

Corruption Question –

1. Consider the avenues of FOI legislation
2. Investigating corrupt conduct is a function of the ICAC
3. Review of administrative decisions: Ombudsman

ICAC

Apart from requesting information under FOI legislation, ICAC can look into matters about the 'integrity and accountability of public administration' **Objectives s2A**

Investigation of Corrupt Conduct;

1. **S7 Corrupt Conduct;** Must fall within Section 8; AND satisfy the provisos in Section 9
 - a. Read sections together in order to identify what falls within the definition of corrupt conduct
 - i. Note you must identify whether the individual is a **public official or not – 8(1)b-d apply to public officials only. S(8)(2) applies to people generally as does s(8)1(a)**
 - b. **S(8)(1)** Corrupt Conduct is;

8(1) – Definition of Corrupt Conduct:

- k) Any conduct of any person (whether or not a public official) that could adversely affect the honest or impartial exercise of official functions by any public official or authority OR

Any conduct of a **public official** – that constitutes or involves

- l) The dishonest or partial exercise of any of his/her official functions OR
- m) Breach of Public Trust OR
- n) The misuse of information or material that they have acquired in the course of his/her official functions – whether or not for their benefit or another.

- c. **S(8)(2)** Corrupt conduct is also the conduct of any person (**public official or not**) – that adversely **affects the exercise of official function** by any **public officials** and could involve any of the following

- | | |
|--|--|
| a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition), • | (m) tax evasion, |
| b) bribery, | (n) revenue evasion, |
| c) blackmail, | (o) currency violations, |
| d) obtaining or offering secret commissions, | (p) illegal drug dealings, |
| e) fraud, | (q) illegal gambling, |
| f) theft, | (r) obtaining financial benefit by vice engaged in by others, |
| g) perverting the course of justice, | (s) bankruptcy and company violations, |
| h) embezzlement | (t) harbouring criminals, |
| i) election bribery, | (u) forgery, |
| j) election funding offences | (v) treason or other offences against the Sovereign, |
| (k) election fraud, | (w) homicide or violence, |
| (l) treating, | (x) matters of the same or a similar nature to any listed above, |
| | (y) any conspiracy or attempt in relation to any of the above. |

- d. **S9 Limitation on the nature of Corrupt Conduct: 9(1)** Despite section 8, corrupt conduct does not amount to corrupt conduct unless it could constitute or involve;

Class 9 – Executive Power

Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the GG as her representative and provides the power extends to the execution and maintenance of this constitution and the law of the Commonwealth. HOWEVER, it is **silent on the scope of power** (compared to s 51, which provides for the scope of the legislative powers of Parliament).

- **In negative terms**, executive power can be described as power that is **neither legislative nor judicial**.
- **In positive terms**, it is the power that is **exercisable** by the Governor-general, or Ministers, or other representatives of the Executive Government, such as public servants. This power may be derived from a **number of sources**

Sources of Executive Power – Can Cite *Williams No.1*

1. **The Constitution** (e.g. the power to dissolve Parliament, appoint ministers and judges, issue election writs and recommend appropriations.) It extends to the ‘execution and maintenance’ of the Constitution and the laws of the Commonwealth
2. **Statute** (e.g. the power to make regulations and ministerial powers to grant visas)
3. **Royal prerogative** (e.g. the power to declare war, make treaties and grant pardons)
4. **The Capacities of a Polity** (e.g. the power to enter into contracts, own property, employ people and spend money)
 - a. To the extent that the Crown shares the capabilities of other legal persons, those capabilities might not have been regarded as having the quality of exclusive privilege that ‘prerogative’ implies
5. (More controversially) **inherent powers** (e.g. the nationhood power).

M68/2015 –

1. **Rule of Law:** The Commonwealth’s executive power is constitutionally limited by section 61 – the executive only has those powers given to it by law
2. **Judicial Method** – s 61 interpreted in the light of purpose of CH II to establish a national responsible government, constitutional history and the tradition of the common law
3. **Parliamentary supremacy:** all executive power is susceptible to control by legislation
4. **Judicial remedies:** The exercise of executive power is subject to judicial review and is capable of exposing the Commonwealth to common law liability –

Checkpoint: Distinguish between Statutory Executive Powers and Non-Statutory Powers

<u>Statutory</u>	<u>Non-Statutory/Inherent</u>
Powers conferred expressly in the constitution e.g. S 72	Powers defined by reference to the prerogatives of the crown
Powers conferred in legislation	Powers derived from the character and status of the Commonwealth as national government (nationhood)
Powers incidental to the grants of power in the Constitution or legislation	Powers arising out of the capacities of the Commonwealth as a polity /juristic person
Powers incidental to the administration of a department of State – s 64	

Class 11 Nationhood Power

S 61 – The executive power 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(xxix) – The parliament shall, subject to this Constitution, have power to make laws...with respect to:

- **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 office of the Commonwealth.

Scope:

Nationhood power is the Power of the Commonwealth (specifically, the executive) to make laws based on the Commonwealth as a nation.

There is no express power to deal with things that are national in nature and do not fall within State jurisdiction e.g. national anthem, the flag, bicentennial commemoration etc.

- The HCA has recognised the existence of a Commonwealth non-statutory (inherent) executive power 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' **AAP Case, Davis, Pape**
 - o S 61 is the source of nationhood power. However it is just an executive power, in order to get **legislative power**, s 51(xxxix) needs to be added allows parliament to legislate in the aid of executive powers re 'incidental matters'.
 - In **R v Sharkey**, Latham suggested that section 51 (xxxix) permits legislation incidental to the exercise of executive power
 - o Alternatively there may be an **implied nationhood power**, based upon the general principle that if a body is created to perform certain functions, it is impliedly granted all necessary powers to support its performance of those functions aka 'the very formation of the commonwealth as a **polity** and its emergence as an international state'
 - **R v Sharkey (1949)** (BW 380) Dixon J held that the Commonwealth has an implied power to defend its own functions, such as postal operations and elections
 - *Which arose from the very nature and existence of the Commonwealth as a political institution*
 - In the **Communist Party Case** Dixon J and Fullagar J also accepted an implied legislative power to protect the Commonwealth against internal threats, such as subversion.
 - Other judges however have rejected the existence of an 'implied nationhood power' – lest it suggest the existence of some new or independent source of power. **Davis v Commonwealth (1988)**: Wilson and Dawson –
 - *We think it desirable to deprecate speaking of implied powers as distinct from the proper scope of the executive power conferred by s61 – lest the term suggest the existence of some new or independent source of power.*
- **Modern View:** Nationhood power is an aspect of the executive power, with ancillary legislative power arising from s51 (which allows the commonwealth to legislate powers incidental to executive power)

Like the prerogative powers, the **nationhood power is a non-statutory executive power** which;

1. Exhibits the recognised long-standing 'inherent incapacities' e.g. to dispense with general laws, create crimes, impose taxes, authorise detention.
2. Supports a) legislation under s 51 (39) and b) the exercise of Commonwealth capacities, including to spend appropriated funds.

In contrast with prerogative powers:

1. Nationhood power is not a mere residue of historical powers

2. That **State courts are competent** to be entrusted with the exercise of federal jurisdiction; and
3. That State courts **continue to bear the defining characteristics of courts**, such as **independence, impartiality, fairness and adherence to the open-court principle**.

French CJ: ‘the heart of judicial independence, is decisional independence from influences external to proceedings in the Court – including the executive government and its authorities

- ‘Decisional independence is a necessary condition of impartiality’
- Here the Magistrates Court was being enlisted to **implement decisions of the executive in a manner incompatible with the Court’s institutional integrity**. This removes one of the essential characteristics of a court – the appearance of independence and impartiality. A majority of the Court agreed.

Kuczborski v Queensland

A law is only invalid under the Kable principle if it affects the functioning of the courts in a way that is incompatible with their institutional integrity. It is not invalid just because courts disapprove of it.

Facts; The Queensland legislation made certain activities unlawful when undertaken by participants in a criminal organisation. It was argued that the Parliament was enlisting the courts in effectively banning these organisations.

- Under Criminal Code (Qld), it is a criminal offence for a participant in a declared organisation to do certain, otherwise lawful, activities: e.g. being present in a public place with 2 or more other participants; recruit new participants.
- In prosecution under these offence-creating provisions, it is a defence to prove that the organisation does not have a purpose of engaging in, or conspiring to engage in, criminal activity.

Held: The offence creating provisions are valid – the executive’s declaration of the organisation does not impair decisional independence in a trial under the offence-creating provisions.

- Crennan, Kiefel, Gageler and Keane JJ **distinguished Totani**. Here the court’s role was one of an **ordinary criminal trial**.
 - o No departure from the judicial function.
 - o Nor was there any ‘cloaking’ of the work of the legislature or executive ‘in the neutral colours of judicial action’

IMPORTANT POINT ABOUT ‘DECLARATIONS’

The Court rejected the argument that there was a usurpation of judicial power because the Hells Angels Motorcycle Club was declared a ‘criminal organisation’ by way of regulation

- **The declaration of an organisation as criminal is not an adjudgement of criminal guilt**
 - o While adjudging criminal guilt is exclusively judicial (*Magaming v Queen 2013*)
 - **The declaration did not do this.**
 - Its only legal effect was to establish the ingredient of an offence which would have to be established through an ordinary criminal trial in court.
 - o **Therefore no usurpation.**

- **Importantly; the statute creates a defence**, the defendant can raise the question whether the organisation was properly declared, it can raise the question that the organisation doesn’t have the purpose of engaging in criminal activities.

[Evans v NSW \(2008\) – World Youth Day Case](#)

Case about legality – the court concluded that ‘personal liberty including freedom of speech, is regarded as fundamental, subject to reasonable regulation for the purposes of an ordered society’

Act: A NSW Act establishing an Authority to co-ordinate delivery of government services in relation to World Youth Day 2008.

Delegation: To make regs ‘regulating ... the conduct of the public on, WYD venues and facilities’.

Regulation: Authorised persons may direct a person within a WYD area to cease engaging in conduct that is a risk to personal safety; obstructs the WYD event; causes annoyance or inconvenience to participants in a WYD event. Failure to comply is an offence

68 – Principle of legality is this long standing presumption against the encroachment of common law. If a fundamental proposition of the common law is at stake – the **parliament needs to use clear words to override it**. Here we have a common law fundamental principle – freedom of speech and expression – it’s not unqualified it has limits. So they read the regulation in terms of **what would be valid in terms of these proportionate/justifiable limits on freedom of speech**.

Held: Court said that the constraint on conduct which causes inconvenience is justiciable (because it has an **objective criterion**) however the one part that was unjustifiable was the ‘conduct that causes annoyance’ – p 82 – because it has **subjective content** – depends on the reactions of each individual participant. So the remedy given by the court is a declaration which states that that aspect of the clause is invalid (annoyance is struck out)

- **You can challenge the regulation as being outside the scope of power if it compliments rather than supplements the purpose of the act – Shanahan**
- **If it’s made for an unauthorised purpose – Toohey**
- **Or if it infringes fundamental common law rights and the court would be able to say that the fundamental principle of the abrogation of common law rights applies to the regulatory power (Evans)**

Check – When can you challenge the validity of delegated legislation?

1. **Constitutional Validity:** [Link to limits on Cth legislative power taught in this Unit] –
 - Do the provisions breach a Constitutional limit on Cth legislative power?
2. **Administrative validity: Purpose** is unauthorised – **R v Toohey**
 - Do provisions **exceed the scope** of the delegation of legislative power – statutory interpretation of the delegation and regulation - **See Shanahan v Scott**
3. Infringement on fundamental **common law rights** – **Evans v NSW**

- **A) To promote the integrity and accountability of public administration by constituting an ICAC as an independent and accountable body**
 - **i) Investigate, expose and prevent corruption**
 - ii – educate public authorities, officials and members of the public about corruption and its detrimental effects on public administration and on the community
- **Non-Investigative functions** – s 13 e – k
- **Investigative functions** – s13 a and b, 13A

Corrupt Conduct s 7

This is defined in two parts s7: conduct that falls within section 8; AND satisfies the provisos in section 9.

- i.e. The definition of corrupt conduct is drawn very **widely in s 8** of the ICAC Act and then **narrowed down by exclusions in s 9** of the Act
- **The two sections must be read together to identify what falls within the definition of corrupt conduct. S 8(1) provides that corrupt conduct is;**

8(1) – Definition of Corrupt Conduct:

- a) Any conduct of any person (whether or not a public official) that could adversely affect the honest or impartial exercise of official functions by any public official or authority OR
Any conduct of a public official – that constitutes or involves
- b) The dishonest or partial exercise of any of his/her official functions OR
- c) Breach of Public Trust OR
- d) The misuse of information or material that they have acquired in the course of his/her official functions – whether or not for their benefit or anothers.

2. **S8(2)** provides that corrupt conduct is also **any conduct of any person** (public official or not_ that adversely affects the exercise of official functions by any public officials and could involve any of the following.
- a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition), •
 - b) bribery,
 - c) blackmail,
 - d) obtaining or offering secret commissions, •
 - e) fraud,
 - f) theft,
 - g) perverting the course of justice,
 - h) embezzlement
 - i) election bribery,
 - j) election funding offences

s9(1), despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- a criminal offence
- disciplinary offence
- reasonable grounds for dismissing, dispensing with the services or otherwise terminating the services of a public official
- in the case of conduct of a Minister of the Crown or member of a house of parliament – a substantial breach of an applicable code of conduct
 - this did not exist at the time of *Greiner v ICAC*

Class 15 – Separation of powers and the meaning of judicial power

Chapter III of the Constitution establishes an integrated national court system for the exercise of Commonwealth judicial power and a unified national common law. In classes 15-17 we look at two principles implied from Ch III that impose parameters on the institutional arrangements for adjudicative and regulatory decision-making by the Commonwealth and the States. These principles operate to constrain:

- Functions that can be performed by courts and judges;
- Functions that can be performed by executive branch entities or officials.

The Court has implied two discrete principles from Ch III:

Boilermakers' Principle: There must be maintained a strict institutional separation between Commonwealth judicial and non-judicial powers (but federal judges may be appointed as individuals to perform non-judicial functions, provided these are compatible with judicial office).

- Use this if you are asked to advise on constitutionality of institutional arrangements for the **exercise of Commonwealth powers.**

Kable Principle: All courts, being elements of a national integrated judicial system, must retain institutional integrity i.e. continue to bear the essential or defining characteristics of courts.

- Court is able to use this to imply limits on State jurisdictional powers and impose limits on state courts.
- Use this if you are asked to advise on constitutionality of institutional arrangements for the **exercise of State powers.**

Question: What is the appropriate use of courts/judicial power?

What does Ch III of the Constitution do?

- **Establishes the High Court of Australia** (s 71) – confers judicial power of the Commonwealth on the HCA and other such federal courts as the Parliament creates and other courts as it invests with federal jurisdiction e.g. State Courts (autochthonous expedient – allowing State Courts to exercise federal jurisdiction).
- Deals with **tenure of federal judges** (s 72) and removal (not state judges).
- Establishes the High Court as a national appellate court in federal **and State matters** (s 73).
 - o Gives the HCA the power to hear appeals from any other federal court or courts exercising federal jurisdiction or supreme courts.
 - o This implies there is to be **one national common law**; and requires the continued existence of a Supreme Court in each State.
- **Limits** federal jurisdiction (ss 75 and 76).
 - o **75** – Gives the HCA original jurisdiction on the HCA e.g. where the Commonwealth is a party,
 - o **76** – allows the parliament to confer additional original jurisdiction on the HCA e.g. in relation to matters arising under the Cons. Or involving its interpretation, or arising under a Commonwealth law.
 - o Scope of judicial power of the Commonwealth
 - o These features support the implied separation of Commonwealth Judicial Power
- Provides that Commonwealth judicial power is to be exercised by: the High Court; other federal courts; and **State courts** (ss 71 and 77).
 - o This 'autochthonous expedient' (using State courts to exercise federal jurisdiction) establishes an integrated Australian court system for the exercise of Commonwealth Judicial power.

Chapter 3 Courts

At the state level you can have entities which are possibly tribunals and possibly courts – hence, the jurisprudence requires us to identify whether the body is a court.

Ch III jurisprudence requires identification of tribunals that are courts within the meaning of s 71 ('Ch III courts'). For the purpose of your assessment in this Unit of Study, it will suffice to bear in mind:

1. Gives answers to **questions of law** that were raised in a **concrete controversy**, and which will have a **binding and determinative** effect in administration of the law: e.g. *Mellifont [also Culleton (No 2)]* to similar effect; and contrast *Momcilovic*].
2. determines a **controversy** between a **person with standing** who asserts that a purported law is invalid and the polity whose law it purports to be: e.g. *Croome*.

In re Judiciary and Navigation Acts (1921) 29 CLR 257

An attempt by Commonwealth Parliament to confer 'pre-enforcement' advisory opinion jurisdiction on the HCA was **struck down on the basis that it required the Court to exercise judicial power in the absence of a 'matter'**.

The grant of advisory jurisdiction to the Court: 'Whenever the Governor-General refers to the High Court for hearing and determination any question of law as to the validity of any Act or enactment of the Parliament the High Court shall have jurisdiction to hear and determine the matter.'

The referral to the Court: The G-G referred the validity of a law that had been passed and assented, but was to come into force on a date to be proclaimed.

Reason advisory jurisdiction struck down: '[T]here can be no matter ... unless there is some immediate right, duty or liability to be established by the determination of the Court. [Parliament] cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law': CLR 266-7.

Summary: Doesn't allow advisory opinions

- Not a matter if;
 - o It seeks to make a '**declaration of the law divorced** from any attempt to administer that law'
 - o Is an **abstract question of law** without the right or duty of anybody or person being involved

Mellifont v A-G (Qld) (1991) 173 CLR 289

Facts: Mellifont was charged with perjury. Proceedings terminated after trial judge interpreted perjury law favourably to Mellifont. Mellifont was discharged. Attorney-General referred, under Criminal Code, a question of law to the Court of Criminal Appeal (This is a typical statutory power used to correct errors of law without necessarily exposing an accused to double jeopardy - **Double jeopardy** is a procedural defence that prevents an accused person from being tried again on the same (or similar) charges and on the same facts, following a valid acquittal or conviction.) Court of Criminal Appeal interpreted perjury law favourably to prosecutor. Mellifont appealed Court of Criminal Appeal's decision to the High Court. Queensland A-G said High Court did not have jurisdiction to hear the matter under s73 of the Constitution.

A contrasting case - HCA held court's function in answering questions of law referred by government party to a discontinued criminal prosecution is integral to judicial administration of the law.

- **Specifically:** The HCA held that an answer given by a State Court of Appeal on a question of law referred from a criminal trial could found an appeal to the HCA under s 73

The particular statutory mechanism for Court of Appeal to give answers on questions of law: A State A-G may refer any point of law that has arisen at a criminal trial in the State to the Court of Appeal if the defendant has been acquitted, or discharged as a result of a determination of the trial court on that point of law

- This is a standard procedure to correct errors of law without exposing accused to double jeopardy

Reason this is not 'abstract': The answer given by the Court of Appeal corrects errors of law in criminal proceedings 'for the better administration of justice' - it is not academic or hypothetical

2D. Options where standing of a PI doubtful?

- ✚ PI may apply for A-G's fiat to bring '**relator action**'.
 - Individuals can borrow the AG's standing.
- ✚ **Intervention of parties with standing** - e.g. Williams No 1 and 2 (States intervened in support of Mr William's challenge to spending on NSCP).
- ? Court may decide case on its merits without determining standing - not uncommon where Court rejects challenge on its merits (eg DOGS Case; Combet; Wilkie v Cth [2017] HCA 40); but see also in context of recent successful constitutional challenge, Brown v Tasmania [2017] HCA 43.
- ? PI may attempt to argue for further liberalisation of the standing test in public interest litigation ...

On the one hand

- **Constitution does not preclude** legislation for '**open standing**': see *Truth About Motorways (2000)*.
- **Public interest considerations** may favour determining allegations of public wrong which will otherwise go undetermined.

On the other hand:

- HCA **declined to recognise tax payers' standing** to challenge spending of public funds in *Pape (2009)*.
- *Kuczborski* at [183-186] (Crennan, Kiefel, Gageler and Keane JJ): 'Natural reluctance' of courts to abandon standing requirements, which ensure that the work of the courts remains focused upon 'the most concrete and specific expression of the law in its practical operation', rather than 'the writing of essays of essentially academic interest'
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Standing

Standing

'Standing' refers to an applicant's right to be heard by a court. Australian law does not have a general principle of 'open' standing to enforce public law. As such the standing of the plaintiff may be a threshold question in public law litigation. You would be seeking a declaration that the law is invalid -

Spending Legislation: Standing

State: A threshold requirement to get a public law issue before the court is standing (*ACF*)

- a) **State, for Standing:** Applicant must have a 'special interest in the subject matter' as distinct from 'a mere intellectual or emotional concern' (*ACF*)
- b) **State:** The question of what is a sufficient interest will vary according to the nature of the subject matter of the litigation (*Onus v Alcoa*)
 - a. **Note:** *Onus v Alcoa*; the HCA reiterated the *ACF* test, and stated that there is 'no ready rule of thumb capable of mechanical application'
- c) **Acknowledge;** No definitive answer to whether individuals can have a special interest in laws which authorise spending of appropriated funds from the CRF/appropriate funds from the CRF. (*Combet*)
- d) **Acknowledge;** HCA has expressly declined to follow overseas authorities which have held that taxpayers have standing to challenge financial legislation (*Pape*)
 - a. *Pape* - they held that he had direct interest in the validity of the payment to him
- e) **Acknowledge;** That in *Williams* (1 and 2) and *Wilkie* - the HCA left open the question of Plaintiffs standing
 - a. *Williams*; Resolved due to the joinder of states
- f) **Consider;** possible ways of resolving standing issues as set out below.

IF - Regulatory Legislation;

State: In the case of regulatory legislation, the relevant enquiry is **whether the present operation of the legislation has an effect on the plaintiff's interests** (excluding emotional or intellectual concerns) - *ACF test*

- ***Kucsborski: Present Operation:*** is a key concern, there is no standing where the court has to hypothesise future contingencies e.g. criminal guilt

Standing for - Plaintiff's interest in the relief claimed

State: Even if the plaintiff has an interest affected by the operation of regulatory legislation, you must consider whether the plaintiff has an interest **in the relief claimed in the proceedings.**

- ***Pape:*** Cth conceded *Pape* had a direct interest in the validity of the \$250 payment to him, but this did not give him standing to seek a declaration of invalidity of the Tax Bonus Act (However the court held that he did have standing to seek the declaration as the controversy regarding the validity of payment did not turn solely on circumstances unique to him)
- ***Williams:*** HCA left it open whether any party had standing to seek declaration of invalidity of the Parliament's delegation of power to authorise executive spending.