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A RESPONSIBLE EXECUTIVE - EXECUTIVE BRANCH FORMATION; RESERVE POWERS; PARLIAMENT'S POWERS TO COMPEL PRODUCTION OF GOVERNMENT INFORMATION

Overview - The Executive Branch and Responsible Government

The Executive Introduced

- **Crown and the Monarch**
 - Executive power formally and legally resides in the Queen and is exercised in virtually all respects by her representatives, the GG and Governors in States
 - The government is carried on in the Queen's name, [s 2 Constitution](#) providing the GG is appointed by the Queen and shall be her representative and [s 62](#) vesting the Queen, not the GG with executive power
 - Though this is exercisable by the GG as her representative
 - [S 64](#) makes reference to the Queen's minister's of States, being members of the FEC advising the GG, and it is as the Queen's representative that the GG is vested with the 'command in chief' of the armed forces pursuant to [s 68 Constitution](#)
 - [S 1](#) vests legislative power of the commonwealth → assent of the GG required before it is law
 - Law may also be reserved by the GG, or Queen may disallow the law (even if the GG has given assent)
 - The Queen is the formal head of state → noted in the preamble
 - Roles including representing, symbolising and acting for the state as a whole in the execution of such defining acts as the declaration of war, summoning of Parliament, swearing in of the ministry, and circumstances where an individual enters into a relationship with the nation as a whole, such as taking an oath of office. Also personifies the body politic, acts as the focus of loyalty for the community and represents the nation on ceremonial occasions.
- **The Queen's Representatives**
 - Queen's power exercised by the GG and Governors
 - Power is in reality exercised by ministers, themselves members of Parliament who are 'responsible' to Parliament and ultimately the electorate, and whose confidence is prerequisite to their exercise of ministerial power
- **Minister's of the Crown, Executive Council and Cabinet**
 - Actual exercise of executive power is undertaken by Minister's of State who are responsible to Parliament
 - Minister's are placed at the head of the Departments of State and hold portfolios → PM, treasurer, Attorney-General, Minister of Foreign Affairs etc.
 - These minister's form the cabinet which constitutes the central core of the government under the leadership of the PM
 - It is the PM and cabinet who directly exercise and direct the exercise of the executive power of the Cth. However, cabinet is not mentioned in the Constitution
 - [S 64](#) provides that the GG may appoint officers to administer such departments of States the GG in Council may establish

- This mean they hold office so long as they maintain the confidence of the HOR, individually as holders of a particular portfolio and collectively as members of the government
- Reinforced by s 64 that they must be minister's within three months of appointment
- S 4 Minister's of State Act 1953 (Cth) currently limits the number of ministers of State specifically designated as parliamentary secretaries to 12 and ministers of state to 30
- Meetings of the executive council are summoned only when there is business to transact, with regular meetings occurring during the Autumn and Budget sessions of Parliament
 - Formal in nature
 - A recommendation or 'minute' is presented to indicate something which is required by the Constitution or statute to be done or made is so done or more
 - Signed by the responsible minister and is accompanied by an explanatory memo
 - Once approved, the GG marks and signs it
- While cabinet has no formal legal status it is one of those conventional emanations of the working of responsible government which has become central to the workings of the government
- Conventions applying to cabinet include secrecy and solidarity
 - These are incidental or ancillary aspects of responsible government
 - Secrecy required to enhance full and frank discussion on matters
 - Cabinet solidarity requires decisions be unanimous → all members must publicly support any final decision of cabinet whether or not they advocated for a contrary position during actual deliberations. If they cannot support it, they must resign.

Responsible Government

- The discretionary powers vested in the Crown are exercised by the vice-regal representative **according to the advice of ministers;** and
- Those ministers , themselves members of parliament, are to be **responsible to parliament;** and
- Parliament is ultimately accountable to the electors
- Minister's are responsible to parliament
 - Issues going to the formation and maintenance of the government
 - Issues going to the executive's accountability to parliament - through the example of production of documents to a House of Parliament
- Under the 'Westminster system'
 - Voters vote for parliamentarians, and ministers are drawn from parliament
 - The core of collective ministerial responsibility is the idea that the executive powers of government are exercised by ministers who command the support of the HOR and are not subject to a motion of no confidence

Parliamentary Supremacy and the Executive

- Practices derived from the UK
 - It became settled the Crown could not suspend or dispense with any laws or their execution without the consent of Parliament

- Free election of members of Parliament was established, together with parliamentary privilege, especially the immunity from prosecution or impeachment with respect to any speeches or debate in Parliament
- S 6 *Constitution* provides that session of Parliament shall be held at least once within a 12 month period, and ss 81, 83 have provided all money's or revenues shall form one consolidated revenue fund which can only be appropriated under appropriation made by law
- **The Crown is bound by statute**
 - *Davis v Commonwealth* → executive cannot create a new offence
 - *Vasiljkovic v Commonwealth* → parliament cannot order extradition without statutory authorisation
 - *Commonwealth v Colonial Combing, Spinning & Weaving Co* → it cannot impose taxation without statutory authorisation

Form and Substance

- A central concern is how we reconcile the form of a constitutional monarchy with the substance of a representative democracy
- **S 61 → Executive power**
 - The executive power of the commonwealth is **veste 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 the laws of the commonwealth
- **Powers are exercised on advice**
 - The power is exercised by the GG on advice provided by the minister's sand cabinet, but the constitution makes reference to the **federal executive council**
 - See **s 62** → 'there shall be a federal executive council to advice the GG in the government of the Commonwealth
- **What is the federal executive council?**
 - Not mentioned in chapter II or anywhere in the constitution
 - **Prime Minister** → the person who leads a party or coalition which can command the support of the majority of the HOR.
 - By convention, the PM has effective control of certain matters including the appointment and dismissal of other members, structure of the ministry and cabinet, and dissolving the HOR (subject to limited reserve powers of the GG to refuse advice)
 - **Cabinet** → the council of senior ministers, empowered to make decisions binding on the whole ministry
 - Operates on principles of collective responsibility, solidarity and confidentiality
- **Substance → Mentioned in the Constitution**
 - Minister's of State are the core of executive government, reflected in **s 64**
 - Minister's administer the Departments of State
 - Minister's are members of the FEC
 - And must become a Parliamentarian within three months of appointment
 - This last requirement a prerequisite for, and indication of, the executives accountability to Parliament
- **Form and Substance in Chapter II**

- The text of Chapter II is misleading → suggests extensive powers held by the Queen and GG with little limitation. This does not factor in the interpretive context supplied by history, laws, and convention
- The Queen and GG exercise all but reserve powers on advice of minister's
- The FEC is only a formal conduit for advice to the GG
- The office of the PM and Cabinet are critical to the operation of the ministry
- Responsibility to parliament rests on the mechanism provided in s 64 → minister's must be members of parliament,

Forming Government

- To form the government, a parliamentary grouping must have the support of a majority of the house of representatives ('support' in that a majority agrees to support the government on matters of confidence and supply)
 - Case study of the 2010 election
- A vote of no confidence or refusal to supply (at least in the HOR) will fell the government
- The **guiding convention** → the PM is the leader of the party or coalition who is able to command support of majority of the lower house on matters of confidence and supply
- The GG must determine who commands confidence and supply, and so has authority to advise him or her
- GG needs careful and transparent consideration to determine - who has the confidence of the house? If no one does, how best to arrive at the situation where someone does?

The 'Caretaker' Convention

- **Applies**
 - From after a general election or where a government has clearly lost the confidence of the house; until a new administration is appointed
- **Content**
 - A normal business continues but issues with long-term implications that would limit the freedom of action of the incoming government (ie, signing a major contract, or making a significant appointment), are to be either:
 - **Deferred**, or if **deferral is not possible**, handled by temporary arrangements that do not commit the government in the longer term; or, as last resort be make in consultation with other political parties

Clarification of Conventions

- In relation to general power of the GG, the GG has right to be consulted, to encourage and to warn when exercising their constitutional powers and responsibilities
- With respect to the appointment and dismissal of a government, the Committee considered that the conventions require the following:
 - When a government is defeated at a general election, the GG should appoint as PM that person who can form a ministry which has the confidence of the HOR

- If an alternate PM is clearly designated as a result of election, the outgoing PM should resign as soon as the outcome is known
- Where the outcome is not clear, the incumbent PM may remain in office until such time as the HOR meets to determine whether they enjoy confidence. If the PM resigns, before doing so they may advise the GG of their successor. The GG should follow that advice. If no advice is given, the GG should consult whoever they wish as to the person who enjoys the confidence of the HOR to form a government and then appoint that person.
- If PM dies in office, the GG should follow advice of the next more senior minister in cabinet rank as to the person who should be appointed PM, being that person who can form a ministry which has the confidence of the House
- Where the HOR upholds a motion of no confidence, there was a divergence in the committee
 - One view is the GG must act on advice of the defeated PM, acting in good faith, to send for that person to form a ministry whom the PM believes enjoys confidence or dissolving the house if so advised
 - The alternate view was the ultimate decisions should be the GG's as to whether to dissolve the HOR or appoint another person, and should dissolve the house only if he or she does not think that there is a person who will enjoy the confidence of the house to form a ministry. But in exercising that discretion, the advice of the defeated PM must be taken into account.
- However, if following the no confidence, the house itself names the person who enjoys confidence, the GG must appoint that person
- While the death of the PM does not result in the termination of the other minister's, the resignation of the PM following defeat in the general election or in the house terminates the commission of all other minister's
- If a PM following defeat at an election, or in a vote of no confidence in the house, fails to resign or to advise a dissolution of the House, the GG shall dismiss the PM
- If the PM persists in grossly unlawful or illegal conduct including serious breaches of the constitution, the GG can dismiss the PM when the HCA has declared the matter to be justiciable, and has declared the matter to be unlawful, illegal or breach of the constitution. If not justiciable, the GG may still dismiss the PM if there is no alternative to prevent the PM engaging in such conduct.
- With respect to dissolution of Parliament, the Committee identified the following principles as most consistent with responsible government
 - The GG may dissolve the house only on advice of the PM
 - If a PM has the confidence of the HOR when tendering such advice, the GG shall act upon that advice
 - If a motion of no confidence against the government is pending in the HOR, the GG shall not dissolve or grant a DD. The granting of a DD shall be governed by conditions which apply to the dissolution of the house, except that the conditions specified in [s 57](#) must be satisfied.
 - Following any general election, the GG shall not dissolve the House until such time as it has had the opportunity to consider who shall be commissioned as PM.

- A GG appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as her majesty may be pleased to assign to him

Constitution s 61 → Executive Power

- The executive power of the commonwealth is vested in the Queen and is exercisable by the GG as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth

Constitution s 62 → Federal Executive Council

- There shall be a Federal executive Council to advise the GG in the government of the Commonwealth, and the members of the council shall be chosen and summoned by the GG and sworn as executive councillors, and shall hold office during his pleasure

Constitution s 62 → Provisions referring to Governor-General

- The provisions of this Constitution referring to the GG in Council shall be construed as referring to the GG acting with advice of the FEC

Constitution s 64 → Minister's of State

- The GG may appoint officers to administer such departments of State of the Commonwealth as the GG in council may establish
- Such officers shall hold office during the pleasure of the GG, they shall be members of the FEC and shall be the Queen's minister's of state for the commonwealth
- **Minister's to sit in Parliament**
 - After the first general election no minister of state shall hold office for a longer period than three months unless he is or becomes a senator or a member of the HOR

Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42

Facts

- Case concerned the Cth executive's capacity to participate in detention in another country, in this case Nauru
- Plaintiff M68 challenged the constitutionality of the Commonwealth government's participation in their detention in Nauru, defended as part of offshore immigration processing arrangements
- The cth government argued the plaintiff was detained under Naurian, not Australian law
- The Plaintiffs argument that they were detained by the Australian government was based on their degree of control over the circumstances of their detention, as manifest in

	<p>contractual, regulatory and practical arrangements between the Australian government, private contractors (notably Transfield) and the Nauruan government</p> <ul style="list-style-type: none"> - Two key developments occurred between the commencement of litigation and hearing <ul style="list-style-type: none"> - The Cth Parliament passed legislation in response to the litigation (inserting a new s 189AHA into the Migration Act) giving retrospective statutory authority to the Cth's involvement in the detention of the plaintiff in Nauru and; - In the week before the hearing, the Nauruan government relaxed restrictions on movement of those transported to Nauru for the purpose of immigration processing - Two interlocking principles from <i>Chu Kheng Lim (1992)</i> were central: <ul style="list-style-type: none"> - Executive needs statutory authority to detain <ul style="list-style-type: none"> - Only lawful to the extent that it is justified by positive authority conferred by valid statutory provision - There are constitutional limits on a <i>valid</i> statutory authority to detain <ul style="list-style-type: none"> - These go to the purpose and, with reference to purpose, duration of detention.
Issue	<ul style="list-style-type: none"> - Do the limits on the Commonwealth's capacity to detain identified in <i>Lim</i> apply to the Commonwealth's participation in executive detention in Nauru?
Held	<ul style="list-style-type: none"> - No (French CJ, Kiefel and Nettle JJ) <ul style="list-style-type: none"> - Held <i>Lim</i> only applies where the plaintiff is in the custody of the Commonwealth executive - Found the plaintiff was not in commonwealth custody in Nauru - Yes (Bell and Gageler JJ) <ul style="list-style-type: none"> - The relevant constitutional principles apply to the Commonwealth executive whenever it has 'de facto control over the liberty of the person who has been detained, in relation to which actual physical custody is sufficient but not essential' - Yes (Gordon J) <ul style="list-style-type: none"> - The Commonwealth was detaining the plaintiff on Nauru, <i>Lim</i> not limited to detention 'in custody'
Issue	<ul style="list-style-type: none"> - Were the constitutional limits on the Commonwealth's capacity to detain complied with?
Held	<ul style="list-style-type: none"> - No need to answer (Joint and Keane J) <ul style="list-style-type: none"> - The constitutional limits identified in <i>Lim</i> did not apply. The Commonwealth's legal authority to participate in detention on Nauru supplied by s 198AHA - Yes (Bell and Gageler JJ) <ul style="list-style-type: none"> - S 198AHA was valid - The detention is for the purpose of regional immigration processing and meets the requirements of limit - No (Gordon J dissenting) <ul style="list-style-type: none"> - Section 198AHA was constitutionally invalid

	<ul style="list-style-type: none"> - The Cth detention of the plaintiff in Nauru did not fall within the recognised exceptions to the rule in <i>Lim</i>, nor form the basis of a new exception (ie, the plaintiff's detention in Nauru was not for processing for an Australian visa or removal from Australia)
<p>Further Points</p>	<ul style="list-style-type: none"> - Gageler J - The executive government was established to take from its inception the form of a responsible government which was to have its own distinct national identity and its own distinctly national sphere of government responsibility - The overall constitutional context for any consideration of the nature of Commonwealth executive power is therefore that, although stated in s61 of the Constitution to be vested in the monarch and to be exercisable by the GG, the executive power of the commonwealth is an always was to be permitted to be exercised at a functional level by minister's and by other officers of the executive acting in their official capacities or through agents.
<p>Principle</p>	<ul style="list-style-type: none"> - The commonwealth only participated in the plaintiff's detention, rather than detaining her directly, because the detention was affected by the government on Nauru and because the Cth could not compel or authorise Nauru to make or enforce the laws necessary for that detention - Rejected reliance on <i>Lim</i> because that principle only applies to detention actually implemented by officers of the Cth, and not the the validity of the participation of officers of the Cth in detention of an alien by another state - Participation was authorised by s 198AHA because it provided a statutory framework for the exercise of Cth's power to enter into an arrangement or regional processing - Gageler → while the detention scheme (whether it involved direct detention or only the participation of officers of the cth) must be reasonably necessary to effect a purpose contained in the statutory authorisation to detain and which can be fulfilled

EXECUTIVE POWERS - THE INHERENT (NON-STATUTORY) POWERS AND CAPACITIES OF THE COMMONWEALTH EXECUTIVE

Introduction

Executive Power

- Cth executive power is described but not defined in the [Constitution s 61](#)
- The executive is the most capacious of the three branches of government
- By way of illustration, not definition - executive power includes the delivery of government services, the formulation and implementation of policy - across competition law, native title, aged care, immigration etc.

'Statutory' / 'Non-Statutory'

- **Statutory Powers** → powers identified by reference to a specific enactment prescribing or authorising action by the executive
- **Non-Statutory Powers** → powers that can be exercised without statutory authorisation. These are identified with reference to non-statutory sources: common law prerogatives; character and status of the polity
- **Atypical** → most of the powers exercised by the executive branch officials are conferred by legislation. Our focus in these classes is on atypical, but important *non-statutory* sources of executive powers

Dimensions of Commonwealth Executive Power

- **Breadth** → the subject matters with respect to which the executive government of the cth is empowered to act having regards to the constraints of the federal system (goes to the relationship between the cth and the states)
- **Depth** → the actions the executive is empowered to take in relation to those subject matters without statutory authorisation (goes to the relationship between the cth and other branches of government, particularly the Parliament)

Categories of Non-Statutory Executive Power

1. Executive power pursuant to **statute**
2. **Prerogative** (non-statutory) powers
 - a. Those non-statutory executive powers that are unique to the executive and not shared with natural persons
 - b. Can be extinguished or modified by statute
 - c. Prerogatives are capable of interfering with the rights of others (though are usually non-coercive)
 - i. Courts have tended to avoid recognising a prerogative power which may interfere with life, liberty or property of the subject → [A v Hayden \(1984\)](#)

- ii. Thus, the prerogative power will not permit the executive to 'deprive a person of liberty' and there is 'no inherent power to deport, extradite or detain' → *Ex parte Walsh and Johnson ; in re Yates (1925)*
 - d. From *Australia Acts* etc → prerogative powers of foreign affairs (*R v Burgess; Ex Parte Henry (1936)*), war (*Farey v Burvett (1916)*), peace, entry into treaties (*Industrial Relations Act Case (1996)*), extradition (*Barton v Commonwealth (1947)*), appointment of diplomats, stationing and control of the armed forces (*Marks v Commonwealth (1964)*) and construction of facilities on its own land (*Johnson v Kent (1975)*)
 - e. One of the most important qualities of the prerogatives is its residual character
 - i. 'Residue of discretionary power left at any moments in the hands of the crown' → *R v Secretary of State for the Home Department; Ex Parte Fire Brigades Union [1995]*
 - ii. No new prerogatives can be created → *British Broadcasting Corporation v Johns [1965]*
 - iii. It may be abrogated by statute
 - iv. It is generally subject to judicial review → *Council of Civil Service Unions v Minister for the Civil Service [1985]*
 - f. Desuetude → prolonged disuse
 - i. Lord Simon → the true doctrine... is that a rule of English common law, once clearly established, does not become extinct merely by disuse, and remains capable of recrudescence in *propitious* circumstances, *but not when it would be grossly anomalous and anachronistic*
3. Non-statutory executive **capacities**
- a. A power that the executive shares with natural persons
 - b. Example, the power to contract and to spend
 - c. Capacities a 'bare capacity of permission' in the exercise of which government subject to same substantive law as anyone else when exercising these capacities
 - d. Until recently it was a common assumption that these capacities subject to general law, were capable of exercise within the sphere of commonwealth legislative competence
 - i. Qualified in *Williams (No 1)*
 - e. Also has the ability to create trusts, transfer property, register companies, enter into partnerships and joint ventures, sue and be sued, and so on.

Prerogative Powers - Summary

- Powers inherent to the Crown by common law, which have not been removed by legislation
 - **Blackstone** → prerogative powers are powers unique to the Crown (ratifying treaties, issuing passports etc)
 - **Dicey** → broader view, the discretionary or arbitrary powers that the Crown still enjoys and have not been eroded (accepted by the courts)
 - Are a diminishing field that cannot be expanded
 - **Sir John Comyns** → compiled list of prerogative powers in 1736
- Justice Evatt and Republic Advisory Committee Classified Prerogative Powers into Three Main Categories:

- **Executive Prerogatives** → declaration of war and peace, control of the armed forces, foreign affairs (treaties and extradition), coin money, pardon offenders
- **Immunities and Preferences** → priority of Crown debts over other creditors, immunity from process of the courts
- **Property Rights** → entitlement to metals, fish, ownership of the foreshore, sea bed and its subsoil
- Prerogative powers may be modified by legislation in two ways:
 - **Statutes may regulate** the exercise of a prerogative power, thus depriving it of its discretionary elements by imposing certain criteria or procedures which control the exercise of power. This process still leaves the conceptual source of the power to the prerogative.
 - **Statutes may completely extinguish** the prerogative power, making what was previously an inherent power a power which is derived by statute.
- Modification was discussed in *New South Wales v Cadia Holdings*
- Also discussed in *Attorney General v De Keyser's Royal Hotel Ltd*
 - When legislation covers the same area as a prerogative power, the prerogative power is modified or extinguished
 - The power is now derived from legislation
 - This power is now subjected to conditions of the legislation

Central Theme

- Non-statutory executive powers are subject to law
- The absence of any dispensing power on the part of the executive, ie, the executive does not have any power to dispense with the law simply by virtue of being 'the government'

The Relationship Between Prerogative and Statute

1. Executive incapacities

- a. These are things that the executive either cannot do, or can only do with statutory authority.
- b. They include
 - i. Power to dispense with the operation of the law;
 - ii. Powers of detention, and powers to deport, extradite and detain;
 - iii. The power to create an offence;
 - iv. The power to impose a tax
- c. The government cannot appropriate money from consolidated revenue without statutory authorisation (parliament 'controls the purse strings')

2. Prerogative Powers

- a. These powers once possessed by the monarch, and are residual in nature
- b. New prerogatives cannot be created
- c. **Lord Diplock, *British Broadcasting Corp [1965]***
 - i. It is 350 years and a Civil War too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon citizens of the UK without any statutory authority are now well settled and incapable of extension

d. *Miller* [2017] UKSC

- i. '... a prerogative power however well-established may be curtailed or abrogated by statute... the statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication... a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute'
- e. A statutory regime may **regulate** a prerogative
- f. Alternatively, a statutory regime may wholly supplant or **extinguish** a prerogative, so that now the power depends wholly on statute.

Case Study: *Cadia Holdings v NSW* (2010) HCA

- **Issue in the Australian Context**
 - The allocation of prerogative powers inherited from UK as between the Cth and the States
- **Cadia Issues**
 - Gold a 'royal metal'
 - Royalties payable to NSW government on mine with copper and gold intermingled
 - Case turned on interaction between 1568 case recognising the prerogative and provisions of 1688 statute
- **Two Steps**
 - On review of the common law was the prerogative ever recognised?
 - What has been its subsequent fate? Abrogated or modified by statute? Also note 'desuetude'

Attorney-General v De Keyser's Royal Hotel [1920] HL

- **Issues**
 - Defence force requisitioned use of hotel for servicemen
 - Regulations provided for compensation in such circumstances
 - Government sought to 'fall back' on prerogative powers, so not bound by conditions contained in the regulations
- 'Would be useless... for the legislature to impose restrictions and limitations on, and to attach conditions... if the Crown were free at its pleasure to disregard all these provisions and by virtue of its prerogative do the very thing the statute empowered it to do'