

Class 10 — Executive Powers - Introduction and Prerogative Powers

Objectives

Focus is on Commonwealth level of executive powers, unless otherwise specified

We focus on 2 questions:

1. What can the Commonwealth executive do *without authorisation by statute* (but also validity of legislation)?
2. What is the scope of the s51(xxxix) power to legislate in aid of actions undertaken by the Cth executive without statutory authority?

Section 51(xxxix)

- **Section 51(xxxix) enables the Cth parliament to legislate in aid of an exercise of executive power** – including non-statutory executive power. Legislation can be used to do things that can't be done through executive power, eg create offences; confer immunity from laws or authorise trespass. The incidental power effectively assists in the practical implementation of each constitutional power vested in the Commonwealth under section 51.
- Note: Cth legislation prevails over State laws to extent of inconsistency (s 109)

Problem Question: Issue Spotting — For Commonwealth Inherent Executive Power

- You are asked to advise whether action by a Cth official is constitutional:

1. Does the Cth officer rely on statutory provision as authority for an action

↓ Yes

No e.g. Tampa Case

2. Statutory interpretation — does the statute authorise the action?

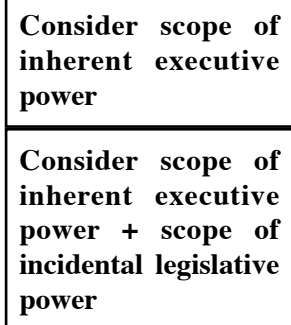
↓ Yes

No e.g. CPCF minority

3. Characterisation — does the statute fall within a head of Cth legislative power?

- If Cth relies on s 51(xxxix) w.r.t. an inherent executive power

e.g. Davis; Pape



Introduction to Executive Power, Forms of Non-Statutory Executive Power

- Executive power includes all the non-judicial, non-legislative powers of the government of a polity. It includes executive of laws, administering the government of the polity, etc.
- **Executive may exercise prerogative powers** (special privileges and rights) **of the Crown** (as accorded to the Crown by the common law)
 - Powers derived from Australia's status as a sovereign nation, powers conferred on the executive by statute, and capacities enjoyed at common law (eg. to enter into contracts and expend public money).
- Section 61 of the *Constitution* vests the executive power of the Commonwealth in the Queen. Exercisable by the GG as her representatives. Power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' (Statutory Provision which encompasses all powers of the executive)
 - **Davis v Commonwealth (1988) 166 CLR 79**: (Mason CJ, Deane and Gaudron JJ) The power under s 61 '[92] has often been discussed but never defined'.
- **Note:**
 - **Statutory Powers** — Identified by reference to a specific enactment prescribing or authorising action by the executive (enhances transparency and legitimacy if powers are distinguished on statutory basis);
 - **Non-Statutory Powers** — Powers that can be exercised without statutory authorisation identified with reference to non statutory sources including common law prerogatives, character and status of polity

Dimensions of Cth Non-Statutory Executive Powers

- **Breadth** (goes to federal issues) — the subject matters with respect to which the Cth is empowered to act. Constraints of the federal system, i.e. federal influencing state matters
- **Depth** (civil liberty issues and relationship between parliament and executive branch) — the precise actions the executive is empowered to undertake in relation to those subject matters *without statutory authorisation*
- Constraints drawn from the historical and constitutional context, including parliamentary government, separation of powers, rule of law
 1. **Acknowledged powers** and capacity for the executive to act without statutory authorisation
 2. Established **inherent constitutional incapacities** of the executive (based on historical development of law). For example, absent statutory authority, the executive does not have power to:
 - Impose a tax; Create an offence; Dispense executive officials from obedience to statutes; Detain a citizen

Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1:

- **Facts:** Commonwealth entered into memorandum of understanding with Nauru in 2013, under which that nation agreed to receive people transferred from Australia to assess their claims to be refugees. After entering Australia's migration zone, the plaintiff, a Bangladeshi national, was taken to and detained at the Processing Centre, and transferred back to Australia to receive treatment
- **Held:** Court determined that it was '[71] within the scope of the executive power of the Commonwealth with respect to aliens to enter into such an arrangement in order to facilitate regional processing arrangements'
- Separate case in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1* determined '[19] any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision'
- **Relied upon statutory power** — enactment of the *Migration Amendment (Regional Processing Arrangements) Act* meant that the Commonwealth did not need to rely upon non-statutory executive power to enable the detention of the plaintiff
- **Gageler J:**
 - [95]: Executive powers in s 61 of the *Constitution* is vested in monarch and exercisable by GG. Permitted to be exercise at a functional level by Ministers and other officers
 - [96]: Executive power always is susceptible to control by statute. Nature of executive power in s 61 is described but not defined
 - [97]: Professor Winterton refers to the 'breadth' and 'depth' of executive power.
 - [97]: Brennan J in *Davis v Commonwealth (1988) 166 CLR 790, 108* state executive power came from: statutory power; prerogatives; or a power that is neither statutory nor prerogative
 - [98]: **An act of prerogative executive power is an act which is capable of interfering with legal rights of others**
 - [98]: Non-prerogative executive capacity involves nothing more than the utilisation of a bare capacity or permission — Executive Government is affected by the condition of the general law *Federal Commissioner of Taxation v Official Liquidator of E O Farley (1940) 63 CLR 278, 308*
 - [98]: Executive must take civil and criminal law as they find it, and suffer punishment for breach
- The scope of executive power of the Cth is susceptible of control by statute ([122]).
- **Rule of Law:** Cth executive power is constitutionally limited by s 61.
 - Executive only has those powers given to it by law
- **Judicial Methods:** Interpreting s 61 in light of the purpose of Chapter II — it is to establish a national responsible government, constitutional history and the tradition of common law ([129], [138])
- **Parliamentary Supremacy:** All executive power is susceptible to control by legislation ([121-2], [128])
- **Judicial Remedies:** The exercise of executive power is subject to judicial review and is capable of exposing the Cth to common law liability ([123-8])

Prerogatives

History

- Prerogatives as described by **Blackstone** (not Dicey) — residual unique or ‘eccentric’ discretionary powers accorded to the Crown at common law. Ancient and ill-defined set of powers
- They exist antecedent and independently of s 61 in the Constitution
- ***Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (1940) 63 CLR 278***: (Evatt J) ‘[T]he royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects’
- Sir John Comyns in 1736 compiled prerogative powers that the King had. This included prerogatives as to foreign nations, the King’s ability to declare times of war, stipulate times of peace
- Some attributes of the Crown arise simply because they are recognised as a legal person: executive can own property, enter into contracts and form companies (***New South Wales v Bardolph (1934) 52 CLR 455***)
- Because prerogatives depend on the common law, they are subject to modification by statute. Can happen in 2 ways:
 - Statutory regime **regulates** exercise of prerogative power; or
 - Statutory regime wholly supplants or **extinguishes** the prerogative.

Republic Advisory Committee, *An Australian Republic: The Options* (Australian Government Publishing Service, 1993) vol 1:

- Historically, Crown prerogatives divided into 3 categories:
 - i. Executive prerogatives (monarch had power to do various acts)
 - ii. Immunities and preferences (e.g. priority of Crown debts over those owed to other creditors)
 - iii. Property rights (e.g. entitlement to royal metals, royal fish)
- Disagreements ‘as to whether ‘prerogative’ can refer to all of the non-statutory or common law powers or the Crown, or whether it should be confined to those powers which are unique to the Crown.’ (At [145]).
- Under s 61, ‘the full range of executive prerogatives relevant to Commonwealth legislative power is vested in the executive government of the Commonwealth, and ... is subject to control by legislation.’ (At [146]).
- Crown in right of each State has inherited executive prerogatives relevant to the State’s role in the federal system (at [146])

Identifying Prerogatives

- The **method** for identifying whether common law recognises a prerogative involves:
 - i. **Identify common law precedents for the prerogative**
 - Historical legal inquiry to ascertain whether there is any precedent for the exercise of the power
 - Certain powers were *never* recognised as part of the prerogative
 - Certain historical prerogatives have long ended — e.g. to dispense with application for the law (*Bill of Rights 1688*, Art 12); to create an offence (*Case of Proclamations*); to impose a tax (*Bill of Rights 1688*, Art 4).
 - The common law will not create *new* prerogatives (although existing prerogatives may be adapted and applied to new circumstances) ***British Broadcasting Corporation v Johns [1965] Ch 32***
 - ii. Determine whether the prerogative has fallen into **desuetude** (fundamental disuse) **or been abrogated/extinguished** by legislative
 - Prerogatives established by legislation
 - Necessary implication or express words
 - Can be displaced by necessary implication if parliament enacts a statutory power that occupies the same field as the prerogative power
- Legislation can terminate a prerogative by express words or necessary implication

Categories of prerogatives and examples

1. **Executive Powers** — e.g. executing treaties; declaring war; making peace; coining money; incorporating bodies by royal charter; pardoning offenders; conferring honours.
2. **Preferences, Immunities, Exceptions** — e.g. priority debtor
3. **Property rights** — radical title to all land; ownership of ‘royal metals’ (gold and silver), ‘royal fish’ (whales and sturgeon); treasure trove; foreshore, seabed and the seabed’s subsoil.