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Executive Power and Prerogative Powers

- Section 61 Constitution: Executive power of the Cth. Is vested in the Queen and is exercisable by the GG.
- Statutory includes:
 - Power expressly conferred in Constitution (e.g. s72 on appointment of justices of HC)
 - Powers conferred in legislation.
 - Powers incidental to the administration of a Department of State (s 64)
- Inherent powers/prerogatives
 - H v Evatt – 3 broad categories of prerogatives:
 1. Executive prerogatives – positive powers that enable the King to do certain things at certain times and places on certain conditions (page 42 of notes)
 2. Certain immunities
 3. Proprietary rights
 - Prerogatives may be extinguished by statute through express words or necessary implication.
 1. Cadia Holdings – gold/copper mine royalties. **Main authority**
 2. AG v De Keyser's Royal Hotel – Defense legislative dealt with permanent and temporary occupation of property by armed forces – prerogative power to occupy displaced.
 3. R (Bancoult) v Secretary of State (UK CASE) – prerogative legislation should be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety.
 4. R (Miller) v Secretary of State for Exiting the EU (UK CASE) – no prerogative to take action on international plane that changes domestic law.
 5. Tampa Case (Australia) – action brought for habeas corpus which is a prerogative writ requiring the executive to produce a detained person so that court can decide if their detention is valid or not.
 - Prerogative power to prevent non-citizens from entering Australia exist (this is fundamental to Australia's sovereignty). Migration Act did not abrogate this power.

Nationhood Power & Powers to Contract and Spend

Whether a matter falls within the 'nationhood' power

- AAP Case:
 - Nationhood power is a Cth executive power (provided under s61), subject to express incidental power of Cth Parliament.
 - Section 51(xxxix) gives legislative power in relation to matters incidental to the execution of any power vested by this Constitution in the Government of the Commonwealth.
 - Two limb test:
 1. The activity is a **national endeavour** – peculiarly adapted to the government of a nation
 2. The activity **cannot otherwise be carried on** by the States.
- Pape v Commissioner of Taxation – challenged validity of Cth payments to taxpayers during GFC.
 - Short-term fiscal measure to meet adverse economic conditions affecting **nation as a whole** – such measures are **peculiarly within the capacity and resources of the Cth government**
 - **National emergency?** – Only Cth has resources to meet the emergency. Executive government is the arm of government capable of empowered to respond to a crisis (war, natural disaster, financial crisis)
- Seas and Submerged Lands Case
 - Nationhood powers extend to proprietary interests of territorial seas, seabed, airspace and continental shelf.
- Davis v Cth – Legislation gave Cth power to restrict certain symbols, words and logos related to the Bicentenary
 - Regime cannot be '**grossly disproportionate**' to the purpose – Bicentenary legislation restricted free speech – grossly disproportionate to protecting bicentenary commemoration.
- Cth v Tasmania – Clash between Cth wanting to preserve Tasmanian wilderness and Tasmanian State Government wanting to build a dam
 - Coercive laws such as **regulation extensive in scope and intrusive** cannot be based on nationhood.
 - Deane J: Cth can exercise nationhood powers within State areas of jurisdiction as long as this did not involve '**competition**' with States and was confined to '**truly national endeavours**'.
 - Nationhood power **doesn't extend to overriding State property rights**.

Whether the power to contract and spend is valid

- Pape v Taxation
 - Appropriation (under s 81 and 83) is a **necessary but not sufficient** requirement for the expenditure of public funds. A **head of power was needed** to authorise its spending.
 - Appropriation is not itself a substantive source of power to spend public money; it earmarks money for a specified purpose, and authorises the treasurer to withdraw money from fund.
- Does the expenditure come under one of the following categories? - Williams (No 1)
 - Services incidental to the **ordinary and well-recognised functions of government** (E.g. ss53 and s 64 – administration of departments of State).
 - E.g. Australian Marriage Equality v Minister for Finance – collection of statistical information falls within ordinary function as a government agency
 - Authorised by implied **nationhood power?** – Look at Williams v Cth (2012) (notes page 49)
 - Supported by a **prerogative power** of Commonwealth
 - Supported by **Constitution**
- If YES, actual legislation is not needed to support expenditure – Williams (No 1)
- If NO, actual legislation/statutory authority is required for the spending to be valid.
 - Does this legislation for appropriation of money come within Commonwealth legislative power?
 - Williams (No 2) – s 51 of Constitution gives legislative power in relation to matters incidental to the execution of any power vested by this Constitution in the Government of the Cth.
 - Sought approval for the proposition that Cth can contract and spend under s 61 in relation to 'all matters that are reasonably capable of being seen as of national benefit or concern' - NO, too broad. Would give Cth power to spend on anything that the Parliament reasonably considered was for the benefit of the nation.

Access to Government Documents, FOI, Production of documents ordered by House

Whether the government document needs to be released and whether there is a right to obtain access

- Access to Government Documents is supported by the FOI Act (section 3) and GIPA Act Section 3. 3 functions:
 1. Requiring the **publication** of certain types of government documents. Proactive release
 - Agencies may refuse FOI requests if undertaking the work would **substantially and unreasonably** divert the resources of the agency from its operations (FOI s24, GIPA s60).
 - AG v Dreyfus – AG could not refuse access to his appointment diary on the ground that it would require too many resources because all meeting participants had to be consulted.
 2. Allowing individuals to **obtain access** to personal information held about them by governments, so they can have errors corrected.
 3. Allowing individuals to **obtain access** to government information at their application, subject to exemption.
- Proactive release:
 - Section 7A: Information publication scheme – guide
 - Agency **must publish** information about **what agency does, way it does it and information dealt with or used in the course of operations**.
 - Section 8 operational information: info held by agency to assist agency to perform/exercise the agency's functions in making decisions or recommendations affecting members of public.
 - Not required to publish exempt matter.
 - Section 10 (2) no prejudice from lack of awareness of unpublished information.
- Right to obtain access
 - Section 11: Every person has a legally enforceable right to obtain access to:
 - A document of an agency, other than an exempt document or
 - Official document of a Minister, other than an exempt document.
 - Section 11A: Agency/minister must give access to the document unless (4) document is an exempt.
 - (5) Agency/minister must give access to document if it is **conditionally exempt** at a particular time unless access would, on balance, be **contrary to public interest**.
- Exempt documents:
 - For exempt and conditionally exempt documents, look at page 53 and 54 in notes.
- Public interest test applies to conditionally exempt documents – Section 11B
 - Look at page 54.
- Note the procedural steps to attaining documents – page 54.
- Mention right to review if not satisfied with the outcome
 - Right to review by the Informational Commissioner. Can appeal on the merits from the IC to the AAT. There is appeal to the Federal Court on questions of law from the IC or the ATT.

Production of documents ordered by House

- Parliamentary Privileges Act 1987 S 49 Privileges of Houses: gives both Houses the power to call for the production of documents at the Cth level.
 - Cth Senate can require production of documents but has recognised certain protected categories:
 - Legal proceedings, law enforcement investigations, national security and defence, deliberations of Cabinet and documents that would damage commercial interests or unreasonably invade the privacy of individuals.
- In NSW, no statutory or constitutional source for such power so Houses must rely on common law powers.
 - They are powers as are **reasonably necessary** for a House to fulfil its functions – Egan v Willis
- Egan v Willis
 - Power of upper house extend to ensuring **government accountability**. Legislative Council has powers, privileges and immunities as are **reasonably necessary for proper exercise** of its functions.