in 1995 as a more decentralised adjunct to the existing statutory scheme to deal specifically with a narrower range of circumstances, namely ‘defective administration’.²⁶ It authorised Commonwealth agencies to provide a financial remedy for the effects of their own defective administration as a ‘last resort’, hopefully inducing agencies to fix any systemic problems to avoid further payments.²⁷

Neither the PGPA Scheme nor the CDDA Scheme is ‘designed to assist claimants who have a viable claim for legal compensation against the Commonwealth Government’.²⁸

A *PGPA Scheme*

As noted, the PGPA Scheme is administered by the Finance Minister. Section 65 of the *PGPA Act* provides that the ‘Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances’, even if the payments ‘would not otherwise be authorised by law or required to meet a legal liability’.²⁹ This section has been described as envisaging ‘an interrelationship and interaction between the circumstances, their specialness and the appropriateness of authorising a payment. It contemplates a melange of those considerations, rather than some neat compartmentalisation or division between them’.³⁰ Although the terms ‘appropriate’ and ‘special circumstances’ are not defined in the *PGPA Act*,

[a]n object of the Act is, under s 5, to require the Commonwealth and Commonwealth entities to meet high standards of governance, performance and accountability, so what is generally (but not exclusively) contemplated under s 65(1) is authorisation of payments in appropriate cases where those standards are not met.³¹

The Minister’s powers under s 65 may be delegated under s 107(1) of the *PGPA Act* by written instrument to the Secretary of the Department of Finance, but the

²⁴ Repealed by *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1.

²⁵ *To Compensate* (n 8) 102–3.

²⁶ *Ibid* 86.

²⁷ *Ibid* 69, 73, 81, 83, 104.

²⁸ Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 295.

²⁹ *PGPA Act* (n 13) s 65.

³⁰ *Dobie v Minister for Finance* [2022] FCA 528, [29] (Rangiah J) (‘*Dobie*’). See also *Toomer v Slipper* [2001] FCA 981, [28]–[32] (‘*Toomer*’); *Dennis v Minister for Finance* [2017] FCCA 45, [46], [59], [64]; *Tomson v Minister for Finance and Deregulation* (2013) 136 ALD 610, 620 [35].

³¹ *Dobie* (n 30) [27] (Rangiah J).

Secretary can only authorise payments capped at \$100,000 per payment.³² Additionally, r 24 of the *Public Governance, Performance and Accountability Rules 2014* (Cth) provides that, if the Minister ‘proposes to authorise’ an act of grace payment exceeding \$500,000, the Minister must establish an advisory committee to report on the appropriateness of the authorisation and must consider the report before making the authorisation.

There is no provision for merits review, but s 65 decision-making is amenable to judicial review using the same avenues as the CDDA Scheme. In addition, s 65 decisions can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*‘ADJR Act’*), as they are made ‘under an enactment’.³³

B CDDA Scheme

The CDDA Scheme hinges on the concept of defective administration and is thus more prescriptive than the PGPA Scheme.³⁴ It is also more limited in its scope because it only encompasses claims against non-corporate Commonwealth entities, not private contractors nor Commonwealth corporations.³⁵

The CDDA Scheme purports to be established pursuant to the authority of the Commonwealth executive,³⁶ and seeks to provide compensation to members of the public where there is no legal remedy but there is a moral justification to provide ‘purely restorative’³⁷ compensation for ‘detriment’. Detriment comprises ‘a quantifiable loss as a direct consequence of defective administration’,³⁸ and can include financial compensation for non-financial damage.³⁹ However, the Scheme is not available to offset the payment of any recoverable debt owed to the Commonwealth, even if the debt arose from defective administration.

The CDDA Scheme ‘is permissive, in that it permits but does not oblige the decision-maker to approve a payment in any particular case’⁴⁰ and is intended to ‘operate in a relatively flexible and responsive manner, lacking the rigid formality and procedures utilised by [other] legal mechanisms’.⁴¹ It is primarily regulated in accordance with *RMG 409*, a guide written by the Department of Finance which ‘aims to assist staff of non-corporate Commonwealth entities in

³² *Ashby v Commonwealth* (2021) 386 ALR 23, 32–5 [40]–[53]; *Ashby v Commonwealth* (2022) 291 FCR 585, 589–90 [15]–[17], 592–3 [31]–[39].

³³ Boughey, Rock and Weeks (n 28) 309.

³⁴ *Ibid* 302–7.

³⁵ Department of Finance, *Scheme for Compensation for Detriment Caused by Defective Administration* (Resource Management Guide 409) [13] (*‘RMG 409’*).

³⁶ *Ibid* 66.

³⁷ Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration: Administration of Decision-Making under the Scheme for Compensation for Detriment Caused by Defective Administration* (Report, August 2009) 31 (*‘Putting Things Right’*).

³⁸ *To Compensate* (n 8) 36.

³⁹ *Ibid* 67–8.

⁴⁰ *Ibid* 67.

⁴¹ Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2022) 265.

managing and determining CDDA Scheme claims'.⁴² *RMG 409* allows individual portfolio Ministers and their staff (as agents)⁴³ to make act of grace payment decisions at their discretion for 'defective administration', with the proviso that the Scheme 'is not to be used in relation to ... claims in which it is reasonable to conclude that the Commonwealth would be found liable, if the matter were litigated'.⁴⁴ *RMG 409* provides that CDDA payments may be made where a claimant suffers detriment caused by 'a specific and unreasonable lapse in complying with administrative procedures', 'an unreasonable failure to institute appropriate administrative procedures', the giving of ambiguous advice, or an unreasonable failure to give proper advice.⁴⁵ There is no obligation upon a decision-maker to approve or refuse compensation in any given case; compensation is at the discretion of the department or agency and 'the scheme is not limited by the quantum of the loss'.⁴⁶

CDDA Scheme decision-making, being non-statutory, is not subject to merits review; nor is it made 'under an enactment'⁴⁷ in terms of the *ADJR Act* and hence subject to judicial review under that Act.⁴⁸ However, CDDA decisions are reviewable in the High Court under s 75(iii) or (v) of the *Constitution*, or the Federal Court under s 39B(1) of the *Judiciary Act 1903* (Cth), on the basis that the decision-maker falls within the constitutional expression 'officer of the Commonwealth'.⁴⁹

C *Constitutionality*

In December 2010, more than a year after the High Court published its reasons in *Pape*, the Senate Legal and Constitutional Affairs References Committee tabled its report on the Review of Government Compensation Payments.⁵⁰ The review examined both the Commonwealth's general act of grace payment scheme under the now superseded *FMA Act* (which, as mentioned, has been substantially re-enacted as the PGPA Scheme) and the CDDA Scheme. For our purposes, what is noteworthy about the review is the persistence of the pre-*Pape* orthodoxy that the

⁴² *RMG 409* (n 35).

⁴³ *Ibid* [2], [7]–[9].

⁴⁴ *Ibid* [23].

⁴⁵ *Ibid* [17].

⁴⁶ *Putting Things Right* (n 37) 2.

⁴⁷ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 ('*ADJR Act*').

⁴⁸ *Smith v Oakenfull* (2004) 134 FCR 413. This case was, however, decided before the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) ('*FFLA Act No 3*') which, it has been claimed, places the CDDA Scheme on a statutory footing: see below in Part II(C)(2). We dispute that claim and, if we are right, the reasoning in *Smith v Oakenfull* is accordingly unaffected by the enactment of the *FFLA Act No 3*. However, even if we are wrong on this point, the *ADJR Act* *ibid* still does not apply to CDDA Scheme decisions. This is because: (1) the substantive power 'to make, vary or administer the arrangement or grant' referred to in *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) is found in s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) ('*FF(SP) Act*'); (2) s 32B decisions are decisions under pt 2 of that Act; and (3) *FF(SP) Act* pt 2 decisions are decisions to which the *ADJR Act* does not apply: see *ADJR Act* *ibid* sch 1(he).

⁴⁹ *Putting Things Right* (n 37) 19.

⁵⁰ *Review of Government Compensation Payments* (n 23).

Commonwealth executive's capacity to spend was effectively unlimited by the *Constitution*: the report simply asserts that '[t]he power to make payments under the CDDA Scheme arises from the Commonwealth's executive power under s 61 of the *Constitution*',⁵¹ and tacitly assumes that the relevant provisions of the *FMA Act* are constitutionally valid. Perhaps such blithe constitutional optimism can be explained by the limited scope of the Senate's reference to the committee, confined as it was to '[t]he administration and effectiveness of current mechanisms used by federal and state and territory governments to provide discretionary payments in special circumstances'.⁵² However, as we will see below, establishing the constitutional validity of both the PGPA and CDDA Schemes is much more complex than the report suggests.

1 PGPA Scheme

(a) *Is Section 65 of the PGPA Act Characterisable as a Law with Respect to a Commonwealth Head of Legislative Power?*

At first glance it might seem that the PGPA Scheme is constitutionally secure because it is statutory and hence avoids the strictures of *Williams No 1* (that is, the general principle that Commonwealth executive spending must be authorised by specific statute). However, that begs the *Williams No 2* question: is s 65 of the *PGPA Act* characterisable as a law with respect to a Commonwealth head of legislative power?

Because s 65 is cast in such general terms, the section can only be characterised as a law with respect to:

- s 97 of the *Constitution* in combination with s 52(xxxvi);
- s 52(ii) of the *Constitution* which gives the Commonwealth Parliament exclusive legislative power 'to make laws ... with respect to ... matters relating to any department of the public service'; or
- s 52(xxxix) of the *Constitution* which gives the Commonwealth Parliament power to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth ... or any department or officer of the Commonwealth'.

The text of s 65 is not even tenuously or remotely linked to the other specific heads of Commonwealth legislative power.

(i) *Section 97 of the Constitution in Combination with Section 51(xxxvi)*

Under the heading 'Audit', s 97 of the *Constitution* provides:

Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to ... the expenditure of money on account of the Government of the Colony ... shall apply to ...

⁵¹ Ibid 47 [3.33].

⁵² Ibid 1 [1.1].

the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.⁵³

Conjunctively, s 51(xxxvi) of the *Constitution* provides that the Commonwealth Parliament ‘subject to this *Constitution*’ has power to make laws with respect to ‘[m]atters in respect of which this *Constitution* makes provision until the Parliament otherwise provides’. Given that the Australian colonies engaged in the practice of making non-statutory act of grace payments,⁵⁴ could it be argued that s 65 of the *PGPA Act* can be characterised as a law with respect to s 51(xxxvi) — in other words, that s 65 is a law made by the Commonwealth Parliament to replace the laws which it inherited, by means of s 97 of the *Constitution*, from the colonies in relation to act of grace payments?

Putting aside the powerful objection that this argument necessitates a radical departure from the hitherto settled, vestigial understanding of s 97 — the section is understood to encompass solely ‘the review and audit of federal accounts’⁵⁵ and its only purpose was to ensure that ‘until the enactment of Commonwealth legislation’ (which occurred in 1901) ‘State laws were to apply to the auditing of Commonwealth moneys within each State’⁵⁶ — we maintain that the argument is also fundamentally inconsistent with the High Court’s reasoning in *Pape* and the *Williams* cases. Whatever non-statutory executive capacities the non-federal colonies enjoyed to spend public moneys subject to a relevant appropriation by a colonial Parliament (which capacities may be analogised to the unlimited power of the Crown in right of the United Kingdom to spend in a unitary jurisdiction), the basic premise of *Pape* and the *Williams* cases is that any such capacity was denied to the Commonwealth executive by the entrenched and federal *Constitution*. Thus, the *Constitution* forecloses the possibility that the Commonwealth executive inherited from the colonies a capacity to make act of grace payments without statutory support, such that the Commonwealth Parliament could subsequently ‘otherwise provide’ for such support in the form of s 65 of the *PGPA Act* using s 51(xxxvi). That the s 51(xxxvi) head of power is ‘subject to this *Constitution*’ only serves to reinforce this point.

(ii) Section 52(ii) of the Constitution

Section 52(ii) of the *Constitution* gives the Commonwealth Parliament exclusive legislative power ‘to make laws ... with respect to ... matters relating to any department of the public service the control of which is by this *Constitution* transferred to the Executive Government of the Commonwealth’. This head of power needs to be read in conjunction with s 69 of the *Constitution* which provides

⁵³ *Constitution* s 97 (emphasis added).

⁵⁴ See below footnote 130 and accompanying text.

⁵⁵ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 872.

⁵⁶ John Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis, 10th ed, 2021) 467.

for the transfer of the state departments of ‘[p]osts, telegraphs, and telephones’, ‘[n]aval and military defence’, ‘[l]ighthouses, lightships, beacons, and buoys’ and ‘[q]uarantine’ to the Commonwealth.⁵⁷

Section 52(ii) is at best only a partial solution to the characterisation problem because s 65 of the *PGPA Act* can only be characterised as a law with respect to s 52(ii) of the *Constitution* if it is capable of being read down to authorise act of grace payments relating only to the Commonwealth departments particularised in s 69 of the *Constitution*. This seems highly unlikely. Reading down ‘is part of the process of ascertaining the essential meaning of the words of the provision’⁵⁸ and there is nothing in the text of s 65 which would provide a toehold for such a narrow interpretation. Indeed, statutory context points in the opposite direction, towards a broad interpretation of the section. Specifically:

- s 65 is in pt 2-4 of the *PGPA Act* which concerns ‘the use and management of public resources by the Commonwealth and Commonwealth entities’;⁵⁹
- the objects of the *PGPA Act* include ‘to require the Commonwealth and Commonwealth entities to use and manage public resources properly’⁶⁰ and ‘to establish a coherent system of governance and accountability across Commonwealth entities’;⁶¹
- the expression ‘public resources’ is defined in s 8 of the *PGPA Act* as ‘relevant money, relevant property, or appropriations’, and ‘relevant money’ is defined in the same section as ‘(a) money standing to the credit of any bank account of the Commonwealth or a corporate Commonwealth entity; or (b) money that is held by the Commonwealth or a corporate Commonwealth entity’;⁶² and
- ‘relevant property’ is defined in s 8 of the *PGPA Act* as ‘(a) property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity; or (b) any other thing prescribed by the rules’.⁶³

Given the *PGPA Act*’s text and statutory context, for what ‘reason based upon the law itself’⁶⁴ or ‘the terms of the law’⁶⁵ could the capacious words ‘the Commonwealth or a corporate Commonwealth entity’ permit an interpretation which encompasses only the Commonwealth departments referred to in s 69 of the *Constitution*: a fortiori when such an interpretation would establish an incoherent

⁵⁷ *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 435–6 (Dawson, Toohey and Gaudron JJ), 424 (Brennan CJ), 449 (McHugh J), 462 (Gummow J); Quick and Garran (n 55) 660–1, 715; Trone (n 56) 423, 517–18.

⁵⁸ *Clubb v Edwards* (2019) 267 CLR 171, 313 [416] (Edelman J) (*‘Clubb’*).

⁵⁹ *PGPA Act* (n 13) s 50 (emphasis added).

⁶⁰ *Ibid* s 5(c)(iii) (emphasis added).

⁶¹ *Ibid* s 5(a) (emphasis added).

⁶² *Ibid* s 8 (emphasis added).

⁶³ *Ibid* (emphasis added).

⁶⁴ *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ) (*‘Pidoto’*).

⁶⁵ *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*‘Industrial Relations Act Case’*).

system of governance and accountability across Commonwealth entities in contradiction of a clear legislative intention that ‘the law was intended to operate fully and completely according to its terms’?⁶⁶ And if reading down is not possible, there is no ‘separately expressed’⁶⁷ ‘substantially independent part’⁶⁸ of s 65 — or of the ‘one collective expression’⁶⁹ ‘the Commonwealth or a corporate Commonwealth entity’ — which can be ‘blue pencilled’ and severed.

(iii) *Section 51(xxxix) of the Constitution*

The characterisation of s 65 of the *PGPA Act* as a law with respect to s 51(xxxix) is complicated by the High Court’s decision in *Williams No 2*, which forecloses the argument that s 65 is a law with respect to s 51(xxxix) on the basis that the placitum empowers the Parliament to enact a law authorising expenditure by the Commonwealth executive of any moneys lawfully appropriated in accordance with ss 81 and 83 of the *Constitution*, no matter what the purpose of the expenditure may be. The Court in *Williams No 2* maintained that such an expansive construction of s 51(xxxix) would erroneously treat spending by the Commonwealth executive as *incidental to* an appropriation Act and bring the expenditure of *any* moneys appropriated in accordance with ss 81 and 83 within the power of the Commonwealth. It would thus, the Court reasoned, be fundamentally inconsistent with the Court’s earlier decision in *Pape* which characterised an appropriation Act as a ‘mere earmarking’ of revenue, and which recognised justiciable limits on the Commonwealth executive’s power to spend appropriated moneys.⁷⁰

Following *Pape*, one must turn to the powers vested in the Commonwealth executive by the *Constitution*, specifically s 61 which describes the executive power of the Commonwealth. Two possibilities will be considered. The first is the so called ‘nationhood power’; the second relies on the attribution of a non-literal, legal meaning to s 65 of the *PGPA Act*.

The canonical expression of the nationhood power is that of Mason J in the *AAP Case*:

[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.⁷¹

Accordingly, it could be argued that (1) a Commonwealth executive power to make act of grace payments can ‘be deduced from the existence and character of

⁶⁶ *Pidoto* (n 64) 108 (Latham CJ).

⁶⁷ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 577 (Brennan and Toohey JJ).

⁶⁸ *Clubb* (n 58) 317 [422] (Edelman J).

⁶⁹ *Newcastle & Hunter River Steamship Co Ltd v A-G (Cth)* (1921) 29 CLR 357, 369 (Knox CJ, Higgins, Gavan Duffy, Powers, Richard Starke JJ).

⁷⁰ *Williams No 2* (n 7) 462–3 [52]–[55], 469–70 [85]–[87] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁷¹ *AAP Case* (n 1) 397.

the Commonwealth as a national government'; and (2) s 51(xxxix) allows that power to be given 'legislative expression'⁷² in the form of s 65 of the *PGPA Act*. To put that argument at its highest, 'a polity must possess all the powers that it needs to function as a polity'⁷³ and the *state* governments cannot be expected 'to engage effectively in the ... activity in question'⁷⁴ that is, to make act of grace payments in relation to *Commonwealth* activities. Hence, the making of act of grace payments by the Commonwealth 'involves no real competition with State executive or legislative competence'⁷⁵ and — as an adjunct to the Commonwealth's primary activities — is itself an 'exclusively'⁷⁶ Commonwealth activity 'which cannot otherwise be carried on for the benefit of the nation'⁷⁷ under s 61 of the *Constitution* 'in the execution and maintenance of this *Constitution* and of the laws of the Commonwealth'. Additionally, such payments are non-coercive and voluntarily received, and hence do not interfere with the legal rights and duties of individuals.⁷⁸

However, the nationhood power argument seems to us to be unconvincing. The nationhood power does not encompass 'all those matters that are *reasonably capable* of being *seen* as of national benefit or national concern'⁷⁹ and the argument misses the *nationhood* power's essential and fundamental *national* character.⁸⁰ The making of act of grace payments is not an activity 'peculiarly adapted to the government of a nation',⁸¹ nor 'appropriate to a *national* government',⁸² nor a power 'possessed by the national government alone'.⁸³ Rather it is an ad hoc, sporadic but enduring activity of *all* governments within the common law world, whether national or *sub-national*, including the several (sub-national) Australian states. Moreover, as Peta Stephenson has observed, 'since *Pape* the nationhood power has been defied as a power to respond to national emergencies',⁸⁴ and act of grace payments (in contrast to the payments

⁷² Stephenson (n 4) 65.

⁷³ *Williams No 2* (n 7) 467–8 [78] (French CJ, Hayne, Kiefel, Bell and Keane JJ), quoting from the defendants' submissions.

⁷⁴ *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J) ('*Davis*').

⁷⁵ *Ibid* 94 (Mason CJ, Deane and Gaudron JJ). See also *Pape* (n 4) 60 [127] (French CJ), 90–1 [239] (Gummow, Crennan and Bell JJ).

⁷⁶ *Williams No 1* (n 5) 348 [503] (Crennan J).

⁷⁷ *Pape* (n 4) 87 [228], approving the formulation in *Davis* (n 74) 111 (Brennan J) of the principle stated in *AAP Case* (n 1) 397 (Mason J).

⁷⁸ *Pape* (n 4) 24 [10] (French CJ), 92 [244]–[245] (Gummow, Crennan and Bell JJ).

⁷⁹ *Williams No 2* (n 7) 466–7 [72] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis in original).

⁸⁰ Peta Stephenson, 'Justice Mason in the *Australian Assistance Plan Case* (1975): Nationhood, Federalism and Commonwealth Executive Power' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 169, 180–3. See also *Williams No 1* (n 5) 348 [503] (Crennan J).

⁸¹ *AAP Case* (n 1) 397 (Mason J) (emphasis added). See also *Pape* (n 4) 63 [133] (French CJ); *Williams No 2* (n 7) 466 [71] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸² *AAP Case* (n 1) 397 (Mason J) (emphasis added).

⁸³ Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2017) 214.

⁸⁴ Stephenson (n 4) 57 (emphasis added).

unsuccessfully impugned in *Pape*) are clearly not ‘short-term fiscal measures taken to respond to a national financial and economic crisis’.⁸⁵

However, the problems with the nationhood power can be avoided: it is possible to mount a simple and plausible argument for the constitutional validity of s 65 of the *PGPA Act* anchored in orthodox principles of statutory interpretation and constitutional text. If s 65 is read *literally*, it does not manifest an obvious connection with s 61 of the *Constitution*. But we would argue that is not its *legal* meaning.⁸⁶ It is a basic constitutional principle of statutory interpretation (recognised in s 15A of the *Acts Interpretation Act 1901* (Cth)) that a statutory provision should be interpreted in conformity, rather than disconformity, with the *Constitution*, provided such a validating constructional choice is reasonably open.⁸⁷ Accordingly, the following can be implied into the *legal* meaning of s 65(1) without violating its text, to secure the necessary validating connection between it and s 61:

The Finance Minister may on behalf of the Commonwealth authorise in writing one or more payments to be made to a person if the Finance Minister thinks it is appropriate to do so because of special circumstances *which have arisen in the exercise of executive power under s 61 of the Constitution*.

(b) *Is RMG 401 Consistent with the Constitutionally Determined Meaning of Section 65 of the PGPA Act?*

It is unfortunate that the constitutional constraints on the meaning of s 65 of the *PGPA Act* are not expressly referred to in *RMG 401*.⁸⁸ In its current form, the guide may mislead its presumably largely non-legally-qualified audience into approving a payment not authorised by s 65. Paragraph 13 of *RMG 401* states:

Payments under the act of grace mechanism must be made from money appropriated by the Parliament. Therefore, as a matter of practice, the act of grace mechanism is generally not available:

- when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or NCE [non-corporate Commonwealth entity] of the Commonwealth and the matter is not related to the impact of any Commonwealth legislation ...

However, the words ‘as a matter of practice ... is generally not available’ obscure the underlying hard law constitutional prohibition on payments in the circumstances described in the accompanying dot point imposed by (the constitutionally determined, read-down meaning of) s 65. The risk that *RMG 401*’s audience will breach the constitutional limits on their powers is exacerbated by the advice in paragraph 9 of *RMG 401* that “‘special circumstances” and “appropriate”

⁸⁵ Ibid 54.

⁸⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁸⁷ *Williams No 2* (n 7) 457 [36] (French CJ, Hayne, Keifel, Bell and Keane JJ); *Industrial Relations Act Case* (n 65) 501–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁸⁸ Department of Finance, *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013* (Resource Management Guide 401) (*‘RMG 401’*).

are not defined in the *PGPA Act* and are for the decision-maker to assess'. That advice fails to draw a distinction between the *definition* of terms within a statute, and the *application* of that definition to a set of facts. Paragraph 9 of *RMG 401* may thus unfortunately imply, in the minds of its non-legally-qualified audience, that the meaning of 'special circumstances' and 'appropriate' can be determined at their discretion. But a discretion allowed by statute must be exercised 'according to law, and not humour',⁸⁹ and the High Court — drawing on United States Supreme Court Chief Justice Marshall's foundational constitutional declaration in 1803 in *Marbury v Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is'⁹⁰ — has committed the Australian legal system 'to a strict version of judicial supremacy'.⁹¹ Accordingly, it is presumed that a statutory expression must have a meaning and its *correct* meaning can only be authoritatively determined by the courts applying the relevant rules of statutory interpretation, including of reading down, to the extent reasonable constructional choices are open, to avoid constitutional invalidity. Hence, it would be more constitutionally prudent if *RMG 401* advised its audience that, although the terms 'special circumstances' and 'appropriate' are not further defined in the *PGPA Act*, they *do* have a legal meaning and then to posit that meaning (subject to the proviso that in our constitutional system, only courts can determine legal meaning authoritatively).

Unfortunately, the constitutional problems with *RMG 401* worsen in its paragraph 10. In that paragraph's list of '[e]xamples of special circumstances that may make it appropriate to approve an act of grace payment', the following dot point appears: 'the matter is not covered by legislation or specific policy, but the Commonwealth intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively'.⁹² But that gives rise to an obvious objection: how is a Commonwealth payment based *not* on existing legislation or policy but on a mere *intention* of the Commonwealth executive to introduce legislation or policy supported by the *legal* meaning of s 65(1), constitutionally confined, as it must be, to circumstances 'which have arisen in the course of the execution and maintenance of the *Constitution* and of the laws of the Commonwealth'? Although, as will be explained shortly, it can be argued that s 65(1) encompasses payments made in the ordinary, well-established course of Commonwealth executive administration (by the link between the Commonwealth executive power to make such payments and s 51(xxxix)), it would be very difficult, if not impossible, to maintain that a payment made based on *intended, but non-existing*, legislation or policy falls within that description.

⁸⁹ *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC).

⁹⁰ *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

⁹¹ *W Bateman* (n 20) 184.

⁹² *RMG 401* (n 88) [10].

2 CDDA Scheme

The constitutional status of the CDDA Scheme is far more questionable than the status of the PGPA Scheme. Although the Department of Finance website asserts that the ‘CDDA scheme was established under the executive power of section 61 of the *Constitution*’,⁹³ following *Pape* and the *Williams* cases, the scheme still requires statutory support. Boughey, Rock and Weeks seem to be confident that it is constitutionally secure, by virtue of a reference to the Scheme in the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) (*FFLA Act No 3*) which was hastily enacted by the Commonwealth in response to *Williams No 1*.⁹⁴ However, we are not as sanguine as they are about the effectiveness of the *FFLA Act No 3* amendments.

Boughey, Rock and Weeks appear to assume that item 407.059 in sch 2 of the *FFLA Act No 3* — which now appears as item 407.059 in pt 4 of sch 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) (*FF(SP) Regulations*) — refers to the CDDA Scheme.⁹⁵ The item reads:

Compensation and Debt Relief

Objective: To provide access for eligible recipients to discretionary payments in special circumstances or financial relief from amounts owing to the Commonwealth.

If Boughey, Rock and Weeks’ assumption is correct, then there is, at very least, a plausible argument that the CDDA Scheme has sufficient statutory support to pass constitutional muster. The argument can be set out thus:

Proposition 1: Section 32B(1) of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) (*FF(SP) Act*) relevantly provides:

If:

- (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
 - (i) an arrangement under which relevant money or other [Consolidated Revenue Fund] money is, or may become, payable by the Commonwealth; or
 - ...
 - (iii) a grant of financial assistance to a person other than a State or Territory; and
- (b) the arrangement or grant, as the case may be:
 - (i) is specified in the regulations; or
 - (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
 - (iii) is for the purposes of a program specified in the regulations;

⁹³ ‘Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)’, *Department of Finance* (Web Page, 2024) <<https://www.finance.gov.au>>.

⁹⁴ Boughey, Rock and Weeks (n 28) 293–4.

⁹⁵ *Ibid* 293.

the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be.

Proposition 2: The CDDA Scheme is either:

- specified in the *FF(SP) Regulations*;
- included in a class of arrangements or grants, as the case may be, specified in the *Regulations*; or
- for the purposes of a program specified in the *Regulations*

by virtue of the inclusion of item 407.059 of pt 4 of sch 1AA of the *Regulations*.

Proposition 3: Section 32B(1) of the *FF(SP) Act* and item 407.059 in pt 4 of sch 1AA of the *FF(SP) Regulations* are constitutionally valid.

Conclusion: Therefore, the CDDA Scheme has statutory support and does not fall foul of the strictures of *Williams No 1*.

Like Boughey, Rock and Williams we agree that proposition 3 above is strongly arguable, employing a similar argument to the one used to secure the *PGPA Act*. Specifically:

- The express incidental head of power allows the Parliament to enact laws incidental to Commonwealth executive power conferred by the *Constitution*.
- Section 61 of the *Constitution* describes the Commonwealth executive's power to execute and maintain the *Constitution* and the laws of the Commonwealth.
- Consistently with the basic principle of statutory construction that legislation should be interpreted to ensure compatibility with the *Constitution* if reasonable constructional choices are open, s 32B(1) of the *FF(SP) Act* and item 407.059 of pt 4 of sch 1AA of the *FF(SP) Regulations* should be read down so as only to confer powers relating to the Commonwealth executive's power to execute and maintain the *Constitution* and the laws of the Commonwealth.
- Therefore, s 32B(1) of the *FF(SP) Act* and item 407.059 of pt 4 of sch 1AA of the *FF(SP) Regulations* are sourced in s 51(xxxix) as laws incidental to powers vested in the Commonwealth executive by the *Constitution*.

However, in contrast to Boughey, Rock and Weeks, we (like Sapienza it appears⁹⁶) entertain grave doubts that a court would find that item 407.509 *does* refer to the CDDA Scheme (proposition 2 above). Given that the purpose of insisting on statutory authorisation in *Williams No 1* was to ensure that the Commonwealth Parliament (including the Senate as a 'states' House') has a direct say on Commonwealth executive spending — 'to ensure "parliamentary control" over the executive and enforce the federal division of powers established by the

⁹⁶ Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) 37 fn 205.

*Australian Constitution*⁹⁷ — it would seem unlikely that a court would reason that the vague words of the item would be sufficient to put the Parliament on notice that the CDDA Scheme is included in it.

Although the High Court in *Williams No 2* may have subsequently set the bar low,⁹⁸ the imprecise language of the item stands in stark contrast to the precision with which other programs are included by name in the schedule (for example, the Remote Youth Leadership and Development Corps, the Remote Jobs and Communities Program, and the Productive Ageing Package).⁹⁹ Even more significantly, the list of programs in pt 4 of sch 1AA is organised by reference to a series of government departments and item 407.509 is part of a set of programs, all beginning with the numbers ‘407’, which appears under the heading ‘Department of Education, Employment and Workplace Relations’. That department (which no longer exists, having been divided into two departments, the Department of Education and the Department of Employment and Workplace Relations in 2022) was not primarily responsible for oversight of the CDDA Scheme, nor are its two successor departments; the Department of Finance has always occupied that position. Moreover, as noted previously, the CDDA Scheme traverses all non-corporate Commonwealth entities, not just the Department of Education, Employment and Workplace Relations or its successor departments.

The item is possibly a reference to a proposal, which was current from 2010 to 2015 but never enacted, to give Comcare (a Commonwealth statutory authority for which the department was responsible) the statutory power to make discretionary compensation payments for defects in its administration analogous to the CDDA Scheme.¹⁰⁰ Or, at best, item 407 is a reference to the administration of the CDDA Scheme *within* the department (and now its successor departments), but not in the numerous other departments that make CDDA Scheme decisions.

On the assumption that we are correct in our misgivings, and that there is a real risk that a court would find that item 407.509 does not refer to the CDDA Scheme (or at least not to the extent that it is administered outside the Department of Education and the Department of Employment and Workplace Relations), we will now consider the CDDA Scheme’s constitutionality on the assumption that it has *no* statutory support.

Act of grace payments out of the bounty of the Crown originated as a response to ‘a lacuna in the rule of law’¹⁰¹ created by the Crown’s legal immunity, encapsulated in ‘the legal apophthegm that the King can do no wrong’.¹⁰² They were (and remain in the United Kingdom) premised on an unconstrained executive power to spend, with the qualification — once the supremacy of Parliament over

⁹⁷ W Bateman (n 20) 185.

⁹⁸ Ibid 187.

⁹⁹ *FFLA Act No 3* (n 48) sch 2.

¹⁰⁰ *Review of Government Compensation Payments* (n 23) 50 [3.42]; Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (Cth) cl 70C; Explanatory Memorandum, Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill (Cth) 27–8, 32–3.

¹⁰¹ Committee on Ministers’ Powers (UK), *Report* (Cmd 4060, 1932) 112.

¹⁰² Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth, 1820) 5.

the Crown was secured in the 17th century — that the requisite funds are appropriated by Parliament.¹⁰³ Hence the Australian constitutional conundrum post *Pape* and the *Williams* cases: given that the High Court has decided that the United Kingdom premise does not apply to the Commonwealth executive under the *Constitution*, is the CDDA Scheme lawful if — as we have assumed — it has no statutory footing?

On the premise that ‘[i]t is well settled that the [Commonwealth] Executive can spend (with an available appropriation) where power to do so is conferred by valid statute *or by the Constitution itself*,¹⁰⁴ the High Court in *Williams No 1* identified three exceptions to the general principle that, under the *Constitution*, the Commonwealth executive cannot spend without legislation authorising that expenditure.

(a) *Nationhood Exception*

The first exception (hereafter referred to as the ‘nationhood exception’) relates to the so-called ‘nationhood power’¹⁰⁵ which derives ‘from the character and status of the Commonwealth as a national government’.¹⁰⁶ It can be dealt with here briefly. Although we would concede that the making of act of grace payments by the Commonwealth without legislative support could come within the *depth* of the nationhood power (as noted previously, the *faculty* to make such payments does not interfere with the legal rights and duties of individuals because their receipt is non-coercive and voluntary), we maintain that act of grace payments fall outside the *breadth* of the nationhood power.¹⁰⁷ As expounded above,¹⁰⁸ the making of such payments is not an activity ‘peculiarly adapted to the government of a nation’,¹⁰⁹ nor ‘appropriate to a national government’,¹¹⁰ nor an exercise of a power ‘possessed by the national government alone’.¹¹¹

(b) *Ordinary Functions Exception*

The second exception is where the expenditure relates to ‘the ordinary course of administering a recognised part of the Government of the Commonwealth or with

¹⁰³ Boughey, Rock and Weeks (n 28) 290–1.

¹⁰⁴ *Williams No 1* (n 5) 249 [193] (Hayne J) (emphasis added) (citations omitted). See also at 361 [558], 366 [569] (Kiefel J).

¹⁰⁵ Discussed above in Part II(C)(1)(iii).

¹⁰⁶ *AAP Case* (n 1) 397 (Mason J); *Williams No 1* (n 5) 249–52 [194]–[198], 267 [240] (Hayne J), 362 [559], 370–3 [582]–[594] (Kiefel J), 346–9 [497]–[507], 357 [542] (Crennan J). See also at 180 [4], 184–5 [22], 188–91 [29]–[34], 216–17 [83] (French CJ), 230–1 [131], 234–5 [144]–[146] (Gummow and Bell JJ), 272 [256] (Hayne J), 342 [485], 355 [535] (Crennan J), 361 [558] (Kiefel J).

¹⁰⁷ For a discussion of the use of the concepts of breadth and depth to analyse Commonwealth executive power, see Stephenson (n 4) 36–8. For a discussion of the limitations on the nationhood power framed by those concepts, see at 59–70.

¹⁰⁸ See above Part II(C)(1)(iii) for our discussion of the possible engagement of the nationhood power, in combination with s 51(xxxix) of the *Constitution*, to provide constitutional support to s 65 of the *PGPA Act* (n 13).

¹⁰⁹ *AAP Case* (n 1) 397 (Mason J) (emphasis added).

¹¹⁰ *Ibid* 397 (Mason J) (emphasis added).

¹¹¹ Hanks, Gordon and Hill (n 83) 214.

the incidents of the ordinary and well-recognised functions of that Government' (hereafter referred to as the 'ordinary functions exception').¹¹² While this exception provides significant assistance to the Commonwealth, it cannot cover the whole of the CDDA Scheme: the Scheme purports to embrace compensation for 'defective administration' by *all* 'non-corporate Commonwealth entities',¹¹³ without reference to the exception. At the risk of stating the obvious, it would be specious to maintain that making act of grace payments for defective administration relating to the *non*-ordinary or *not* well-recognised functions of the Commonwealth government can be characterised as incidental to the ordinary and well-recognised functions of the Commonwealth government.

(c) *Prerogative Exception*

The third exception is where the expenditure is an exercise of the Commonwealth executive's prerogative powers inherent in s 61 (hereafter referred to as the 'prerogative exception').¹¹⁴ The extent to which this exception can provide a constitutional foothold for the CDDA Scheme depends on how act of grace payments made in the absence of statutory authorisation are characterised.

The term 'prerogative' can bear two meanings. In a narrow sense (commonly associated with the writings of Blackstone) it refers to the unique or special *powers* and *privileges* of the Crown which can interfere with the legal rights and interests of others. However, in the broader sense (commonly, but perhaps erroneously, associated with the writings of Dicey)¹¹⁵ it encompasses additionally those legal *capacities* that the Crown enjoys in common with its subjects, and which cannot be used to interfere with the legal rights and interests of others without their consent. When the High Court in *Williams No 1* recognised the prerogative exception, it was referring to the narrow 'true prerogative',¹¹⁶ consistently with longstanding, conventional Australian usage:¹¹⁷ otherwise, the impugned contract between the Commonwealth and Scripture Union Queensland to spend Commonwealth moneys would have fallen within the prerogative exception and survived challenge. Consequently, *if* act of grace payments made without legislative support are made in the exercise of a broad executive *capacity* to spend, *then* payments under the CDDA Scheme do not fall within the narrow, true prerogative exception and are unlawful, unless they fall within the ordinary functions exception.

¹¹² *Williams No 1* (n 5) 233–4 [139]–[141] (Gummow and Bell JJ), 255–6 [208]–[209] (Hayne J), 342 [484], 343 [487], 345 [493], 353–5 [525]–[534] (Crennan J). See at 370 [582] (Kiefel J). In *Williams No 1*, the existence of the ordinary functions exception was not in dispute between the parties: *Williams No 1* (n 5) 233 [139] (Gummow and Bell JJ), 342 [482]–[484], 345 [493] (Crennan J), 370 [582] (Kiefel J).

¹¹³ *RMG 409* (n 35) [1].

¹¹⁴ *Williams No 1* (n 5) 216 [83] (French CJ), 342 [484], 343 [487], 358 [544] (Crennan J), 373 [594] (Kiefel J). See generally at 184–6 [22]–[25] (French CJ), 227–8 [123]–[124] (Gummow and Bell JJ). The existence of the prerogative exception was not in dispute between the parties in *Williams No 1: Williams No 1* (n 5) 342 [482]–[484], 345 [493] (Crennan J); 370 [582] (Kiefel J).

¹¹⁵ *L v South Australia* (2017) 129 SASR 180, 188 [29]–[30] (Kourakis CJ).

¹¹⁶ *Ibid* 31 [107] (Kourakis CJ).

¹¹⁷ *Ibid* 30 [102] (Kourakis CJ). See also Stephenson (n 4) 21.

While acknowledging ‘that the dividing line between special government powers and mere legal capacities may not always be clear’¹¹⁸ we maintain that when the Commonwealth makes an act of grace payment, it exercises a *capacity* derived from its legal personality as a polity (which, following the usage of Gageler J in *Plaintiff M68/2015*, we will hereafter refer to as a ‘non-prerogative executive capacity’)¹¹⁹ not a narrow, unique (Blackstonian) ‘prerogative executive power’.¹²⁰ If we are right, then important constitutional consequences follow, so it is incumbent upon us to explain why we have come to that conclusion.

First, as emphasised previously, when the Commonwealth makes an act of grace payment to a subject, there is no legal coercion and no power ‘exercisable over individuals’.¹²¹ The prospective recipient is not compelled to take the money; they can refuse. It is therefore not ‘an act which is capable of interfering with legal rights of others’.¹²²

Such effects as the act might have on legal rights or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor.¹²³

In other words, an act of grace payment is relevantly analogous to a voluntary payment by a subject to another subject based on a perceived moral obligation (in contrast to a claim of legal right) and ‘involves nothing more than the utilisation of a bare capacity or permission, which can also be described as an ability to act or as a “faculty”’.¹²⁴

Secondly, to apply the 1759 maxim from *Finch’s Law* concerning the prerogative:¹²⁵ *it is the law in the case of a subject that she has the legal capacity to make a payment to another based on a perceived moral obligation rather than claim of legal right, and hence it is not the law unique to the Crown. It does not, therefore ex hypothesi fall within the scope of a prerogative executive power.*

Thirdly, there is no reference to any prerogative power to make act of grace payments in Joseph Chitty’s monumental 500-page *A Treatise on the Law of the Prerogatives of the Crown* published in 1820, HV Evatt’s famous 1924 doctoral thesis, *The Royal Prerogative*, or the first edition of *Halsbury’s Laws of England* published in 31 volumes from 1907 to 1917. Moreover, both Chitty and Evatt make it clear at the outset that their conception of the prerogative is entirely Blackstonian:¹²⁶ if act of grace payments were an exercise of a prerogative power, then it is astonishing that the power to make them is not mentioned in either.

¹¹⁸ Hanks, Gordon and Hill (n 83) 214.

¹¹⁹ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98 [134] (‘*Plaintiff M68*’).

¹²⁰ *Ibid.*

¹²¹ Chitty (n 102) 25.

¹²² *Plaintiff M68/2015* (n 119) 98 [135] (Gageler J).

¹²³ Stephenson (n 4) 64.

¹²⁴ *Plaintiff M68* (2016) 257 CLR 42, 98 [135] (Gageler J) (citations omitted).

¹²⁵ ‘You shall find it to be the law almost in every case of the King, that is law in no case of a subject’: Sir Henry Finch, *Law or a Discourse Thereof in Four Books* (Henry Lintot, 1759) 85.

¹²⁶ Chitty (n 102) 4; HV Evatt, *The Royal Prerogative* (Law Book Company, 1987) 11–12.

Although there are some United Kingdom authorities on act of grace payments which refer to such payments as ‘under the prerogative powers of the executive’,¹²⁷ it needs to be borne in mind that the United Kingdom usage of the term ‘prerogative’ (in contrast to Australia) generally follows the Diceyan conception.¹²⁸

Fourthly, a prerogative executive power must be a product of the common law: it only exists if the common law historically recognises its existence. In the pre-Federation era, both the government of the United Kingdom¹²⁹ and the Australian colonial governments made act of grace payments from time to time, thus enhancing ‘the constitutional framework in which the claims of the citizen upon the state could be resolved’.¹³⁰ In the colony of New South Wales, for example, the established practice was for the aggrieved citizen to petition Parliament and then for Parliament to ‘appoint a select committee to inquire and report as to whether a recommendation should be made to the Government for an *ex gratia* payment’.¹³¹ Therefore, if the making of act of grace payments is an exercise of a prerogative executive power, one would expect that Australian courts in the colonial period would have had occasion to recognise it as such. But they did not. Although there is some curial recognition of the practice,¹³² act of grace payments were never described in terms consistent with an exercise of a prerogative executive power. Instead, they were described in terms consistent with our position that such payments are an exercise of non-prerogative executive capacity.¹³³

If our position is correct, then the Commonwealth must rely solely on the ordinary functions exemption to secure the constitutional legality of CDDA payments (on the assumption that, *contra* Boughey, Rock and Weeks, the CDDA Scheme lacks statutory support). On that premise, any CDDA payments that fall outside the scope of that exception are made in violation of the *Constitution*.

It is perhaps unduly cynical to observe that it is to the advantage of the Commonwealth that no disappointed applicant for a payment under the CDDA Scheme is likely to challenge the constitutionality of the Scheme itself. However, *if* an applicant’s CDDA Scheme application concerned defective administration related to ‘the ordinary course of administering a recognised part of the Government of the Commonwealth, or with the incidents of the ordinary and well-

¹²⁷ *R v Ministry of Defence; Ex parte Walker* (2000) 2 All ER 917, 928

¹²⁸ Stephenson (n 4) 19–21.

¹²⁹ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 28 July 1896, 827.

¹³⁰ Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 75. See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 February 1891; Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 January 1892, 285; Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 December 1892, 447–8; Parliament of New South Wales, *Sessional Papers*, 1899(3) 462–3, 870, 867.

¹³¹ Finn (n 130) 75. See also *Parramatta River Steamers & Tramway Co v Hixson* (1895) 16 NSWLR 105, 109 (Martin CJ), 109–10 (Windeyer J), 110 (Innes J) (*‘Parramatta River Steamers’*); *Twaddell v Driver* [1877] Knox Reports 459 (*‘Twaddell’*).

¹³² Finn (n 130) 75.

¹³³ *Parramatta River Steamers* (n 131) 109 (Martin CJ), 109–10 (Windeyer J), 110 (Innes J). See *Twaddell* (n 131).

recognised functions of that Government’,¹³⁴ and that relationship was *not* considered by the CDDA decision-maker rejecting the application (and why would it be, given that the language of the ordinary functions exemption does not appear in *RMG 409*), *then* that applicant would have a compelling argument that the decision is infected with jurisdictional error: the decision-maker has ignored a constitutionally mandated precondition to the exercise of their power. And it is possible to envisage situations where the fact that a person suffered a loss because of defective administration related to the *ordinary, well-recognised* functions of the Commonwealth government (as opposed to *extraordinary, novel* functions, where some diminution of the standard and quality of administration might be anticipated and excused) militates in favour of a moral obligation to make a payment. Think of Karen Green, a 16-year-old school leaver who was denied unemployment benefits for some months because of the Department of Social Security’s defective administration of an ordinary, well-recognised function of the Commonwealth relating to an entirely foreseeable and ordinary event — that is, that a 16-year-old would choose to leave school at the end of the school year and immediately start actively and genuinely looking for full-time employment.¹³⁵

However, even if we are wrong, and the Commonwealth *does* enjoy a prerogative executive power to make act of grace payments without statutory support under s 61 of the *Constitution*, there are still consequences for the legality of CDDA Scheme decision-making. As a creature of the common law, any prerogative power to make act of grace payments must be legally limited: it follows, therefore, that CDDA payments can only lawfully be made within the legal limits of that prerogative.¹³⁶ Moreover, and in contrast to the inapposite ‘nationhood power’, the legal orthodoxy is that *those limits on the prerogative are fixed by the common law in aspic and determined retrospectively*.¹³⁷ As Lord Diplock famously warned in 1964, ‘it is 350 years and a civil war too late for the Queen’s courts to broaden the royal prerogative’.¹³⁸ While it is conceded that the prerogative may be ‘capable of being *adapted* to “new situations”’,¹³⁹ act of grace payments are an ancient practice from time out of mind, not a ‘new situation’. Hence, if the Commonwealth executive transgresses the historically determined limits of the posited prerogative in making a CDDA decision which does not fall within the ordinary functions exception, then it is vulnerable to judicial review. That raises a difficult question: what would be the historically determined limits on any posited prerogative executive power to make act of grace payments?

Although the *Case of Proclamations* in 1610 established that the authority to determine the existence and extent of the prerogative belonged to the courts, not

¹³⁴ See above n 112 and accompanying text.

¹³⁵ *Green v Daniels* (1977) 13 ALR 1.

¹³⁶ Sapienza (n 96) 177.

¹³⁷ *Ibid* 141; Stephenson (n 4) 25.

¹³⁸ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

¹³⁹ Nicholas Condylys, ‘Debating the Nature and Ambit of the Commonwealth’s Non-Statutory Executive Power’ (2015) 39(2) *Melbourne University Law Review* 385, 406, quoting George Winterton, ‘The Prerogative in Novel Situations’ (1983) 99 *Law Quarterly Review* 407, 408 (emphasis in original).

the Crown,¹⁴⁰ traditionally ‘the manner of exercise of a prerogative power was considered unreviewable on any ground whatsoever’.¹⁴¹ This position was not abandoned until the second half of the 20th century,¹⁴² hence ‘there exists a modest body of case law’¹⁴³ only. However, we maintain that if such an executive prerogative power exists, then it must have some qualities to make it distinguishable. Specifically, we propose that it must be (1) predicated upon the existence of a relevant appropriation by the legislature; (2) exercisable at the discretion of the Crown ‘out of grace’ or favour, without any legal duty or compulsion to make a payment, usually as a remedy of last resort in the absence of another viable available remedy;¹⁴⁴ and (3) exercised on the basis of some sense of a moral obligation to make a payment in exceptional or special circumstances.¹⁴⁵ Of these qualities, it is (3) that is the most distinctive: a sense of moral, in contrast to legal, obligation imposed on the Crown would be the ‘lodestar’¹⁴⁶ of any posited act of grace prerogative.

A problem: paragraphs 17–18 of *RMG 409* explain, under the heading ‘What does the CDDA Scheme do?’:

The CDDA Scheme provides that if a minister or an official authorised by the minister forms an opinion that an official of the entity, acting, or purporting to act, in the course of duty, has directly caused a claimant to suffer detriment, or, conversely, prevented the claimant from avoiding detriment, due to:

- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant’s circumstances
- an unreasonable failure to institute appropriate administrative procedures to cover a claimant’s circumstances
- giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous
- an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official’s power and knowledge to give (or was reasonably capable of being obtained by the official to give) the minister or the authorised official may authorise a payment to the claimant.

The CDDA Scheme is permissive, in that it does not oblige the decision-maker to approve a payment in any particular case. However, the decision to approve or refuse a payment must be publicly defensible, having regard to all the circumstances of the matter.

All the above is undoubtedly very helpful for the staff member to whom *RMG 409* is directed, but nowhere in paragraphs 17 and 18, nor in the other 90 paragraphs of the guide, is there any *express* reference to *morality*, nor indeed *justice* (in

¹⁴⁰ *Case of Proclamations* (1610) 12 Co Rep 74; 77 ER 1352.

¹⁴¹ SA de Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 1959) 118.

¹⁴² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁴³ *Clement v Minister for Finance & Deregulation* [2009] FMCA 43, [32] (Neville FM) (‘*Clement*’).

¹⁴⁴ *Ibid* [25], [30], [38]; *Hartigan v Treasurer (ACT)* (2018) 228 FLR 324, 329 [29] (‘*Hartigan*’).

¹⁴⁵ See, eg, *Toomer* (n 30) [47].

¹⁴⁶ *Clement* (n 143) [31] (Neville FM).

contrast to repeated references to *unreasonableness*). Specifically, the guide does not expressly advise the staff member that they need to consider whether the Commonwealth is under a moral obligation to make a payment and if so, the size of the payment that would be required to discharge that obligation. It is conceded that the need to discern such an obligation may be *implicit* in *RMG 409* but there are dangers in not making the requirement *explicit*.¹⁴⁷ A staff member (frequently without any legal qualifications) in ignorance of both the prerogative, and the distinction between hard and soft law, might be misled by the guide into not giving ‘proper’ and ‘due’ consideration¹⁴⁸ to the moral dimension of a CDDA Scheme claim.¹⁴⁹ Indeed, government agencies have been criticised for ‘adopting an overly defensive and legalistic approach to CDDA decision-making’,¹⁵⁰ that ‘is not in the spirit of the “moral” as opposed to “legal” obligation that is central to CDDA’.¹⁵¹ Within that bureaucratic culture, one can envisage a staff member, dealing with an emotive application for a CDDA payment, scrupulously following the guide and falling into a crude legal positivist trap. She might reason, for example:

I note the repeated references in your application to the injustice of your predicament and the Government’s moral obligation to make a payment to you, but ultimately my decision must be made according to the law, and I am not satisfied that the Government acted unreasonably as set out in paragraphs 17 and 18 of *RMG 409*.

Although it concerns a statutory act of grace scheme, the 2018 decision of the ACT Supreme Court in *Hartigan* illustrates this danger.

Hartigan concerned an *Administrative Decisions (Judicial Review) Act 1989* (ACT) application to review a decision of the ACT Treasurer under the *Financial Management Act 1996* (ACT) to refuse an act of grace payment of \$200,000. The plaintiff had been attacked as a six year old in 2010 by a pit bull terrier when he was visiting a tenant in a house managed by the ACT Commissioner for Social Housing, and had suffered significant facial, head and leg injuries.¹⁵² In 2015, he unsuccessfully sued the Commissioner in the ACT Supreme Court in negligence for compensation.¹⁵³ He subsequently, in 2017, sought an act of grace payment.¹⁵⁴ Section 130 of the *Financial Management Act 1996* required the Treasurer to be satisfied of ‘special circumstances’ before authorising any payment and, in refusing the application, the Treasurer reasoned:

In reading the decision of the Supreme Court, I noted that Justice Penfold found that the Commissioner for Social Housing was not liable for the dog

¹⁴⁷ Sapienza (n 96) 151–2.

¹⁴⁸ *Tickner v Chapman* (1995) 57 FCR 451, 455, 465.

¹⁴⁹ The Commonwealth Ombudsman identified a similar problem with the way in which Centrelink’s *Customer Compensation Handbook* described the CDDA Scheme: *Putting Things Right* (n 37) 25–7, 32.

¹⁵⁰ *Review of Government Compensation Payments* (n 23) 52 [3.47], referring to concerns of the Acting Commonwealth Ombudsman.

¹⁵¹ *Ibid*, quoting Women’s Legal Service NSW, Submission No 108 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) 3.

¹⁵² *Hartigan* (n 144) 335–8 [76]–[93].

¹⁵³ *Hartigan v Commissioner for Social Housing (ACT)* (2017) 319 FLR 158.

¹⁵⁴ Boughey, Rock and Weeks (n 28) 319–20.

involved in the attack and breached no duty of care to prevent the dog attack on your client. Her Honour found that there were no steps the Commissioner might have reasonably taken that could have prevented the attack. Accordingly, pursuant to s 130 of the *Financial Management Act 1996* I am not satisfied that there are special circumstances to warrant authorising a payment to your client and it is for this reason that I am declining your request. I am sympathetic to the serious injuries that your client sustained, but they are not the Commissioner's or the Territory's responsibility.¹⁵⁵

The Treasurer's decision, unsurprisingly, did not survive judicial review. The Supreme Court found that he had misconstrued the nature of the power under s 130 because he had focused solely on the lack of legal liability; he had thus missed the 'whole premise of an act of grace payment [as] an appeal to the Treasurer's goodwill and moral conscience'.¹⁵⁶

III State and Territory Schemes

A States

The potential problem for the states is that all of them bar Queensland either rely exclusively on an inherent executive power to make discretionary act of grace payments (Victoria, Tasmania and SA) or assert such a power in addition to their statutory arrangements (WA and NSW).¹⁵⁷ Thus, *if* the constraints on the Commonwealth executive's expenditure identified in *Williams No 1* apply wholly or in part to the states, it can be powerfully argued that many of the act of grace payments made by the states without statutory support are unlawful. This Part sets out why it is probable that the strictures of *Williams No 1* apply to the states and then identifies the possible suspect and non-suspect categories of state non-statutory act of grace payments.

1 *Why It Is Probable that Williams No 1 Applies to the States*

The High Court has emphasised that *Williams No 1* did not consider the spending powers of the state executives,¹⁵⁸ and academic opinion as to whether its constraints on executive spending apply to the states is divided.¹⁵⁹ On the one hand, it can be argued that the limits on Commonwealth executive power to spend identified in *Williams No 1* were anchored in the text and structure of the

¹⁵⁵ *Hartigan* (n 144) 326 [4].

¹⁵⁶ *Ibid* 331 [47] (McWilliam AsJ).

¹⁵⁷ Western Australia distinguishes between 'act of grace payments' under the *Financial Management Act 2006* (WA) and 'ex gratia payments' made 'under non-statutory executive power': 'Treasurer's Instruction 319: Act of Grace Payments' in Treasury (WA), *Financial Administration Bookcase* (Update 92, November 2023) ('*WA Treasurer's Instruction*'). By contrast, in NSW the two terms are treated as interchangeable: *NSW Treasury Circular* (n 11).

¹⁵⁸ *Williams No 2* (n 7) 464 [64] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹⁵⁹ See, eg, Hanks, Gordon and Hill (n 83) 220, 236–7; Selena Bateman, 'Constitutional Dimensions of State Executive Power: An Analysis of the Power to Contract and Spend' (2015) 26(4) *Public Law Review* 255.

Constitution,¹⁶⁰ and that they therefore do not apply to the states, as there are no state equivalents to s 61 of the *Constitution*, nor to s 81.¹⁶¹ Moreover, while the Commonwealth Parliament is a legislature conferred with limited, express heads of power, the state Parliaments are not.¹⁶² However, we maintain that it is possible, even probable, that the constraints on Commonwealth executive expenditure identified in *Williams No 1* will be applied wholly or in part to the states for the following reasons:

- (1) The application of the High Court's reasoning in *Williams No 1* to the state executives would be consistent with what has been described as an 'undertone'¹⁶³ in the High Court's jurisprudence — since its 2010 decision in *Plaintiff M61/2010E v Commonwealth*¹⁶⁴ — of 'concern ... about the dangers of unconstrained executive power'.¹⁶⁵
- (2) The High Court's reasoning in *Williams No 1*, where it is based on the requirement of representative and responsible government 'that the Parliament, as the directly elected representative of the people, must have control over the expenditure of money by the Executive',¹⁶⁶ may be applied equally to the states.¹⁶⁷
- (3) The High Court's reasoning in *Williams No 1*, insofar as it is based 'on the need to ... enforce the federal division of powers established by the *Australian Constitution*',¹⁶⁸ may be applied to the states.¹⁶⁹ Although the *Constitution* is structured such that the *means of enforcement* of its federal division of powers upon the Commonwealth is different from the *means of enforcement* of that federal division upon the states,¹⁷⁰ it remains the case that the *Constitution* must require both the states and the Commonwealth to comply with that division.
- (4) Given that the High Court in *Williams No 1* found the 'natural person' analogy advanced by the Commonwealth unhelpful in delimiting the power of the Commonwealth executive, it is likely that the Court would find any

¹⁶⁰ *Williams No 1* (n 5) 254 [206] (Hayne J).

¹⁶¹ With the arguable exception of WA: see *Constitution Act 1889* (WA) s 64. However, in contrast to s 81 of the *Constitution* which is entrenched (and binds the Commonwealth Parliament), s 64 of the *Constitution Act 1889* is not entrenched.

¹⁶² Anne Twomey, 'Post-*Williams* Expenditure: When Can the Commonwealth Spend Public Money without Parliamentary Authorisation?' (2014) 33(1) *University of Queensland Law Journal* 9, 25.

¹⁶³ Kathleen Foley, 'What is the Relevance of *Williams* and *Plaintiff M61* for the Exercise of State Executive Power?' (2013) 36(2) *University of Western Australia Law Review* 168, 179.

¹⁶⁴ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

¹⁶⁵ Foley (n 163) 179.

¹⁶⁶ Appleby and McDonald (n 17) 270. See *Williams No 1* (n 5) 241 [173] (Hayne J).

¹⁶⁷ Appleby and McDonald (n 17) 253.

¹⁶⁸ W Bateman (n 20) 185. See *Williams No 1* (n 5) 192–3 [37] (French CJ); *Williams No 2* (n 7) 468–9 [79]–[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹⁶⁹ Appleby and McDonald (n 17) 280.

¹⁷⁰ For example, the Commonwealth's legislative powers are directly conferred by the *Constitution*, whereas the states enjoy the 'unexpressed residuary' of legislative power; and s 109 gives Commonwealth laws paramountcy over inconsistent state laws.

submission that a state executive's powers to spend can be ascertained by reference to a natural person's powers to spend similarly unhelpful.¹⁷¹

- (5) The High Court's reasoning in *Williams No 1* may be applied to the state Legislative Councils in so far as that reasoning is protective of the role of the Senate as an integral component of a *bicameral* legislature (in contrast to the Senate's role as a 'states' House', a role which is inapplicable to the state Legislative Councils).¹⁷² A fortiori as the existence of the state Legislative Councils in all states except Queensland has been effectively entrenched by means of s 6 of the *Australia Acts 1986* (Cth and UK).¹⁷³
- (6) The argument that Commonwealth executive spending should be supported by legislation, in contrast to an appropriation Act only — because 'the Senate has limited powers to deal with an Appropriation Bill, whereas it has much greater powers with respect to general legislation which might authorise the executive to spend money in specific ways'¹⁷⁴ — can be applied with equal force to the SA and Tasmanian Legislative Councils, and with even greater force to the Victorian and NSW Legislative Councils. The restrictions on the SA and Tasmanian Legislative Councils in relation to appropriation Bills are analogous to those imposed on the Senate by s 53 of the *Constitution*.¹⁷⁵ The restrictions on the Victorian and NSW Legislative Councils in relation to appropriation Bills are significantly greater than those imposed on the Senate by s 53 of the *Constitution*: in Victoria and NSW, appropriation Bills for the ordinary annual services of government, which can include appropriation for capital works and new policies, can be enacted without the respective Legislative Council's agreement.¹⁷⁶
- (7) The High Court's reasoning in *Williams No 1* — where it draws on the fundamental constitutional principle that the executive does not have the power to impose taxation (that is, just as the executive cannot levy tax

¹⁷¹ Foley (n 163) 176, 178.

¹⁷² *Williams No 1* (n 5) 205 [60] (French CJ), 232 [136] (Gummow and Bell JJ).

¹⁷³ S Bateman (n 159) 269–70.

¹⁷⁴ *Williams No 1* (n 5) 205 [60] (French CJ).

¹⁷⁵ Section 62(1) of the *Constitution Act 1934* (SA) provides that the SA Legislative Council cannot amend any 'money clause', which is defined in s 60(4) as 'a clause of a Bill, which clause appropriates revenue or other public money, or deals with taxation, or provides for raising or guaranteeing any loan or for the repayment of any loan'. The Legislative Council can, however, under s 62(2), 'return to the House of Assembly any Bill containing a money clause with a suggestion to omit or amend such clause or to insert additional money clauses, or may send to the Assembly a Bill containing suggested money clauses requesting, by message, that effect be given to the suggestion'. However, s 62(3) provides that s 62(2) 'applies to a money clause contained in an appropriation Bill only when such a clause contains some provision appropriating revenue or other public money for some purpose other than a previously authorised purpose or dealing with some matter other than the appropriation of revenue or other public money'. In Tasmania, s 42(1) of the *Constitution Act 1934* (Tas) provides that the Legislative Council 'may not amend ... a provision of a Bill for an Appropriation Act ... to meet the cost of the ordinary annual services of the Government' although it may, under s 43(1) 'request, by message, the amendment of the Bill'.

¹⁷⁶ *Constitution Act 1975* (Vic) ss 62, 64, 65; *Constitution Act 1902* (NSW) s 5A.

without legislation, it cannot spend the money raised by taxation without legislation)¹⁷⁷ — can be applied equally to the state executives.

- (8) The High Court’s reasoning in *Williams No 1* — where it draws a distinction between, on the one hand, a natural person spending their “own” moneys¹⁷⁸ and, on the other hand, the spending of ‘public moneys’¹⁷⁹ by the Commonwealth executive — can be equally applied to the spending of public moneys by the state executives.¹⁸⁰
- (9) The application of the High Court’s reasoning in *Williams No 1* to the state executives may be characterised as another instance of an uncontroversial principle that the text and structure of the *Constitution* imposes limitations on state legislative and executive power, including implied limitations, such as the implied freedom of political communication. It is also consistent with the Court’s rejection of the term ‘plenary’ as an accurate description of *any* executive or legislative power under the *Constitution*.
- (10) Just as the High Court has recognised that the *Constitution* impliedly attributes certain essential, entrenched characteristics to state courts, it may recognise that the textual references to the state executives and Parliaments in the *Constitution* imply certain essential, entrenched characteristics, including the characteristics of democratic representative and responsible government such as parliamentary control over executive spending.

2 *Some Constitutional Problems if the Constraints Imposed by Williams No 1 Are Applied to the State Executives*

If we accept that the constraints on Commonwealth executive expenditure identified in *Williams No 1* might apply wholly or in part to the states, then the states that persist in making non-statutory act of grace payments (that is, all states except Queensland) may find themselves in some difficulty in upholding their commitment to spend public money lawfully. Specifically:

- (1) The ordinary functions exception is unlikely to cover all non-statutory act of grace payments made by the states.¹⁸¹ Of those States that have soft law instruments regulating such payments (SA, Victoria and NSW),¹⁸² no reference is made in those instruments to the exception; it can thus be inferred that payments are made without reference to it. In Tasmania and WA, in the absence of soft law instruments (WA having a soft law instrument in relation to its statutory act of grace payment scheme, but no

¹⁷⁷ *Williams No 1* (n 5) 352 [519] (Crennan J).

¹⁷⁸ *Ibid* 236 [151] (Gummow and Bell JJ), 241 [173] (Hayne J).

¹⁷⁹ *Ibid* 236 [151] (Gummow and Bell JJ), 241 [173] (Hayne J), 368 [577] (Kiefel J).

¹⁸⁰ Twomey (n 162) 9.

¹⁸¹ *Ibid* 27.

¹⁸² Those instruments are Treasury (SA), *Ex Gratia Payments* (Treasurer’s Instruction 14, July 2020) (‘SA Treasurer’s Instruction’); Treasury (Vic), *Disclosure of Ex Gratia Expenses* (Financial Reporting Direction 11, April 2022) [6.1] (emphasis added) (‘Victorian Treasurer’s Direction’) and *NSW Treasury Circular* (n 11).

such instrument relating to its assertion of the prerogative),¹⁸³ one is left to assume that non-statutory payments are also made without reference to the exception.

- (2) The prerogative exception is more promising for the states that persist in making non-statutory act of grace payments, but it is also not without similar difficulties to those faced by the Commonwealth. To reprise: *if* state act of grace payments made without legislative support are made in the exercise of a non-prerogative executive capacity to spend, *then* non-statutory act of grace payments do not fall within the prerogative exception and are unlawful, unless they fall within the ordinary functions exception; all other payments are, in constitutional principle, illegal. Moreover, as was the case with the Commonwealth, any putative prerogative executive power will be subject to legal limits, including most likely a requirement that the state is under a moral obligation to make a payment.
- (3) Of the existing state soft law instruments regulating non-statutory act of grace payments (that is, in SA, Victoria and NSW), only the Victorian instrument refers to morality;¹⁸⁴ the NSW and SA instruments¹⁸⁵ are devoid of any reference to it. This increases the risk that act of grace decisions in NSW and SA (as well as in Tasmania and WA where there is no soft law guidance at all) will be made unlawfully, and without jurisdiction, on the basis that a relevant consideration of act of grace decision-making was not considered.¹⁸⁶

Finally, should the post-*Pape* constitutional framework be applied to the states, it should be noted that the one area where the position of the states is fundamentally different from that of the Commonwealth is in relation to legislative power. As detailed in the previous Part, the Commonwealth must grapple with the complexities of s 51(xxxix) and s 61 of the *Constitution* to place its act of grace payment schemes on a statutory footing. The legislative powers of the state Parliaments are not constrained by heads of legislative power, and thus placing their act of grace payment schemes on a statutory footing is less legally complicated.¹⁸⁷ If Victoria, NSW, SA, Tasmania or WA is reluctant to contain its act of grace payments within a comprehensive statutory scheme, one possible solution may be the enactment of a provision in similar terms to s 51(1) of the *Constitution of Queensland Act 2001* (Qld) which provides: ‘The Executive Government of the State of Queensland ... has all the powers, and the legal capacity, of an individual.’ If act of grace payments in the absence of statutory support are an exercise of the prerogative executive power, then such a provision is not needed and would not affect such payments. But if we are right, and they are an exercise of the non-prerogative executive capacity, then such a provision

¹⁸³ *WA Treasurer’s Instruction* (n 157).

¹⁸⁴ *Victorian Treasurer’s Direction* (n 182) 6.1 (emphasis added).

¹⁸⁵ *NSW Treasury Circular* (n 11); *SA Treasurer’s Instruction* (n 182).

¹⁸⁶ *Craig v South Australia* (1995) 184 CLR 163, 179.

¹⁸⁷ *Foley* (n 163) 178–9.

may arguably provide those payments with sufficient statutory authorisation to satisfy the requirements of *Williams No 1*.¹⁸⁸

B Territories

In contrast to the unclear position in the Australian states, we maintain that the constraints imposed by *Williams No 1* on the Commonwealth executive must also apply to the exercise of executive power in the Australian territories. Constitutionally speaking (and in stark contrast to the constitutional autonomy of the state executives),¹⁸⁹ the source of any territory executive power is Commonwealth executive power, and the stream cannot rise higher than its source. Fortunately, both of the self-governing Australian territories (that is, the ACT and the NT) have made statutory provision for act of grace payments.

As mentioned earlier in our discussion of *Hartigan*,¹⁹⁰ s 130(1) of the *Financial Management Act 1996* empowers the ACT Treasurer to authorise an act of grace payment ‘[i]f the Treasurer considers it appropriate to do so because of special circumstances ... although the payment of that amount ... would not otherwise be authorised by law or required to meet a legal liability’. The NT equivalent is s 37(1) of the *Financial Management Act 1995* (NT), which empowers the NT Treasurer to authorise an act of grace payment ‘[i]f the Treasurer is satisfied that, by reason of special circumstances, it is proper to do so’. Given that the ACT and NT Legislative Assemblies each have ‘power to make laws for the peace, order and good government of the Territory’,¹⁹¹ both s 130(1) of the ACT Act and s 37(1) of the NT Act are almost certainly valid and hence sufficient to place act of grace payments in the ACT and the NT on a constitutionally secure statutory footing.

There are also relevant soft law instruments in each jurisdiction, namely section 2 in part 6 of the *Treasurer’s Directions* in the NT, and the *Act of Grace Payments: Policy and Procedures Guide* (‘ACT Guide’) in the ACT. The NT Directions are skeletal, and hence of little help to decision-makers. By contrast, the *ACT Guide* is much more detailed (running to eight A4 pages in its pdf version) and hence more helpful. Unfortunately, however, two of its paragraphs may mislead.

First, paragraph 23 of the *ACT Guide* repeats the advice in paragraph 9 of *RMG 401* that “special circumstances” and “appropriate” are not defined in the [Act] and are for ... the decision-maker to assess and decide on’. Paragraph 23 of the *ACT Guide* is thus vulnerable to the same criticism that was made previously of paragraph 9 of *RMG 401*: it pays insufficient heed to Australian judicial supremacy in the interpretation of the law.

¹⁸⁸ Twomey (n 162) 27.

¹⁸⁹ *R v Governor of South Australia* (1907) 4 CLR 1497.

¹⁹⁰ See above Part II(C)(2)(c).

¹⁹¹ *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22; *Northern Territory (Self-Government) Act 1978* (Cth) s 6. Section 22(2) of the former adds that ‘power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive’.

Secondly, paragraph 27(c) of the *ACT Guide* states:

Act of grace payments may not be approved, for example: ... when a request has arisen from private circumstances outside the sphere of ACT administration, there has been no involvement of an agent or ACT Government employee or entity and the matter is not related to the impact of any ACT legislation ...

Analogously with the criticism made previously of paragraph 13 of *RMG 401*, this statement risks misrepresenting the legal position for its non-legal audience. It is hardly likely that a court would find a payment falling within paragraph 27(c) of the *ACT Guide* to be legal: the slightly ambiguous word ‘may’ should therefore be hardened to ‘must’. By contrast s 37(2) of the *Financial Management Act 1995* (NT) adds, with commendable clarity: ‘Subsection (1) does not authorise a payment of money ex gratia unless the special circumstances arose in the course of the business of the Government of the Territory.’

IV Conclusion

In his detailed analysis of public finance law in the United Kingdom and Australia, Will Bateman has argued that the Australian High Court’s early 21st century attempts to police ‘the authority possessed by treasury departments over public expenditure’¹⁹² has ‘resoundingly failed’.¹⁹³ This article, albeit confined as it is to one narrow and somewhat arcane area of public expenditure, would suggest that Bateman’s conclusion might be too pessimistic and sweeping. At the very least, it may distract attention from some of the specific ‘ripples of affection’ of *Pape* and the *Williams* cases.

This article has sought to identify some of those ripples of affection for the ancient Crown practice of act of grace payments, which has been imported from one constitutional universe, comprising an unwritten, unitary constitution, to another constitutional universe, comprising a written, federal constitution. It concludes that:

- the Commonwealth’s general statutory act of grace provision, s 65 of the *PGPA Act*, should be read down with reference to Commonwealth executive power under s 61 of the *Constitution* to ensure that it is sufficiently connected to a head of Commonwealth legislative power (that is, s 51(xxxix) of the *Constitution*);
- an explicit and unambiguous reference to the Commonwealth’s non-statutory CDDA Scheme should be included in the *FF(SP) Regulations*;
- the States of Victoria, NSW, SA, Tasmania and WA should enact legislation to provide statutory support for their general act of grace payment schemes; and

¹⁹² W Bateman (n 20) 179.

¹⁹³ *Ibid* 195.

- all Australian jurisdictions, including the self-governing territories of the ACT and the NT, should ensure that they have soft law instruments on act of grace decision-making which alert decision-makers to the constitutional constraints which must limit and inform their decisions.

ADVANCE