How responsible is responsible government — parliament, statutes, the executive and the courts

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Introduction

This paper is about responsibility in the working of our democratic institutions—responsibility in the constitutional sense of responsible government and in a larger moral sense which is indispensable to the success of our democracy and trust in its workings by the Australian people. It acknowledges and celebrates Harry Evans as a role model of responsible commitment to that democracy and to the great public office he occupied for so long.

The Senate, responsible government and Harry Evans

There are 3 key chapters of the Australian Constitution — Chapter 1, the Parliament; Chapter II, the Executive Government and Chapter III, the Judicature. Part II of Chapter 1 concerns the Senate. It was in Part II of Chapter I and in the Senate that Harry Evans made his contribution to the working of Australian democracy as Clerk of the Senate for 21 years from 1988 to 2009.

The Senate is part of the parliament as reflected in section 1 of the Constitution. As an element of the parliament, the Senate is part of the law-making machinery under the Constitution. It is also part of the formal structure of the system of responsible ministerial government defined by the relationship between the executive government and parliament.[1] That relationship is reflected in section 6 of the Constitution requiring a session of the parliament at least once a year, and section 83 of the Constitution requiring parliamentary approval for expenditure by the executive government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth. Section 49, dealing with powers, privileges and immunities, 'secures the freedom of speech' in debate which historically was a powerful instrument for defending the privileges and immunities of the Senate and the House of Representatives and specifically freedom of speech in debate, which enables parliament to express opinions on the conduct of the affairs of the state. Section 49 also provides the

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558.

source of power of each chamber of the parliament to summon witnesses or require the production of documents under pain of punishment for contempt.[2]

The first Chief Justice of Australia, Sir Samuel Griffiths, said that the effect of responsible government 'is that the actual government of the State is conducted by officers who enjoy the confidence of the people'.[3] And as was said by the High Court in *Lange*:

> *That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government.*[4]

Responsible government means government chosen from those who have the confidence of the House of Representatives. It also requires that for the most part the Governor-General acts on ministerial advice. Those requirements are not spelt out in the Constitution.

Harry Evans was acutely conscious of the importance of maintaining the constitutional role of the Senate in holding the executive accountable to the parliament and the people through the committee and inquiry processes. In an article written in *The Age* under the headline 'Senate sentinel' in 2009, Michelle Grattan described him as 'a Canberra institution, standing up to governments of either hue, advising senators on how they can push their power, clothing parliamentary adventurism in a benign exterior, with the loping gait of a weekend bushwalker'.[5]

He authored short but illuminating papers on various aspects of the constitutional role of the Senate. In a paper published in 2001 he quoted 2 statements by framers of the Constitution, which he said illustrated the rationale of the Senate.[6] The first was by Sir Samuel Griffith whom he characterised as a conservative:

> *… it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives …*[7]

The second quotation was by Dr John Cockburn whom he characterised as a radical democrat:

> *… the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent that as grouped in the states.*[8]

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2 (1997) 189 CLR 520, 559 and see *R v Richards*; *Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

3 Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, Government Printer, Brisbane,1896, p. 17.

4 (1997) 189 CLR 520, 559 (footnote omitted).

5 Michell Grattan, 'Senate's sentinel', *The Age*, 30 May 2009.

6 Harry Evans, 'The Role of the Senate', *Papers on Parliament*, No. 52, Department of the Senate, 2001, pp. 93–94.

7 Sir Samuel Griffith, quoted by Sir Richard Baker, *Official Records of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, p. 28.

8 Dr John Cockburn, *Official Records of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, p. 340.

He had a strong grip of the messy reality of our democracy at work and the fact that having the numbers does not equate to good government. In 2006 he described democracy as a necessary but sufficient condition of good government:

> *To the extent that government in the west has been a more civilised business it has not been due to democracy but something far older: constitutionalism, subjecting government itself, even when power is exercised by a majority, to limitations and restraints. It is more important that the rulers know that their power is limited by enforceable rules than that they bask in the mandate of 'the people'.*[9]

Harry Evans most substantial written legacy lives on in the 14th edition of *Odgers' Australian Senate Practice*. Harry Evans produced 6 editions of the work. The 14th edition was published in 2016, 2 years after his death.

He wrote forcefully and clearly about the role of the Senate in holding executive government to account. He particularly emphasised the importance of the Senate estimates process. He offered a clear eyed vision of its untidiness:

> *Accountability is not a refined process which operates on an elevated plain above sordid politics. Accountability operates down in the swamp of politics amongst the crocodiles and mosquitoes. The political wetlands sustain our cultural life and biodiversity, without them the desert of despotism assumes the landscape.*[10]

Public confidence and public trust

The confidence of the parliament which is a central element of responsible government is itself only meaningful if there is public confidence in the parliament. Trust in our public institutions may be a questioning or even sceptical trust, but trust in their basic working is fundamental.

Sadly there is evidence of diminishing levels of trust in our institutions in Australia. Earlier this year a global report under the banner of the Edelman Trust Barometer issued reflecting the results of a survey-based methodology conducted in 28 countries around the world. This was its 23rd year.

The global index is based on what is called an average percent trust in non-governmental organisations (NGOs), business, government and media. In 2023, Australians were said to have indicated a level of trust measured at 48%. Of course, the first question that one might ask is: why should the Edelman Trust Barometer be trusted? Perhaps because it accords with what we see ourselves. Causative factors included economic imbalance, institutional imbalance, class divides and the battle for truth. Social media plays a part. So it was said:

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[9] Harry Evans, 'Democracy: The Wrong message', *Democratic Audit of Australia*, *Discussion Paper 24/06*, August 2006.

[10] Harry Evans, 'Estimates hearings and government control of the Senate', *Australian Policy Online*, 12 April 2006.

> *A shared media environment has given way to echo chambers, making it harder to collaboratively solve problems. Media is not trusted, with especially low trust in social media.*[11]

The so-called Gen Z is said to lead the decline in trust.

Australia falls into what the Trust Barometer calls the field of moderate polarisation where people see deep divisions, but think they might be addressable. Not surprisingly perhaps the United States (US) falls into what is categorised as 'severely polarised'.

Obviously civics education has a very important part to play. People are less likely to trust institutions whose workings they do not understand or of which they are ignorant. Civics education attainment in our schools is below par as indicated by the National Assessment Program – Literacy and Numeracy (NAPLAN) assessments issued by the Australian Curriculum Assessment and Reporting Authority (ACARA). In my role as Chairman of the Constitution Education Fund Australia, I have become increasingly conscious of the importance of a basic understanding of our democracy by the people whose choices determine its government.[12]

When it comes to establishing and continuing trust in our key constitutional institutions, the parliament, the executive and the judiciary, the people who operate those institutions are key. If the confidence of the parliament necessary to responsible government, is to be meaningful, the people who are elected to the parliament must collectively inspire the confidence of the people who elect them. This requires a basic ethical framework for the discharge of their functions. That is true also for the executive and the judiciary.

Public office and public trust

A general ethical framework can be stated fairly simply:

> *The holder of a public office must discharge its duties and exercise its powers for the purposes for which the office exists and for which the powers are conferred and only for those purposes and according to the conditions and within the limits of the powers.*

This is not only an ethical proposition, it has a legal and constitutional dimension. It encompasses honesty, diligence and rationality. But it does not unreasonably constrain. It is not an unattainable counsel of perfection. It allows for the exercise of public power for a wide range of public purposes even though they may be contestable on grounds of justice, fairness and workability. Judgments about those things are a matter for the parliament.

By way of example, the Australian Parliament has the power under section 51 of the Constitution 'to make laws for the peace, order and good government of the Commonwealth' on the various subjects which are set out in that section. That is a familiar form of provision conferring constitutional power on parliaments. It does not legally limit the exercise of the law-making power by reference to a criterion of peace, order and good government. It does

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[11] Edelman, *2023 Edelman Trust Barometer Global Report*, p. 4.

[12] The Hon Robert French AC, *'Constitutional Education Fund Australia: Serving Vital Needs in Civics and Citizenship Education'*, paper prepared for the Constitution Education Fund Australia, 2022.

not authorise the High Court of Australia to strike down a law on the ground that it is not for the peace, order and good government of the Commonwealth.[13] That judgment, for better or for worse, is a matter for the parliament, which is ultimately accountable to the people. That said, the exercise of public power is analogous to the exercise by a trustee of powers conferred under a trust. That applies to members of the parliament.

The idea that election to parliament imposes a trust-like or fiduciary obligation on the elected member goes back a long way. It was applied to individual members of parliament in the 1920s by the High Court in 2 cases, *Horne v Barber*[14] and *R v Boston*.[15] Mr Horne was a land agent engaged by Mr Barber to sell a property to the Victorian Government. The agent engaged Mr Deany, a member of the Victorian Parliament, to act as a lobbyist for the sale, promising him a share of the commission if it went through. Mr Deany made representations to the relevant minister about the virtues of the property, but did not tell the minister that he was acting in the matter as a commission agent. A dispute arose between the vendor of the land and the land agent about the agent's entitlement to commission. The Supreme Court of Victoria held that the commission agreement was illegal and void because of the involvement of the parliamentarian. The High Court emphasised the obligation of members of parliament as an aspect of responsible government and upheld the decision of the Supreme Court that the commission agreement was void. Sir Isaac Isaacs, who was to be appointed as the first Australian-born Governor-General, said in his judgment that:

> *When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament—censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.*[16]

Justice Rich in the *Horne* case reasoned explicitly in terms of a trust relationship:

> *Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid.*[17]

Similar statements were made in the *Boston Case* decided in 1923, in which a member of parliament was charged with conspiracy. It was alleged that he had agreed to receive

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[13] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, [9].
[14] (1920) 27 CLR 494.
[15] (1923) 33 CLR 386.
[16] (1920) 27 CLR 494, 500.
[17] (1920) 27 CLR 494, 501.

payments as an inducement to use his position as a member of parliament to secure the acquisition of certain lands by the Government of New South Wales. Isaacs and Rich JJ described members of parliament as 'public officers'.[18] They cited the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'.[19] Higgins J made a comparison with private trusteeship and said:

> *He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough.*[20]

That does not mean that the public trust affecting the way a member should discharge his or her work has a legal effect on the validity of a law passed with the support of a person whose vote has been bought with a bribe.

The practical importance of the public trust metaphor waned for a time as specific mechanisms were created for the oversight and accountability of public officials. However, as the late Justice Finn pointed out, a loss of faith in those mechanisms in the late 20th century led to 'renewed interest in "the public trust" and its implications for both officials and for our system of government itself'.[21] In codes of conduct for public officials at many levels, the trust or fiduciary concept is invoked. The *National Anti-Corruption Commission Act 2022* (Cth) includes in its definition of 'corrupt conduct' in section 8:

> *… any conduct of a public official that constitutes or involves a breach of public trust.*

The term 'public official' is defined in section 10 and includes 'a parliamentarian'.

A larger concept of responsibility in government

The ethical framework and the public trust idea tap into a wider concept of responsibility which has a much larger meaning that informs ethics for everybody. That is the idea of responsibility as a response or answer to the myriad questions which in our daily life are posed by family, friends, acquaintances, strangers, society and by events and circumstances which confront us. The great Jewish theologian, Martin Buber, wrote:

> *We practice responsibility for that realm of life allotted and entrusted to us for which we are able to respond.*[22]

Where official power is conferred upon an individual or individuals acting collectively, it attracts the application of the large idea of responsibility and the ethical framework which may give practical expression to it.

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[18] (1923) 33 CLR 386, 402.

[19] Ibid.

[20] (1923) 33 CLR 386, 412.

[21] PD Finn, 'The Forgotten "Trust" The People and the State', in Malcolm Cope (ed), *Equity: issues and trends: the importance and pervasiveness of equitable doctrines and principles in modern private, commercial and public law*, (Leichardt, Federation Press, 1995) p. 134.

[22] Martin Buber, *Between Man and Man*, 2nd edition, Routledge, 2002, p. 109.

So responsibility in the exercise of public power has an institutional dimension, but in the end it rests upon the shoulders of each individual who has the right or freedom to participate or contribute to the working of our institutions.

The key constitutional responsibilities of parliament are to make laws and to scrutinise the work of the executive, including the immense amount of delegated legislation and legislative instruments generated by ministers and public officials and authorities.

The law-making responsibilities of the parliament

The extent and limits of the responsibility of individual parliamentarians in the law-making process is not the same in its detailed content for every parliamentarian, for every law that the parliament considers. The volume and complexity of modern legislation is such that it is simply too much to expect that every member of parliament will have mastered the detail of every element of every law on which they vote. The Constitution does not in terms require that of them.

The regular process for the passage of a bill into law involves a first, second and third reading. The first is a formality, the second, introduced by a second reading speech from the relevant minister, which ordinarily sets out the substance and purposes of the proposed law, and involves substantial debate about that law. The second reading debate may be followed by consideration of the bill in detail in a committee process in which individual clauses or groups of clauses are agreed to or otherwise, and amendments debated. That process may be by-passed if agreed, and the bill proceed to a third reading. A bill may also be referred to an advisory committee for consideration. Broadly speaking, similar processes are followed in the Senate in considering a bill originating in the House of Representatives and passed through all stages there.

Sometimes a bill is declared by a minister to be urgent. If that is agreed by the House, time limits may be determined leading to a guillotine when time is exhausted and the questions necessary to complete that stage of the consideration of the bill are put.

In this setting, those who vote for a bill may include members highly conversant with its provisions, those who are not across the detailed provisions but are conversant with its purpose and effect as set out in the second reading speech and explanatory memoranda and perhaps a committee report — and perhaps some who support a bill because of advice or instructions they have received that the bill is consistent with the policy of the party to which they belong, or is otherwise supported by the leadership of the party.

The interpretation of the laws and the elusive concept of parliamentary intention

This aspect of the law-making function carried out by the parliament leads to a consideration of the principles, assumptions and presumptions about law-making that courts use when interpreting laws in disputes about their meaning. Here a question of institutional and individual responsibility, on the part of courts and judges, arises. Statutory interpretation lies on the constitutional boundary between the law-making role of the parliament and the interpretive role of the courts. The boundary is not defined by a clear bright line. In a dispute about the meaning of a law, courts may be faced with 2 or more reasonably arguable

meanings. In interpreting the statute after a contest they will choose one meaning over others – at least in application to the particular case before them. In such a case, they have a legitimate small scale law-making role for the choice determines what the law is. Sometimes, of course, the meaning is clear and the language allows only one reading.

The rules which the courts apply to the task of statutory interpretation are well known to the parliamentary counsel who draft proposed laws and who will be well aware of the possibility that choices of meaning may arise.

The general approach of the courts to the interpretation of a statute is to go first to the words – that is its text – then to context – that is other provisions of the same law or the legislative scheme. The court may also refer to background materials such as a report of a Law Reform Commission which has given rise to the proposed law. With text and context, the court also looks to the purpose of the law or the particular provision of a law being examined. The purpose might be stated in the law itself. It might be apparent from the text and the place in it of the particular section. It may be stated in the minister's second reading speech.

Section 15AA of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) provides that:

> *In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*

We often hear the term 'legislative intention' in relation to laws passed by the parliament. None of the above requires a court to try to construct an imaginary intention of the parliament and from that imaginary intention, to determine what parliament intended the Act to mean. The diversity of understandings which different members of parliament have in voting for a law, and perhaps the diversity of reasons for which they might cast their votes, suggests that for a court to first announce that it has discovered a common legislative intention is to announce that it has constructed a fiction. In a formal sense, the legislative intention is said to be ascertained by the court's determination of the meaning of the law having regard to its text, context and purpose and general rules of interpretation laid down in the Acts Interpretation Act and at common law as developed by courts over the years.

In a case decided in 2011, 6 Justices of the High Court said that legislative intention is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted by the court as a statement of its compliance with the rules of construction, both statutory and common law, which have been applied to reach the preferred result and which are known to parliamentary drafters and to the courts.[23] In that case the Court also had something to say about the idea of a statutory purpose:

> *The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.*

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[23] *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, 592 [44].

The responsibility of the courts in interpreting the law

In making constructional choices, the courts must stay within their constitutional boundaries. They must not trespass into the law-making domain of the parliament. In a case decided in 2012, 4 Justices of the Court said:

> *In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.*[24]

Nor is it appropriate for courts to construe a statute by imposing upon it a meaning that the words of the statute will not bear in order to achieve some laudable social purpose. They cannot rewrite the law.

Sometimes a law can be interpreted in one way, which may impair or extinguish common law rights or freedoms. If interpreted in another way, it will not have that effect or will have that effect to a lesser extent. It is a well-established principle that the courts in such a case prefer the interpretation which avoids or minimises the adverse impact on existing rights and freedoms. This is a rule of interpretation known as 'the principle of legality'.

The principle is similar to that which is found in human rights legislation in Victoria, Queensland and the Australian Capital Territory (ACT). The human rights legislation there requires that courts should interpret state or territory legislation consistently with fundamental human rights and freedoms which are set out in the Act or schedules to the Act and derived from the International Covenant on Civil and Political Rights.

The High Court has interpreted that requirement under the Victorian human rights legislation as going no further than the common law principle of legality approach. That is, the Court can only choose a meaning which is reasonably open on the text of the legislation being interpreted. The English courts have taken a more robust approach under the *Human Rights Act 1998* (UK) in the United Kingdom.

The responsibility of the courts to stay within their constitutional boundaries is also clear when it comes to deciding whether a law made by the parliament is beyond the law-making power of the parliament under the Constitution. It is a big decision to strike a law down. The first question the court must ask is what does the text of the challenged law mean? Is there an interpretation open that lies within the scope of the parliament's law-making power even though on another interpretation, the law may lie outside that scope?

Section 15A of the Acts Interpretation Act provides that:

> *Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.*

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[24] *Australian Education Union v Department of Education and Childrens' Services* (2012) 248 CLR 1, [28] (footnote omitted).

The first task the High Court undertook in its recent decision about the mandatory detention provisions of the *Migration Act 1958* (Cth) was to determine whether the relevant provisions could be interpreted so as not to authorise a punitive indefinite detention.[25] The Court had previously held that they could not be interpreted to avoid that result. In the recent decision, the Court held that it could not overrule that conclusion. This left the Court to deal with the question of constitutional validity of indefinite detention. It could not interpret its way out of having to deal with that question.

Constitutional interpretation

As appears from the decision in *NZYQ,* constitutional interpretation can take the court into hotly contested areas of political sensitivity. Decisions which do not involve constitutional interpretation may also have political consequences. Examples are the decision in *Mabo (No 2)*,[26] *Wik*,[27] and the decision of the Court in the *Malaysian Declaration Case.*[28] The effects of such decisions can usually be changed by legislation. A constitutional interpretation of the High Court however, can only be changed in 2 ways:

1. by a referendum to amend the Constitution
2. by the High Court overruling its decision.

The judicial protection of the rule of law by implication

The High Court has also in a series of cases since 1996, interpreted the provisions of Chapter III of the Constitution relating to the judicature, in such a way as to protect the institutional integrity of courts and the essential characteristics of courts, federal, state and territory, from legislative intrusions. These cases have provided, among other things, that state parliaments cannot abolish the state Supreme Courts.[29] Further, they cannot deprive the state Supreme Courts of their traditional supervisory jurisdiction over executive action. That is to say, they cannot deprive the state Supreme Courts of their jurisdiction to determine whether action by a minister or a public authority of the state exceeds the legal power that that minister or authority has.[30] The High Court has such a jurisdiction entrenched in section 75(v) of the Constitution — a jurisdiction which cannot be removed by parliament. This leads into the question of responsibility of the courts in holding the executive government to account in determining, where executive action is challenged, whether that action is beyond the legal power conferred on the executive either by the Constitution or laws made under the Constitution.

The limits of judicial review of executive action

In this area also, as in the areas of statutory interpretation and constitutional interpretation, the courts have a responsibility to stay within their constitutional boundaries. It is no part of the court's function in determining the lawfulness of executive action in a particular case, to

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[25] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.
[26] *Mabo v Queensland (No 2)* (192) 175 CLR 1.
[27] *Wik v Queensland* (1996) 187 CLR 1.
[28] *Plaintiff M70 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
[29] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[30] *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

decide that they would prefer a different decision to have been made and to step into the shoes of the executive and make such a decision.

The general framework of judicial review of executive action was set out by Brennan J in an often quoted passage from *Attorney-General v Quinn*:

> *The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.*[31]

The reference to political control picks up the notion of that element of responsible government which involves parliamentary scrutiny of executive action.

Generally speaking the courts require of administrative decision-makers exercising a statutory power, that they comply with what I have termed the logic of the statute. The reasoning process of an executive decision-maker exercising a statutory power must meet the following requirements:

- it is a reasoning process – that is, so far as possible a logical process even though it may involve the exercise of a value judgment, including the application of normative standards and the exercise of discretion
- it must be consistent with the statutory purpose
- it must be based upon a correct interpretation of the statute, where that interpretation is necessary for a valid exercise of a power
- has regard to considerations which the statute expressly or by implication requires to be considered
- must disregard considerations which the statute does not permit the decision-maker to take into account
- must involve findings of fact or the existence of states of mind of the decision-maker which are required by the statute as necessary to the exercise of the relevant power
- must not depend upon inferences which are not open or findings of fact which are not capable of being supported by the evidence or the materials before the decision-maker.

All of this is to say no more than that the court will require the executive to comply with the law which the parliament has made.

The valid exercise of a statutory power by a public officer may require more than rationality in the sense of compliance with the logic of the statute. The decision-maker exercising a statutory power may tick all the logical boxes and yet make an unreasonable decision. Reasonableness imposes an additional element which may involve a concept of

[31] (1990) 170 CLR 1, 35 [17].

proportionality. Metaphorically speaking, it might be rational to use a sledgehammer to crack a peanut, but it will generally not be reasonable to do so.

So far I have considered the role of courts in determining cases in which it may be said that the executive government has exceeded a power conferred on it by statute – that is by a law made by the parliament.

The executive unplugged – non-statutory executive power

There is another ill-defined area of executive power that is more troublesome. That is executive power which comes directly from the Constitution and not from a law made by the parliament in the exercise of its law-making powers.

The starting point for consideration of this aspect of executive power is section 61 of the Constitution which provides:

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

The content of the executive power conferred by section 61 includes 'the execution and maintenance of the laws of the Commonwealth'. That limb of section 61 covers the case of executive power exercised under a law made by the parliament. The other limb 'the execution and maintenance of the Constitution' does not require statutory authority. Even that limb does not exhaust the scope of executive power.

In the drafting of the Constitution the content of the words 'the executive power of the Commonwealth' which found their way into section 61, were not the subject of much explanation.

The Constitutional Committee, established in 1891 by the National Australasian Convention to draft a federal constitution had, among its list of issues for decision, drafted by Griffith, an executive with 'powers correlative to those of the legislature'. The committee ultimately produced a document which proposed an executive government but said nothing about its powers.[32]

Uncertainty about the scope of executive power is not limited to Australia. Paul Craig and Adam Tomkins, writing in a *Collection of Essays* published in 2006, referred to what they called '[t]he inadequacy of formal definitions of executive power' and described it as 'an underlying shared phenomenon'.[33] In each of the examples they cited, the US, Australia, Canada, New Zealand and Germany, there are gaps and silences in relation to the executive. An Indian judge, Justice PP Mukharji, writing in 1967 about the Indian Constitution, suggested that definitional difficulty is in the nature of executive power:

> *… executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable*

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[32] 'Memorandum of Decisions of Constitutional Committee' printed from day-to-day '(Document 4) in Sir Samuel Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia*, (1891, reprinted 1973).

[33] Paul Craig and Adam Tomkins (eds), *The Executive and Public Law*, Oxford University Press, 2006, p. 4.

> *multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of State in political philosophy and political science.*[34]

Much has been written about executive power since federation and the difficulties of its definition. By 1977 when Professor Jack Richardson wrote about it in *Commentaries on the Australian Constitution*, it had received what he called 'only scant definition'. No case, he said, had yet arisen requiring a definition of the power.[35]

It is reasonably well established that non-statutory executive power enables the Commonwealth to undertake executive actions appropriate to its position under the Constitution, which is sometimes called the nationhood power and the prerogative powers historically accorded to the Crown under the common law and relevant to the functions of the Commonwealth.[36]

The executive spending public money

An important aspect of non-statutory executive power which has come under scrutiny in recent times has been the power of the executive to enter into contracts and to spend public money.

The question of parliamentary control of public expenditure by the executive was one which concerned Harry Evans. In a decision handed down in 2005, *Combet v Commonwealth* the High Court held that the government's industrial relations advertising campaign was an authorised purpose of expenditure under appropriations made by parliament for the Department of Employment and Workplace Relations.[37]

Evans referred to the very broad form of appropriations, stating that there was, as he said, 'very little limitation on the purposes for which money may be spent'.[38] Having regard to the broad brush appropriations held lawful by the Court he observed:

> *It is now clear that control of expenditure must be undertaken by the Parliament or not at all.*

But is it enough that a proposed expenditure is covered by an appropriation of money by the parliament to make it lawful? The answer to that question is no. The executive cannot spend money simply on the basis of a parliamentary appropriation. Parliamentary appropriation is a necessary condition of spending power, but it is not sufficient. The power to spend money and thus the power to contract to spend money must be found in the Constitution itself or in a valid law made under the Constitution. That proposition emerges from a trilogy of cases decided by the High Court in 2009, 2012 and 2014.

The first case was *Pape v Commissioner of Taxation*.[39]

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[34] Prasanta Bihari Mukharji, *Critical Study of the Indian Constitution*, Bombay University Press, 1967, pp. 9–10.

[35] Jack Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution*, 1987, p. 50 and pp. 54–55.

[36] *Cadia Holdings Pty Ltd v New South Wales* (2010) 212 CLR 195, 226.

[37] [2005] HCA 61.

[38] Harry Evans, *'Government advertising – funding and the financial system'*, Parliamentary Matters (No 15), February 2006.

[39] (2009) 238 CLR 1.

Pape concerned the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (Tax Bonus Act) which made provision for payments to Australian resident taxpayers. This Act was a fiscal response to the global financial crisis described in the explanatory memorandum for the bill for the Act as 'the most significant economic crisis since the Second World War'. The tax bonus was intended to 'provide immediate economic stimulus to boost demand and support jobs'. Brian Pape, a lecturer in law at the University of New England would have been entitled to $250 under section 7 of the Act. He didn't want it and he sued the Commissioner of Taxation asserting that the legislation was beyond power. Justices Gummow, Crennan, Bell and I held that the determination by the executive government of a need for an immediate fiscal stimulus to the national economy enlivened legislative power under section 51(xxxix) to enact a Tax Bonus Act as a law incidental to the exercise of non-statutory executive power. Justices Hayne, Heydon and Kiefel dissented in relation to that proposition. However, Justices Hayne and Kiefel held the Tax Bonus Act to be a valid enactment under section 51(ii) of the Constitution.

Mr Pape lost his challenge. However, an important principle which emerged from it was a win for his view of the executive power of the Commonwealth in relation to public expenditure. That was the proposition that sections 81 and 83 of the Constitution do not confer substantive spending power. Appropriation is a necessary condition of such expenditure. The power to spend appropriated moneys is to be found elsewhere in the Constitution or in statutes made under it.

Pape set the scene for *Williams (No 1)*.[40] *Williams (No 1)* concerned the validity of an agreement between the Commonwealth and the Scripture Union, Queensland. Under the agreement the Scripture Union was to provide chaplaincy services and to ensure those services were 'delivered' as identified in its application for funding. The only obligation imposed on the Commonwealth was to provide the funding for those services subject to the availability of sufficient funds. The plaintiff, a parent of children attending a Queensland school, challenged the validity of the agreement and the lawfulness of payments by the Commonwealth pursuant to it. One of the grounds was that the agreement and the payments were beyond the executive power of the Commonwealth under section 61 of the Constitution. Six of the 7 Justices held that the agreement was beyond the executive power of the Commonwealth described in section 61 of the Constitution as was the making of payments by the Commonwealth to the Scripture Union under the agreement.

In response to the decision in *Williams (No 1)*, the Commonwealth Parliament enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which amended the *Financial Management and Accountability Act 1997* (Cth) and regulations made under it to confer power on the Commonwealth to make, vary or administer arrangements under which public money was or might become payable by the Commonwealth and grants of financial assistance which, apart from the Act, the Commonwealth did not have power to make. Subsection 32B(1) of the Amended Act relevantly provided:

[40] *Williams v Commonwealth* (2012) 248 CLR 156.

If:

(a) apart from this subsection, the Commonwealth does not have power to make:

…

(i) an arrangement under which public money is, or may become, payable by the Commonwealth; or

(ii) a grant of financial assistance to a State or Territory; 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

the Commonwealth has power to make … the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

On Mr Williams' second challenge, asserting that the payments continued to be unauthorised, the Court held that section 32B should be read as providing the Commonwealth with power to make arrangements or grants only where it was within the constitutional power of the Commonwealth to authorise the making of those arrangements or grants.[41] The validity of the section in its application to a particular payment depended upon it being supported by a head of legislative power. The Court held that the impugned provisions were not for the provision of benefits to students within section 51(xxiiiA) of the Constitution and were not supported by any other head of legislative power. Nor was the making of payments for the purposes of the program within the executive power of the Commonwealth. The impugned provisions were invalid and the payments were unlawful.

Pape and the Williams' cases tell us that the executive government of the Commonwealth cannot spend public money on anything without an appropriation. They must also have legal authority deriving from statute or otherwise from non-statutory executive power found in the Constitution. That said, there are few litigants who would want to go to Court to test the validity of a payment. There are many more prepared to test the correctness of an exaction.

The legislation which responded to *Williams (No 1)* was an attempt at a global fix providing a legislated substitute for the common assumption. It validated all that could be validated. Whether it did so validly may be debatable. Harry Evans would probably have been disappointed in the parliament for passing that legislation.

The general question arises how is the executive held to account? The judicial process is an ad hoc mechanism of accountability. It is not systematic. Ultimately, it is the parliament, as Evans said after *Combet*.

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[41] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

In a submission to the Joint Committee of Public Accounts and Audit inquiring into Commonwealth Grants Administration in October 2022, Professor Anne Twomey observed that:

> *Those who actively approve the grants are rarely aware of the limits on their powers that are derived from the limited legislative support for the spending program.*[42]

As a result, in her opinion, much of the expenditure under grants schemes is unlawful or at least of doubtful legal validity. She put it thus:

> *This needs to stop. Governments should not be unlawfully spending public money. The principle of the 'rule of law' means that the law, including the Constitution, binds the government in relation to the expenditure of public money'.*[43]

Her concern does not appear to have led to any response in the committee's report.

The question remains: who is accountable for the lawfulness of public expenditure – quite apart from the ethical integrity of grants programs – and to whom are they accountable? The exercise of executive power cannot be systematically policed by the courts because they can only respond to the cases brought before them. This emphasises the importance of effective accountability mechanisms in the parliament and, as we have seen, particularly in the Senate.

The executive power of the Commonwealth can lawfully extend to funding programs well beyond those which might find support in heads of Commonwealth legislative power. Where such programs can be effected by grants to the states, the generous powers available under section 96 of the Constitution are available – with conditions to which the states must agree if they are to receive the money – but which they often find to be offers too good to refuse – and with few constitutional constraints.

There are few people who are prepared to come to court to challenge the validity of a payment made by the Commonwealth. There is therefore a practical limit on the accountability which can be imposed by the courts in relation to contracts and payments made under them. Responsible government trumps judicial review every time. The parliament does not have to wait for a case to come before it in order to examine the lawfulness and merits of public expenditure. Sometimes of course, it may not be politically prudent to challenge a popular program. But if responsible government is to mean anything it must mean that the executive is accountable to the parliament for its use of public money. The question is whether the parliament is discharging its function.

Conclusion

Across our constitutional system there are many calls for its actors – the institutions and the people who make them up – to respond ethically to the public interest and the public

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[42] Professor Anne Twomey, Submission No 5 to Joint Committee on Public Accounts and Audit, Parliament of Australia, *Inquiry into Commonwealth grants administration*, 27 October 2022.

[43] Ibid.

purposes which they are called on to serve. The idea of responsible government is at the centre of that picture. The ethical framework offers a larger picture. People like Harry Evans, a true servant of the public who carried out the duties of the Clerk of the Senate, are models for everybody, whether they are in the parliament, the executive or on the bench.