# Drafting Principles on which the Advancing Democracy Model is Based

The 1999 referendum aimed to make as few changes as were necessary to replace the Queen and Governor-General with a President. This model aims to solve real problems and accordingly is much more ambitious. The drafting has been governed by these considerations:

*A. Democratic Conventions Must Become Written Provisions*
The 1975 crisis showed that we cannot guarantee democracy by relying on unenforceable constitutional conventions. Democracy must be written in to the Constitution.

*B. The Scope of the Changes Proposed is Limited*
Not one section of the Constitution is worth retaining in its present form. Ideally, the entire Constitution should be replaced. However, as the appetite for change of the average Australian is limited, the aim of this proposed model is more limited.

The aim is to remove from our political system the undemocratic features which make it vulnerable to political instability. Changes which are not connected to removing instability have generally (but not entirely) been avoided, even if they are consistent with improving democracy. For example:

- Our Constitution should have a guarantee that each elector's vote in the House of Representatives has equal value. This omission is a cause of unfairness, but not (yet) a prime cause of instability, so it has been omitted from the model.
- The Senate should not have nearly the same powers as the House of Representatives. But only one Senate power is targeted for removal by the Advancing Democracy model - its power to blackmail an elected Government, since that is another prime cause of instability. Even that change does not affect the Senate's legislative powers. It is to be removed indirectly by removing the Crown's power to appoint the Government.

*C. Replacing Monarchy with Democracy*
The model aims to remove monarchy, because the ancient rules concerning the Crown are the major source of instability and uncertainty. This requires more than simply replacing the Queen with an alternate head of state. *All* residual aspects of monarchy must be removed. Sometimes this requires the abolition of a function rather than just the reallocation of the function to the new head of state. For example:

- Our present Constitution contains a number of provisions where, after either the voters, Parliament or the Government has made a decision, the Queen's representative must do something before the decision is valid. This allows decisions by the people or their representatives to be stymied by the Head of State simply declining to act, for whatever reason, or by acting against the wishes of the majority. A democracy does not need someone to supervise or rubber stamp the people's decisions.
- Our Constitution provides for the holders of various positions to swear oaths of office. This is a primitive, feudal practice which originated in notions of personal loyalty. Personal loyalty is not a basis for democracy. *We need loyalty to principle.* The correct principle is that the will of the people is to prevail. If the people or their representatives have selected someone to fill a position, no other step should be necessary before the person attains the position. Oaths of office have been discarded.

All provisions which refer to the Queen or Governor-General in Council must be amended. Where the provision is redundant, it has been discarded, but other redundant provisions are not altered if they do not refer to the monarchy.

*D. The People Should Understand their Constitution*
The Constitution belongs to the people of Australia. It is the foundation of our system of Government and the ultimate law with which all other laws must be consistent.

At present, an ordinary person reading the Constitution would not understand how our Government works. In the 1890s this may have been acceptable, but in the current age it is unforgivable. *Every rule book should be comprehensible to those governed by the rules.* Where possible, the amendments proposed update the language of the Constitution so that contemporary Australians can understand it.

*E. The Primary Purpose is Practical*
Laws serve a practical purpose. They are rules about what people can and cannot do in particular circumstances. Implicitly they reflect the values held by the law makers in relation to the subject matter of the law, but their primary purpose is not to demonstrate adherence to certain beliefs - it is to achieve a practical result.

The Constitution, as our ultimate law, operates at a higher level than ordinary legislation. Its subject matter is the rules concerning decision-making: by whom, when and how should decisions be made, on which subjects and in which circumstances. It is inevitable and legitimate for the Constitution to reflect the values we hold in relation to the proper scope of rules and decision-making, but unnecessary and possibly counter-productive for it to include statements reflecting values or beliefs which go beyond those which are necessary to achieve the practical result of an improved democratic system.

For example, s.116 of the Constitution prevents the Commonwealth from making “any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion ....”. This reflects the belief that religion is a matter of personal choice, beyond the role of Government and the law. This is an appropriate expression of a value, because the value relates to an objective of the Constitution - to set rules about the subjects on which Parliament may make laws. But to insert something in the Constitution about faith in God would serve no practical purpose. It would demonstrate religious belief, which not everyone shares, and which is quite unnecessary.

The amendments presented here avoid grandiose statements about democracy which some might regard as contentious and the practical effect of which would be uncertain.

*F. Tradition and Sentiment Are Not Relevant Factors*
Similarly tradition and sentiment should be discarded where they have no practical effect. It is not necessary to retain provisions which no longer serve a useful purpose.

# Drafting Notes on the Proposed Amendments

These drafting notes:

- Record which sections of the Constitution will be altered;
- Note how they will be amended; and
- Explain why the amending words have been chosen.

They also briefly note the reason for the changes, but generally the justification for the changes is set out more fully in the Rationale.

An effort has been made to frame the amendments in a style consistent with the drafting style of the present Constitution, though actually the Constitution reflects different styles in different places. For example:

- The Constitution generally uses the word "shall" for requirements which are mandatory. Since the late 1980s, practising lawyers have seen an ambiguity in "shall" which was not apparent to prior generations - supposedly "shall" can indicate the future or the imperative - and so we have all been using "must" rather than "shall". The amendments use "must" to denote mandatory requirements. This should not cause any reinterpretation of provisions which use shall, as the Constitution already uses "must" in sections 34 and 128.
- New sections have been labelled with a section number followed by a capital letter, either 'A', 'B' or 'C', for ease of reference. This follows the example set by other new provisions, such as s.51(xxiiiA) and s.105A.

One way in which the style does depart from the original is that in the amendments a handful of phrases or words have been included primarily for their educative effect. For people to be able to understand their Constitution, sometimes things must be spelled out in more detail than is legally necessary.

References below to Quick and Garran are references to the first edition of '*The Annotated Constitution of the Australian Commonwealth*', 1901, (Angus & Robertson, Sydney & Melville & Mullen, Melbourne).

## Chapter 1 - The Parliament

### Part 1 - General

#### Section 1 Legislative Power

1.1 The proposed amendment removes the Queen from Parliament, and mentions the House of Representatives ahead of the Senate, to better reflect the House's primary status as the more democratic House of Parliament.

#### Section 2 Governor-General

2.1 The proposed amendment deletes the section, as the Governor-General will no longer represent the Queen or discharge her functions. The new position of Governor-General of Parliament will be dealt with in a new s.58A.

Section 3 Salary of Governor-General
3.1 The proposed amendment deletes the section as unnecessary. Its subject matter is dealt with in the proposed s.60B(2)(iii).

Section 4 Provisions relating to the Governor-General
4.1 The current section gives the Queen an unlimited power to appoint someone other than the Governor-General to administer the Commonwealth. This is undemocratic. The proposed amendment deletes the section. New provisions concerning replacement of the Governor-General of Parliament and the Deputy are set out in ss.58A and 59A. Laws concerning the appointment of substitutes when the incumbents are temporarily unable to act are dealt with in proposed s.60B(2)(i).

Section 5 Sessions of Parliament. Prorogation and dissolution
5.1 This section and the related s.6 are to be deleted.
5.2 Control over when Parliament meets is to be determined by each House itself under a new s.6A and an amended s.50, which deals with standing orders.
5.3 Control over dissolutions of the House of Representatives will no longer be vested in the Governor-General, whether acting with the advice of the Prime Minister or against it. Only the House itself may resolve to hold an election: see proposed s.58A(iii), unless it has exceeded the limit of the 3 year term in s.28.
5.4 Presently it is unclear whether ss.5 and 28 are the sole source of the Governor-General's power to dissolve Parliament. Traditionally the dissolution of Parliament was part of the prerogative power of the Crown, and some argue that this may still influence the statutory powers of dissolution given in the Constitution: see Professor Pat Lane's article, "Double Dissolution of Federal Parliament" (1973) 47 ALJ 290 at 300-301, with the effect that the Governor-General may decline to dissolve Parliament even when the Crown's Ministers advise a dissolution. Such an interpretation is untenable, but why should it be a matter of debate when we can set clear rules? The Advancing Democracy model will sweep away the Crown and its prerogatives - see proposed s.63A - and set strict limits on when the House of Representatives may be dissolved.

Section 6 Yearly session of Parliament
6.1 Currently sessions of Parliament are dealt with in two sections, s.5 and s.6. The proposal is to condense the rules as to Parliamentary sessions into a new section s.6A, to be called 'Sessions of Parliament', which will impose a requirement that the standing orders of each house include rules that:

- Each House must meet not less than 30 days after an election, and
- Each House must meet once per year.

These requirements are in the present sections 5 and 6. The proposed section 6A uses the same words, except that the phrase "return of the writs', which is likely to confuse many readers will be replaced with the more comprehensible "declaration of the results of the election".

Section 6A Sessions of Parliament
6A.1 This is a new section which provides that certain minimum requirements for

Parliamentary sittings which are in sections 5 and 6 of the present Constitution must be retained in the Standing Orders. The proposed section 6A uses the same words, except that the phrase “return of the writs’, which is likely to confuse many readers will be replaced with the more comprehensible “declaration of the results of the election”.

Section 7 The Senate
7.1 Only one change is proposed to this section. In the last line, the person to whom the names of new senators are to be certified is to be changed from the “Governor-General” to the “Deputy Governor-General”. The reason is that the Senate is to be presided over by the Deputy Governor-General of Parliament, a position created by the proposed new s.59A. (An identical change is to be made to s.15).

Section 8 Qualification of electors
8.1 This section will remain in its present form.

Section 9 Method of election of senators
9.1 This section will remain in its present form.

Section 10 Application of State laws
10.1 This section will remain in its present form.

Section 11 Failure to choose senators
11.1 This section will remain in its present form.

Section 12 Issue of writs
12.1 This section will remain in its present form.

Section 13 Rotation of senators
13.1 This section will remain in its present form.

Section 14 Further provision for rotation
14.1 This section will remain in its present form.

Section 15 Casual vacancies
15.1 Only one change is proposed to this section, for identical reasons as the change proposed to s.7. In the fourth paragraph, second line, the person to whom the names of new senators are to be certified is to be changed from the “Governor-General” to the “Deputy Governor-General”. The reason is that the Senate is to be presided over by the Deputy Governor-General of Parliament, a position created by the proposed new s.59A.

Section 16 Qualifications of senator
16.1 This section will remain in its present form.

Section 17 Election of President
17.1 This section is to be deleted, as it requires Senate debates to be chaired by one senator

chosen to be the Senate President. The new presiding officer in the Senate will be the Deputy Governor-General of Parliament - see proposed s.59A(i). The Senate may still choose one of its number to preside when neither the Deputy Governor-General nor Governor-General are available: see proposed s.60B(1). A similar change is to be made to s.35 concerning the Speaker.

Section 18 Absence of President
18.1 This section is to be deleted. The deletion of s.17 and the inclusion of the proposed s.59A(i) mean that the President of the Senate will no longer be a position recognised by the Constitution; hence it is not necessary for the Constitution to provide for what happens if the President is absent. A similar change is to be made to s.36 concerning the Speaker.

Section 19 Resignation of senator
19.1 The section is to be amended to keep its meaning consistent with that of the current section. Presently the section requires resignations by senators to be given in writing to presiding officer in the Senate. Since by virtue of proposed s.59A(i) that will become the Deputy Governor-General of Parliament rather than the President of the Senate, the amendment requires resignations to be given to the Deputy Governor-General. Note that proposed s.60B(2)(ii) provides for what may be done in the absence of the Governor-General or Deputy, so resignations will still be possible notwithstanding absences. A similar change is to be made to s.21. Both changes are consistent with those to be made to s.37.

Section 20 Vacancy by absence
20.1 This section will remain in its present form.

Section 21 Vacancy to be notified
21.1 As with s.19, the section is to be amended to keep its meaning consistent with that of the current section. Presently the section requires the presiding officer in the Senate to notify State Governors of any vacancies which have arisen in the representation of their States. Since by virtue of proposed s.59A the presiding officer will be the Deputy Governor-General rather than the President of the Senate, the amendment requires vacancies to be notified by the Deputy Governor-General. Note that proposed s.60B(2)(ii) provides for what may be done in the absence of the Governor-General or Deputy, so vacancies may still be notified notwithstanding absences.

Section 22 Quorum
22.1 This section will remain in its present form.

Section 23 Voting in Senate
23.1 Presently the section states that questions in the Senate are determined by majority vote. The section requires amendment to incorporate the proposal that the standing orders of each House of Parliament will in future require that rulings during debates cannot be overturned except by a two-thirds majority: see proposed s.50(2)(i). Accordingly the amendment exempts such questions from the general rule that the majority prevails.
23.2 The section requires further amendment consequent upon the presiding officer in the

Senate being changed from the President of the Senate to the Deputy Governor-General of Parliament. This does not have an impact on who can vote. An ordinary Senator standing in for the Deputy Governor-General will have an ordinary right to vote, as is presently the case. The Deputy Governor-General will not be a member of the Senate - see proposed s.60A(3).
23.3 Unlike the Speaker of the House, the Senate President does not have a casting vote. The amendment proposes to confirm this expressly in s.23, for two reasons. The principal reason is to negate any argument that the express negation in the proposed s.40 of a casting vote for the Speaker, and the absence of such a provision in relation to a presiding senator, implies that the latter does have a casting vote. Secondly expressly negating a casting vote ensures that ordinary voters do not misunderstand the position when reading the clause.

## Part III – The House of Representatives

Section 24 Constitution of House of Representatives
24.1 This section will remain in its present form.

Section 25 Provisions as to races disqualified from voting
25.1 This section provides that if a State excludes particular racial groups from the electoral roll, those people are not to be counted in the distribution of Federal electorates. The section is grossly undemocratic and odious to modern values. Now that a proposal for a different referendum to remove the section appears to have been shelved, the deletion of section 25 can be included in the Advancing Democracy model, even though the section is not a cause of instability.

Section 26 Representatives in first Parliament
26.1 This section will remain in its present form.

Section 27 Alteration of number of members
27.1 This section will remain in its present form.

Section 28 Duration of House of Representatives
28.1 This section sets the term of the House at 3 years, but provides for the House to be dissolved earlier by the Governor-General. The latter part of the section is to be qualified by adding at the end that the Governor-General may only exercise this power pursuant to the existing s.57 or the proposed s.58A(iii). The latter section limits the reasons for dissolutions to three: firstly if the House resolves to hold an election, secondly if the House cannot form a Government within 60 days, and thirdly if the House has sat for longer than the 3 years permitted by s.28.

Section 29 Electoral divisions
29.1 This section will remain in its present form.

Section 30 Qualification of electors
30.1 This section will remain in its present form.

Section 31 Application of State laws
31.1 This section will remain in its present form.

Section 32 Writs for general election
32.1 This and the related section 33 are to be deleted. Both sections deal with the mechanics of calling House of Representatives' elections. All provisions concerning such matters are to be concentrated in the new ss.58A(iii) & 58A(iv), which limit when the powers may be used and who may exercise them.

Section 33 Writs for vacancies
33.1 This and the related section 32 are to be deleted. Both sections deal with the mechanics of calling House of Representatives' elections. All provisions concerning such matters are to be concentrated in the new ss.58A(iii) & 58A(iv), which limit when the powers may be used and who may exercise them.

Section 34 Qualifications of members
34.1 This section should really be deleted in its entirety, as it is an arbitrary limitation on the people's right to choose whoever they want as a representative. (Is it really likely that they will start choosing minors or foreigners? If they do, it will only be because those people are exceptional in some way.) Nevertheless, consistently with the aim of making only such changes as are necessary to eliminate the potential for instability, the model does not delete the section.
34.2 The proposed model does however amend the words of sub-clause (ii), which currently require a candidate for election to be a "subject of the Queen". This and the subsequent words are to be replaced with the requirement that the candidate must be an Australian citizen. This is what the electoral laws currently require: see Commonwealth Electoral Act 1918, s.163(1) & (2).

Section 35 Election of Speaker
35.1 This section is to be deleted, as it requires debates in the House of Representatives to be chaired by one member chosen to be the Speaker. The new presiding officer in the House will be the Governor-General of Parliament - see proposed s.58A(i). The House may still choose one of its number to preside when neither the Governor-General nor Deputy Governor-General are available: see proposed s.60B(1)(i). A similar change is to be made to s.18 concerning the President of the Senate.

Section 36 Absence of Speaker
36.1 This section is to be deleted. The deletion of s.35 and the proposed s.58A(i) mean that the Speaker will no longer be a position recognised by the Constitution; hence it is not necessary for the Constitution to provide for what happens if the Speaker is absent. A similar change is to be made to s.18 concerning the President of the Senate.

Section 37 Resignation of member
37.1 The section is to be amended to keep its meaning consistent with that of the current section. Presently the section requires resignations by members of the House of

Representatives to be given in writing to the Speaker. Since by virtue of proposed s.58A(i) the Governor-General will replace the Speaker as the presiding officer in the House, the amendment requires resignations to be given to the Governor-General. Note that proposed s.60B(2)(i) provides for what may be done in the absence of the Governor-General or Deputy, so resignations will still be possible notwithstanding absences. The change is consistent with those to be made to ss.19 and 21.

Section 38 Vacancy by absence
38.1 This section will remain in its present form.

Section 39 Quorum
39.1 This section will remain in its present form.

Section 40 Voting in House of Representatives
40.1 Presently the section states that questions in the House are determined by majority vote. The section requires amendment to incorporate the proposal that the standing orders of each House of Parliament will in future require that rulings during debates in each House cannot be overturned except by a two-thirds majority: see proposed s.50(2)(i). Accordingly the amendment exempts such questions from the general rule that the majority prevails.
40.2 The section requires further amendment consequent upon the presiding officer in the House being changed from the Speaker to the Governor-General of Parliament. Unlike the position in the Senate (see the current s.23), this *does* have an impact on who can vote. The Constitution currently deprives the Speaker of his or her right to vote as an ordinary member, then gives the Speaker a casting vote in the event that the votes are equal. The final section of Chapter 5 of the Rationale for the Advancing Democracy model explains why this is undemocratic. It is also quite unnecessary. Accordingly a key part of the amendment is to restore the ordinary right to vote to an ordinary member standing in for the Governor-General. The Governor-General will not be a member of the House - see proposed s.60A(3) - and so will not vote.
40.3 The amendment does not just remove the casting vote of a presiding member - it expressly negates such a vote, for two reasons. Firstly, it allows the drafting of the clause to replicate that of s.23 concerning voting in the Senate. Secondly it ensures that ordinary voters do not misunderstand the position when reading the clause.
40.4 The removal of the Speaker's casting vote means that s.40 should follow s.23 concerning voting in the Senate and provide that when the votes are equal, the question being put is negated.

## Part IV – Both Houses of the Parliament

41 Right of electors of States
41.1 This section will remain in its present form.

42 Oath or affirmation of allegiance
42.1 This section, which requires Parliamentarians to affirm their allegiance to the Queen, will be abolished. Once the voters have decided that a person is suitable to serve in

Parliament, there should be no further step required before the person can commence to serve.

43 Member of one House ineligible for other
43.1 This section will remain in its present form.

44 Disqualification
44.1 The section currently disqualifies from Parliament a person who "holds any office of profit under the Crown" etc. In England such provisions originated in 1705 (according to Quick and Garran at p.493) presumably to prevent the Queen or King from influencing Parliamentary votes. In the Australian Constitution the provision prevents the Government of the day from 'buying' the support of members by appointing them to administrative positions or sinecures. The purpose of the section will be retained, but its words must change consequent on the removal of the Crown from Australia.
44.2 It is proposed to substitute the words "under the Government of the Commonwealth, a State or a Territory" in place of the words "under the Crown". This ensures that the Federal Government cannot 'buy' the vote of a member by arranging for another Government under the control of the same political party to appoint the member to a lucrative office.
44.3 In the final paragraph a minor amendment is necessary to remove the reference to the Queen.

45 Vacancy on happening of disqualification
45.1 This section will remain in its present form.

46 Penalty for sitting when disqualified
46.1 This section will remain in its present form.

47 Disputed elections
47.1 This section will remain in its present form.

48 Allowance to members
48.1 This section will remain in its present form.

49 Privileges etc. of Houses
49.1 This section will remain in its present form.

50 Rules and orders
50.1 This section will be substantially re-written through the introduction of an additional subsection (2), to implement one of the new arrangements designed to ensure impartial conduct by those chairing Parliamentary debates.
50.2 It is proposed to change the name of the section to 'Standing Orders'. Quick and Garran at p.507 noted that the British Parliament divided its rules and orders into three types: standing orders, sessional rules and orders, and resolutions of indeterminate duration. There is no longer any reason to follow British practice. All types of rules can fall within the term standing orders - the Houses of Parliament simply have to make the effect and the duration of each rule clear. The name 'Standing Orders' is the term by which most people recognise such

rules, so using that term makes the Constitution more comprehensible to ordinary voters. It also facilitates the drafting of the amendments proposed to s.50.

50.3 Subsection 50(2)(i) implements the requirement for a two-thirds majority to overturn decisions on during Parliamentary debates. For consistency, the rule applies to *any* person who so presides, regardless of whether that is the Head of State or the Deputy Head of State or a Member of the House. Presiding over Parliament will become the primary roles of the Governor-General and Deputy, and they should not be absent often, except by reason of ill health.

50.4 Subsection 50(2)(i) refers to "decisions made during *proceedings in Parliament*". The latter phrase is intended to limit the two-thirds majority requirement to decisions made on the floor of Parliament, and to exclude from the rule any decisions which the standing orders might authorise be made outside of Parliamentary debates. For example, decisions of an administrative nature made by the presiding officer would be liable to be overturned on a simple majority.

50.5 Subsection 50(2)(ii) will permit the Governor-General, who will generally preside in the House of Representatives, and the Deputy who will generally preside in the Senate, to impose a new penalty on those who do not follow particular Standing Orders. This power will not be available to ordinary members of Parliament presiding in the absence of either the Governor-General or Deputy, because such members will usually be partisan political figures whose decisions on such matters are unlikely to be accepted by opposing members of Parliament, or the electorate, as easily as those made by the impartial figures the Governor-General and Deputy are intended to be. Because rulings on such matters are classed as 'decisions being made during proceedings in Parliament', they fall within the class of decisions identified in s.50(2)(i), and cannot be reversed except by a two-thirds majority.

50.6 The penalty may be imposed on Ministers who fail to "adequately answer" questions. This will be determined by the subjective judgment of the Governor-General or Deputy. A Minister who objects to the penalty would have two options. The first is referred to in s.50(2) - to seek to gain a two-thirds majority vote in favour of reversing the ruling. The second would arise from the duties imposed on the Governor-General in s.58A(i) and the Deputy in s.59A(i) to show "impartiality and fairness". As duties, whether or not they have been discharged is justiciable before the High Court under the proposed new section 60A(1). The Minister's second option therefore is to ask the High Court for a declaration that the imposition of the penalty was not a valid exercise of the power, either because the question had been answered, or the decision that it had not been was either not impartial or not fair.

50.7 The penalty on Ministers is only potentially available where the standing orders oblige the Minister to answer. If standing orders remain as presently drafted, no penalties will ever be imposed because there is no requirement for Ministers to answer questions. Standing order 104 merely requires answers to be "directly relevant" to the question. The content of the standing orders will continue to be determined by majority vote, which means that ordinarily a Government will have control over which questions, if any, must be answered. It may take some time for Governments to have the courage to impose on themselves an obligation to answer questions, but if this hurdle can be overcome the section should improve the standard of question time in both Houses of Parliament.

50.8 Subsection 50(2)(ii) also allows penalties to be imposed on unruly members who are suspended from each House. Again, the member would have the same two options for

challenging the decision as a Minister would have, outlined at Note 50.6 above.
50.9 The amount of the penalty is set by reference to salary, but not allowances or other entitlements. The main sanction is the imposition of a penalty, not its size. The express reference to allowances and entitlements is more about clarifying the extent of the penalty than limiting its size.
50.10 The penalties are forfeitures. The intention is that the sums forfeited are never paid to the members. Unlike with the current s.46, the sums do not become a debt due. The proposed section extinguishes an entitlement to payment. The amount forfeited would not form part of the member's taxable income.
50.11 Though not expressly mentioned in the section, the standing orders will have to conform with s.6, s.58A(i) and s.59A(i).
50.12 Subsection 50(3) provides a mechanism for requiring the standing orders to meet the requirements set out in the Constitution. The High Court, on the application of any elector, has a discretion to re-write the standing orders to ensure compliance with the Constitution.

## Part V – Powers of the Parliament

Section 51 Legislative powers of the Parliament
51.1 This section will remain in its present form.

Section 52 Exclusive powers of Parliament
52.1 This section will remain in its present form.

Section 53 Powers of the Houses in respect of legislation
53.1 This section will remain in its present form.

Section 54 Appropriation Bills
54.1 This section will remain in its present form.

Section 55 Tax Bill
55.1 This section will remain in its present form.

Section 56 Recommendation of money votes
56.1 This section will be deleted. It *prevents* a proposed law spending Government money from becoming law unless the purpose of the spending has been recommended by the Governor-General. When the Governor-General acts on the advice of the Government, the section means that only the Government can initiate Government spending. That was the original intention behind the English rule on which the section is based - to ensure that Government expenditure remained under control of the Government. Members of Parliament, it seems, could not be trusted to spend money wisely. While it would be possible to amend the section by substituting the words "Executive Government" for "Governor-General", the Advancing Democracy model will instead delete this section entirely, as it represents an unnecessary and unacceptable limitation on democracy.
56.2 Section 83 of the Constitution provides that no Government money may be spent without a law being passed which authorises the expenditure, and the Advancing Democracy

model does not change this requirement. To pass the law, both Houses of Parliament must approve the expenditure. When the Government has majority support in the House of Representatives, the deletion of the section will make no difference - the law cannot pass without Government support. When the Government's majority is uncertain, or there is a 'minority' Government as there has been since the 2010 election, it is possible that the majority of each House will, on some items of expenditure, disagree with the Government. If those who disagree with the Government can obtain majority support for certain expenditure, why should the Government - which is in a minority on that one item - be able to prevent the expenditure? To permit it to do so would be to breach a cardinal principle of democracy - majority rule.

Section 56A How laws are made

56A.1 This is a new section which states clearly how a proposed law will become a law. Presently the Constitution does not contain a simple precise explanation of how a law is made. All we have is s.58, which implies rather than directly states that a proposed law becomes a law via a 3 stage process: the proposed law must be passed by the House of Representatives, then by the Senate, then assented to by the Governor-General under the current s.58. As the requirement for royal assent will be abolished, a new section is required which explains clearly to voters how a law is made.

56A.2 The intention of the amendment is that no proclamation, publication or certification by any Parliamentary officer is required for a Bill to become law unless such a requirement is stated in the proposed law. There were suggestions after the 1975 crisis that the Labor Speaker could have thwarted the Governor-General's appointment of the Fraser Government by withholding from the Governor-General the Appropriation Bills which had just been passed by the Senate, so that he could not assent to them. In a crisis people will look for any technical reason to promote their position. It is better to have clear rules based on principle, so that a law which has been passed by the people's representatives cannot be delayed or negated by trivial technicalities.

Section 57 Disagreement between the Houses

57.1 One significant change will be made to this section, which sets out how disagreements may be resolved when the House of Representatives persists with legislation to which the Senate will not agree. At two stages, whether the dispute resolution process proceeds further depends on decisions made by the Governor-General who "may" dissolve the Senate and the House of Representatives (a double dissolution), and later "may" following that election convene a joint sitting of both Houses.

57.2 While in each of the six double dissolutions which has so far occurred, the Governor-General of the day has acted on the advice of the Government which held a majority in the House of Representatives, the word "may" implies he has a discretion as to whether he does so or not. This discretion is asserted by a number of writers on constitutional law.

There is no logical reason why the Governor-General, whether as the Queen's representative as she now is, or as the Head of State under the Advancing Democracy model, should have a *decision-making* role in a dispute between the two Houses of Parliament. When the source of disagreement is the insistence by the House of Representatives that a particular law be made, the question of whether the dispute resolution process should move to the next stage should

be determined by majority vote in that House. Accordingly the amendment replaces "the Governor-General may" with "the Governor-General *must* at the request of the House of Representatives". Note that under proposed s.60A(1), court action could be taken to ensure the Governor-General did fulfill his or her duty to comply with the House's request.
57.3 Where the Governor-General acts on the advice of the Government under s.57, as has been the case to date, the amendments make no difference to the result.

Section 58 Royal assent to Bills
58.1 This section will be deleted.

Section 59 Disallowance by the Queen
59.1 This section will be deleted.

Section 60 Signification of Queen's pleasure on Bills reserved
60.1 This section will be deleted.

Chapter IA – The Head of State
The amendment inserts a new chapter into the Constitution dealing with the position, powers and method of appointment of the Head of State and Deputy Head of State.

Section 58A Governor-General - duties, rights and powers
58A.1 This section re-constitutes the Governor-General as the Governor-General *of Parliament* and as Australia's Head of State instead of the Queen.
58A.2 The Governor-General has "only" the duties, rights and powers which are set out in the Constitution. The Constitution will be the sole point of reference defining what the Head of State may and may not do, unless:

- The House of Representatives through its Standing Orders requires the Governor-General to manage the administration of the House; or
- Parliament passes legislation conferring additional powers on the Governor-General.

The word "only" therefore contributes to the abolition of several current concepts:

- It will no longer be possible to argue that the Governor-General has reserve powers, or prerogative powers formerly held by British royalty, or that those powers influence how the powers stated in the Constitution should be exercised.
- Nor will it be possible to argue the Governor-General has implied powers *by reason of his or her position*. Over time some may wish to argue that other powers can be implied from the text of the Constitution. The purpose of the "incidental" power under proposed s.58A(vi) is to make such implications unnecessary.
- The Governor-General will no longer act on the advice of his or her ministers. That concept was developed to bring Royal power under democratic control. There will no longer be any Royal power, and the constraints on the Governor-General's powers will be clear from the Constitution itself.

58A.3 The functions of the Head of State have been divided into duties, rights and powers. This has a practical effect which is set out in s.60A. The Head of State may be required by Court order to fulfill the duties. A person dissatisfied with the Governor-General's exercise of the rights could seek a declaration that they have not been validly exercised. The Head of State could himself or herself take court action to vindicate his or her entitlement to take the

actions classed as rights. With the limited exception of powers incidental to the exercise of duties, the Head of State cannot be forced to exercise a mere power, but the grant of power permits the Head of State to take the action. The main mere power is the power to act in place of the Deputy. The exercise of this power is intended to be a matter for the discretion of the Governor-General. The only other mere powers are those conferred by standing orders or legislation. If the Governor-General declines to exercise the former, changing the standing orders is a better remedy than court action. Whether powers conferred by legislation may be the subject of court proceedings will be stated in the legislation itself.

58A.4 Although the standing orders of each House will now determine when Parliament meets - see s.6A - subsection 58A(i) imposes a duty on the Governor-General to convene such sessions as are required. The Governor-General will not be able to prevent a House from meeting, as is possible at present.

58A.5 Although the Governor-General's main job will be chairing debates in the House of Representatives, the word "*right*" to preside has been chosen over "duty" because:

- It is unlikely the Governor-General will need to be forced to chair debates - if he or she becomes reluctant, permanent replacement is the more appropriate remedy;
- There may be occasions when it is advisable for the Governor-General to be elsewhere - for example, he or she may in the Deputy's absence choose to chair an important debate in the Senate rather than an unimportant debate in the House; and
- The Governor-General should not be subject to court action to enforce fulfillment of the duty when he or she may be suffering ill-health.

58A.6 The Governor-General's right to preside is qualified by the words "impartiality and fairness". The right is not validly exercised if rulings are partial or unfair. Such conduct may be challenged under s.60A(3).

58A.7 Subsection 58A(ii), together with s.64A, is one of the main provisions in the Advancing Democracy model. The combined effect of the sections is that a future Governor-General could not remove a Prime Minister with majority support in the House and replace him or her with the leader of the minority opposition as Sir John Kerr did in 1975. If the Governor-General did so, his or her decision could be immediately reversed through court action under s.60A(3). The sections also place the power of appointment of the Deputy Prime Minister in the hands of the House of Representatives, rather than in the hands of the Prime Minister, who will appoint all other Ministers pursuant to s.64A. This is appropriate because the Deputy will be the immediate replacement Prime Minister if the Prime Minister dies or resigns.

58A.8 Subsection 58A(iii) specifies three circumstances only in which the Governor-General has a duty to dissolve the House of Representatives and call an election. There is no right or power to do this. If one of the three circumstances applies, a dissolution must occur. If not, a dissolution by the Governor-General would be unconstitutional, and the High Court could declare it invalid under s.60A(3). Of the three circumstances:

- The first places the power to call an early election with the House of Representatives, rather than the Prime Minister;
- The second forces the House to choose a new Government within 60 days of an election or Prime Ministerial death, resignation or removal, otherwise it must face another election; and
- The third merely provides a mechanism to remedy any failure by the House to call a

new election before its term expires.

Under this clause, it would be impossible for a Governor-General to force an unwanted dissolution on a Government in the way Sir John Kerr did in 1975. As the power is classed as a *duty*, the Governor-General could not refuse a dissolution when the House had decided there should be an early election.

58A.9 There are several statements from High Court judges and constitutional writers which assert that, under our present Constitution, an election cannot be cancelled or prevented by court action once the House of Representatives has been dissolved by the Governor-General. This would change under proposed s.58A(iii). It will be clear whether or not a dissolution breaches the section, and if so the High Court should stay the election process then cancel it by injunction under s.75(v).

58A.10 Subsection 58A(iv) deals with by-elections. Here a greater role for the Prime Minister is conceded, but the House may still overrule the Prime Minister by passing a contrary resolution before implementation of the Prime Minister's request for a by-election has commenced. This goes some way to ensuring that a by-election is not delayed for Government advantage unless the whole House agrees to that course of action.

58A.11 The intention behind subsection 58A(v) and its counterpart, s.59A(ii), is that the Governor-General and Deputy can freely fill in for each other when one of them is unavailable, without the Governor-General ceding his or her position to the Deputy.

58A.12 Subsection 58A(vi) is intended to negate any suggestion of implied powers beyond incidental powers. Incidental powers are really a subset of all possible implied powers. Whereas an implied power may cover any subject, an incidental power is an implied power which assists in the exercise of one of the stated subjects of an express power. By way of example:

- If it were not for s.58A(vi) and the word "only" in the opening line of s.58A, it would be possible to imply from the Governor-General's role as Head of State that he or she has the authority to communicate and meet with other Heads of State. Upon implementation of the Advancing Democracy model, the Governor-General would *not* have this power, as this is not one of the subjects on which he or she is given power in the Constitution and it is not "incidental" to any of the other powers in s.58A. The conduct of relations with other countries has always been a matter for the Government, and the Governor-General will no longer have any role, formal or otherwise, in Government. If Parliament wants the Governor-General to have a diplomatic role, it may pass legislation under s.58A(viii). Hopefully it will not do so.
- The Governor-General is not given a power to liaise with members of the House of Representatives about the formation of a Government. Ordinarily, such discussions would not be necessary, because s.64A requires Governments to be formed in accordance with a resolution by the majority of the House of Representatives. However, if the House is not sitting when a Prime Minister dies or resigns, s.64A allows the Governor-General to form his or her own opinion on who the House is likely to support and appoint that person. To form that opinion, the Governor-General may need to discuss the issue with members of the House. The power to conduct such discussions and negotiations is therefore incidental to the Governor-General's powers in s.58A(ii).
- The present Governor-General is the patron of a large number of not-for-profit

organisations. This role is not incidental to any of the express powers vested in the Governor-General of Parliament, so he or she could not continue such patronage.

58A.13 The language describing incidental powers follows that of s.51(xxxix) so as to ensure conformity in the interpretation of the two sections.

58A.14 Subsection 58A(vii) permits the House to give the Governor-General a role in managing the House of Representatives. This needs to be considered in the context of the Speaker's current role.

58A.14.1 Parliamentary staff are generally not part of the Commonwealth Public Service. They belong to a separate Australian Parliamentary Service, which is divided into 3 departments: the Department of the House of Representatives, presided over by the Clerk of the House, the Department of the Senate, presided over by the Clerk of the Senate, and the Parliamentary Library: s.9, Parliamentary Service Act 1999. The Clerk is the supervisor of the House's staff (of 158 officers, according to the 2010-2011 Annual Report, p.4). The Parliamentary service is independent of the Government: s.10(1)(a).

58A.14.2 The Speaker of the House of Representatives appoints the Clerk - s.58(2) - and has limited powers to give directions to the Clerk of the House: s.20(2), s.19.

58A.14.3 Whether, and to what extent, the Governor-General should take over the current Speaker's role in relation to the Clerk, or some greater or lesser version of that role, is a matter on which opinions may differ over time. Subsection 58A(vii) permits the House to determine in its standing orders which, if any, of these roles the Governor-General will perform. This and the next subsection build flexibility into the position. If Parliament wants to allocate more duties to the Governor-General by legislation under subsection 58A(viii), it could simultaneously lighten the Governor-General's workload by relieving him or her of administrative responsibilities in the House of Representatives.

58A.15 Subsection 58A(viii) permits Parliament to confer other powers on the Governor-General by law. Without legislation, the Governor-General would not be able to continue to play a diplomatic role, administer the honours system, act as patron to organisations, roam around the country attending functions, support causes or generally squander taxpayers' funds as currently occurs. This is intentional. The new role for the Governor-General will *not* be like the old role. There should be a clean break with the past. About the only additional function consistent with the strict impartiality of the position is as an ambassador for democracy within Australia, explaining to the people how our system of Government works and encouraging constructive participation in politics. That would be a truly useful contribution.

Section 58B Governor-General - method of appointment

58B.1 The requirement for a two-thirds majority should ensure the appointment of a genuinely impartial person to chair Parliamentary debates.

58B.2 After appointment, it is possible that there could be significant dissatisfaction with the performance of the Governor-General which nevertheless falls short of the two thirds majority required for removal. It is therefore preferable to have the Governor-General's term expire by the passing of time, following which reappointment would again require a two thirds majority. The fixing of this term does not however guarantee the Governor-General the

position for the duration of the term. It will always be possible for the House to remove a Governor-General who performs poorly, provided two thirds of the members agree.
58B.3 No purpose would be served by specifying criteria for appointment or removal. There is no reason to limit the House's discretion over such matters.
58B.4 The current practice of usually appointing Governors-General for five years is irrelevant. With the change in role, it is better that each newly elected House have the ability to select its presiding officer, rather than be bound to accept one appointed for a long term by a prior House. Every resolution for appointment will need to take account of the possibility that the next election will occur sooner than the three year period prescribed in s.28. It would probably be better for all such resolutions to simply repeat the words of subsection (i) when describing the Governor-General's term of office.
58B.5 There are several dates of relevance to elections: the date of issue of the writs to commence the election, the date for the closing of nominations, polling day, the date of return of the writs and so on. The six month period will date from the most important of those dates, polling day, as over time the other dates could vary across different electorates. The word "polling" has been used in the Commonwealth Electoral Act to mean the date on which everyone votes, so there is unlikely to be any difficulty interpreting the word in the future.

Section 59A Deputy Governor-General - duties, rights and powers
59A.1 This section establishes a new position of Deputy Governor-General of Parliament, whose principal role will be to preside in the Senate. Presently section 4 of the Constitution may extend to appointing deputies - it permits the Queen to appoint any person to administer our Government, and that person is then regarded as the Governor-General. Provision is made for an Acting Governor-General in the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia issued by Queen Elizabeth II on 21 August 1984, as amended on 11 May 2003. The provisions extend to 4 pages and allow the Governor-General to appoint deputies for limited purposes. With the abolition of the Crown and the Letters Patent, a formal process for appointing a deputy is advisable.
59A.2 While the Governor-General and the Deputy are to some extent interchangeable, there is a difference between their obligations. Under s.59A(ii) the Deputy Governor-General *must* take over the role of the Governor-General when the latter is unavailable. By contrast, the Governor-General *may* stand in for the Deputy: s.58A(v).
59A.3 Otherwise the section closely follows the drafting of s.58A concerning the Governor-General. Accordingly the notes under s.58A are generally applicable to s.59A.
59A.4 Under s.59A(ii), the Deputy may fill in for the Governor-General during any vacancy, absence or inability of the Governor-General. Vacancy and absence are unlikely to be matters of dispute, but ‘inability’ is a much more difficult area, bringing with it notions of competence and mental health. Rather than attempt to define what these terms mean, or have the High Court interpret them during a crisis when someone is alleging the Governor-General is “unable”, it is better to provide, as s.60B(2)(ii) does, that Parliament may pass laws defining the meaning of these terms.

Section 59B Deputy Governor-General - method of appointment
59B.1 This new provision for the appointment and dismissal of the Deputy Governor-General is virtually identical to that for the Governor-General of Parliament, so the Notes to s.58B

apply to this clause as well.
59B.2 The only difference is that whereas for House of Representatives' elections the Commonwealth sets one polling day, for the Senate s.9 of the Constitution gives the power to determine the dates of Senate elections to the States. Conceivably they may choose different days, or refuse to hold the elections, as was threatened in 1975 by conservative States who were attempting to thwart Mr Whitlam's plan for a half Senate election. As the six month period needs to date from a definite date, the earliest polling day selected by a State will set the period from which the six month period will date.

60A Status of the Governor-General and Deputy Governor-General
60A.1 Writing in 1901 on s.78 of the Constitution, Quick and Garran noted the traditional legal position of the Crown as follows (at p.805):

> "Remedies Against the Crown. - 'It is an ancient and fundamental principle of the English Constitution, that the king can do no wrong.' (Broom's maxims, p.53) One consequence of this principle is that no suit or action, even in respect of civil matters, can - apart from statute - be brought against the sovereign. "Indeed, his immunity, both from civil suit and from penal proceeding, rests on another subordinate reason also, viz., that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the Crown itself. But who, says Finch, shall command the king?" (Steph. Comm. ii. 480)".

The Crown's immunity from ordinary claims in tort or contract has been eroded by statute and High Court decisions (see for example *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471). But the Governor-General has extensive powers of governance under the Constitution and nothing makes the exercise of those powers subject to legal action. The old rule therefore continues to apply. This presumably is why the Court in *Cormack v Cope; Queensland v Whitlam* (1974) 3 ALR 419 said the then Governor-General was neither a necessary or proper party to the proceedings and ordered his name be struck out as a defendant (though the Court did not explain why he was not a necessary or proper party). It is generally accepted by most writers on the Constitution that the exercise of the Governor-General's powers cannot be prevented or changed by direct legal action against the Governor-General. The extent to which they can be challenged by action against other officials implementing his or her decisions is unclear. Defenders of the present Constitution have never explained why it makes sense to grant extensive powers to the Governor-General without providing a clear and obvious mechanism to control the exercise of those powers. That is because it does not make any sense.
60A.2 Proposed section 60A ensures that all important decisions made by the Governor-General and Deputy can be challenged in court, in the following ways:

- Firstly, the rule that 'the King can do no wrong' applies only to Kings, not Heads of States or other office holders. Abolish the Crown and the immunity is abolished.
- Secondly, the exercise of duties and rights, and powers incidental to their exercise, will be "justiciable", which means that they may be brought before a court for resolution. An express provision of this kind negates any suggestion which might otherwise be made that the Governor-General's acts or omissions are immune from court action.
- Thirdly, s.60A(5) requires the Governor-General and Deputy to be regarded as

"officers of the Commonwealth" for certain purposes. Such officers may be subject to court orders requiring them to do something, or refrain from doing something, through the combined effect of proposed s.60A and s.75(v). A Governor-General who refused to carry out a duty could be required to carry it out by a High Court injunction.

- Fourthly, because the remedies in s.75 do not expressly include a power to make a declaration of validity or invalidity of an action, s.60A(3) does so. A Governor-General or Deputy who was denied the opportunity to preside in the House or Senate would be able to obtain an order from the High Court declaring his or her entitlement to exercise that right, with consequential orders against those preventing its exercise.

Note that although s.60A(3) applies to all constitutional powers exercised by the Governor-General, not just those introduced by the Advancing Democracy model, this does not effect much change, because the model either abolishes the Governor-General's existing powers or transfers them to Parliament or the Government.

60A.3 Where the Head of State and/or the Deputy are allocated additional powers by legislation, it is appropriate that the legislation specify the extent to which their decisions are open to review. The effect of subsection 60A(2) however is to establish a default position if any legislation fails to address the issue that the Governor-General and Deputy, as "officers" for the purposes of s.75(v), will be liable to the issue of the constitutional writs.

60A.4 The only decisions of the Governor-General and Deputy which cannot be challenged in Court will be the Governor-General's power to act in the Deputy's place - s.58A(v) - and any powers to manage the Houses of Parliament - ss.58A(vii) and 59A(iv). Note that sections 58A and 59A draw a distinction between the duties and rights in relation to Parliamentary debates on the one hand, and a power of management of each House on the other. These are separate roles - management does not include presiding over debates, and presiding over debates is not management. It is only the management powers in 58A(vii) and 59A(iv) which are exempt from court action. It will be possible for court applications to be brought against the Governor-General or Deputy in relation to a failure to chair Parliament fairly or impartially, in breach of ss.58A(i) and 59A(i). No attempt has been made to specify which remedies should apply if such an application was upheld. A declaration that a power was not properly exercised should be sufficient to prompt the Governor-General or Deputy to reverse the ruling under challenge.

60A.5 Subsection 60A(6) creates a levelling effect, bringing the Head of State down to the level of Members of Parliament. It is one of a number of changes which reflect a concern for function rather than status. *Notions of superior status are inconsistent with democracy*. People who hold high office, whether they are judges, Ministers or the Governor-General, should not be regarded as of higher status. They should be seen as ordinary people who, for a limited time, fulfill an important function to serve the community. They should be provided with the powers and authority necessary to discharge the function. They have no need of some special status which encourages snobbery, arrogance and abuse of power. All the Governor-General and Deputy need is similar protection against defamation and other claims which Parliamentarians already have.

60B Acting Governor-General and Supplementary Provisions

60B.1 This new section provides for the appointment of persons to act in the place of the

Head of State and Deputy.
60B.2 Since the role of presiding over debate in a House of Parliament is primarily of concern to the House affected, subsection 60B(1) permits the standing orders of each House to determine how proceedings will be managed in the absence of the Governor-General and/or Deputy. This will be the appropriate way of dealing with sittings of the Houses of lesser importance. Where however the Governor-General or Deputy is likely to be absent or unable to preside for an extended though temporary period, it may be necessary to appoint an Acting Head of State or Deputy. Legislation is the appropriate way to deal with such appointments.
60B.3 It has been customary for State Governors to stand in for the Governor-General when the latter is absent. This practice should be discontinued. The chief role of the Governor-General day to day will be to chair Parliamentary debates. This will require an extensive knowledge of Commonwealth Parliamentary procedure, which is likely to differ over time from that of the States. The States have Lieutenant Governors to act in place of their Governor. Usually this person is the Chief Justice of the Supreme Court. This practice is a clear breach of the separation of powers, because it involves a judicial officer in the actions of the executive. (Currently our system is riddled with such contradictions and breaches of principle). After the introduction of the Advancing Democracy model, it would be a breach because it would involve a judicial officer in the proceedings of Parliament. The job of Governor-General will also involve some real work for a change, and it is doubtful any judge would have the time to do it while still undertaking judicial work.
60B.4 Subsection 60B(2)(ii) authorises Parliament to make laws defining "the meaning of the terms vacancy, absence and inability" in the new sections of the Constitution. It would be possible to include a definition of "inability" in the Constitution, but such a definition may prove inadequate over time. Parliamentarians will be those most directly affected by an inadequate performance of the roles of Head of State and Deputy, so they should be allowed over time to work out exactly which types of inability really matter. It may be that Parliament will provide a procedure for the Governor-General and Deputy to undergo medical assessment if their competence is in doubt. Parliament will not have a completely free hand to determine what 'vacancy, absence or inability' means. The introductory words to the section states that any such laws must be "not inconsistent with this Constitution". If the legislative definition of 'vacancy, absence or inability' strayed too far from an ordinary meaning of those words, the legislation would be invalid as inconsistent with the Constitution.

## Chapter II – The Government

The name of the chapter will be changed, by removing the unnecessary word "Executive" from before "Government". In each section amended by the Advancing Democracy model the same change is made, purely so that the language of the Constitution reflects contemporary Australian usage. (There are about six other sections where the phrase "Executive Government" will remain. These can be amended at a later time).

### Section 61 Executive power

61.1 This section will be deleted because:

- Section 61 refers to the Queen, who will be removed;
- It allocates executive power to the Governor-General, which is inconsistent with the new role for the position under the Advancing Democracy model; and

- The current interpretation of the section bears no resemblance to the words of the section. For example, according to the High Court's decision in the AAP case *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397, s.61 confers on the Commonwealth Government "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" (per Mason J.) No ordinary person reading s.61 would understand it includes such a power. In the case of *Pape v Commissioner of Taxation* [2009] HCA 23; 238 CLR 1; 257 ALR 1, Chief Justice French summarised his conclusions by saying at paragraph [8]:
  "The executive power of the Commonwealth conferred by s 61 of the Constitution extends to the power to expend public moneys for the purpose of avoiding or mitigating the large scale adverse effects of the circumstances affecting the national economy ...., and which expenditure is on a scale and within a time-frame peculiarly within the capacity of the national government."
  An Australian without considerable experience of Constitutional law could be forgiven for wondering which words in s.61 relate to spending at a time of economic crisis. A final example concerns control of the military. This is regarded in most comparable political systems as a part of executive power. In our Constitution though, it is granted separately to the Governor-General in s.68. So does that mean control of the armed forces is not part of "executive power" under s.61?
- The divergence between the legal interpretation and the meaning apparent to ordinary voters arises partly from the antiquated and ambiguous words in the section. It defines executive power as 'extending' to the execution and maintenance of the Constitution and Commonwealth laws. "Extends" could mean 'extends only so far as' which would set a limit, or it could mean 'extends at least as far as', which would not set a limit. The High Court has held in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (the *Wool Tops Case*) (1922) 31 CLR 421 that the phrase sets a limit to executive power. Justice Gibbs in *Victoria v Commonwealth (The AAP Case)* (1975) 134 CLR 338 at 378-9; (1975) 7 ALR 277 at 312 came to a similar view:
  "Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth." Yet the interpretations of the section, such as in *AAP Case* referred to above, are hardly consistent with this approach. Similarly the word "maintenance" as applied to an inert document like a Constitution has no obvious meaning. If there were no doctrine of separation of powers, its most likely meaning would be "enforcement", but under our system laws are enforced by courts, rather than the executive.

61.2 Section 61 will be replaced with new sections:

- s.61A, which vests executive power in the Government comprised of the Prime Minister, Deputy Prime Minister and Ministers, not the Governor-General;
- 62A, which will define executive power;
- 62B, which will abolish prerogative powers; and
- 63A, which will confirm that the legislature is supreme over the executive.

Section 62 Federal Executive Council

62.1 This section will be deleted as:

- It is premised on executive power being exercised by the Governor-General which is inconsistent with the new role for the position under the Advancing Democracy model;
- The concept of executive power being exercised by a person acting on the advice of another person has never made sense and will be abolished; and
- There is no need for an Executive Council as well as a Cabinet of Ministers.

62.2 Section 62 will be replaced with new sections:

- s.64A, which sets out how Governments are formed and Ministers are appointed;
- s.65A which deals with Cabinet and provides for the delegation of executive power.

Section 63 Provisions referring to Governor-General

63.1 This section will be deleted for the same reasons as s.62:

- The section is premised on executive power being exercised by the Governor-General which is inconsistent with the new role for the position under the Advancing Democracy model;
- The concept of executive power being exercised by a person acting on the advice of another person has never made sense and will be abolished; and
- The Executive Council is to be abolished.

63.2 An additional reason for its removal is:

- The section is apt to mislead ordinary voters. It purports to draw a distinction between sections referring to the "Governor-General" from those which refer to the "Governor-General in Council". This allows some to argue that powers given to the Governor-General which don't refer to the Executive Council may be exercised without the Governor-General considering Ministers' advice. Of course, the distinction is illusory, because to act "with the advice" of Ministers does not mean that the advice will be followed. Quick and Garran at p.707 describe the distinction as "historical and technical, rather than practical or substantial". Crown powers which originated from common law were vested in the Governor-General if they were not controlled by statute at the time the Constitution was drafted. Other powers which originated from, or were controlled by, statute were vested in the Governor-General in Council. (See also Note 65A.4).

Section 64 Ministers of State

64.1 This section will be deleted because:

- Under the Advancing Democracy model, Ministers will be appointed by the Prime Minister, not the Governor-General, and the latter will have no role in determining which Departments of State will be established; and
- The section contains references to the Executive Council and Queen which will be redundant.

64.2 Section 64 will be replaced with:

- Section 64A, which will provide for the Prime Minister and Deputy to be appointed in accordance with the majority vote in the House of Representatives, and for Ministers to be appointed by the Prime Minister, subject to any resolution by the House; and
- Section 67A, which will deals with the requirement for the Prime Minister and Deputy

to be a member of the House of Representatives and for Ministers to be members of Parliament.

Section 65 Number of Ministers

65.1 This section will be removed because:

- It was only ever a transitional section, setting the number of Federal Ministers at seven until "Parliament otherwise provides"; and
- It contains a redundant reference to the Governor-General having power to determine the number, which is inconsistent with the Advancing Democracy model.

There is no need for a new section to replace s.65. Its abolition removes the need for a law to set the number of Ministers, but Parliament will retain power to set a number if it wishes. The source of the legislative power will be s.51(xxxix) and proposed s.62A(iii).

Section 66 Salaries of Ministers

66.1 This section will be deleted because:

- It refers to the Queen, who is to be removed; and
- Otherwise the section was transitional, merely setting an upper limit on the cost of Ministerial salaries until Parliament determined otherwise.

66.2 The section need not be replaced. Parliament may continue to make laws for the remuneration and allowances of Ministers under s.51(xxxix) and s.62A(iii).

Section 67 Appointment of civil servants

67.1 This section will be deleted because:

- It refers to the "Governor-General in Council", which is to be abolished;
- It was only a transitional section, dealing with public servant appointments "until the Parliament otherwise provides".

67.2 Its subject matter will be covered in the new s.65A, which will permit the Prime Minister to appoint and remove public servants subject to any law. Legislative power over appointments will be available via s.51(xxxix) and s.65A.

Section 68 Command of naval and military forces

68.1 This section will be removed as it vests the control of the military in the Governor-General as the Queen's representative. This is inconsistent with the Advancing Democracy model. The new definition of the power to govern in proposed s.62A includes as part of the executive power given to the Government the "command of such military and defence forces as are established by law".

68.2 Scenario 6 in Appendix 1 to the Rationale for the Advancing Democracy model is based on a Governor-General using the present s.68 to take an active role in military decisions which contradict decisions taken by the Government. This is not a fanciful scenario. It is based on two arguments, either one of which is sufficient:

- The first is that s.68 is a reserve power, where the Governor-General has the discretion to act contrary to, or in the absence of, advice from his or her Ministers. This is a controversial interpretation, but one for which there is significant support.
- The second, which really cannot be disputed, is that the Governor-General can use s.68 in conjunction with ss.62 and 64 to prevail over a House of Representatives

majority.

Note that neither argument relies on a strictly literal interpretation s.68.

68.3 In *China Navigation Company Ltd v Attorney-General* [1932] 2 KB 197 the English Court of Appeal considered a submission that the Crown's power over the disposition of the armed forces was no longer a prerogative power, but had been replaced over the centuries by statute law which did not authorise the conduct the plaintiff challenged. Three judges unanimously rejected the submission at 214-5, 227-8 and 239. In brief, the reason was that the Act 13 Charles II c.6 declared that the command and disposition of the military "is ... and ever was the undoubted right of His Majesty". This Act declaring the existing Crown prerogative was not affected by the Bill of Rights of 1688, which referred only to the raising of an army in peace time and did not deal with the command of any army lawfully raised. When 13 Charles II was repealed in 1863, the above preamble declaring the prerogative right was retained, and Parliament never subsequently sought to affect the Crown's right to command. If this was the position in 1932, it must also have been the position in 1901 when Australia's Constitution came into force. At that time, through s.68, the power was elevated above the level at which it could be altered by legislation.

68.4 All of the powers usually identified by constitutional writers as reserve powers were once prerogative powers of the Crown. The significance of the *China Navigation* case is that it confirms the power in s.68 meets this criterion. Such powers can be distinguished from the many discretionary powers which the Constitution vests in the Governor-General, such as the power to dissolve both Houses of Parliament under s.57 and the power to put proposed Constitutional alterations to a referendum: s.128. Interpretation of former prerogative powers written into the Constitution involves consideration of the Crown's historical powers, whereas the construction of newly created discretionary powers does not. That the Kings of England did at one time personally command the armed forces, and retained the legal power to do so right up until Federation, is a factor to be considered in the interpretation of s.68.

68.5 Beyond an origin in the prerogative, there are no broadly accepted criteria for determining whether a power may be regarded as a reserve power. However some writers have pointed out, logically enough, that they can be seen as equivalent to emergency powers, to be used only in at a time of crisis: see e.g., *Federation Under Strain*, Geoffrey Sawer (1977, Melbourne University Press) at p.153. The command of the armed forces is quintessentially a power which may need to be exercised in an emergency. So s.68 meets a second criterion for a reserve power.

68.6 Some may see the vesting of the power in the Governor-General, as opposed to the Governor-General in Council, as a third indicator of a personal discretion. The author takes the view that this distinction is meaningless, for the reasons set out in Notes 63.2 and 65A.4. However, some respected commentators have taken a different view, such as Geoffrey Sawer in *Federation Under Strain* at p.151. Mr Ellicott was prepared to use this argument to justify his party's actions in 1975 and - a crucial point in constitutional law - they won: see *Commentary* by R. J. Ellicott in Evans' *Labor and the Constitution 1972-1975* (Heinemann, Melbourne 1977) at p.293. Disturbingly, Sir Gerard Brennan seems to support the view that powers not expressed to be exercisable by the 'Governor-General in Council' are reserve powers, though for no apparent reason he omits s.68 from the list of such powers: see A Pathway to a Republic, George Winterton Memorial Lecture 2011, published in Constitutional Law and Policy, Vol. 13, No.1, March 2011 (LexisNexis).

68.7 Although s.68 has occasionally been referred to by High Court judges in passing, the only case in which its interpretation was potentially determinative of the result was *Lane v Morrison* [2009] HCA 29. The plaintiff had contended that s.68 vests in the Governor-General the prerogative power of the Crown as understood in the United Kingdom, and therefore legislation could not establish a military court which was inconsistent with that power. French CJ and Gummow J dismissed this argument at paragraphs [55] - [59] on the basis that s.68 "is placed within the system of responsible government"; an expression usually taken as indicating that the power is exercised with the advice of the Executive Council. However, the other five judges declined to comment on this point, deciding the case on other issues. There are isolated comments by single judges in other cases to the effect that the Governor-General's role is titular only - for example *Attorney-General for Victoria v The Commonwealth* (1935) 52 CLR 533, per Starke J (in dissent); *The Commonwealth v Quince* (1944) 68 CLR 227, per Williams J - but such throwaway lines in cases where s.68 was not in issue have no weight at all. Nor do the statements of former Governors-General take the matter further. The content of a power conferred by the Constitution is not determined by the opinions of those who have held the power. Accordingly the argument that the Governor-General retains a reserve power under s.68 to act alone or contrary to advice remains open and is supported by the two strong arguments, and one lesser argument, referred to above.
68.8 Let us nevertheless assume that, as Justices French and Gummow said, the power in s.68 must be exercised within a system of responsible government. It is accepted that probably that was the intention of the 'founding fathers', and various High Court judges have said responsible government permeates the Australian Constitution. This is comprehensively dealt with in section 2 of Chapter 4 of *Parliament, The Executive and the Governor-General* by George Winterton (1983 Melbourne University Press). Most constitutional texts, where they deal with the issue at all, state that the Governor-General's role under s.68 is titular only; that he is only nominally in charge of the military. And though *China Navigation* did not concern responsible government, Lawrence LJ at 228 stated that the prerogative in respect of the military was, like other prerogatives, constitutionally subject to the advice of Ministers.
68.9 Interpreting s.68 as subject to an implication of responsible government perhaps excludes any reserve power but does not remove the possibility of independent action by the Governor-General under s.68, because *responsible government does not prevent the Governor-General appointing advisers who do not have the support of the majority in the House of Representatives*. Sections 62 and 64 can be used to appoint ministers prepared to advise the Governor-General to use the s.68 power as he/she wishes.
68.10 Responsible government is not the same as government by the majority. They are separate, distinct concepts, which can (and ideally should) complement each other, but which may exist independently of each other.

> 68.10.1 "Responsible" government means a government which is responsive to, or accountable or answerable to, the elected representatives of the people. The degree of accountability may vary. A system could meet this criterion simply by requiring ministers to report to Parliament and to attend and answer questions from Parliament. It could go further, as ours does, by providing for Parliament to withhold funds from ministers if their policies are inappropriate. In our system of responsible government, Ministers must, subject to the 3 month exception, be Parliamentarians. The term 'responsible government' therefore covers a range of systems, only some of which

would require Ministers to be supported by a majority in the lower house.

68.10.2 High Court judgments have recognised the *convention* that ministers must command the support of the lower house - see for example Gaudron, Gummow and Hayne JJ in *Egan v Willis* at [36] and [45] in relation to the New South Wales' Constitution - but to take this further and say that majority rule is implied in s.64, such that no-one but a Minister favoured by the majority can legally be appointed, is another matter entirely. As Justice Kirby said in *Egan v Willis* [1998] HCA 71 at [152], 158 ALR 527 at 580:

> "Care must be observed in the use of the notion of "responsible government" in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements. As with the notion of "representative government", it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding in law."

Can we draw from the presence of responsible government in our Constitution an implication that no minister may be appointed unless he or she has majority support in the House of Representatives?

68.10.3 Section 64 states that ministers hold office during the pleasure of the Governor-General. The same expression is used in s.62 concerning the Federal Executive Council. There is no doubt what service at the Crown's pleasure means: the servant may be appointed or dismissed by the Crown whenever it suits the Crown. Should authority be needed on this point it may be found in *Fletcher v Nott* (1938) 60 CLR 55 and more recently in *Jarratt v Commissioner of Police* [2005] HCA, 221 ALR 95. In the latter case Gleeson CJ said at [8]: "To say that an office is held at pleasure means that whoever has the power to remove the office-holder may exercise the power at any time, and without having to provide, either to the office-holder, or to a court examining the decision to remove, any justification of the decision." See also the comments by McHugh, Gummow & Hayne JJ at [64] - [66], which refer to the phrase permitting termination at will. When the Constitution says ministers hold office at the Governor-General's pleasure, which has a precise and accepted meaning, it is not possible to imply a *specific* limitation on this power, such that only those who have majority support may be appointed, from *general* notions of responsible government. To do so would contradict the section and impose a different rule.

68.10.4 Further, if as Justices French & Gummow did in *Lane v Morrison*, it is permissible to consider contributions to the debates of the founding fathers, it must also be permissible to consider their *decisions* on what not to include in the Constitution. Such decisions were made by majority vote and should carry more weight than statements from individual participants. The awkward truth is that the founding fathers *expressly rejected* Sir Henry Parkes' proposal at the Sydney Convention of 1891 that the Constitution establish:

> "An Executive, consisting of a governor-general and such persons as may from time to time be appointed as his advisers, such persons sitting in Parliament, and whose term of office shall depend upon their possessing the confidence of the house of representatives, *expressed by the support of the majority*."

See Quick & Garran (1901), where the resolution is set out in full at p.125, and the decision to remove the requirement for Ministers to sit in Parliament and to have the confidence of the House is recorded at p.128.

68.10.5 Accordingly it cannot be said that Australia's Constitution contains a legal rule that Ministers must always have majority support in the House. We have responsible government in that if the Government does not have support of the lower house, it loses the co-operation of that house and will soon find it difficult to govern. Legislation will not pass, and money for government may not be forthcoming. But the ministry is nevertheless legally entitled to remain in office if that is the 'Governor-General's pleasure'.

68.11 It follows that any requirement for s.68 to be exercised in accordance with the requirements of responsible government could be met by the Governor-General finding, either within or outside Parliament, persons who are prepared to join the Federal Executive Council and advise him or her how he or she wishes to be advised. In this way, the Governor-General can control the military. Lack of funds from Parliament may make this a short term option only, but in a crisis it is the short term which counts. Neither lack of funds nor the Governor-General's ultimate dismissal of his additional advisers necessarily reverses the steps taken in the meantime, which are legally valid.

68.12 If Australia wants a genuinely democratic Constitution, it will have to create one. We cannot rely on judges doing the job for us, by implying into the Constitution words and principles which simply are not there. The democratic base in the present Constitution is insufficient to sustain further, more democratic implications.

Section 69 Transfer of certain departments

69.1 This section is to be removed. As with section 70, it deals with the implementation of Federation - the transfer of State Government departments to the Commonwealth when the Constitution became operative. These transfers took place more than 100 years ago. There is no need for a continuing authority to transfer them to be retained in the Constitution.

Section 70 Certain powers of Governors to vest in Governor-General

70.1 This section is to be removed. As with section 69, it deals with the implementation of Federation - the transfer of powers over areas passing from State to Commonwealth control from State Governors to the Governor-General. It is highly unlikely that there is now any single power exercised by the Commonwealth which depends for its validity on this section alone. Commonwealth power over subjects which are now under the Commonwealth's jurisdiction will all be the subject of Commonwealth legislation. If there are any legislative gaps, they can be filled in between the time the Advancing Democracy referendum is passed and the amendments become operative.

61A Vesting of executive power in the Commonwealth Government

61A.1 The present Constitution vests executive power in the Queen then says it is exercisable by the Governor-General: s.61. This is misleading, as in practice executive power is exercised by the Government. The proposed model recognises reality by vesting the power in the Government.

61A.2 The proposed section also defines the Government - it comprises the Prime Minister,

Deputy Prime Minister and his or her Ministers. Again, this simply recognises reality, in a way that our current Constitution fails to do. People reading the Constitution should understand how Government works.

61A.3 The net result of s.61A is to advance democracy. Power will be vested in those who are elected to Parliament, then chosen by the House of Representatives to govern. Power will no longer be exercised - nominally or otherwise - by an unelected Queen or Governor-General.

Section 62A The power to govern defined

*Why define executive power?*

62A.1 Currently the Constitution does not define the content of executive power; supposedly s.61 simply marks out its boundaries. There are three reasons why the words of s.61 should not be repeated in the Advancing Democracy model:

- Firstly, it is completely unsatisfactory that executive power is not defined. Concern at the extent of Government powers is one of the few things which unites all voters.
- Secondly, voters are entitled to understand their Constitution when they read it. The language of s.61 is incomprehensible to most people.
- Thirdly, it is accepted that s.61 includes the Crown's prerogative powers. They will be abolished. What effect would this have on the interpretation of the words used in s.61?

The proposed section equates executive power with the power to govern, to assist ordinary voters to understand their Constitution. The remainder of the subsection defines what the power to govern means. *Apart from limited changes made in subsections 62A(vi), 62A(vii) and 62A(viii), the definition is based on the prevailing interpretation of s.61.* The need to ensure powers formerly classed as prerogative powers of the Crown are retained, where appropriate, has little influence on the definition.

62A.2 The significance of executive power is usually not apparent, because Governments rarely take action on the basis of executive power alone. Usually Governments act pursuant to powers regulated by legislation, and constitutional challenges to their actions take the form of a challenge to the Parliament's legislative powers under s.51, rather than the Government's executive power under s.61. The definition, or extent, of executive power becomes significant only when:

- Parliament has not made a law on a subject - perhaps it cannot agree on a law, or it has inadvertently omitted something from legislation, or a court interprets the law in an unexpected way; or
- A law passed by Parliament has no obvious or convincing connection with a specific subject of legislative power under s.51, and is based on the incidental power in s.51(xxxix). The latter section states that Parliament may make laws with respect to:

  > "(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

  The words of relevance to executive power have been underlined.

Until 20th June 2012, the main issue was whether - or how far - the executive power extended

beyond the subjects of legislative power set out in ss.51 and 52. To the extent that it did, the Government could act *without* legislation authorising its actions, because they were authorised by s.61. Its actions were however likely to be severely limited by s.83, the first paragraph of which provides: "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law." (The first paragraph of s.83 will remain in its present form under the Advancing Democracy model. The redundant second paragraph will be deleted).

On 20th June 2012 however, the interpretation of the Constitution was changed by the High Court in *Williams v Commonwealth of Australia* [2012] HCA 23, the school chaplains case. A majority of the Court refused to accept that without legislation the Government could act even in relation to those subjects which fall within Commonwealth legislative power, even though at the start of the case every party to it had accepted that this was the position. Somehow the Court managed to deny this common assumption yet failed to identify a coherent alternative rule. It nevertheless recognised some exceptions where the previously accepted common assumption does still operate. The result is that the content of the Commonwealth's executive power has become even more hopelessly confused.

The *Williams Case* magnifies the need for a definition of executive power to be included in the Constitution. The Advancing Democracy model was complete and on the point of publication in early June 2012. The definition of the power in the model has now been revised to reverse the contraction in the executive power caused by the Court's departure from the previously accepted common assumption.

*The original aim*

62A.3 In the proposed section 62A, the power to govern is stated to be "comprised of and limited to" certain components. The original intention of the proposed clause was to:

- Restate the current ambit of executive power;
- Then *expressly limit* executive power so that it extends no further than its presently accepted ambit;

in order to achieve the results that:

- Everyone can understand how much power the Government has; and
- The extent to which Government power can be expanded or contracted in the future by judicial decision is reduced.

The aim was to clarify the extent of Commonwealth executive power, without extending or reducing it.

62A.4 Even before *Williams v Commonwealth of Australia* there were two difficulties with this aim:

- There was not complete agreement over the present extent of executive power. The Constitution does not define it, so its extent has been defined partially and incrementally in an ad hoc way through High Court decisions. (Court cases can only determine the law in relation to the issues raised in the case, so a complete comprehensive definition of the extent of Government power will never emerge unless we include it in the Constitution).
- The law on the current s.61 was arguably in a state of flux, with the decision in *Pape v Commissioner of Taxation* [2009] HCA 23; 238 CLR 1; 257 ALR 1 indicating some Government actions thought by judges in prior cases to have been justifiable under

ss.81 & 83 now needed to be justified (in part) under s.61, which the 2009 High Court seemed inclined to interpret narrowly.

*Williams v Commonwealth of Australia* has exacerbated the uncertainty over the meaning of the current s.61 in this respect: before *Williams*, it was accepted that executive power could be exercised in relation to the subjects on which the Commonwealth may legislate, but there was only a partial consensus on the extent to which it could be exercised beyond those subjects. Now it is no longer clear how far executive power extends even within those subjects without legislation, yet it is acknowledged that executive power sometimes extends beyond those subjects even without legislation. The result is an incoherent mess.

*Current interpretation of the executive power*

62A.5 Notes 62A.5 to 62A.15 below present a summary of how the executive power is currently interpreted. Section 61 cannot however be considered in isolation from the appropriation provisions in ss.81 and 83, because until *Pape v Commissioner of Taxation* many judges and commentators took the view that these provisions conferred an independent spending power on the Government. Spending pursuant to an Appropriation Act could be justified without reference to s.61. Successive Governments from opposing political sides acted on this basis for decades. In *Pape,* and then in *Williams v The Commonwealth,* the High Court dismissed previous interpretations of ss.81 and 83 as being based on an *assumption* that they conferred a spending power. This supposed assumption was discarded in favour of an interpretation which sees the appropriation provisions as an internal management rule for the Commonwealth, rather than one which governed how the Commonwealth interacts with others. By analogy, in its constitution, a company or an incorporated association decides who within the entity may make certain decisions - the directors or executive committee make some decisions, while others are reserved for the members in general meeting. This allocation of powers within the organisation does not determine the extent of the powers the company or association has when dealing with those outside it. On this approach, s.83 merely states which entity within the Commonwealth can make decisions about expenditure - Parliament, rather than the Government - but does not itself confirm that the Commonwealth has the power to spend. Spending must therefore be justified under s.61 alone, which in *Williams* was given a much reduced ambit. **The result is a contraction of the Commonwealth's executive power which only became apparent from 20th June 2012.**

62A.6 Section 61 states that executive power "extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth". There has never been any dispute that this grants power to put into effect the requirements of the Constitution and any law passed by Parliament. A number of individual statements confirm this but for brevity they are omitted. Several are referred to below in commentary on why it is proposed to discard the words "execution and maintenance".

62A.7 Does s.61 mean, however, that the Government cannot act unless the Constitution or a law authorises the action? The section has never been interpreted in such a limited way, because the section does not vest executive power in the Government, a new entity created by the Constitution, but in the Queen, who already had powers at common law. Thus the power includes the Crown's prerogative powers. This was not definitively established by a case which turned on the point, but was generally assumed to follow from prevailing theory (which at the time of Federation included the view that there was one Crown for the whole

British Empire, an idea later discarded). The existence of the prerogative in Australia at the Commonwealth level was referred to in several judgments. Opinions differed however on how the prerogative came to be incorporated into the Constitution. That s.61 provides the mechanism really only emerged from 1947 onwards:

- *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425 per Griffiths CJ: "It is clear law that in the case of British Colonies acquired by settlement the colonists carry their law with them so far as it is applicable to the altered conditions. In the case of the eastern Colonies of Australia this general rule was supplemented by the Act 9 Geo. IV., c. 83. The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the Sovereign in his capacity of head of the Realm and the protection of his officers in enforcing them, ...".
- *Commonwealth v Colonial Combing Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421 per Starke J: "The Executive power ..... section simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King." In the same case, Isaacs J referred to the prerogative being incorporated by the presence of the Crown in the Constitution.
- *R v Hush Ex parte Devanny* [1932] HCA 64; (1932) 48 CLR 487 per Evatt J: "Whatever powers or duties are conferred or imposed upon the King's executive government, by any section of the Constitution, or by such portion of the Royal prerogative as is applicable, may lawfully be exercised; but sec. 61 itself gives no assistance in the ascertainment or definition of such powers and duties."
- *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 per Starke J: "But it is necessary to consider the precise right claimed by the Crown in right of the Commonwealth. It is a prerogative right because it is a right which belongs to the Crown 'over and above all other persons.' It is not expressly conferred upon the Crown by the Constitution but flows, however, from the fact that the executive authority of the Commonwealth is vested in the Crown." Per Dixon J: "But the priority which the State Act, ..., is supposed to have destroyed ..., is a consequence of the King's prerogative. It is an adjunct of the "Executive power of the Commonwealth" that is vested by s. 61 of the Constitution in the Sovereign."
- In *Barton v Commonwealth* (1974) 3 ALR 70 Mason J said at ALR 86: "By s.61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law." This statement has been accepted or supported in cases referred to below, namely the *AAP* Case (by Jacobs J), *Davis and Others v Commonwealth of Australia and Another* and *Pape v Commissioner of Taxation*.

That s.61 incorporates the Crown's prerogative powers is no longer disputed. But opinion has fluctuated over time as to how far those prerogative powers extend. This is illustrated by the contrast between the judgment of Jacobs J in the *AAP Case*, in which he regards spending by

the Commonwealth Government as part of the prerogative power, and the decision in *Williams* which negates that view.

62A.8 There has always been controversy over the breadth of the power in s.61. 'Breadth' here is used in the same sense as George Winterton used the term in *Parliament, The Executive and the Governor-General* (1983, Melbourne University Press) at pp.29-31 - namely the range of subjects over which the Commonwealth can exercise the power. Prior to the decision in *Williams* on 20th June 2012, there seemed to be a consensus that executive power at least extended over all the subjects on which the Commonwealth had legislative power. The issue was whether the power extended beyond those subjects. In *Victoria v Commonwealth (The AAP Case)* (1975) 134 CLR 338, 7 ALR 277 there was majority support for s.61 extending Commonwealth executive powers beyond the subjects of legislative power in ss.51 and 52 to a limited extent, but there was no consensus on how far it extended. (Consider when reading the following extracts whether the judges were acknowledging that executive power at least extends as far as the subjects of legislative power, or whether, as the High Court in *Williams* would now have us believe, they saw gaps within those subject areas where no executive power existed in the absence of legislation).

- Mason J, in a passage at CLR 397, ALR 327-8 much cited in later cases, said: ".. there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) 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. ...
  However, the executive power to engage in activities appropriate to a national government, arising as it does from an implication drawn from the Constitution and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programs standing outside the acknowledged heads of legislative power merely because these programs can be conveniently formulated and administered by the national government."
- Barwick CJ said at CLR 362, ALR 298: "The Commonwealth is a polity of limited powers, its legislative power principally found in the topics granted by ss 51 and 52: its executive power is described as extending to the execution and maintenance of the Constitution and of the laws of the Commonwealth. No doubt some powers, legislative and executive, may come from the very formation of the Commonwealth as a polity and its emergence as an international State. Thus it may be granted that in considering what are Commonwealth purposes, attention will not be confined to ss 51 and 52. The extent of powers which are inherent in the fact of nationhood and of international personality has not been fully explored. Some of them may readily be recognized: and in furtherance of such powers money may properly be spent. One such power, for example, is the power to explore, whether it be of foreign lands or seas or in areas of scientific knowledge or technology. Again, there is power to create Departments of State, for the servicing of which as distinct from the activities in

which the Departments seek to engage money may be withdrawn from the Consolidated Revenue Fund. But, to anticipate a submission with which I must later deal, to say that a matter or situation is of national interest or concern does not, in my opinion, attract any power to the Commonwealth. ..... [ALR 299] In the long run, whether the attempt is made to refer the appropriation and expenditure to legislative or to executive power, it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid. With exceptions that are not relevant to this matter and which need not be stated, the Executive may only do that which has been or could be the subject of valid legislation."

- Gibbs J, dealing with s.81 at CLR 375, ALR 309, said: "It therefore seems correct to say that "purposes of the Commonwealth" are purposes for which the Commonwealth has power to make laws - purposes which however are not limited to those mentioned in ss 51 and 52 but which, as was pointed out by Starke J (at 266) and Dixon J (at 269) in the Pharmaceutical Benefits Case, may include matters "incidental to the existence of the Commonwealth as a state" and to the exercise of its powers as a national government." Having found the appropriation was not valid as it was not for a 'purpose of the Commonwealth', he said at 312: "It follows from what I have said that the expenditure of the moneys of the Commonwealth for the purposes of the Plan would be unlawful. According to s 61 of the Constitution, the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth. A view consonant with that which I have expressed has previously received acceptance in this court: see *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922), 31 CLR 421 at 431-2, 437-41; 29 ALR 138; *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 10; [1927] ALR 61. The Constitution effects a distribution between the Commonwealth and the States of all power, not merely of legislative power. We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction. Once it is concluded that the Plan is one in respect of which legislation could not validly be passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan."
- Jacobs J said at CLR 406, ALR 333-334: "The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself. This exercise of the prerogative is in no different case from other exercises of the prerogative which fall within the powers of the Executive Government of the Commonwealth under s 61 of the Constitution. If legislation were a prerequisite it would follow that the Queen would never be able to exercise the prerogative through the Governor-General acting on the advice of the Executive Council; she would always exercise executive power by authority of the Parliament. This cannot be suggested. It would, if correct, result in an inability of Australia to declare war, make

> treaties, appoint officers of State and members of the Public Service of the Commonwealth and do all the multitude of things which still fall within the prerogative, unless there was a general or special sanction of an Act of Parliament. .....[ALR 334] Within the words "maintenance of this Constitution" appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States."

62A.9 In *Davis v Commonwealth of Australia* (1988) 166 CLR 79, 82 ALR 633, four of the seven judges cited with approval Justice Mason's formulation of the breadth of section 61 in the *AAP Case* set out above: see the judgments of Mason CJ, Deane and Gaudron JJ at 166 CLR 93, 82 ALR 640, and Brennan J at 166 CLR 119, 82 ALR 653. The remaining 3 judges gave Justice Mason's formulation qualified support, but the qualifications related more to the identification of the source of power than the extent of the power. Justices Wilson & Dawson JJ at CLR 103, ALR 648 and Toohey at CLR 119, ALR 658-9 saw the powers under discussion as falling within the incidental legislative power in s.51(xxxix), so that Commonwealth executive power did not extend beyond the subjects of the Parliament's legislative power. They agreed that the character and status of the Commonwealth as a national government is an element to be considered in the construction of s 61. The majority in *Davis v Commonwealth of Australia* (1988) 82 ALR 633 also regarded the present s. 61 as incorporating such of the prerogative powers of the Crown as can be exercised by the Commonwealth in a federal system: per Mason CJ, Deane and Gaudron JJ in at CLR 93, ALR 640 and Brennan J at CLR 108, ALR 652.

62A.10 In *Pape v Commissioner of Taxation* [2009] HCA 23; 238 CLR 1; 257 ALR 1, six of the seven judges generally accepted Justice Mason's interpretation of section 61 in the *AAP Case* set out above: see French CJ at para.s [127] - [133], Gummow, Crennan & Bell JJ at [228] and Hayne & Kiefel JJ at [329] - [330]. (Justices Gummow, Crennan & Bell JJ also agreed at [214] that the executive power included the Crown prerogatives). However, there were indicators in *Pape* that the application of the Mason test would be applied much more narrowly by the 2009 High Court. For example:

- At para. [239] Justices Gummow, Crennan and Bell referred to the need to examine the "sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in cooperation with the States)" when deciding whether the enterprise or activity fell within the Commonwealth's executive power. The implication is that only if the States don't have sufficient power to do something will it fall within Commonwealth power. Where does this leave research, such as that conducted by the CSIRO, which Justice Mason (and Barwick CJ) regarded as within Commonwealth power despite its absence from the subjects of legislative power in s.51? The States appear to have sufficient power to conduct research. If the Commonwealth has no executive power of research, how is the legislation establishing the CSIRO valid? The same question mark hangs over inquiries, investigations and advocacy in relation to matters affecting public health, which Justice Mason also regarded as within Commonwealth power, but which the States have sufficient power to undertake.

- At para. [345] Justices Hayne and Kiefel concluded that expenditure by the Government directed to addressing a national economic emergency such as the Global Financial Crisis of 2008 was not an exercise of power "derived from the character and status of the Commonwealth as a national polity or as deduced from the existence and character of the Commonwealth as a national government". In other words, the judges did not see an immediate response to a threatened economic depression as within the range of activities 'peculiarly suited to a national Government' - a bizarre misapplication of the Mason formulation. (In *Williams* Justice Hayne accepted at [194] the majority position in *Pape* that whether or not there was a national emergency or crisis did affect whether the power was available.)
- Justice Heydon dissented in *Pape*, and indicated at [519] - [520] that if Mason's test was valid, he would give it a narrow ambit. He held that the Commonwealth's response to the Global Financial Crisis was beyond its power, saying at [504] "the mere fact that controlling economic crises is a matter of national interest does not lead to the conclusion that the Commonwealth has any power to control them apart from the powers expressly granted to it".

62A.11 *Pape* appeared to have partially settled the question of the breadth of the executive power, through acceptance of the Mason formulation, but the implications of it being interpreted more narrowly are profound. Significant sections of Commonwealth Government activity and expenditure are at risk of being declared unconstitutional. The Commonwealth has no legislative power over education, local government and the environment. It has only indirect powers of economic management, exercised through powers such as those over trade and commerce between the States, taxation, corporations and banking. It has only limited powers in relation to health and welfare. Many of its activities in these areas are undertaken by way of grants to States under s.96, to which conditions are attached. The s.96 approach is not threatened by the tendencies in *Pape*, but activities where s.96 cannot be used, perhaps because the States do not agree with them, are now open to challenge.

62A.12 *Pape* also finally established an accepted interpretation of s.81, the appropriation power. This had a significant effect on the analysis of s.61, because previously where spending not authorised by legislation other than an Appropriation Act had been challenged, the cases had often focused on s.81. Post 2009, such cases will focus instead on s.61. Section 81 states: "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth ....". For present purposes, the question is whether s.81 is merely an internal management rule, as explained above at Note 62A.5, or an independent source of power for the Commonwealth. Early commentaries, and several participants in the constitutional conventions, favoured the latter interpretation - that s.81 conferred a power to spend appropriated money. Section 81 has however only been considered by the High Court intermittently and this issue did not receive detailed consideration until 1945.

62A.12.1 The first case which referred to appropriation, *New South Wales v Commonwealth (the Surplus Revenue Case)* (1908) 7 CLR 179, mainly considered ss.89 and 94, and did not address the question of whether s.81 is an internal management rule or a section granting the Commonwealth power to spend. Hence the statements judges made were equivocal on that point. The same comment can be made in relation to the discussion of appropriations by Isaacs J in *Commonwealth v*

*Colonial Combing Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421, where he was the only judge to refer to s.81.

62A.12.2 In *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 the majority of three decided the case on contractual grounds and did not consider constitutional issues. Only Justices Isaacs & Rich considered s.81. They held that three Appropriation Acts had not expressly validated a contract when they authorised the expenditure of funds related to the purposes of the contract, and such validation could not be implied due to the nature of appropriations. The judgment is consistent with the view that appropriations do not ordinarily grant powers to the Government which impact on another party, but by considering whether there had been an express validation their Honours implicitly acknowledged it would be possible for an Appropriation Act to confer such power. Appropriation (under the New South Wales' Constitution) was discussed at length in *New South Wales v Bardolph* [1934] HCA 74; (1934) 52 CLR 455, but the issue was whether the absence of an appropriation rendered invalid a contract which required expenditure - it doesn't.

62A.12.3 In *Attorney-General (Ex Relatione Dale) v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237, the Victorian Government claimed a declaration that the Pharmaceutical Benefits Act 1944 was unconstitutional, in that it was an exercise of legislative power vested in the States. The Commonwealth conceded the Act would be invalid without the section which appropriated funds for the scheme, but said that was an appropriation under s.81, and the remaining provisions were valid under the incidental power in s.51(xxxix). The Commonwealth lost because 5 of the 6 judges held that the appropriation was not "for the purposes of the Commonwealth", though there was no consensus among the majority as to what those words meant. The case therefore focused more on the extent of any limitation on the appropriation power than on whether the section conferred power. However, the latter issue was directly raised by a submission which Chief Justice Latham recorded in this way:

"The principal argument for the plaintiff was that a Commonwealth purpose (for which alone appropriation of money is said to be legitimate) must be found in powers conferred upon the Parliament by some other provision than s 81: that s 81 conferred no legislative power whatever, but was based upon the assumption that the purposes of the Commonwealth were defined or limited by other provisions of the Constitution; so that 'the purposes of the Commonwealth" must be construed as meaning purposes for which the Commonwealth Parliament has power to make laws.'"

- Two of the six judges, Dixon J (Rich J concurring), saw no need to decide this point, on the basis that the Act was not just an appropriation; it was much more: "appropriation of money is the consequence of the plan; the plan is not consequential upon or incidental to the appropriation of money."
- Another two, Latham CJ and McTiernan J, held that s.81 did confer legislative power to spend for such purposes as Parliament determined.
- Justices Starke and Williams held that s.81 authorised appropriations for the Commonwealth's legislative, executive and judicial purposes, which included (according to Starke J at least) those arising from its status as a national government.

The *Pharmaceutical Benefits Case* did not therefore decide whether ss.81 and 83

conferred additional power on the Commonwealth, or merely regulated its internal management. Two judges favoured the former view, while another two impliedly favoured the latter, with two not answering the question.

62A.12.4 In *Victoria v Commonwealth (The AAP Case)* (1975) 7 ALR 277, the Court dismissed a challenge to the appropriation of money for the Australian Assistance Plan, which had no legislative basis other than a short entry in the schedule to the Appropriation Act. There was no consensus among the majority as to the reasons for the decision.

- Two of the majority judges, McTiernan & Murphy JJ, agreed with the Latham/McTiernan position in the *Pharmaceutical Benefits Case* and held s.81 conferred an independent spending power.
- Stephen J held that an Appropriation Act was a machinery provision which created no rights, privileges, duties or obligations: "... the real substance of the plaintiffs' complaint must be, not that the Commonwealth has exceeded its legislative competence but rather that, by the manner in which it is proposing to spend its revenues, it is exceeding its spending powers, which are not necessarily restricted to its heads of legislative power." As the Act was only of concern to the jurisdiction which created it, he said the plaintiff had no standing to bring the case.
- The final member of the majority in favour of dismissing the demurrer, Jacobs J, held that appropriation, as a mere earmarking of money, was a matter internal to Government and could not be challenged. Relief can only be given in relation to expenditure, and then only in respect of so much of it as lies outside the purposes for which an appropriation can be made. Expenditure of moneys voted by Parliament is part of the prerogative granted to the Government through s.61. In the absence of legislation to the contrary, the Government may spend the money which has been appropriated.
- Two judges (Barwick CJ & Gibbs J) held that "the purposes of the Commonwealth" meant the purposes for which the Commonwealth could make laws, though this was not limited to the purposes in ss.51 and 52. Their position was virtually identical to that of Starke and Williams JJ in the *Pharmaceutical Benefits Case*.
- Mason J distinguished between appropriation and spending, so that while he agreed that with Justices McTiernan and Murphy that it was for Parliament to determine for what purposes it appropriates money, he would allow challenges to spending: "An appropriation .... has a limited effect. It may provide the necessary parliamentary sanction for the withdrawal of money from Consolidated Revenue and the payment or subscription of money to a particular recipient or for a particular purpose, but it does not supply legal authority for the Commonwealth's engagement in the activities in connection with which the moneys are to be spent. Whether the Commonwealth can engage in any specified activities depends upon the extent of the Commonwealth's legislative, executive and judicial powers."

In summary, five of the seven judgments were more consistent with the appropriations power not being an independent spending power, but rather one which is limited to

the internal management of the Commonwealth.

62A.12.5 In *Pape v Commissioner of Taxation* [2009] HCA 23; 238 CLR 1; 257 ALR 1, all seven judges agreed said that s.81 did **not** confer an independent power to spend the money appropriated: French CJ at [111], Gummow, Crennan & Bell JJ at [180], Hayne & Kiefel JJ at [296] & Heydon J at [604]. The legislation under challenge was the Tax Bonus for Working Australians Act (No 2) 2009 (Cth) and the Tax Bonus for Working Australians (Consequential Amendments) Act (No 2) 2009 (Cth), passed by Parliament in mid-February 2009. The legislation was part of the Rudd Government's efforts to respond to the global financial crisis. The Acts provided for payments in 2008-09 on a sliding scale to taxpayers who earned no more than $100,000 in the 2007-08 financial year, according to their tax assessments. The total of all bonuses was about $7.7 billion. The Commonwealth submitted that the Act was supported on any or all of five bases: the appropriations power read with the incidental power, the implied "nationhood power" in s.61, the external affairs power, the trade and commerce power and the taxation power. The only basis on which the legislation was upheld was the 'nationhood' power - that part of s.61 referred to in the Mason formulation outlined at Note 62A.8 above.

62A.13 The full significance of *Pape* became apparent in *Williams v Commonwealth of Australia* [2012] HCA 23, in which the High Court held the Commonwealth's expenditure on the school chaplains program to be invalid despite being authorised by appropriation legislation.

62A.13.1 Like the disputed program in the *AAP Case*, the chaplains program was not regulated by separate legislation. It was simply money spent on a particular purpose pursuant to guidelines and a contract between the Commonwealth and the supplier of chaplains. The Court approached the case on the basis that it did not raise questions about:

- the administration of departments of State pursuant to s 64 of the Constitution;
- the execution and maintenance of the laws of the Commonwealth;
- the exercise of power conferred by or derived from an Act of the Parliament;
- the exercise of prerogative powers; or
- the exercise of inherent authority derived from the character and status of the Commonwealth as the national government - the Mason formulation of an aspect of s.61.

Accordingly its decision does not affect executive power over and spending on these matters, but it has a substantial impact on any grant of money or payment pursuant to a contract which is based solely on an Appropriation Act (rather than on a s.96 payment or separate legislation).

62A.13.2 Because the Court regarded the appropriation power as an internal management rule, not a conferral of power, *it disregarded the Appropriation Act*, and considered only whether the expenditure could be justified under s.61. Had its reasons been limited to the ground that the chaplains program was outside the breadth of s.61 - i.e., beyond the range of subjects on which the Commonwealth could spend - there would have been no surprise, but:

- In relation to *breadth*, the Court unexpectedly opened gaps in executive power within the range of subjects over which the Commonwealth can legislate; and

- It found the *depth* of executive power to be much more shallow than previously thought. 'Depth' refers to the extent of the power the Government may exercise over a subject within the breadth of Commonwealth power; that is, whether a power available to the Commonwealth is exercisable by the executive alone or requires support from legislation. Whereas breadth is mainly determined by federal considerations, depth is affected by the separation of powers.

62A.13.3 *Breadth:* There had been a consensus that executive power in s.61 could be exercised in relation to a subject over which the Commonwealth had legislative power even if there was no legislation authorising the actions taken. This view was based on the Constitution establishing spheres of Commonwealth responsibility for certain areas, which requires executive power to be co-extensive with legislative power. The position was most succinctly put by Barwick CJ in the *AAP Case* when he said at (1975) 7 ALR at 299: "the Executive may only do that which has been or could be the subject of valid legislation." Prior to *Williams* there had been such extensive support for this view that all parties in the case based their submissions prior to the hearing on the common assumption that this proposition was the law: see the dissenting judgment of Justice Heydon at [2012] HCA 23 at [340] - [404], where he sets out the authorities in support and the reasons why the proposition was consistent with principle.

62A.13.4 Nevertheless this proposition was *rejected* by a majority of 4 judges: French CJ at [26] - [27], Gummow & Bell JJ at [134] - [135] and Crennan J at [544]. (Justices Hayne at [183] & [288] and Kiefel at [569] found it unnecessary to decide, though the latter at [594] seemed inclined to accept the proposition. Only Heydon J in dissent at [340] actually accepted it).

- Chief Justice French said at [26] - [27] that the proposition that the executive power in all of its aspects extends to the subject matter of grants of legislative power to the Commonwealth Parliament, should not be accepted. Executive action, except in the exercise of delegated legislative authority, is qualitatively different from legislative action. To say without qualification that the executive power in its various aspects extends, absent statutory support, to the "subject matters" of the legislative powers of the Commonwealth is to make a statement the content of which is not easy to determine. At [60], he said a Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.
- Justices Gummow & Bell JJ said [134] - [135] that any proposition that the spending power of the executive branch of government is co-extensive with those activities which could be the subject of legislation supported by any head of power in s 51, is too broad. Referring to s 51(ii), the taxation power, 'it is well settled that there can be no taxation except under the authority of statute (234). Many other of the heads of power in s 51 are quite inapt for exercise by the Executive. Marriage and divorce, and bankruptcy and insolvency by executive decree, are among the more obvious examples. These heads and

other heads of legislative power in Ch II are complemented by the power given to the Parliament by Ch III to make laws conferring upon courts federal jurisdiction in matters arising under federal laws. Further, while heads of power in s 51 carry with them the power to create offences (235), the Executive cannot create a new offence (236), and cannot dispense with the operation of any law (237). Secondly, such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution. There are considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process. And that appropriation process requires that the proposed law not originate in the Senate, and that the proposed law appropriating revenue or moneys "for the ordinary annual services of the Government" not be amended by the Senate (240). The questions therefore cannot to be answered through debate as to what legislation could have been passed by the Parliament in reliance upon s.51'.

- Justice Crennan at [542] - [544] said that opinions about the synergy between executive power and legislative powers expressed in terms which are general, absolute or otherwise imperfect should not be taken to imply that expenditure by the Executive which does not fall within the second limb of s 61 is nevertheless within the scope of s 61 provided it is possible to identify special legislation which might be, but was not, passed. If the fact that the Parliament could pass valid Commonwealth legislation were sufficient authorisation for any expenditure by the Commonwealth Executive, the Commonwealth's capacities to contract and to spend would operate, in practice, indistinguishably from the Commonwealth Executive's exercise of a prerogative power. Such a view ignores the restrained approach to the prerogative adopted by Brennan J in Davis and disregards the constitutional relationship between the Executive and Parliament affecting spending.

The majority judges did not set out a clear alternative proposition.

62A.13.5 *Depth (1):* Of the majority of six, only Justice Hayne at [229] - [231] acknowledged that an Appropriation Act could perform the dual role of not just authorising expenditure but also conferring power, where power is available under a section of the Constitution other than s.81. Justice Crennan's position differed slightly. She said at [531]: "It is possible for an Act to do both where it amounts to a special appropriation Act and provides some detail about the policy being authorised." It is not clear what she meant by a special appropriation - see Note 62A.15.2 below. Partly because of the way the case was argued, the other four majority judges did not address this point specifically, but their reasoning seemed more consistent with Justice Crennan's approach.

62A.13.6 *Depth (2):* Further, none of the judges was prepared to determine the extent of Government powers by reference to notions an ordinary individual's capacity to enter contracts and spend money. Any individual may enter any agreement which does not affect the rights or liabilities of others, but whether the Commonwealth has

analogous legal capacity within the breadth of the executive power was regarded as irrelevant: French CJ at [38] & [83], Gummow & Bell JJ at [150] - [151], Hayne J at [202] - [204], Crennan J at [518] - [524], Kiefel J at [581].

- Chief Justice French said at [83]: “The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone.”
- Justices Gummow & Bell referred at [150] - [151] to the Commonwealth’s argument that because the capacities to contract and to spend moneys lawfully available for expenditure do not "involve interference with what would otherwise be the legal rights and duties of others" which exist under the ordinary law, the Executive Government possesses these capacities in common with other legal persons. The capacity to contract and to spend then was said to take its legal effect from the general law. But, the judges said, a Government is not in the position of a person proposing to expend moneys of his own. Public moneys are involved. The law of contract has been fashioned primarily to deal with the interests of private parties.
- Justice Hayne said: [204] - [205]: “It is not to be assumed, and was not demonstrated, that the Executive Government of the Commonwealth has all of the capacities – in the sense of powers – to contract and spend that a natural person has. There is no basis in law for attributing human attitudes, form, or personality to the federal polity. .... Of course, it is important to recognise that s 61 begins by providing that "[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative". But, as was pointed out in Sue v Hill [321], the personification of the Executive as "the Crown" (or, I would add, as "the Queen" or "the Governor-General as the Queen's representative") must not be permitted to disguise the several different senses in which the term "the Crown" is used or to deny that the Executive Government of the Commonwealth is the executive government of an artificial legal entity – a polity.
- Justice Crennan said at [516]: “The principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend. Such principles do not constrain the common law freedom to contract and to spend enjoyed by non-governmental juristic persons.”

62A.14 The reasoning and methodology of the majority in *Williams v The Commonwealth* are well below acceptable standards.

62A.14.1 The discussion about how certain judges in the *AAP Case* regarded s.61 as extending across the Commonwealth’s spheres of responsibility under the Constitution misrepresents what those judges said. Barwick CJ and Gibbs, Mason & Jacobs JJ saw the subjects of legislative power as within the sphere of Commonwealth executive action, with the question being whether executive powers extended beyond the subjects of legislative power. (This is apparent from the passages referred to at Note 62A.8 above, and from the judgment of Mason CJ, Deane and Gaudron JJ in *Davis and Others v Commonwealth of Australia and Another* (1988) 82 ALR 633 at 82 ALR 640.) Their judgments are not consistent with there being gaps within the

subjects of legislative power over which no Commonwealth executive power exists. Had there been such gaps, that surely would have been a factor tending against executive power extending beyond legislative subjects which would have required consideration. It is difficult to understand how judges could make the comments made by French CJ at [29] - [30], Gummow & Bell JJ at [130] - [132] and Crennan J at [540]. In the *AAP Case*, there were few issues for which there was majority support, but there was majority support for executive power at least extending across the subjects of legislative power, and this appears to be a necessary step in the reasoning underpinning the conclusions of Barwick CJ and Gibbs, Mason & Jacobs JJ. That they did not agree in the result does not detract from the authority of the case on this point. The Court should have expressly overruled the *AAP Case* on this point and explained where those judges were wrong if it was not prepared to accept the decision.

62A.14.2 The *Williams* majority do not cite any authority to support the proposition that there are such gaps in the breadth of the power. They appear to have deliberately steered a path around prior authority to arrive at their preferred position. While that may be permissible where prior authority:

- is divided,
- or based on a wrong principle,
- or based on a principle which is subsidiary to a more important principle,

none of these factors was present. The Court seemed determined to establish its own interpretation regardless of established opinion. Under our totally deficient Constitution, which contains no mechanism to hold judges accountable for their exercise of power, they can do that. But what if a later Court adopts the same approach? Will the pendulum swing back the other way, with further resulting confusion to the orderly running of Government?

62A.14.3 The view that the subjects of executive powers are co-extensive with the subjects of legislative powers was distilled from considerable prior authority. If the view is taken, disregarding the *AAP Case*, that no previous case had determined, as part of the reason for the decision, that legislative and executive powers were co-extensive, that approach is nevertheless consistent with federalism and provides an easy, workable rule to guide Government. That rule was discarded without an alternate rule being suggested. This is irresponsible. Justice Heydon's judgment should have been adopted by the majority.

62A.14.4 Some of the reasoning of the majority is intellectually shallow. To point to the differences between legislative and executive power, as French CJ did at [26] and Gummow & Bell J did at [134] - [135], as a reason for not regarding them as covering the same subject areas is to misrepresent the argument in favour of this approach. The argument is not that the executive may exercise *legislative* powers over the subjects listed in s.51, but that it may exercise *executive* powers over those subjects. Thus the point made by Justices Gummow & Bell, querying how the executive could exercise power over subjects of power such as taxation, divorce and bankruptcy, is devoid of substance. Potential executive powers on these matters are limited. They could however include the establishment of centres to counsel citizens on these matters, or to train professionals dealing with these areas, assuming money was appropriated for these purposes under s.83. Further, since executive power does not include authority

to create offences or dispense with compliance with the law, the executive could never exercise such powers, which in no way impairs the proposition that it could exercise executive powers over the subjects of legislative power.

62A.14.5 Similarly the comments at [136] by Justices Gummow & Bell are an absurd exaggeration. Of the proposition that the spending power of the executive branch of government is co-extensive with legislative powers, they said:

> "such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution. No doubt the requirement of s 64 of the Constitution that Ministers of State be senators or members of the House of Representatives has the consequence that the Minister whose department administers an executive spending scheme, such as the NSCP, is responsible to account for its administration to the Parliament [238]. This is so whether the responsibility is to the chamber of which the Minister is a member or to the other chamber, in which the Minister is "represented" by another Minister [239]. But there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process."

The Parliament had approved the expenditure in the Appropriation Act, and the Government remained accountable to Parliament for that expenditure. The Senate was not by-passed. It could have rejected the Appropriation Bill, but did not. The fact that it could not have amended it is not to the point. While the program was open to challenge as beyond federal power, what occurred clearly met the requirements of responsible government.

62A.14.6 Similarly the dismissal of the argument that the Commonwealth, as a legal entity, has a right to contract as much as any individual does, and that this is a factor in determining the extent of executive power, was accompanied by remarks which ought not to have been made. The Court's comments were not directed to the Commonwealth's power to contract in relation to the administration of Government departments and the provision of the ordinary services of Government. The issue was a submission that just as an individual may make a contract which does not affect the rights of others, so too may the Crown, and no statutory authority is needed for such contracts whether they are part of ordinary Government administration or otherwise. The criticisms of this view by Justices Gummow & Bell at [150] - [153] and particularly Justice Hayne at [204] - [205] (see above at Note 62A.13.6) overlook an elementary point: under our Constitution, executive power is not vested in a Government, it is vested in a *person*, the Queen, and is exercisable by another person, the Governor-General. The Queen always had the same common law rights as an ordinary citizen as well as her prerogative powers. To claim that the Crown is used in different senses does not explain why powers which once existed are no longer available to the Government.

62A.15 The result in the case is absurd.

62A.15.1 A decision that the chaplains program was outside the range of subjects of the Commonwealth's power would not have been surprising. But invalidity was

based on Parliament's supposed failure to confer power on the Government to run the program, even though the program was a widely discussed political issue, and Parliament provided funds for the program on a bipartisan basis year after year. In substance, Parliament did what it regarded as necessary to approve the program, but was told by the Court, in effect, that it should have passed two laws, not one. This result could have been avoided had the Court accepted prior authorities that an appropriation impliedly conferred power - some are referred to below at Note 62A.41 - or by considering whether the Appropriation Acts in issue could have been regarded as *both* an appropriation and a conferral of power over the activity to be funded by the appropriation. In principle, there should be no reason why an Act cannot serve both purposes, but only Justice Hayne at [229] - [231] indicated this approach was available.

62A.15.2 As noted at 62A.13.5 above, Justice Crennan said at [531] that it is possible for an Act to be both an appropriation and a conferral of power "where it amounts to a special appropriation Act and provides some detail about the policy being authorised". She did not define 'special' appropriation. The context suggests that she regarded a special appropriation as one which was not for the "ordinary annual services of the Government" under s.53: see para.s [527] - [530]. This fitted with her earlier comments at [472] - [473], where she had referred to Parliamentary practice in a way which suggested that 'special' means an appropriation for something other than the "ordinary annual services of the Government" under s.53 of the Constitution. However, at [531] she gave the legislation dealt with in *Pape* as an example of legislation which both appropriated and conferred power, and referenced paragraph [167] from her joint judgment in *Pape*. That paragraph cited the *House of Representatives Practice*, which treats as a special appropriation bill one which:

> "while not in [itself] containing words of appropriation, would have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be paid out of the Consolidated Revenue Fund under existing words of appropriation in a principal Act to be amended, or another Act."

This definition could apply equally to the "ordinary annual services of the Government" under s.53 or to expenditure outside that definition. Accordingly it is quite unclear whether or not the judge was saying that an Appropriation Act could only be both an appropriation and a conferral of power if it is of the kind which the Senate may amend under s.53. The tenor of her judgment suggests that she was making that distinction but she failed to make it clear in her words. Given the comments about responsible government and the place of the Senate in the judgments of other judges in the majority, it is quite likely that they also would require an appropriation to be one which is not for the 'annual ordinary services of Government' if it is also to confer power. There is no justification for interpreting an Appropriation Act by reference to whether or not it deals with ordinary government services or other matters outside that class.

62A.15.3 Six days after the decision in *Williams*, remedial legislation, the Financial Framework Legislation Amendment Act (No.3) 2012, was introduced into the House of Representatives and passed the same day. The next day it was introduced into and

passed by the Senate. Assent was given on 28th June 2012. Although divisions were called on amendments unsuccessfully moved by the Liberals in the House and the Greens in the Senate, no division was required in either House on the final vote. For all the high-sounding rhetoric in the Court's judgments about responsible government and the need for proper Parliamentary scrutiny of spending, all political groups represented in the Parliament, right across the political spectrum, wanted the continuation of the 416 then-current government programs which were based solely on Appropriation Acts. Given the opportunity to terminate programs which were not controlled by special legislation, no-one voted to do so. **There is a message here for High Court judges and commentators who like to preach about responsible government. Those actually involved in responsible government; i.e., the people who have to make it work, do not think it is necessary for every program to be based on separate legislation, in addition to appropriation provisions.** The Court should not presume to tell them now to do their jobs.

62A.15.4 Among other things, the legislation amended the Financial Management Act 1997 by adding s.32B. The new section provides that if, apart from the section, the Commonwealth does not have power to make, vary or administer a financial arrangement under which public money is payable, or make a grant to any person, then the Commonwealth has that power by virtue of the section, provided the arrangement or grant is specified in regulations. At the same time the regulations were amended to include Schedule 1AA specifying the 416 programs as arrangements under s.32B. Whether this approach overcomes the supposed problem identified in *Williams* is not clear. If, as is suggested at Note 62A14.8 above, some judges in the majority would only regard legislation as having conferred power if the Senate had the opportunity to amend the legislation, then the new Act will not work. It depends for its efficacy on programs being referred to in regulations, which are then presented to both Houses on a take it or leave it basis. They may disallow the regulations, in whole or in part, but not amend them: see the Legislative Instruments Act 2003, s.42, and Pt 5 generally. (Of course, amendments can be forced if either House threatens disallowance unless an amendment is made). So it seems possible that in the near future the High Court will tell Parliament 416 separate Acts of Parliament are needed, even though Parliament doesn't think that is necessary. That would be High Court mandated red tape.

*The revised aim*

62A.16 In summary, this is how the Advancing Democracy model responds to the changes in the law made by the decisions in *Pape* and *Williams*:

62A.16.1 *Pape* decided that ss.81 and 83 were not spending powers; but rather an internal approval mechanism determining which entity within the Commonwealth decides whether or not money can be spent, if the Commonwealth otherwise has the power to spend. This approach will be retained. Nothing in the model changes the appropriations provisions back into a spending power.

62A.16.2 *Pape* and *Williams* confirmed that the source of the power to spend is the executive power, currently in s.61. The Advancing Democracy model retains this approach, but the section defining executive power will now be s.62A.

62A.16.3 *Williams* rejected the commonly, but not universally, held view that the executive powers in the section were co-extensive with the Commonwealth's legislative powers - that if the Commonwealth Parliament had legislative power on a particular subject, the Commonwealth Government had executive power on that subject. The majority held that with certain (ill-defined) exceptions, the Government only had executive power when Parliament had passed a law which it could administer. This was a court-determined amendment to the Constitution which contracted the Commonwealth's executive power. It will be reversed through proposed subsections 62A(vii) and 62A(ix).

62A.16.4 *Williams* established that for activities requiring spending which is not 'for the annual ordinary services of Government' under s.53, an appropriation is not sufficient - there must be two Acts; an appropriation and special legislation conferring power to spend. This too was a court-determined amendment to the Constitution which contracted the Commonwealth's executive power. It too will be reversed through proposed subsections 62A(vii) and 62A(ix).

62A.17 The intention then of proposed section 62A is to reverse the arbitrary reduction in executive power imposed by the High Court in *Williams*, while otherwise preserving the prevailing interpretation of s.61, and to re-write the section in more comprehensible terms which prevent further expansions of power. An alternative to this express restatement would be to provide that executive power comprises 'such powers as the executive power included immediately prior to the passing of the Advancing Democracy referendum'; or to just repeat the words in the current s.61, which was what was proposed in the 1999 republican referendum (in a revised s.59). That approach however would force us to constantly refer to what the law was prior to the referendum. It would perpetuate past uncertainties for several more decades. A clean break from the past is a far better approach.

62A.18 In restating executive power, consideration has been given to whether some or all of the prerogative powers of the Crown should be included in the definition. This raises the following problems:

62A.18.1 The main problem is that prerogative powers were always capable of abolition or amendment by statute, whereas the intention of s.62A is to list powers the Government may exercise in the absence of legislation, and which cannot be taken away by Parliament. To expressly include prerogative powers in s.62A would elevate their status and deprive Parliament of the right to amend or abolish them. To not include them risks reducing Commonwealth executive power.

There are some minor problems as well:

62A.18.2 There is no universally accepted, exhaustive definition of these powers.

62A.18.3 These days the powers comprise a rather eclectic mix, from the prerogative to grant mercy to criminals to the power to make treaties.

The solution adopted in the Advancing Democracy model is to include only the Crown prerogatives over foreign affairs in s.62A, for the reasons set out in Notes below, and to abolish the remainder. The Notes under s.63A indicate why abolition will not significantly affect Commonwealth executive power.

62A.19 Each component of 62A will now be examined to demonstrate its consistency or otherwise with the existing state of the law.

*Subsection 62A - comprised of and limited to*

62A.20 At present, Australia lacks a definition of what it means to govern. Section 62A confirms that it is the aggregate of the nine separate components identified in the subsection. The key words are "limited to". If the justification for an action cannot be found within the section, the action is outside executive power and cannot be undertaken. From time to time courts have examined which powers are executive, and which are legislative and judicial. Much of that will no longer be necessary. For example, the section does not say that the Government can override the law, or change legal rights, or impose penalties, or create offences. It follows from the words "limited to" that it can do none of these things. Similarly it will not be possible for future lawyers to conjure up additional implied powers based on other parts of the Constitution, in the way that the 'nationhood' power was invented.

*Subsection 62A(i) - administration, implementation and protection of the Constitution*

62A.21 In the first two components of executive power, the words "administration, implementation" have been chosen rather than the present "execution and maintenance" of the Constitution and Commonwealth laws. There are few cases dealing with s.61 exclusively, and none has turned on the meaning of "execution and maintenance". The phrase has been explained as follows:

- In *Commonwealth v Colonial Combing Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421 Knox CJ and Gavan Duffy J said at 425: ".... execution of the Constitution means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation." This statement was part of the reasons for their Honours' decision, but the following comment by Justice Isaacs at 441 in the same case was merely an observation: "The mere fact of the creation of the Executive Government carries with it some constitutional consequences, unwritten, it is true, but nevertheless very real, that Courts recognize and that are included in the terms "maintenance of the Constitution."".
- In *R. v Hush; Ex parte Devanny* (1932) 48 CLR, at p 506, Rich J. said: "To prevent persons associating together for the purpose of destroying the Constitution is a matter incidental to maintaining it." The other members of the Court decided the case on other grounds.
- In *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1, Williams J at CLR 230 said: "The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation." (This case did not turn however on an interpretation of s.61).
- As noted above at 62A5.1, in *Victoria v Commonwealth (The AAP Case)* (1975) 134 CLR 338, 7 ALR 277 Jacobs J said at CLR 406, ALR 334: "Within the words "maintenance of this Constitution" appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States." His interpretation was endorsed by Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79, 82 ALR 652 at at CLR 108, ALR 652.

- In *Pape v Commissioner of Taxation* [2009] HCA 23; 238 CLR 1; 257 ALR 1 Gummow, Crennan and Bell JJ. said:
  "[214] .... The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with "the prerogative"; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it.[259]
  [215] With that understanding, the phrase "maintenance of this Constitution" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia."

62A.22 While this is not an exhaustive list, it does convey the range of implications judges have been prepared to draw from the word "maintenance". In proposed s.62A, the words "administration, implementation" replace "execution and maintenance" for these reasons:

- The word "maintenance" has an uncertain meaning when applied to law. It is better to avoid words which may be susceptible to varying interpretation over time.
- The new phrase is more comprehensible to the public.
- The words 'administration and implementation' are consistent with the dominant view of the meaning of 'execution and maintenance'.

62A.23 Proposed s.62A(1)(i), uses the term "protection" of this Constitution. There is no doubt the Commonwealth Parliament has *legislative* power to protect the Constitution. This has been variously seen as stemming from:

- The incidental power in s.51(xxxix) of the Constitution: *R v Kidman* [1915] HCA 58; (1915) 20 CLR 425, per Griffith CJ at 434, Isaacs J at 442, Higgins J at 450, Gavan Duffy J at 456, and Rich & Powers JJ at 459-460; *Burns v Ransley* [1949] HCA 45; (1949) 79 CLR 101 per Latham CJ at 109-110, Rich J at 111, Dixon J at 116 & McTiernan J at 120; *The King v Sharkey* [1949] HCA 46; (1949) 79 CLR 121 per Latham CJ, Rich, McTiernan & Williams JJ;
- The defence power in s.51(vi): *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1, per Latham CJ at CLR 151, Dixon J at CLR 186; *Thomas v Mowbray* (2007) 233 CLR 307, where Gummow & Crennan JJ held at [139]-[148] that the power was not limited to resisting external aggression, Gleeson CJ agreeing at [6] - [9], Heydon J agreeing at [611]; Kirby J similar at [250] - [251]; and
- Necessarily implied from the Commonwealth's existence: per Dixon J in *Burns v Ransley* and *The King v Sharkey* and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-8.

(This list of citations is not exhaustive). The extensive legislative power for protection has meant that few judges have needed to comment on the protective aspect of executive power. Nevertheless there is direct support for protection of the Constitution being part of executive power in 3 of the passages cited at Note 62A.9 above, and it seems implicit in many other, more general, explanations of s.61, such as the Mason formulation in the *AAP Case*.

*Subsection 62A(ii) - administration and implementation of the laws of the Commonwealth*

62A.24 The second component - s.62A(1)(ii) - is a partial restatement of s.61. The change in

wording - from 'execute and maintain' the laws to "administer and implement" the laws - does not change the meaning, and has been made to make the section more comprehensible. However, the temptation to define "laws of the Commonwealth" has been resisted. The only issue is whether it means laws enacted by the Commonwealth Parliament, or those laws plus the common law. *Commonwealth v Colonial Combing Spinning & Weaving Co Ltd* (1922) 31 CLR 421 is generally taken as having decided that it means only the laws made by the Parliament. This is probably correct, as it is difficult to see how the Commonwealth could 'execute and maintain' the common law. Similarly it is not clear how the Commonwealth could 'administer and implement' the common law, so the meaning of "laws of the Commonwealth" will probably remain the same under s.62A. However, cases referring to this phrase pre-date *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, in which it was held that there was one common law for Australia. It may be in future that the Commonwealth jurisdiction is seen as having a greater role in the development of the common law and that the meaning of the phrase in s.62A needs to be adapted accordingly. Leaving "laws of the Commonwealth" undefined allows, but does not compel, such a reinterpretation.

*Subsection 62A(iii) - administration of the Government*

62A.25 The third component in s.62A(iii) merely makes explicit what is already obvious - the power to govern is a power of administration. Given the introductory words "and limited to", the obvious must be included for completeness. There is no need to be more explicit. Even without a power of administration having been conferred, the High Court has been prepared to imply that the Commonwealth has power to regulate its own activities: e.g., *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 357, 73 ALR 161 at 177-8, per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

*Subsection 62A(iv) - foreign affairs*

62A.26 The fourth component is a restatement of part of the Crown's prerogative to act in international matters. The right to declare war was a Crown prerogative: see for example *Joseph v Colonial Treasurer (NSW)* [1918] HCA 30; (1918) 25 CLR 32 at 45-47 per Isaacs, Powers & Rich JJ and at 54-55 per Gavan Duffy J. The power to make treaties is partly a corollary to the power to make war, and was traditionally regarded as part of the Crown prerogative. The treaty power has been recognised in several High Court case, e.g.:

- *Farey v Burvett* (The Bread Case) (1916) 21 CLR 433 per by Isaacs J at 452 (with whom Powers J agreed at 468): "By s 61 of the Constitution that is vested in the Sovereign, and (subject to s 2) is exercisable by the Governor-General as the Royal representative, and, says s 61, this executive power extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth. These provisions carry with them the Royal war prerogative, and all that the Common Law of England includes in that prerogative, so far as it is applicable to Australia. The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire, but apart from that, the prerogative powers of the Crown are exercisable locally." (Emphasis added)
- *Chow Hung Ching v R* (1948) 77 CLR 449 at 478-479 per Dixon J.
- *Davis v Commonwealth of Australia* (1988) 166 CLR 108, 82 ALR 633 per Brennan J

at ALR 651.

- *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 278 at 286-7, 128 ALR 353 at 361-2 per Mason CJ & Deane J (Gaudron J agreeing): "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (4) This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of parliament, not the Executive. (5)"

Quick and Garran (1901) at pp. 322-323 mention other elements of the power: accrediting and receiving ambassadors, recognition of foreign states and appropriating prizes of war. The range of these executive prerogatives is no more extensive than Parliament's legislative powers over external affairs in s.51(xxix). The prevailing interpretation of that power was summarised by Gummow, Hayne and Crennan JJ. in *XYZ v Commonwealth* (2005) 227 CLR 532, 227 ALR 495, [2006] HCA 25 as follows:

> "[30] In the joint judgment of five members of the court in the Industrial Relations Act Case, (32) it was said:
>
> 'The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in *Polyukhovich v Commonwealth*. (33) Dawson J expressed the doctrine in these terms: (34)
>
> > "[T]he power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but is wide enough to cover places, persons, matters or things. The word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'."'
>
> Similar statements of the doctrine are to be found in the reasons for judgment of other justices: Mason CJ; (35) Deane J; (36) Gaudron J; (37) and McHugh J. (38). They must now be taken as representing the view of the Court."

62A.27 Some powers Australia presently exercises internationally may not have been part of the Crown prerogative. For example, under the Seas and Submerged Lands Act 1973, Australia asserts sovereignty over the "territorial seas", which generally speaking are the seas beyond the low water mark of our coastline. In the case which upheld the validity of this legislation, *New South Wales and Ors v Commonwealth* (Seas and Submerged Lands) (1975) 135 CLR 337, 8 ALR 1, six of the seven judges expressed different views as to whether, prior to adoption of the Constitution, claims over the seas arose from an assertion of the royal prerogative or from international law. The argument no longer matters. The legislation itself is firmly grounded on international law: initially on Australia's rights under the Convention on the Territorial Sea and Contiguous Zone and Convention on the Continental Shelf, Geneva 1958, and now on the United Nations Convention on the Law of the Sea 1982. Such comprehensive legislation would have extinguished any remaining prerogative power. Proposed s.62A(iv) confirms that rights under international law may be exercised by the Commonwealth Government, which in turn makes the manner of their exercise a subject of legislation under s.51(xxxix) as well as under s.51(xxix). Rights rarely come without

obligations, so it is necessary to provide that the same branch of Government which exercises the rights must also discharge any obligations.

62A.28 In re-stating the power the word "Australia" has been chosen in preference to the words "the Commonwealth". The choice between the two has little relevance for s.62A(iv) but has been chosen for consistency with proposed s.62A(vi), where the choice has some significance - see Note 62A.33 below.

62A.29 As noted above at 62A.7, the foreign affairs prerogative is the only current prerogative which will be expressly included in the Constitution. The reasons are:

62A.29.1 Of all the Crown's prerogatives, that over foreign affairs holds a unique position under our Constitution. Some prerogatives have been completely replaced by express terms of the Constitution. Many others are completely untouched by the Constitution. But the foreign affairs prerogative has been *partly* inserted in the Constitution - section 68 gives the Governor-General control of our military forces which is the main part of the war prerogative - with the lesser parts not expressly referred to. This leaves it open to Parliament to abolish these lesser powers, which would not be appropriate. Logically the power to make treaties and other arrangements should be held by the same branch of Government which controls the military, whose services may be needed if a treaty cannot be made or is broken.

62A.29.2 The omission of the power to make treaties from the executive powers in the Constitution did not arise from a conscious decision that the Government should not have that power, or that the power should reside with Parliament, not the executive. It arose from Australia's position as a colony. In 1901, the power to make treaties for Australia was vested in the executive Government of Britain. Following Britain's gradual withdrawal from Australia's affairs, all foreign affairs prerogatives have been exercised by Australia's executive, not Parliament. Inclusion of those prerogative powers in the expression of executive power is therefore consistent with how the Constitution has developed since World War II.

*Subsection 62A(v) - command of the armed forces*

62A.30 Proposed s.62A(v) is a restatement of s.68, which gives command of "naval and military forces" to the Governor-General, with three changes:

62A.30.1 The Governor-General has been removed as the commander in chief.

62A.30.2 Whereas the current s.68 refers to "naval and military forces", the proposed new section refers to "naval, military and defence forces". The additional term is better suited to possibilities such as cyber warfare and counter-terrorism. It is conceded that the new section would use a wider term to that in the defence power, s.51(vi), and in s.114, but no adverse consequences flow from this. The latter sections can be amended in due course.

62A.30.3 More importantly, proposed s.62A refers to "such military and defence forces *as are established by law*". The italicised words do not appear in s.68. Their purpose is to confirm that the Government cannot create a military force without Parliamentary approval. This is probably the legal position at present, but it is better to put the matter beyond doubt.

62A.30.3.1 The Bill of Rights of 1688 abolished any Crown prerogative to create an army in peace time:

> "Standing Army.
> That the raising or keeping a standing Army within the Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law."
> (Citation from online version available at www.bailli.org.uk).
> 62A.30.3.2 The Commonwealth Constitution incorporates some of the principles evident in the Bill of Rights but does not expressly adopt it or include the above provision. Instead, s.68 simply vests command in the Governor-General. The only High Court decision of significance on s.68, *Lane v Morrison* [2009] HCA 29, left its interpretation unresolved - see Note 68.3 above.
> 62A.30.3.3 The most likely interpretation of s.68 is one consistent with the principles of the Bill of Rights - that the section means command of the forces which have been established by legislation. However, in *Marks v Commonwealth* (1964) 111 CLR 549, two of the five judges indicated that at common law the sovereign could still compel her subjects to serve in such offices as the public good and the nature of the constitution require. The extent of the obligation was said to be unclear. Windeyer J held that this rule was obsolete and the other two judges did not address this specific issue. This is the sort of judgment which in future could form part of an argument that the Constitution overruled the Bill of Rights on this point.
> 62A.30.3.4 If the monarchy is abolished, and command of the military becomes part of the executive power vested in a democratic government, then a second, more potent argument could be made for the Bill of Rights requirement having been abolished. It could be said that it was a rule to control the Crown which is no longer required after the abolition of the Crown. Such arguments would be untenable if, as proposed, the section vests command of "such military and defence forces *as are established by law*".

*Subsection 62A(vi) - activities for the benefit of Australia*

62A.31 The sixth component of s.62A makes explicit the power which the High Court has found to be implicit in the Constitution. Subsection (vi) is a restatement of the Mason formulation in the *AAP Case.* The words in Justice Mason's judgment quoted at Note 62A.5.1 cover a couple of paragraphs. By contrast, the proposed s.62A(vi) condenses this into a couple of lines:

> "The power to engage in activities for the benefit of Australia where in the circumstances prevailing at the time of such engagement the States lack the practical power to engage in those activities".

Making this power explicit confirms the extent of executive power as established by case law over the last 4 decades in a way that makes it comprehensible to ordinary Australians. Such a significant power should be explicit. Four elements must be present before the power may be exercised.

62A.32 *Activities for the benefit:* No criteria is set for judging whether an activity is of benefit, because at present the case law does not set any criteria. The approach the High Court takes at present is analogous to the statement of Barton J in relation to s.51(xxxv) in *Jumbunna Coal Mine v Victorian Coal Miners Association* (1908) 6 CLR 309 at 334: that

once the end sought to be achieved is found to be something which might be of benefit, whether it is actually of benefit is a political question best left to the decision of the Government. This allows the Court some control over whether something is of benefit.

62A.33 *Of Australia:* The entity intended to be benefited is "Australia". Mason J's formulation in the *AAP Case* refers to the "nation", but this word is not found in our Constitution. Similarly the word "Australia" is included only once; in s.51(x) concerning "fisheries in Australian waters". (Note that the UK Act implementing the Constitution is not part of the Constitution.) The words "the Commonwealth" are used throughout the Constitution, but in different senses. Sometimes it means the whole nation; something apart from other nations. At other times the words are used to distinguish the Commonwealth Government from the States. In the opening sentence of s.62A and in subsections (ii) and (iii) "Commonwealth" necessarily means the political entity which is separate from the States. If "Commonwealth" was used in that sense in s.62A(vi) the whole meaning would be changed. The word "Australia" has therefore been selected. It directs attention to whether the activity can be said to be benefit to the nation as a whole.

62A.34 *The States lack the practical power:* A State may have the legal power to act but not be able to exercise it in practice. This is consistent with the High Court's approach to date. Of the activities which have been held to be within the power in the cases such as the *AAP Case*, *Davis v The Commonwealth* and *Pape*, all were within the legal power of the States. Yet this was not a reason for finding them beyond the Commonwealth's power. Practicality is the governing consideration at present. Practicality is affected by many factors - financial resources, expertise, administrative ability, legal powers and, arguably, the level of consensus between affected States as to the means by which the end should be achieved. The question will be: could this be done by the States if they supported the end to be achieved?

62A.35 *In the circumstances prevailing at the time:* The fourth element focuses attention on the timing of the action. Could the States do the same thing within the same time frame? Consideration of this issue was implicit in the decision of the majority in *Pape*. It was an issue on which Justices Hayne and Kiefel differed from the majority. At paragraphs [345] - [350], they said that whether or not there was a national crisis or emergency was not a factor in the interpretation of the powers in s.61. Had one more judge taken this view, a major part of the Government's response to the global financial crisis of 2008 would have been rendered ineffective. It is absurd that whether the Commonwealth Government can respond adequately to an economic crisis depends on the obscure words of s.61. The reference to "circumstances prevailing at the time" ensures that whether or not there is a crisis or emergency will be of prime importance in whether or not the power in s.62A(1)(vi) is validly activated. That is exactly when such powers are needed, and most of the time it will be difficult for the Commonwealth to base action on the power unless there is a short-term need for action which the States cannot perform. The phrase does not however mean that the power may only be activated for temporary or short term activities. For example, the activities of the kind considered in the *Davis* case - national celebration of the Bicentenary of white settlement / invasion - are inherently beyond the practical power of the States.

62A.36 It may be argued that a consequence of elevating the power from an implied to an expressed term is that it will have more importance. The argument does not stand up to close scrutiny. By making the power explicit, its extent has been limited, and its impact will become more predictable. Four elements must be present before the power can be used. The

third and fourth elements may be quite difficult to establish when the action planned is something other than a temporary response to a crisis, and in a crisis the people and the State Governments usually expect the Commonwealth Government to take action.
62A.37 As mentioned above at Note 62A.3, the aims of the section 62A include the restatement of the current ambit of executive power, and the reduction of the extent to which Government power could be expanded or contracted in the future by judicial decision. Proposed s.62A(1)(vi) is more consistent with the former than the latter. After the referendum is passed, judges will continue to have considerable discretion in declaring Government actions either within or outside s.62A(1)(vi), just as at present they have the power to determine the width of the implied power recognised in the *AAP Case*.

*Subsection (vii) - the power to make contracts, acquire property and spend appropriated money*
62A.38 Subsection (vii) reverses the contraction in Commonwealth executive power brought about by *Williams v The Commonwealth*: firstly, by re-establishing the Government's power to exercise common law rights without legislative authorisation beyond an appropriation, and secondly by confirming those powers may be exercised across the full range of the Commonwealth's spheres of responsibility under the Constitution.
62A.39 *Make contracts, acquire property and spend:* One of the Commonwealth's submissions in *Williams* referred to executive powers being available to achieve anything which could be the subject of Commonwealth legislation. The Advancing Democracy model proposes a narrower power. The proposed subsection does not refer broadly to "executive power". Instead it singles out three specific powers from all those potentially available; those which are most likely to be the subject of disputes if not dealt with clearly. It will be easy to see what the Government may do pursuant to the subsection. This negates the point made by French CJ at [27], Gummow & Bell JJ at [134] - [135], and possibly by Crennan J at [544], about the implications of accepting the Commonwealth's submission. It is important to note that the three powers mentioned are all powers which the common law recognises as being possessed by any legal entity. Discussion below will focus on the prime power conferred by the subsection - the power to make contracts. (Aside from grants of funding, the acquisition and spending powers will ordinarily also be an exercise of the power to enter contracts).
62A.40 *Appropriated money:* Strictly speaking, the word "appropriated" is redundant. Since s.83 prevents money being drawn from the Treasury except under an appropriation by law, and s.62B states executive power must be exercised in accordance with the Constitution, the Government would have no power to spend money which has not been appropriated. The word has been included for its educative effect. It will prevent misunderstandings by non-lawyers who read the Constitution, which over time will of course include many politicians.
62A.41 *Contract power - the argument in favour:* The power to contract should be regarded as a return to the pre-*Williams* position, for the following reasons. Under our Constitution, executive power is not vested in a Government; it is vested in a *person*, the Queen, and is exercisable by another person, the Governor-General. The Constitution did not emerge in a legal vacuum. Under the common law prior to Federation, the Crown held prerogative powers which it alone could exercise, as well as the same common law rights which ordinary citizens possessed, such as the power to make contracts which did not interfere with the rights of others. Both sets of rights were available to be used for Government purposes. These powers

must be regarded as having been divided on Federation between the Commonwealth and the States, limiting the range of subjects over which they could be exercised to those for which the Commonwealth had responsibility under the Constitution. This has been recognised in case law with reference to the prerogative. Logically the same approach should have been taken to common law powers. Just as a citizen or a corporation has power to enter contracts which do not interfere with the rights of others, so the Commonwealth had this power *without* the need for any special legislation authorising the contract beyond an Appropriation Act (if the contract requires expenditure). The power to enter contracts was subject to legislative control, under s.51(xxxix) if no other provision applied. *Williams* changed the law on this point. Proposed s.62A(1)(vii) reverses the change.

62A.42 *Contract power - the authorities in support:* Set out below are several authorities indicating the extent of judicial support for this argument before it was rejected by the majority in *Williams.* The purpose is not to present the ultimate refutation of the majority decision in *Williams;* or even to present all authorities one way or the other to allow readers to form their own judgment. The purpose is more political than legal - it is to show that many judges would regard the amendment as a continuation of the past, rather than a radical departure from it.

Note that until *Williams v The Commonwealth* there was no case which turned on whether a contract which required spending on something other than the ordinary services of Government needed to be authorised by legislation in addition to an appropriation. Prior authority consists of comments by individual judges when they were considering other related issues which were not necessarily the subject of comment by other judges in the same case. The weight to be attributed to each comment is open to debate.

- In *Clough v Leahy* (1904) 2 CLR 139 at 157, Griffith CJ (with whom Barton & O'Connor JJ agreed) said while examining whether it was lawful for the Crown to commission inquiries, said: "We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle. The liberty of another can only be interfered with according to law, but, subject to that limitation, every person is free to make any inquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown, ....." Logically this approach should apply to the Crown's right to contract.
- In *Williams v Silver Peak Mines Ltd* (1915) 21 CLR 40 Griffith CJ considered whether a clause under which the Governor had cancelled a mining lease was void as against public policy. In finding that the term was not void, he said: "In my opinion, the Crown when making a contract with a subject is entitled, unless forbidden by law, to take advantage of the ordinary rules governing the rights of private citizens." His Honour was in dissent in the result, but not on this point, and the decision of Isaacs J that the terms in the lease were valid impliedly supports Justice Griffith's approach.
- The significance of the above cases is that judges who had been involved in the drafting of the Constitution saw it as obvious that the Crown had the right to make contracts not forbidden by law. It is unlikely the statements in the above extracts would have been made had the judges thought that the Commonwealth had no power to contract without legislative authority.
- The Full Court of the Queensland Supreme Court took what may at first appear to be a

different view in *Australian Alliance Assurance Co. Ltd v John Goodwin, Insurance Commissioner* [1916] QSR 225. It held that: "... the Executive cannot enter into any business or any contracts which, in their operation or performance, are an appropriation of or lead to the appropriation of any part of the public revenue, unless expressly or by necessary implication authorised by an Act of the Legislature." Per Lukin J at 258, (Cooper J concurring at 240, Shand J agreeing on this point at 272; Real & Chubb JJ agreeing with Shand J). However it is clear from the reasoning which preceded this statement that it was thought, based on statements in *Alcock v Fergie* (1867) W. W. & A'B 285, that the constitutional requirement for a Parliamentary appropriation meant that a contract which required expenditure for which there had been no appropriation must be illegal. This interpretation was however later rejected in *New South Wales v Bardolph* (1934) 52 CLR 455, where it was held that a lack of an appropriation does not invalidate a contract; appropriation is merely a condition precedent to payment. Accordingly the *Australian Alliance Assurance Case* does not support the *Williams* view that two laws are needed for a contract to be valid. It was only the absence of an appropriation which determined the result.

- The passage from *Alcock v Fergie* (1867) W. W. & A'B 285 at 310 cited in *Australian Alliance Assurance* [1916] QSR at 259 supports one branch of the argument at Note 62A.38.5, and refutes the other. Stawell CJ of the Full Court of the Victorian Supreme Court did say that there was no authority which determined that in the absence of an enabling power, the Government can enter contracts, which (without explanation) negates any common law right in the Government. But his preceding comments showed that he regarded special legislation conferring a power and an appropriation as alternative methods of authorisation by statute, which is the approach taken in proposed s.62A: "Parliament may, by Legislative enactment, either in express terms or by necessary implication, authorise the Government to enter into contract. Statutes directing the execution of certain works and appointing a certain department or person to carry them out, afford instances of the former. Statutes appropriating part of the Consolidated Revenue for certain services, and thus impliedly empowering contracts to be made for the performance of those services, afford instances of the latter kind."
- *Commonwealth v Colonial Combing Spinning & Weaving Co Ltd* (1922) 31 CLR 421 considered Commonwealth contracts rightly held invalid on a number of grounds. The expenditure in that case was not supported by an appropriation, so it is difficult to determine whether the decision that the contracts were not valid would have been different had there been an appropriation; i.e., whether the judges would have regarded an appropriation as sufficient authority. However Justice Isaacs, in discussing and approving of *Commercial Cable Co. v Government of Newfoundland* [1916] 2 AC 610 and *Mackay v Attorney-General for British Columbia* [1922] 1 AC 457, paraphrased the rule from the former case as: "the constitutional practice that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless Parliament had sanctioned it, *either by direct legislation or by appropriation of funds* ....." (Emphasis added) This suggests he regarded the Crown as having a power to make contracts, and saw an appropriation

as an alternative form of authorisation.

- As mentioned in Note 62A.12.2, in *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, the judgment of Justices Isaacs & Rich is consistent with the view that appropriations do not ordinarily grant powers to the Government which impact on another party, but by considering whether there had been an express validation their Honours implicitly acknowledged it would be possible for an Appropriation Act to confer such power.
- *New South Wales v Bardolph* (1934) 52 CLR 455 concerned a contract accepted by the Court as one for the ordinary services of Government. Though the case concerns the Constitution of New South Wales, it is generally accepted that the decision is applicable to the Commonwealth. At first instance, Evatt J observed : “No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects.” In upholding Evatt J’s decision on appeal, Rich J stated the rule for which the case stands at 496: “Apart from the question whether Parliamentary appropriation of moneys is a pre-requisite of the Crown's liability to pay under a contract made by it, the Crown has a power independent of Statute to make such contracts for the public service as are incidental to the ordinary and well-recognised functions of Government.” Dixon J at 508, (Gavan Duffy CJ agreeing at 493), phrased it as follows: “No statutory power to make a contract in the ordinary course of administering a recognised part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown ...’. McTiernan J said at 517: “The contract now in suit is within the prerogative powers exercised by the Crown ....”. The Court did not indicate whether the same or a different rule applied to contracts which were not for the ordinary services of Government.
- *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 concerned the interpretation of contracts which underpinned the ‘two airlines policy’ which then existed. The agreements provided that they should have no effect until approved by the Commonwealth Parliament, and subsequently they were approved by legislation. Aickin J (in dissent in the result) said at 113: "It is plain that even without statutory authority the Commonwealth in the exercise of its executive power may enter into binding contracts affecting its future action." Barwick CJ added at 61: "We are not considering an agreement resting merely on the authority of the executive, though I agree with my brother Aickin in thinking that, even if we were, there is no ground for thinking that the Agreements or any of them were beyond the competence of the executive." Aickin J's statement was quoted with approval by Gibbs CJ in *A v Hayden* (1984) 156 CLR 532 at 543.
- In *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at 60 [126], French CJ said that the powers which the Executive has under s 61 include statutory powers, "prerogative" powers and the "capacities" which may be possessed by persons other than the Executive. Gummow, Crennan and Bell JJ said at [214]: "The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with 'the prerogative'." In

> other words, four of the judges who in *Williams* denied the Commonwealth a general capacity to contract seemed to acknowledge it three years earlier.

62A.43 *With respect to:* This phrase is the same as that used in the opening paragraph of s.51 and should be interpreted in the same way. This approach is consistent with ensuring that the subjects over which the executive powers in the subsection may be used extend as far, but no further, than the subjects of legislative power. As to the meaning of the phrase, in the Work Choices case, *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth* [2006] HCA 52, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ summarised the prevailing interpretation as follows [142]:

> "The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit" [180]. The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates [181]. The practical as well as the legal operation of the law must be examined [182]. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject-matters [183]. Finally, as remarked in Grain Pool of Western Australia v The Commonwealth [184], "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice [185]"."

62A.44 *Any subject on which the Commonwealth Parliament has the power to make laws:* Contrary to the decision in *Williams,* the breadth of executive power will be the same as that of legislative power. There will be no gaps within the subjects of Commonwealth legislative power where no Commonwealth executive powers can operate. The proposal is completely consistent with the existing federal division of powers. Indirectly the subsection will affect the interpretation of section 81, which provides that appropriations may only be made "for the purposes of the Commonwealth". With the power of spending limited as per subsection (vii), the logical interpretation of "for the purposes of the Commonwealth" will become that of Starke and Williams JJ in the *Pharmaceutical Benefits Case* and Barwick CJ and Gibbs J on the *AAP Case*: that the purposes are those for which the Commonwealth may make laws, which are mainly, but not exclusively, set out in ss.51, 52 and 122. Note the Constitution also allocates legislative power to the Commonwealth on judicial matters (e.g., ss77, 78) and other matters (e.g., ss.46-48).

*Subsection 62A(viii) - research and inquiries*

62A.45 *The power to research or conduct an inquiry:* The words are wide enough to cover matters such as scientific and medical research, investigations into social problems and inquiries of the kind usually undertaken by Royal Commissions. *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 41 ALR 71 confirms the Commonwealth has power to establish inquiries: see Gibbs CJ at 41 ALR 81-84, Stephen J at 94, Mason J at 113, Aickin J at 138-139, Wilson J at 141-143 and Brennan J at 161-163; but the Crown's executive power does not extend beyond a mere inquiry and report. A long line of authority referred to in the case confirms that powers to compel witnesses to

testify on oath or produce documents are not executive powers. Compulsion cannot occur unless authorised by legislation. Proposed s.62A(1)(viii) will operate in the same way. The section says powers are "limited to" those described, and nothing in the power to research and inquire refers to compulsion. Accordingly the Government will only be able to establish the equivalent of Royal Commissions if Parliament has passed an Act allowing the compulsion of witnesses.

62A.46 *With respect to:* This will be interpreted in the way set out above at Note 62A.42.

62A.47 *Any subject other than:* The subjects on which the research power may be used will not be limited to those on which the Commonwealth may make laws. The intention is that the Government have power to investigate matters even if they are the responsibility of the States. It is likely that this is an expansion of power, though the extent of the expansion is debatable. In *Williams* French CJ said at 63:

> "An early example of such consideration concerned the power of the Executive to undertake inquiries. ..... Importantly, the extent of the "power" was not at large. It was at least constrained by the distribution of powers in the Constitution. In Colonial Sugar Refining Co Ltd v Attorney-General (Cth) [131] the Court divided equally on the question whether s 51(xxxix) of the Constitution authorises legislation, incidental to the executive power, compelling persons to give evidence on matters outside the constitutional authority of the Commonwealth [132]. Griffith CJ, who viewed the question from a federal perspective, rejected the proposition, as one which [133]: "implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact."
>
> On appeal to the Privy Council, pursuant to s 72 of the Constitution, the view of the Chief Justice and Barton J prevailed [134]."

The subsequent 'discovery' of the implied power to engage in activities for the benefit of the nation has arguably widened the power of inquiry, so that it is likely to be available to investigate any problem which extends beyond the limits of one State. Further, Barwick CJ in the *AAP Case* favoured a wide research power - see the quote at Note 62A.8. Royal Commissions already range fairly widely, as does medical and scientific research. A broad power to research and inquire is appropriate for a Government which is national in character.

62A.48 *The administration of a Government or entity which is accountable to a State Parliament*: The power to research and inquire may not be used to investigate State Governments, or those responsible to such Governments. The word "responsible" has not been used however, as it may be interpreted too narrowly as only applying to Ministers and their Departments. "Reportable" is also inappropriate, as it would set the criterion by reference to something which may change over time leading to unforeseen consequences. The word "accountable" really means "answerable". This is a broader concept than the alternatives.

*Subsection 62A(ix) - the powers of a natural person*

62A.49 *With respect to the exercise of the above powers:* The opening phrase confirms the power is intended to be something which supplements other powers as necessary and is not an independent power in its own right. It is an incidental executive power analogous to s.51(xxxix) which ensures there are no unintended gaps in power and makes it more difficult

for courts to deprive future Governments of powers.
62A.50 *The powers of a natural person:* By aligning incidental government powers with those of individuals, the subsection ensures that the powers remain consistent and compatible with those of citizens over time. The main legal powers of individuals have already been set out in subsection 62A(vii), so subsection (ix) adds little. Examples of what it does add though include the power to incorporate companies, run businesses and create new property. These powers could not be exercised except as an adjunct to another power. But it is necessary to include them, given that the opening line of proposed s.62A states that power is "comprised of and *limited* to" those listed.

Section 62B Executive power - abolition of prerogative and reserve powers

*Subsection (i) - prerogative powers*
62B.1 The proposed section abolishes any residual prerogative powers currently held by the Crown, as far as those powers are a feature of the Commonwealth Constitution. Although the States will be required by proposed s.110A to abolish the monarchy, it is up to each State to decide whether to retain, discard or amend powers formerly exercised by the Crown.
62B.2 Prerogative powers are those powers which the common law recognises are validly exercised by the Crown alone. The *Case of Proclamations* (1611) 77 ER 1352 is taken as having decided that Crown's prerogative can be abolished or amended by statute. The Stuart Kings of the 1600s perhaps saw things differently, but after a civil war, the execution of Charles I and a revolution, the Stuarts departed, and the Bill of Rights (1688) Will and Mar Sess 2 decisively established the rule. The Bill of Rights abolished multiple powers which the deposed King James II had purported to exercise, including the "levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament". Further, where a matter within the prerogative is provided for by statute, the prerogative becomes merged in the statute: *De Keyser's Royal Hotel Ltd v The King* (1919) 2 Ch., 197, at pp. 216-217. These rules have been acknowledged in many High Court cases; for example *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1; *Barton v Commonwealth* (1974) 3 ALR 70. The current extent of the royal prerogative is unclear. The confusion is not of recent origin. The opening chapter to Justice Evatt's doctoral thesis in 1924, *The Royal Prerogative*, (1987 Law Book Company) cites many authorities which refer to the confusion. More recently the prerogative has been eroded by judicial decisions as much as by legislation. Several of the most important executive powers regarded at one time as prerogatives were written in to our Constitution as express powers. After the Advancing Democracy model is adopted a few more will become express powers, and all will be unrelated to the monarchy. These powers include:

- The power to summon and dissolve Parliament;
- The power to govern
- The power to control the military
- The foreign affairs powers, and
- Miscellaneous powers, such as the right to coin money.

The powers will continue, but they will not be vested in the monarchy and the source of authority for their exercise will be the Constitution, not the Crown.
62B.3 The other powers - which were once or are now prerogatives but will not be expressly

written in to the Constitution - are examined below, with consideration of two issues:

- With prerogatives amended or affected by statute, would the abolition of the Crown remove the constitutional basis for the legislation?
- With prerogatives as yet unaffected by statute, should any be retained by their express inclusion in the Constitution?

Generally the conclusion reached is that none of the powers need be expressly included in section 62A, as they are either:

- Already implicit in the subsections of 62A;
- Capable of being the subject of legislation if Parliament considers they should be retained; or
- Redundant, and therefore deserving of abolition.

62B.4 *Mercy:* The prerogative of mercy is the last remaining power the Crown has in relation to the administration of justice. The Crown has the right to pardon offenders. This power will be lost by the abolition of the monarchy. However, it will be open to the Commonwealth Parliament, either before or after the Advancing Democracy model takes effect, to legislate to confer on the executive the power to pardon offenders on such terms as seem appropriate. Every Act creating an offence is already based on a subject of legislative power in s.51, and the power to pardon will arise from the same basis. Pardoning offenders is as related to the subject matter of the law as the offence itself.

62B.5 *Inquiries:* The Commonwealth has traditionally conducted inquiries known as 'royal commissions'. There has been judicial disagreement as to whether the power to inquire was a royal prerogative, or whether it was just an example of the Crown exercising a right held by everyone to make inquiries on a matter. The competing judicial opinions on the source of the power are summarised in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 41 ALR 71. The judgments in that case confirm there is no doubt the Commonwealth has power to establish inquiries; even inquiries into whether an individual has committed a criminal offence, so long as the commissioner is not empowered to make a binding determination of guilt or innocence: see Gibbs CJ at 41 ALR 81-84, Stephen J at 94, Mason J at 113, Aickin J at 138-139, Wilson J at 141-143 and Brennan J at 161-163. The same judgments confirm that the Crown's executive power does not extend beyond a mere inquiry and report. A long line of authority referred to in the case confirms that powers to compel witnesses to testify on oath or produce documents are not executive powers. This means that even if the power was prerogative in nature, the powers which make such commissions effective in fact come from legislation. After the Advancing Democracy model is adopted, the source of the Government's power to conduct commissions of inquiry will be the power to research and conduct an inquiry in s.62A(viii). Executive power will not extend to compelling testimony or the production of documents, but legislation to that effect will continue in force pursuant to the incidental power in s.51(xxxix).

62B.6 *Honours:* The conferring of honours is a prerogative power. According to the Annual Report of the Office of the Governor-General for 2010, the Order of Australia was established by letters patent signed by Her Majesty on 14th February 1975. The order, as presently constituted, would cease to exist on abolition of the monarchy. However, the conferring of honours for service to Australia would fall within the executive power proposed in s.62A(vi) - the power to engage in activities for the benefit of the nation where in the circumstances the States lack the practical power to engage in those activities (by analogy with the reasoning in

*Davis v Commonwealth of Australia* (1988) 166 CLR 79, 82 ALR 633). It would be a simple matter to re-constitute the order by an executive act, or by legislation if that were preferred.
62B.7 *The care of those who lack legal capacity:* Originally an aspect of the prerogative was the sovereign's feudal obligation as *parens patriae* - the parent of the country - to protect the person and property of his subjects, particularly those unable to look after themselves, such as children and the mentally incompetent. The history of the jurisdiction given by La Forest J of the Supreme Court of Canada in *E. v Eve* [1986] 2 S.C.R. 388 shows the prerogative was delegated to the courts some time in the 1540s, then delegated to the Chancery Court around 1660. Delegations can of course be withdrawn, but it is doubtful whether Commonwealth's powers ever depended on a mere delegation. Such powers as the Commonwealth currently exercises over children and the mentally incompetent are exercised pursuant to legislation based on the divorce power in s.51(xxii), the immigration power in s.51(xxvii) and the territories power in s.122. Abolition of the prerogatives will have no effect on the exercise of powers pursuant to this legislation.

*Subsection (i) - reserve powers*
62B.8 Section 62B(i) also abolishes any "reserve powers" of the Crown. The Constitution does not refer to any powers as "reserve" powers. Nor is there complete agreement on the criteria by which one should judge whether a power is or is not a reserve power. Suggested criteria are referred to in Notes 68.2 to 68.6 above. The main reason why some of the written powers of the Crown in the Constitution are regarded as reserve powers is that they mirror the prerogative powers once exercised by the Kings and Queens of England. This is how those powers are described in an official version of the Constitution issued by the Attorney-General and Australian Government Solicitor and currently available for download via www.comlaw.gov.au:

> "There is a small number of matters in relation to which the Governor-General is not required to act in accordance with Ministerial advice. The powers which the Governor-General has in this respect are known as 'reserve powers'. There are probably only four: the powers to appoint and to dismiss a Prime Minister and to force a dissolution of the Parliament or to refuse to dissolve the Parliament. In exercising a reserve power, the Governor-General ordinarily acts in accordance with established and generally accepted rules of practice known as 'conventions'."

Every reserve power is an affront to democracy, as it enables an unelected Governor-General to go against the wishes of the majority of the House of Representatives. Note however the words "probably only four". What do they mean *probably*? They mean that under our farcical Constitution, no-one is really sure as to the extent of the Governor-General's power. A key aim of the Advancing Democracy model is to remove not just the monarchy, but all remnants of Crown power, and the clarify the extent of the remaining powers.

*Subsection (ii) - proprietary interests*
62B.9 The main purpose of s.62B(ii) is to transfer assets held in the name of the Crown to the Government. To the extent to which assets of the Australian Government are technically owned by the Queen or Governor-General they will become vested in the Commonwealth Government automatically. The words "subject to any law to the contrary" have been included to provide flexibility. The intention is for the referendum to be submitted to the

people at or prior to the 2013 election, but not take effect until 25th April 2015. Within that period the Commonwealth Parliament can work out which property is affected by this clause and make the appropriate arrangements.

62B.10 Proprietary interests vested in the Crown include not just known assets but ownership of gold and silver, the "royal metals", and any treasure which might be found on or under land, whether the Crown owns the land or not: *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1. Whether in Australia this prerogative is vested in the Crown in right of the States or the Crown in right of the Commonwealth, still seems to be undecided. Two High Court cases have been decided on an *assumption* that immediately prior to Federation the Crown's prerogative rights were vested in the colonies which became the States: see *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27; (2010) 269 ALR 204 at [87] - [89] per Gummow, Hayne, Heydon and Crennan JJ. That case noted reasons why it might be argued that following Federation the prerogative over 'royal metals' might have been transferred to the Commonwealth, but also a comment by Evatt J in *Commissioner of Taxation v E O Farley Ltd (In Liq) and Cmr of Taxation for New South Wales* (1940) 63 CLR at 322 that "as a general rule" prerogatives which partook of the nature of proprietary rights and which before federation had been exercisable by the executive governments of the colonies were exercisable by the executives of the various states. (French CJ made similar comments at [30] - [34]). State mining legislation seems to proceed on the assumption that the States are entitled to the royal metals. Proposed s.62B(ii) does not attempt to resolve whatever Commonwealth / State controversy there may be on this issue. Any rights to gold and silver previously owned by the Crown in right of the Commonwealth will pass directly to the Commonwealth. In the Territories, the effect on mineral ownership is likely to be minimal. The Australian Capital Territory (Planning and Land Management) Act 1988 permits the Minister administering the Act to divide ACT land into National Land and Territory Land: ss.28, 29. Section 31A(2) provides that so long as land is Territory Land, all rights of the Commonwealth to minerals within it are vested in the Territory. Under the Northern Territory (Self-Government) Act 1978, s.69(4) transferred all the Commonwealth's rights to minerals in territory to the Territory, except for substances covered by the Atomic Energy Act. The position in relation to Australia's other territories has not been checked.

62B.11 Evatt's thesis on the royal prerogative referred to in Note 62B.2 above makes a passing reference (at p.237) to another quaint right - the ownership of 'royal fish', that is, whale and sturgeon. Whether any such rights are still vested in the Crown in right of the Commonwealth has not been checked, but if they are, ownership will pass to the Commonwealth.

*Subsection (iii) - other prerogative rights, immunities and capacities*

62B.12 *Powers over Crown land:* Among the miscellaneous prerogative rights of the Crown was that recognised in *Johnston v Kent* (1975) 5 ALR 201. The case concerned the proposal to build the telecommunications tower which now sits on top of Black Mountain in Canberra. Objections were raised to the tower on various grounds, but those grounds (including lack of planning approval) had evaporated by the time the case reached the High Court. This left the sole ground of objection being the lack of statutory authority to build the tower, given that it would include a restaurant and tourist facilities which would help pay for the construction. The Court held that there was no statutory power, but power was available under the Crown

prerogative in relation to the Territories. Barwick CJ said (McTiernan, Stephen JJ & Jacobs agreeing): “Consequently, whatever the position in other parts of Australia, the Executive, unless its power is relevantly reduced by statute, may, in my opinion, do in the Territory upon or with respect to land in the Territory anything which remains within the prerogative of the Crown. ..... There can be no objection, in my opinion, to the Commonwealth, in the absence of any statutory provisions, establishing parks, gardens, sports grounds, tourist facilities and the like upon land it possesses in Canberra. But, of course, funds to be expended on any such activity must be the subject of due appropriation according to law (s 83 of the Constitution). Such a conclusion would cover the erection in the present circumstances of a restaurant and viewing facilities, assuming that there is no relevant statutory impairment of the prerogative.” This executive power will not be expressly preserved by the Advancing Democracy proposal. It may be that in future comparable proposals will fall within the proposed executive powers to administer the Government - s.62A(iii) - or the powers of a natural person - s.62A(ix). However, if this prerogative to open restaurants in the Territories is not so preserved, it will be no great loss. The Parliament may confer the power by legislation if it chooses.

62B.13 *The priority of debts due to the Crown:* The prerogative included not just powers, but various rights and immunities, such as the Crown’s right to be paid its debts first in priority to payments due to others. The right was described in *Commissioner of Taxation v E O Farley Ltd (In Liq) and Cmr of Taxation for New South Wales* (1940) 63 CLR 278 by Rich J: “ "The King's debt, and his prerogative to be preferred before other creditors arises from the regard the law hath to the publick good beyond any private interest" -- Bacon's *Abridgment* (7th ed ), Vol III., p 514. This preference extends by virtue of the prerogative, both to debts due to the Commonwealth and those due to a State, unless excluded or abridged by legislation.” Justice Dixon said: “The prerogative which gives Crown debts priority over those due to a subject is in this way carried into the executive authority of the Commonwealth. It follows that in an administration of assets in a State of the Commonwealth, apart from statute, debts due to a subject rank behind debts due to either the Commonwealth or the State.” The preference really only matters in the administration of deceased estates, which is a State matter, and when a debtor is unable to pay all his or her debts, in which event the Crown preference lead to other creditors not being paid. The prerogative was taken over by legislation. For many years, the bankruptcy and corporate insolvency laws expressly provided for debts to the Commonwealth to be paid in priority to other creditors. This preference has been removed in recent years: see Bankruptcy Act 1966, s.109, and Corporations Act 2001, s.556. If Parliament ever wanted to revive the effect of the preference in the future, it could do so through legislation made under the corporations power in s.51(xx) or the bankruptcy power in s.51(xvii).

62B.14 *Immunity from legislation:* The Crown once had a limited immunity from legislation unless the legislation stated that it was to apply to the Crown. However in *Bropho v State of Western Australia* (1990) 93 ALR 207 Per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ said at 213: “The rule that legislative provisions worded in general terms are prima facie inapplicable to the Crown is a rule of statutory construction which identifies a presumption to be applied in ascertaining the relevant legislative intent. It is not a prerogative right or power of the Crown.” Accordingly the presumption of immunity would not be affected by the Advancing Democracy proposal.

62B.15 *The Crown's immunity from suit:* Originally the common law developed propositions that the sovereign could do no wrong and could not be sued in his own courts. In *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 all seven High Court judges held that this immunity had been revoked as far as the Commonwealth was concerned. The majority, Brennan CJ, Gaudron, Gummow & Kirby JJ, held that the Constitution itself negated the rule. Gummow & Kirby JJ, with whom Brennan CJ agreed, said that Chapter III of the Constitution, concerning the Judicature, is to be considered in the light of the tradition already established by 1900 in the Australian colonies which had all legislated to permit claims against the Crown. Doctrines of executive immunity from England could not be simply carried over into a federal system in which judicial power played an essential role. Chapter III established courts which could not be regarded as the King's courts. Further, the operation of the Constitution gave rise to at least four types of potential claims which could not have occurred in England:

- Claims in tort and contract between a State and the Commonwealth;
- Claims by a State or the Commonwealth that the other had breached a constitutional requirement;
- Injunctive relief against officers of the Commonwealth under s.75(v); and
- Claims by citizens that the Commonwealth had breached constitutional requirements or guarantees.

None was consistent with the immunity rule. Accordingly s.75 operates to deny the common law rule of Crown immunity. Nevertheless it remains open for the Commonwealth to legislate for specific immunities, through the combined powers in s.51(xxxix) and 78. The other majority judge, Gaudron J, did not deal with the issue in any detail. She merely concluded her statement with: "... s 51(xxxix) of the Constitution permits the Commonwealth to legislate so as to prevent any liability arising for acts done in the exercise of its executive powers. But absent legislation of that kind, liability attaches to the Commonwealth under the general law and the Constitution applies to deny immunity from suit." The minority judges, Dawson, Toohey & McHugh JJ, preferred the view that the immunity was removed by sections of Judiciary Act rather than the Constitution. The Advancing Democracy model will make no change to any immunities the Commonwealth now claims.

62B.16 *The proviso:* When powers which were once prerogative in nature are written into the Constitution they will draw their continued force from the Constitution itself and not the abolished royal prerogative. However, since it will not be beyond the opportunism of later generations of lawyers to draw implications which were never intended, the proviso has been included to make untenable any later argument that the abolition of the royal prerogatives has somehow affected how powers referred to in the Constitution should be interpreted.

Section 63A Control of executive power

63A.1 Although there is no comparable provision in the current Constitution, this section merely restates the present law, as set out in constitutional principles and case law. To avoid misunderstandings, such an important concept be expressed rather than implied.

63A.2 There is a long-standing principle that executive action cannot override legislation or the common law. The executive has no power to dispense with compliance with the law. This was reiterated recently in *Port of Portland Pty Ltd v Victoria* [2010] HCA 44, by French CJ,

Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at [9] - [13]. Their Honours noted that one issue which lead to the 'glorious revolution' of 1688 was the actions of James II in dispensing with compliance with laws passed by Parliament. Any such power was removed by the ensuing Bill of Rights.

> "The constitutional rearrangements made by the Convention Parliament had the effect in England, and thereafter in the United Kingdom, of settling the scope of the executive power in various respects. In Australia it was with these limitations upon the executive that the constitutions of the States took their shape. ..... From the *grundnorm* represented by the constitutional settlement by the Convention Parliament there was to be no turning back in England, or thereafter in the United Kingdom. In Australia the absence of a power of executive dispensation of statute law, what Dixon CJ called a "general constitutional principle"[16], became an aspect of the rule of law .... Such a power is absent from the Constitutions of the States which are identified in s 106 of the Constitution."

Section 63A confirms this rule.

63A.3 *In accordance with this Constitution:* The effect of these words should be the same as "subject to this Constitution" in ss.51 and 52. They ensure that ss.61A and 62A are not seen as provisions which override others; rather they are subject to the restrictions in s. 83, s.116 and other provisions.

63A.4 *The laws of Australia:* The term "laws of Australia" has been used to distinguish them from the "laws of the Commonwealth" in s.62A(ii), which is a much narrower concept. "Laws of the Commonwealth" means only laws enacted by the Commonwealth Parliament - see Note 62A.24. The broader term "laws of Australia" includes Commonwealth legislation, State and Territory legislation as well as the common law. The High Court has confirmed in *Re Residential Tenancies Tribunal of New South Wales; ex Parte Defence Housing Authority* (1997) 146 ALR 495 that the Commonwealth Government is bound by State laws of general application: per Brennan CJ at 499, Dawson, Toohey & Gaudron JJ at 508 and McHugh J at 519. "Laws of Australia" confirms this principle remains unchanged, and also makes it clear to ordinary voters reading the Constitution what the position is. The principle recognised in the section prevents there being any inconsistency between Commonwealth executive action which is authorised, but not required, by a law, and State executive action which is authorised but not required by a law. Where State executive action has already created legal rights or duties, such as contractual obligations, the Commonwealth Government has no power to alter existing contractual rights, without statutory authority. In the absence of the subsection, the point would not be obvious to non-lawyers.

63A.5 *Any law made by the Commonwealth Parliament to control the exercise of such powers:* At one time there was controversy under the present s.61 about whether there is any field of executive power which is beyond control by the legislature - see the discussion in Part 2 of Chapter 5 of Winterton's *Parliament, The Executive and the Governor-General* (1983, Melbourne University Press). The concern to avoid a gap between the extent of legislative and executive powers seems to underpin the dissenting judgments of Wilson & Toohey JJ in *Davis v The Commonwealth.* This controversy pre-dated *Brown v West* (1990) 91 ALR 197 where at 200 Mason CJ, Brennan, Deane, Dawson and Toohey JJ. said:

> "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so

limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope."

(The source of legislative power would be s.51(xxxix), if no other power was available.) *Brown v West* is consistent with recent statements in *Williams v The Commonwealth* about the supremacy of the legislature over the executive. Section 63A confirms that supremacy, and makes the rule clear to voters.

63A.5 The inclusion of a specific reference to "the Commonwealth Parliament" as the entity which may make laws controlling executive power negates any suggestion which might otherwise be made that State Parliaments may pass laws affecting the exercise of Commonwealth executive power. While the word "Commonwealth" is arguably not required to identify the relevant Parliament, due to section 1, its inclusion assists in the conclusion that "laws of Australia" is broader than "laws of the Commonwealth", and it has an educative effect - it makes the position clear to non-lawyers.

63A.6 What Parliament may do is "control" executive power. It should be clear that Parliament cannot abolish a power conferred by the Constitution. It may only regulate the way in which it is used. This is a natural consequence of including powers in the Constitution. Parliament, being the creation of the Constitution, cannot alter the Constitution itself, except in so far as the Constitution permits it to do so.

Section 64A How Governments are formed

64A.1 One of the many deficiencies of our current Constitution is that it does not state correctly how Governments are formed. Sections 62 and 64 refer to a Federal Executive Council, rather than a Cabinet or Ministry which makes the real decisions; they refer to Ministers being appointed by the Governor-General without any reference to them needing the support of the House of Representatives, and they refer to the Governor-General making decisions on advice, not to Ministers making decisions. The Prime Minister - the most sought after political position in the land - is not mentioned. These unforgivable omissions will be remedied by via s.64A.

64A.2 Section 64A opens with the statement that: "The Prime Minister and Deputy Prime Minister shall be appointed and removed by resolutions passed by the House of Representatives in accordance with section 40." The latter words confirms the resolutions will be 'questions arising' in the House under s.40, and will need to be supported by a majority of votes cast on the question.

64A.3 The opening clause is followed by a proviso. There is only one other proviso in the Constitution: in s.26; and it has ceased to have relevance, so there is no guidance from other sections or past cases as to how it is to be interpreted. It should however be quite clear that the opening clause states a general rule to which the proviso makes an exception. (There are of course other clauses in the Constitution which contain exceptions, such as s.53). The general rule should ensure that on most occasions that the Prime Minister and Deputy are replaced, it occurs in public, on the floor of the House of Representatives. This is important. If people must have formalities and symbolism, they should be consistent with principle and reality. Following an election, the House should be convened as soon as possible with the Governor-General presiding. The first item of business should be a motion 'That X be appointed as Prime Minister'. On most occasions this motion will be carried. Where no party has a clear majority, debate on the motion may become more interesting, with amendments

being moved to insert a different name in the motion. Following the motion being passed into a resolution, the Governor-General will immediately announce something like: 'In accordance with the resolution of the House, and my duty under the Constitution, I appoint X as Prime Minister of the Commonwealth.' This procedure will reinforce in the public's mind how Governments are made - by command of the majority in the House.

64A.4 Strictly speaking, it ought not to be necessary to have anyone appoint the Prime Minister or Deputy. He or she could be appointed directly by a vote of the House. That could be inconvenient if a vacancy arose while the House was not sitting - perhaps when members have gone on overseas trips during the winter recess. Convening the House may be an expensive and slow process now that it has 150 members. Providing for formal appointment by the Head of State allows some flexibility, so that there can be a seamless transfer of power when an unexpected vacancy occurs; as happened when Harold Holt disappeared. Hence appointment by the Governor-General has been retained, but with the Governor-General's power to initiate appointments removed. The exception is however strictly limited, because most of the time the Acting Prime Minister provisions in proposed s.66A will be sufficient.

64A.5 Note that the proviso in the first paragraph of s.64A only refers to appointments. The Governor-General therefore has no power at all to remove a sitting Prime Minister or the Deputy until the House passes a resolution for removal. This does not of course prevent political parties from removing a serving Prime Minister, in the way that Kevin Rudd was ousted in June 2010. The loss of party leadership will usually induce a Prime Minister to resign without the necessity for a House resolution, following which the successor can be appointed and then confirmed in office by a House resolution. However, if a person in Mr Rudd's position did not resign, the Governor-General could not appoint a replacement. Conceivably this could occur when there was a political re-alignment consequent on parties splitting; such as in 1917, when Prime Minister Hughes and his supporters walked out of the ruling Labor party, yet retained Government by forming an alliance with the opposition. Resolution of such cases by the House of Representatives is the more appropriate procedure.

64A.6 The proviso states four conditions which must be met before the Governor-General may exercise his or her power to fill a vacancy without a resolution from the House.

64A.6.1 Firstly there must be a "vacancy". Whereas provision has been made in proposed s.60B(2)(ii) for Parliament to define what is meant by vacancy in relation to the positions of Head of State and Deputy, that approach has been deliberately omitted from s.64A. Vacancies will usually be obvious - most will arise through resignation, death or the Prime Minister losing his or her seat in the House. But there is one other scenario which could be classed as a vacancy, in a broad sense: where the Prime Minister loses the support of the governing party yet does not resign; not due to a political re-alignment, but due to a mental illness, or some other medical condition which may or may not be temporary. The Prime Minister may not resign because he is comatose in intensive care. Is there a vacancy? There would be a similar problem if the Prime Minister went missing. At what point after Harold Holt disappeared was there a vacancy? To allow legislation to determine whether scenarios like this amount to a "vacancy" would be unwise. The legislation would probably have been made by a prior Parliament, which may not have foreseen the exact scenario which has unfolded. Generally in such cases it would be better to rely on the Acting Prime Minister provision in s.66A(ii) and then await the next sitting of the House; though the section would permit an appointment by the Governor-General in an emergency.

64A.6.2 Secondly, the House must not be in session. Under proposed s.6A, the Standing Orders will provide for the determination of session times. Presumably it will be done by reference to particular dates, so it will be easy to determine when the House is in session. The requirements of Parliament are the main factor determining session times, but currently session times should be set with regard to their possible effect on the operation of sections 57, 72(ii) and 128 of the Constitution. It is unlikely the addition of s.64A will cause different decisions to be made about when the House is in session.

64A.6.3 The third pre-condition is that an absolute majority of the House must request the appointment of the replacement. This ensures that the Governor-General cannot initiate an appointment without a House resolution. Under our present Constitution, it would be possible for the Governor-General to team up with a disgruntled group in the House to appoint one of the latter as Prime Minister, to achieve some specific purpose. This albeit remote possibility is completely removed under the Advancing Democracy model. The term "absolute majority" is used in ss.57 and 128, and means a majority of the total number of possible votes, rather than a majority of the votes actually cast. The reason why an absolute majority is needed is that in the absence of a formal meeting of the House, there is no procedure for recording who has voted on the question.

64A.6.4 Finally the support of the absolute majority must be evidenced "in writing". There is no reference to signatures, or documents 'by hand' or 'under seal'. The intention is simply that there be a documentary record of the request, so that it can be verified. The requirement should not prove a problem in the time of electronic communications. An email will be sufficient.

64A.7 Another important consequence flows from the limited role for the Governor-General under s.64A and the introductory words of s.58A which provide that the Governor-General may only exercise powers set out in the Constitution. Under the Advancing Democracy proposal, the Constitution contains no power for the Governor-General to appoint a Prime Minister in a ‘caretaker’ capacity, so it abolishes the notion of appointment of ‘caretakers’. After dismissing the Whitlam Government in 1975, Sir John Kerr purported to appoint Mr Fraser in a ‘caretaker’ capacity, which he claimed meant the Government would make no appointments or dismissals nor initiate new policies. This was a public relations stunt without any legal validity. Had the Fraser Ministry broken the ‘caretaker’ rules, its actions would still have been lawful, and Kerr could not have done anything - by choosing sides as he did he had nowhere else to turn if Fraser did not do as he was asked. To pretend that there was some control on the Fraser Government was therefore an act of deceit. Our current Constitution, which makes no mention of ‘caretakers’, allows those who wield the remnants of royal power to make up the rules as they go along, to suit themselves. That will end when the Advancing Democracy proposal is adopted.

64A.8 The final paragraph places the power to appoint, remove and suspend Ministers in the hands of the Prime Minister. At present, the Prime Minister advises the Governor-General who to appoint. That simply delays the appointment. Presumably appointments will be made in writing, but the omission of a method of appointment is intentional. There may be appointments which need to be made in times of war, rebellion or natural disaster where following a particular procedure would simply hamper the Government’s efforts to govern.

64A.9 Ministerial appointments are “subject to any resolution of the House of Representatives”. Although no Minister has ever been removed pursuant to a resolution of the

House, the convention has always operated that each Minister must command the support of the majority of the House to maintain his or her position. The final words of s.64A make this convention explicit. They also provide an avenue of appeal to the House for any Minister who believes he or she should not have been dismissed.

64A.10 In summary, s.64A inserts the missing rule which is the essential characteristic of democracy - that the majority rules.

Section 65A Management of executive power

65A.1 Section 65A contributes to the transformation of Chapter II from a mere outline to a comprehensive and comprehensible code explaining how Government operates. Except in relation to the Acting Prime Minister provisions, the Chapter will recognise, rather than change, the way our Governments operate.

65A.2 The section opens with the words "The Prime Minister *may*". It would be quite possible for the Prime Minister to exercise the power in s.62A(iii) to administer the Government in other ways, though the alternatives are limited. For example, it would be possible to run a more presidential style of Government, where the Prime Minister consults with individual Ministers to make decisions; or to form several, separate committees of Ministers to make decisions over distinct sections of policy. (This might be an option for a coalition comprised of several parties, if or perhaps when the two-party system fragments). If a Cabinet is formed however, it would be difficult for those in Government to avoid the requirement to make collective decisions, given the combined influence of history and s.65A(i), though the provisions of that section would not be enforceable in the Courts.

65A.3 Subsection (i) recognises Cabinet in the Constitution for the first time, while allowing the Prime Minister flexibility in its composition. If political parties wish to impose their own rules on their leaders concerning Cabinet composition, that would not infringe the section. The section will not change existing practice. It will however allow readers of the Constitution to understand Cabinet's role.

65A.4 While recognition is given to Cabinet, the Advancing Democracy model does not make the mistake of including an analogue for s.63 of the present Constitution, which refers to the 'Governor-General in Council' being the Governor-General acting on the advice of the Federal Executive Council. The reasons why there is no provision establishing a 'Prime Minister in Cabinet' are as follows:

> 65A.4.1 The distinction the Constitution draws between powers exercised by the Governor-General and the Governor-General in Council has caused a great deal of confusion. The distinction was an attempt by those who drafted the Constitution to pedantically follow English constitutional practice - royal powers which had their origin in the Crown prerogative were vested in the Governor-General alone and those which had their origin in legislation were vested in the Governor-General in Council: Quick and Garran (1901) at p.707. It was never intended to indicate that those powers vested in the Governor-General alone gave him or her a power to act without the advice of Ministers responsible to Parliament, yet this argument has repeatedly emerged. See *Parliament, The Executive and the Governor-General* (George Winterton, 1983, Federation Press) pp.14-17. If the distinction was replicated in references to Prime Ministerial powers, people would in time look for a reason for the distinction, and assert that some powers were supposed to be exercised without

reference to Cabinet. That is not the intention of the Advancing Democracy proposal.

65A.4.2 Secondly, the device of purporting to limit the use of a power by requiring it to be exercised with the advice of some other person or group does not really work. Acting with advice does not mean that advice has to be followed.

65A.4.3 It would be possible to require the Prime Minister to act in accordance with a Cabinet decision, but since the Prime Minister appoints the Cabinet, he or she can find a way around the restriction whenever the need arises, unless the Constitution attempts to prescribe who should be in Cabinet, which would be extremely difficult if not impossible. And with a great number of decisions to require a formal Cabinet decision would be unnecessary.

65A.4.4 Fourthly, whereas there is considerable danger in the present arrangement, there is no similar danger in the proposal. The current 'in Council / not in Council' distinction appears to give significant executive powers to an unelected Governor-General without any check or balance on its exercise. The Prime Minister however is subject to multiple checks and balances. The first two are legal restrictions, namely:

- Reliance on the support of a majority of the House of Representatives; and
- The possibility of legal action.

The remainder are practical in nature:

- Modern Government is a team sport, which by its nature is inclined to collective decisions; and
- There is constant media scrutiny of a Prime Minister whereas our present Governors-General are comparatively immune from scrutiny.

65A.4.5 In theory, the present arrangement is that the Governor-General is our chief executive officer. In practice, the real chief executive is our Prime Minister. The Advancing Democracy model recognises that reality.

65A.6 Subsection (ii) authorises a practice which Prime Ministers have sometimes adopted of issuing lists of Ministers in some sort of order of importance. The change is that the list will now have legal significance - see s.66A.

65A.7 The final two subsections are prefaced by the words "Subject to any law". The phrase has been omitted from the first two subsections. This contrast between the subsections should make it clear that Parliament cannot make laws governing how Cabinet shall be constituted, how it operates and who is eligible to be Acting Prime Minister. These matters have always been the exclusive preserve of the Executive. The opening words of s.51 indicate that legislative power is granted "subject to this Constitution", so the contrast within s.65A should be sufficient to indicate that s.51(xxxix) does not extend to the powers in s.65A(i) and 65A(ii).

65A.8 Subsections (iii) and (iv) transfer powers formerly held by the Governor-General to the Prime Minister. Subsection (iii) permits the Prime Minister to delegate "some or all executive power". This is what will occur when a Prime Minister is overseas or on holidays. We are accustomed to an acting Prime Minister being appointed by the Governor-General. In future, the Prime Minister will appoint that person, though the person need not be given the title of acting Prime Minister. The Prime Minister will also determine the administrative arrangements within the Government under s.65A(iii). Currently these are made by an Administrative Arrangements Order issued by the Governor-General on the advice of the Federal Executive Council.

65A.9 Subsection (iv) in part replaces s.67.

Section 66A Acting Prime Minister

66A.1 Section 65A(iii) is available to deal with a Prime Minister's voluntary absences. By contrast, s.66A mainly addresses the involuntary absence or incapacity of a Prime Minister. It will be of most use when there is an emergency. It has been prepared with reference to what would work if the country was invaded and it is not clear which Government members are alive or dead.

66A.2 An Acting Prime Minister would assume office when either of two events occurs - a vacancy in the office of Prime Minister or an inability on the part of the Prime Minister to communicate with his or her Ministers. The latter may occur because of physical difficulties - e.g., stranded by floods - or due to ill health or accident. No attempt has been made to define vacancy or inability to communicate, because use of the provision is expected to be temporary. Except in times of chaos or war, it will be obvious whether the requirements of the section are met, and a Minister who attempted to usurp the Prime Minister's position through a bogus claim to be acting could be the subject of an injunction from the High Court if other Ministers can show the Prime Minister is in contact with them, or if the Prime Minister himself/herself appears.

66A.3 The provision operates without any formal appointment because in times of emergency it may not be possible to communicate with the Governor-General or convene Parliament.

66A.4 Because the seniority list will have a clear legal effect, such lists in future will be based primarily on the Prime Minister's view of 'Who should take over in a crisis if the Deputy and myself are not here?" The list should be determined by who performs best in a crisis.

66A.5 Appointment will depend on who is "available". This is a wider, more elastic concept than vacancy or inability to communicate. It includes proximity to the seat of power. A senior Minister who is stuck in the outback may not be sufficiently "available" to act until he or she returns to Canberra. This is something for those in the Cabinet to work out at the time.

66A.6 The section intersects with s.67A, which provides that Senators may become Acting Prime Minister.

66A.7 This clear provision for what is to happen in an emergency negates the need for any 'temporary' appointments, or the legally dubious appointment of 'caretaker' Prime Ministers.

Section 67A Ministers to be Members of Parliament

67A.1 Section 64 of the current Constitution requires Ministers to be Members of Parliament. It does not require the Prime Minister to be a member of the House of Representatives, but that has been the invariable practice, with the sole exception being the appointment of John Gorton while he was a senator in January 1968. Before Parliament resumed sitting, he resigned from the Senate and won the by-election for Harold Holt's seat in the House of Representatives. The 2nd edition of *House of Representatives Practice*, AGPS, 1989, p.97, notes other occasions when senators have acted as Prime Minister. Section 67A requires Prime Ministers to be members of the House, but permits senators to act in the position.

67A.2 Section 64 requires that a Minister cannot hold office for longer than 3 months unless he or she becomes a member of Parliament. This wording is unacceptably loose, as it would permit the regular appointment of non-Parliamentarians to serve in a temporary capacity. The Advancing Democracy model adopts a different approach. No-one can be appointed as a Minister unless or until he or she is eligible. This maintains the importance of the rule that the

Government is drawn from the ranks of Parliamentarians. The section provides that a Minister may remain in office for 90 days after losing eligibility, to allow for the possibility of Ministers losing their seats at elections, but contesting the result.

## Chapter III – The Judicature

Section 71 Judicial power and Courts
71.1 This section will remain in its present form.

Section 72 Judges' appointment, tenure and remuneration
72.1 The section currently provides for High Court judges to be appointed by the Governor-General in Council. Under the Advancing Democracy amendments, this and all other powers formerly exercised by the Governor-General in Council will be exercised by the Government. Resignations will also be submitted to the Government. Governments will establish their own procedures under s.65A to make decisions under this section.

Section 73 Appellate jurisdiction of High Court
73.1 This section will not be amended. It refers to the Queen three times, but these are historical references which do not imply any ongoing recognition of the Queen as part of our constitutional structure.

Section 74 Appeal to Queen in Council
74.1 This section will be deleted. It deals with appeals from Australian Courts to the Privy Council in London. Such appeals were abolished by s.11 of the Australia Acts of 1986. (The Australia Acts were laws passed by the Commonwealth and United Kingdom Parliaments, at the request of the State and Commonwealth Parliaments, which were designed to sever a number of constitutional links between Australia and Britain.)

Section 75 Original jurisdiction of High Court
75.1 This section will remain in its present form.

Section 76 Additional original jurisdiction
76.1 This section will remain in its present form.

Section 77 Power to define jurisdiction
77.1 This section will remain in its present form.

Section 78 Proceedings against Commonwealth or State
78.1 This section will remain in its present form.

Section 79 Number of judges
79.1 This section will remain in its present form.

Section 80 Trial by jury
80.1 This section will remain in its present form.

## Chapter IV – Finance and Trade

Section 81 Consolidated Revenue Fund
81.1 This section will remain in its present form.

Section 82 Expenditure charged thereon
82.1 This section will remain in its present form.

Section 83 Money to be appropriated by law
83.1 The section requires change because it refers to the "Governor-General in Council", which will be abolished. However, this reference is in the second paragraph which deals with arrangements in the first year of Federation. It is completely redundant, so deletion of the paragraph makes more sense than amendment.

84 Transfer of officers
84.1 This section will remain in its present form.

Section 85 Transfer of property of State
85.1 This section deals with the consequence of transferring Government Departments from the States to the Commonwealth on Federation. Its original purpose was met long ago, but it could still have relevance if the States transfer departments in the future. The section's only reference to the monarchy is in relation to departments controlling customs, excise and bounties. Power over these matters became exclusively vested in the Commonwealth on Federation: s.90. Accordingly the clause referring to the monarchy can be deleted, as it will have no further effect.

Section 86 [Customs, excise, and bounties]
86.1 This section will remain in its present form.

Section 87 [Revenue from customs and excise duties]
87.1 This section will remain in its present form.

Section 88 Uniform duties of customs
88.1 This section will remain in its present form.

Section 89 Payment to States before uniform duties
89.1 This section will remain in its present form.

Section 90 Exclusive power over customs, excise, and bounties
90.1 This section will remain in its present form.

Section 91 Exceptions as to bounties
91.1 This section will remain in its present form.

Section 92 Trade within the Commonwealth to be free

92.1 This section will remain in its present form.

Section 93 Payment to States for five years after uniform tariffs
93.1 This section will remain in its present form.

Section 94 Distribution of surplus
94.1 This section will remain in its present form.

Section 95 Customs duties of Western Australia
95.1 This section will remain in its present form.

Section 96 Financial assistance to States
96.1 This section will remain in its present form.

Section 97 Audit
97.1 This section will remain in its present form.

Section 98 Trade and commerce includes navigation and State railways
98.1 This section will remain in its present form.

Section 99 Commonwealth not to give preference
99.1 This section will remain in its present form.

Section 100 Nor abridge right to use water
100.1 This section will remain in its present form.

Section 101 Inter-State Commission
101.1 This section will remain in its present form.

Section 102 Parliament may forbid preferences by State
102.1 This section will remain in its present form.

Section 103 Commissioners' appointment, tenure, and remuneration
103.1 The two references in this section to the "Governor-General in Council" will be replaced with a reference to "the Government" which will determine its own procedures under s.65A for making decisions under this section.

Section 104 Saving of certain rates
104.1 This section will remain in its present form.

Section 105 Taking over public debts of States
105.1 This section will remain in its present form.

Section 105A Agreements with respect to State debts
105A.1 This section will remain in its present form.

## Chapter V – The States

Section 106 Saving of Constitutions
106.1 This section will remain in its present form.

Section 107 Saving of power of State Parliaments
107.1 This section will remain in its present form.

Section 108 Saving of State laws
108.1 This section will remain in its present form.

Section 109 Inconsistency of laws
109.1 This section will remain in its present form.

Section 110 Provisions referring to Governor
110.1 This section will be removed and replaced with s.110A.

Section 110A State Governors
110A.1 This is a new section to replace s.110A. Currently each State has a Governor who is a representative of the Queen. The Advancing Democracy aims to require States to change their Constitutions so that their Governors no longer represent the Queen. This aim will be achieved by inserting 110A and making it a provision which overrides State Constitutions pursuant to s.109.
110A.2 The proposed section uses the phrase "foreign power" rather than "the Queen". "Foreign power" is drawn from s.44(i). It should be interpreted consistently with the approach taken to that section in *Sue v Hill; Sharples v Hill* [1999] HCA 30, where Gleeson CJ, Gummow & Hayne JJ at [48] and Gaudron J at [173] indicated that the phrase directs attention to issues of sovereignty, not the closeness or otherwise of Australia's relationship with the other power. In that case the Court held the United Kingdom was a "foreign power", so there is no doubt that the Queen will be one after the Advancing Democracy proposal removes her as our sovereign.
110A.3 The section extends beyond the appointments of Governments. It refers to functions being vested in a foreign power, such as royal assent to legislation, which is a feature of all State Constitutions. (The provisions are summarised in Appendix 5 to the Rationale for the model.)
110A.4 The mechanism chosen to enforce the removal of the monarchy from State Constitutions is:

- Firstly to treat functions or powers vested in the Queen under State Constitutions as if they were vested in the Governor-General; and
- Secondly to provide that s.110A overrides the relevant State provision in the same way that valid Commonwealth legislation overrides State legislation on the same subject.

Note that the penultimate paragraph to s.128 states that no change to a State Constitution may be made by a Commonwealth referendum unless a majority of the electors in that State approve of the change, so the mechanism only works for States which vote in favour of the

Advancing Democracy model. For these States, s.110A allows the States to simultaneously change their State Constitution and the Commonwealth Constitution. See Chapter 11 of the Rationale for the implications of this proposal. The aim is to make the change with minimal intervention into the affairs of the State. Of course, the section has no effect if all States change their own Constitutions to avoid triggering the pre-condition for the section's operation.
110A.5 Subsection 110A(3) will give States the flexibility to abolish Governors altogether without it affecting the operation of those sections of the Commonwealth Constitution which refer to Governors.

Section 111 States may surrender territory
111.1 This section will remain in its present form.

Section 112 States may levy charges for inspection laws
112.1 This section will remain in its present form.

Section 113 Intoxicating liquids
113.1 This section will remain in its present form.

Section 114 States may not raise forces. Taxation of property of Commonwealth or State
114.1 This section will remain in its present form.

Section 115 States not to coin money
115.1 This section will remain in its present form.

Section 116 Commonwealth not to legislate in respect of religion
116.1 This section will remain in its present form.

Section 117 Rights of residents in States
117.1 The reference to the Queen will be removed, along with the offensive description of ordinary people as "subjects" of a higher authority. Such hierarchies of status are incompatible with democracy, which emphasises the equality of all.

Section 118 Recognition of laws etc. of States
118.1 This section will remain in its present form.

Section 119 Protection of States from invasion and violence
119.1 This section will remain in its present form.

Section 120 Custody of offenders against laws of the Commonwealth
120.1 This section will remain in its present form.

## Chapter VI – New States

Section 121 New States may be admitted or established

121.1 This section will remain in its present form.

Section 122 Government of territories
122.1 The words "by the Queen" can be removed from this section without affecting its meaning.

Section 123 Alteration of limits of States
123.1 This section will remain in its present form.

Section 124 Formation of new States
124.1 This section will remain in its present form.

## Chapter VII – Miscellaneous

Section 125 Seat of Government
125.1 This section will remain in its present form. The reference to "Crown" lands is of historical rather than current relevance.

Section 126 Power to Her Majesty to authorise Governor-General to appoint deputies
126.1 This section will be abolished. Provision for a Deputy Governor-General is made in proposed s.59A.

Section 127 [repealed in 1967]
127.1 This was the section which stated that Aborigines were not to be counted when calculating the Commonwealth's population.

## Chapter VIII – Alteration of the Constitution

Section 128 Mode of altering the Constitution
128.1 Section 128 provides two ways in which a referendum to change the Constitution may be submitted to the people. The first is if both Houses of Parliament pass the proposed law, in which event the proposed law "shall" be submitted to the electors. The section does not say who must submit it, but responsibility would fall on the Governor-General under our present Constitution, pursuant to s.61. No change will be made to this part of the section.
128.2 The second method is if one House of Parliament passes the proposed law twice within a certain time period and the other House does not pass the law. In that event, "the Governor-General may" submit the proposal to a vote. "May", when contrasted with "shall" in the previous paragraph, must mean that there is a discretion as to whether or not the proposal is placed before the people at a referendum. If the Governor-General acts on the advice of his or her Ministers, the decision is the Government's. Some have suggested that the Governor-General has a reserve power to decide on his or her own behalf, but this is simply wrong. Reserve powers are those which originated from the royal prerogative. The prerogative never included a power to ask Australians to vote.
128.3 As with s.57, this is a case where the Governor-General's nominal power should be placed in the hands of the House of Representatives.

128.4 The people are the ones who decide whether or not to change the Constitution. A referendum, once passed, should not depend for its effect on it being ‘signed into law’ by the Governor-General or anyone else. Accordingly a change has been made so that referendums which are passed will automatically change the Constitution without any further step being necessary.