

TOPIC 6: A RESPONSIBLE EXECUTIVE

6.1: THE EXECUTIVE BRANCH AND RESPONSIBLE GOVERNMENT

Ch II, Constitution:

s 2	Governor-General A GG appointed by the Queen shall be her representative in the Cth, and shall have and may exercise in the Cth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as she may assign to him.
s 61	Executive power The exec power of the Cth 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 the laws of the Cth.
s 62	Federal Executive Council There shall be a FEC to advise the GG in the govt of the Cth; its members shall be chosen by the GG and shall hold office during his pleasure.
s 63	Provisions re Governor-General The provisions of this Constitution referring to the GG in Council shall be construed as referring to the GG acting w the advice of the FEC.
s 64	Ministers of State The GG may appoint officers to administer such depts of state of the Cth as the GG in Council may est; such officers shall hold office during the pleasure of the GG, shall be members of the FEC and shall be the Queen's ministers of state for the Cth. Ministers to sit in Parl After the first general election, no minister shall hold office for a longer period than three months unless he is or becomes a senator or member of the HoR.

Formal vs substantive exec power:

- Per **s 61** of the *Constitution*, exec power is legally vested in the Queen and is exercisable by the GG, but was always intended to be exercised at a functional level by govt ministers, who are in turn accountable to parliament and susceptible of control by Cth statute (Gageler J, *Plaintiff M68/2015*).
- **The Queen:**
 - Exec power continues formally to reside in the Queen, but is exercised in virtually all respects by the GG (**s 61**).
 - Formally, a bill may be reserved by the GG "for the Queen's pleasure" (**s 68**) and the Queen may disallow any law to which the GG has given assent (**s 59**), though a bill has not been reserved since the early days of federation and disallowance has never been exercised.
- **The GG:**
 - In reality, the Queen's formal powers are exercised by the GG, who is himself merely a formal repository of the power in almost all respects (**s 61**).
 - The GG's power is exercised on the advice of ministers, except for 'reserve powers' which may be exercised in extraordinary circumstances without or contrary to advice.

- **Ministers:**
 - The actual exercise of exec power is undertaken by ministers, who are placed at the head of depts of state and hold particular portfolios; the principal ministers form the Cabinet which constitutes the central core of govt under the leadership of the PM.
 - However, neither the Cabinet nor the PM are mentioned in the Constitution; exec power is formally wielded by the GG acting on the advice of the FEC, which is not a deliberative body but a 'rubber stamp', bound to give effect to the advice of ministers (Wilson J, *Winneke*).
 - Cabinet has no formal legal status, but is a convention emanating from the principle of responsible govt; its two key features are confidentiality and solidarity.

Parliamentary supremacy:

- A session of parliament must be called at least every 12 months (s 6);
- All revenue received by the govt "shall form one Consolidated Revenue Fund" which can only be used for Cth purposes "under appropriation made by law" (ss 81, 83);
- The exec cannot dispense w obedience to the law (*A v Hayden*);
- In sum, it is axiomatic and incontrovertible that the Crown is bound by statute.

6.2: RESERVE POWERS

Settled reserve powers:

1. Power to commission a new PM:

- When a govt is defeated at a general election, the GG should appoint as PM the person who, in his/her opinion, can form a ministry which has the confidence of the House.
- Where the outcome of an election is unclear, the GG may need to communicate w the leaders of the various parties to determine which can command a majority.
- Size alone provides no reason to prefer a party if its leader does not appear to command a majority; it is better to wait for negotiation to produce a majority (Hardie Boys).

2. Power to refuse advice to dissolve the House:

- If, after an election, a party/coalition forms govt w the confidence of other MPs but loses this confidence during the term of parliament, the GG can refuse the PM's advice to dissolve the House if satisfied that there is an alternative viable govt in the current parliament.
- If a PM has the confidence of the House when tendering advice to dissolve the House, the GG should act upon that advice; but if a motion of no confidence against the govt is pending, eg. within 8 days, the GG should not dissolve the House (Constitutional Convention 1985).

3. Power to dismiss a PM who has lost an election / lost a vote of confidence in the House:

- If, after defeat at an election or a vote of no confidence in the House, the incumbent PM fails to resign or advise a replacement or a dissolution, the GG has the power to dismiss him/her.

4. Power to dismiss a PM who persists in “grossly unlawful or illegal conduct”:

- If a PM persists in such conduct, including a serious breach of the Constitution, the GG can dismiss the PM when the HC has declared the matter to be justiciable, and has declared the conduct to be unlawful, illegal or a breach of the Constitution.
- Alternatively, if the HC declares the matter to not be justiciable, the GG can dismiss the PM if there is no alternative to prevent him engaging in such conduct (eg. [Lang Dismissal](#)).

Debateable reserve powers:

1. Power to dismiss a PM who retains the confidence of the House but is unable to obtain supply from the Senate, and refuses to resign or advise a dissolution:

- This is what occurred when the Whitlam govt was dismissed in 1975, but the GG’s decision was and remains controversial.
- The Constitutional Convention 1985 was of the view that in such circumstances, the GG may not dismiss the PM on the ground that the govt has failed to secure supply through the Senate, but should instead wait, eg. for supply to actually run out and the govt to engage in unlawful appropriation.

2. Power to refuse a request to prorogue parliament:

- There is continuing controversy over whether or not prorogation is a reserve power; it becomes controversial when it is used to avoid accountability or manipulate the system to party advantage: eg.
 - To shut down a parliamentary investigation into govt corruption or a controversial parliamentary committee inquiry;
 - To disqualify a member of parliament (where he/she fails to attend the House for a whole session without the permission of the House);
 - Most controversially, to avoid a no confidence motion being passed in the House, allowing the govt to continue governing without being responsible to parliament.
- The Canadian GG’s delay in granting a prorogation request by the Canadian PM in 2008 suggests that prorogation is indeed at the GG’s discretion; though query whether this is only in circumstances where the PM is facing an imminent vote of no confidence in the House.
- Per Twomey, the GG would be entitled to reject advice to prorogue:
 - Where prorogation would prevent the House from sitting at least once within a 12 month period (as required by [s 6](#) of the [Constitution](#));
 - Where a vote of no confidence in the govt is pending and likely to succeed, and the govt is seeking to avoid facing parliament so it can continue governing without being responsible.
- But the GG would probably not be entitled to refuse a request to prorogue where it is being used to avoid an investigation into corruption or illegality.
- Arguably, the guiding principle should be whether prorogation would involve upholding, rather than undermining, responsible govt.