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Nationhood Power

s 61 Executive power - *The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*

s 51 (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.*

HC's interpretation + scope

- The incidental power in s 51(xxxix) taken in conjunction with s 61 executive power allows the Parliament to legislate where there is not a direct power in The Constitution.
- Laws relating to existence of Australia as a nation
- Davis v Commonwealth (1988):
 - Section 61 has a broad scope for **the protection and advancement of the nation**
 - s 51(xxxix) must be read down by applying the **proportionality test**
- The ability of the executive to act under the Nationhood power is limited to: (Pape v Commissioner of Taxation (2009))
 - a. Matters **appropriate to a national government** (not one which would be dealt with by state)
 - b. **Necessity** for national action (not just convenience)
 - c. For **benefit** of the nation (protection or advancement)

Common Law Examples

- Extends to the **establishment of an authority** to organise bicentennial celebrations(Davis v Commonwealth (1988))
- Responsibility and power of the government to give bonus **payments** as a response to the global Financial Crisis (Pape v Commissioner of Taxation (2009))
 - *"It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. ...The Executive Government is the arm of government capable of and empowered to respond to a crisis..."* (Gummow, Crennan and Bell)

Limitations

- Has to be limited by considerations of federalism (Pape v Commissioner of Taxation (2009))
 - *"[Section 61] has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of "national government" cannot be invoked to set aside the distribution of powers between the Commonwealth and the States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions."* (French CJ)
- Williams v Commonwealth (no 1) (2012) was distinguished from Pape
 - There was no specific legislation establishing the NSCP scheme or authorising the payments
 - Pape held that the appropriation power is not a source of spending power
 - At minimum there must be laws in place not only for the appropriation of money but also the expenditure