

What does the executive do?

Develop Policy	Implements laws passed by parliament	Implement government policy/ administer government department
Declare war and peace; send troops to war	Conducts foreign affairs, national defence, security	Sign international treaties
Intercept and detain aliens	Prosecute criminal offences	Pardon offenders
Provide services, benefits, welfare	Coin money	Regulate individual and group behaviour

Key Institutions

- Cabinet:
 - High-level body comprised of the Prime Minister and other senior government Ministers.
 - Central driver of national policy
 - Sets the agenda for the government of the day
 - Principal of collective responsibility: Each member of Cabinet supports, and is responsible for, the decisions made by cabinet
 - Ministers must answer to parliament for the decisions of Cabinet
 - Secrecy:
 - Cabinet Handbook
 - Not publicly talk about matters that they propose to bring to the cabinet announce a major new policy without previous Cabinet approval
 - Not express private views on Government policies nor speak about or otherwise become involved in a ministerial colleague's portfolio without first consulting that colleague and possibly the Prime minister
 - Understand that absolute confidentiality of cabinet discussions is essential
- Ministers:
 - Members of parliament, and the political party that holds the majority of seats in the lower house
 - This demonstrates that there is no strict separation between executive and legislative branches of government

- Chosen by the prime minister to take responsibility for one or more areas of executive power 'portfolio'
- There may be up to 30 ministers
- Each minister is responsible for the public service department that administers the relevant area of government activity
- Liaise with secretary of their relevant department
 - Secretary: Administrative leader of a department
- Main Duties:
 - Manage the policy directions in the particular portfolio
 - Meet with stakeholders
 - Meet with constituents in their electorate
 - Report to the media regularly
- The Public Service
 - All the people employed to carry out the day to day operation of government departments and agencies, or appointed to perform specific roles
 - Some perform specific roles or occupy specific public office's
 - Given power under statute
 - High degree of independence in comparison to those working in government departments
 - Some public service bodies perform a regulatory role (regulate and supervise certain areas of public activity)
 - Eg. Australian Competition and Consumer Commission, Australian Prudential Regulation Authority and Australian Securities and Investments Commission
 - Some bodies are responsible for supervising the exercise of executive power by other members of the executive branch
 - Eg. Ombudsmen
 - The public service is responsible for providing advice to assist and inform the operations of the government of the day
 - 'frank and fearless advice '

Sources of Executive Power

- Executive actors must point to some legal authority for his or her actions
- State constitutions do not spell out the nature or scope of executive power
 - Scope of power depends on principles of common law inherited from the UK but modified by statute
- Federal level there is express provisions in the Australian Constitution

- S61
 - All federal executive power is derived from S61
 - 'the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen representative and extends to the execution and maintenance of this Constitution and the laws of the commonwealth
 - Broad and vague
 - Allows for flexibility and a degree of discretion
 - 'executive power' interpreted in its historical context: encompassing the power that the British Crown enjoyed at the time
 - Understood as comprising of 5 categories of power:
 - Specific powers vested by the Constitution
 - Statutory executive powers
 - Prerogative-type powers
 - The capacities enjoyed by the executive as a legal person
 - The nationhood power

1. Specific powers vested by the constitution

- S61 vests the executive with the power to 'execute' the Constitution
- Constitution requires the executive to perform certain functions
 - Many vested in the Governor-General
 - Expected that these powers will be exercised on ministerial advice
 - Reserve powers of the Governor-General:
 - i. The refusal to dissolve parliament
 - ii. The power to appoint the Prime Minister
 - iii. The power to dismiss the Prime Minister

2. Statutory executive powers

- S61: 'executing.. The laws of the commonwealth'
 - Parliament can enact legislation that authorises or directs the executive to do certain things
- Statutes that confers executive power must conform to the constitution
- Legislative power of parliament is very broad, parliament can therefore confer a wide range of powers to the executive branch

3. Prerogative-type power

- UK Prerogative powers:
 - The remaining portion of the Crown's original authority... the name for the residue of discretionary power left at any moment in the hands of the crown, whether such power be in fact exercised by the King himself or by his ministers
- Can be executed without parliamentary approval
- Three categories of the Prerogative in Australia
 - Prerogative powers: power to do certain acts
 - Prerogative immunities and privileges
 - Prerogative property rights
- Prerogative type powers of the Federal Executive
 - Eg.
 - The power to enter into treaties
 - The power to declare war
- State Prerogative Power
 - The prerogative of mercy
 - The prerogative power to appoint to commissions of inquiry
 - The prerogative power to grant honours
 - The prerogative power to make appointments to common law offices
- Limits of prerogative power
 - Prerogatives can lapse due to disuse (Tampa)
 - Certain things prerogative power cannot be used to do eg. To create criminal offences or impose taxes
 - Vulnerable to parliamentary abrogation

4. The Capacities of the executive as a legal person (Common Law Powers)

- Executive can exercise certain powers because it is a legal person
- Similar power to that of the UK 'same legal rights and legal obligations' of a legal person
- S61 does not confer unlimited power to contract and spend

5. Nationhood Power

- 'the capacity to engage in enterprises and activities particularly adapted to the government of a nation'

- There are some additional powers that our commonwealth parliament might have but weren't powers of the crown at 1901 but still needs in virtue of being a sovereign entity.
- Necessary to govern and function a national
- Recognised that our Crown has these powers and are quite limited
- Can be overwritten by legislation

Overseeing the executive

- Mechanisms in place for supervising the exercise of executive power
 - Parliament; ministers questioned in parliament about the activities of their portfolio, parliamentary committees can investigate executive action
 - Courts; courts may be called upon to check whether an executive actor has acted within its power 'judicial review of executive action'
 - Executive; executive institutions and officers who's role it is to supervise other executive actors
 - Eg.
 - Administrative tribunals
 - Ombudsmen offices
 - Royal Commissions
 - Human rights and anti-discrimination commissions
 - Anti-corruption agencies
 - Other bodies including Public Service/Sector Commissions, the Australian Commission for Law Enforcement Integrity etc.
- Royal Commissions
 - Form of public enquiry
 - Chaired by a nominated person
 - Investigate problems in government, or broad policy or systemic issues
 - Bound by 'terms of reference'
 - Royal Commissions Act: Confers the power to establish a royal commission on the Governor General
 - Can inquire into any matter that 'relates to or is connected with the peace, order and good government of the commonwealth, or any public purpose or public power of the Commonwealth'
 - Royal Commissions Act:
 - Empowers the Royal Commission to:

Topic 9 Our Statutory Universe

Legislation and the public law context

- The principals of statutory construction applied by the Australian courts reflect the constitutional structure: they necessarily reflect the constitutional distribution of powers, and the interaction between the three branches of government
 - Parliament: makes statute law
 - Executive: gives effect to statutes
 - Australian courts system: wait to be called upon to determine the validity of a statute, or of the executives actions, or the rights and duties of private persons
- Important element of the rule of law: the courts decision as to what a statute means is the one that is legally binding
 - Important element of the rule of law: means the executive and legislative branches cannot decide for themselves whether what they have done is within the bounds of legal authority, rather this is independently decided by the courts
- The courts cannot make statute law; they cannot rewrite the statutes that parliament has enacted and they are duty bound to enforce what parliament has validly enacted
- The courts must properly discharge their constitutional function of interpreting the law and resolving disputes before them, without overreaching the limits of judicial power and usurping the legislative power of the commonwealth

Nature of a statute

- Statute: a source of law
- Statute law is subordinate to The Commonwealth Constitution
- Statute law prevails over common law

Acts Interpretation Acts 1901 (Cth)

- Contains many common sense rules about how to interpret federal legislation
- An Acts Interpretation Act can override or displace a common law principal of interpretation, although many exist side-by-side

Statutory Interpretation: An Overview

- The process by which the court ascertains what a statute 'means'
- Statutory provisions are open to more than one interpretation
 - The English language is complex and different words can carry different meanings in different contexts
 - Statutes are not interpreted in exactly the same way as you would interpret other texts

Parliamentary Intentions

- Richard Ekins and Jeffery Goldsworthy:
 - The primary object of statutory interpretation 'is to determine what intention is conveyed either expressly or by implication of the language used'
 - 'To give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in which it is employed'
 - Cooper Brookes:
 - 'the fundamental object of statutory construction in every case is to ascertain the legislative intention... the rules [of interpretation] ... are no more than rules of common sense, designated to achieve this object.'

- *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (NAAV)

- There is doubt as to whether parliament can 'intend' anything.
- 'Intention' is generally understood to be a mental state, and it is unclear whether groups of people can have a mental state- even if they act as one.
- Parliamentary intention: is a conclusion reached about the proper construction of the law in question and nothing more
- Requires reference to matters which were before the parliament when the law was enacted
- Courts apply the established principles of statutory interpretation and the meaning produced by that process in the one that Parliament can be said to have intended

Overview of principals of statutory interpretation

- *Project Blue Sky v Australian Broadcasting Authority (Project Blue Sky)*

- 'The duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences if a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'

Topic 10 & 11 Principals of Statutory Interpretation

Statutory Interpretation Process

- Ordinary/Grammatical Meaning (Text) > Context > Purpose > Principals/Canon of Construction > Legal Meaning
- Intrinsic then extrinsic

SI Answer Template

1. General Principals
 - Statements about modern approach to statutory interpretation
2. Ordinary Grammatical meaning
3. Context
4. Purpose
5. Statutory Presumptions/Canons
6. Which approach would a court adopt (and why)
7. Apply

Sample Conclusion (if asked for which approach the court would adopt)

- Acknowledged the potential tension between, and sought to reconcile, the various principles of interpretation
- 'There are important reasons for concluding that the legal meaning of a statute is the same as its ordinary natural meaning (e.g., rule of law – that an ordinary person on the street should be able to read/understand the legislation), but on the other hand the court should be sensitive to context and purpose. Some answers made clear that, in any event, the

court cannot rewrite the statute but is bound to find the meaning that it is most likely Parliament can be *taken to have* intended ((re)stating some of the general interpretative principles discussed above).'

Main Approaches to Statutory Interpretation

Literal Approach

- the words of the provision
- Justification: the court's role is to interpret law, not to make it
- Problems: can result in law being read in a way which obviously wasn't intended/anticipated by those who made it.
- Exceptions: if natural meaning leads to absurd result, courts may apply the mischief rule

Vs

Purposive Approach

- the objective intent of Parliament in making the law
- Justification: reflects intentions of those elected to make the law.
- Problems: Parliament doesn't have a single 'intent' or 'purpose'

TEXT

Justification:

- Ordinary natural meaning is now assumed to parliaments intention- **NAAV**
- Statutes must be interpreted in a way that is consistent with that statute – **Project Blue Sky**
- Court 'must strive to give meaning to every word of the provision' - **Project Blue Sky**
- The duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily the meaning (the legal meaning) will correspond with the grammatic meaning of the provision- **Project Blue Sky**
- Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually

- been employed in the text of legislation is the surest guide to legislative intention" - *Alumina Pty Ltd v Commissioner of Territory revenue NT*
- 'Giving the text its natural and ordinary meaning maximises the comprehensibility and accessibility of statute law and the accountability of the legislature' (closely linked to rule of law) – *Treasurer of Victoria v Tabcorp Holdings Limited*
 - "Those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen" *International Finance Trust v NSW Crime commission*
 - By prioritising statutory text, courts might avoid constructing their own idea of desirable policy - *Treasurer of Victoria v Tabcorp Holdings Limited*
 - Dictionaries seem to be a sensible place to look for confirmation of an ordinary meaning - *Evans v New South Wales*
 - Where there is a legal, technical or trade meaning to words or phrases then that meaning may be applied, in light of the context and purposes of the legislation – *Herbert Adams Pty Ltd v federal Commissioner of Taxation*
 - Presumed that words will be used consistently throughout an act, and if Parliament uses a different word where the same word could have been used it is assumed that the word has a different meaning
 - Check definitions section first. Definition in definitions section prevails over dictionary definition.
- *Evans v New South Wales (2008) 168 FCR 579*
- Section 46 World Youth Day Act – sale and distribution
 - NSW Govt: Parliament only intended to regulate commercial distribution. Points to context and purposes of s 46
 - Application: section is overly broad (and therefore outside the scope of the Act) Would prevent a 'good Samaritan' from giving water and food to pilgrims
 - Court:
 - Definition of sale – addition of 'distribution' = intention to deal with non-commercial giving of something
 - Ordinary/dictionary meaning of distribute = non-commercial