
A Responsible Executive

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Reserve Powers

Reserve powers are exercised to safeguard the system of responsible government, exercised contrary to advice from the PM and government. They can theoretically be exercised without advice but are subject to convention.

- Generally, and by convention, the GG must act on the advice of Ministers who are responsible to Parliament.
- Reserve powers of the GG may include:
 - **Power to appoint a PM (settled): Constitution s 62.**
 - Convention: Leader of the party the majority of seats in the lower house is to be appointed as PM.
 - This is because they have confidence: **Winterton**.
 - Convention: The incumbent PM has the right to remain in office and test his support on the floor of the house.
 - The GG has no right to dismiss a PM before the House has met and expressed a vote of no confidence.
 - Convention: There must be a government at all times.
 - **Power to dismiss PM/government: Constitution s 64.**
 - **PM loses confidence of the lower house (settled)**
 - Occurs when there is a vote/motion of no confidence.
 - The PM has two options:
 - (1) Resign
 - Advises the GG to commission a new majority to form government and to terminate the appointment of all the other ministers.
 - (2) Dissolve the lower house
 - Leads to an election.
 - Reserve power: If the incumbent PM does not take either option, the GG is entitled to dismiss the PM.
 - Convention: Dismissal should only occur if all attempts to induce the PM to do their duty has failed. It is only when the PM has clearly refused to adhere to convention that it becomes safe for the reserve power to be used to restore the constitutional order.
 - **Illegality (debatable)**
 - Occurs when the Government has the confidence of the lower house, but is persisting in illegal, unconstitutional conduct.
 - Reserve power: The reserve power of the GG to dismiss may operate in such circumstances to dismiss the government if (**Winterton**):
 - (1) The government is breaching a fundamental constitutional principle or provision.
 - (2) The GG has asked the government to desist but the government has refused.
 - (3) The contravention is not justiciable (i.e., if it is justiciable, it should go to the courts).
 - **Lang dismissal**
 - **Facts**: NSW Governor drew the Premier's attention to a circular that was published by the Government which directed public servants to contravene Commonwealth law.

- The Governor held that persistent directive to not comply with the Commonwealth Constitution is an act of illegality and dismissed the Premier.
 - **Principle:** Where a decision is justiciable, illegality cannot be the only basis for dismissal, and it can be tested in court: Lang Dismissal in the Republic Advisory Committee.
- **PM unable to obtain supply**
 - Occurs when:
 - **(1) The lower house refuses to pass a supply bill (settled):**
 - Equates to an expression of no confidence (see above).
 - **(2) The upper house refuses to pass a supply bill (debatable):**
 - Federal level: there is dispute over whether the GG can exercise reserve power to dismiss when supply is refused by the Senate.
 - Convention: Dismissal is only justified based on a loss of confidence in the Lower House.
 - The strong disagreement with Whitlam's dismissal demonstrates that there is no convention that justifies dismissal due to a lack of confidence in the Senate.
 - For this to be a reserve power, supply would likely have to first run out and the GG would have to advise the PM that they need to obtain supply: **Whitlam dismissal**.
 - State level: when the upper house refuses supply, the lower house can send the bill directly to the Governor for assent: **NSW Constitution s 5A.**
- **Power to refuse to prorogue Parliament (debatable): Constitution s 5.**
 - Convention: Done on the advice of Government.
 - Reserve power: Where the GG is to secure a fundamental constitutional principle: **Twomey**.
 - For example, occurs when there is a request to prorogue Parliament and:
 - There is a parliamentary inquiry into government corruption.
 - Following a shortened session, used to disqualify a member of Parliament who was not present for the session.
 - To avoid a motion of no confidence.
 - Continuing to govern for a long period without facing Parliament.
 - Note Constitution s 6 requirement to have a yearly session.

PM68

- **Facts:** M68 challenged the constitutionality of the Commonwealth government's detention in Nauru. The Commonwealth argued that M68 was detained under Nauru law, but M68 argued that they were detained under Australian law due to their degree of control.
- **Issue:** Do the limits on the Commonwealth's capacity to detain identified in *Lim* apply to the Commonwealth's participation in executive detention in Nauru?
 - **The Commonwealth only participated in the plaintiff's decision, as the detention was effected by Nauru and because the Commonwealth could not compel or authorise Nauru to make or enforce the laws necessary for that detention.**
 - ***Lim* only applies to detention actually implemented by officers of the Commonwealth.**
- **Issue:** Where the Constitutional limits on the Commonwealth's capacity to detain complied with?
 - **Unnecessary to answer**
 - **Bell and Gageler JJ**
 - Detention for the purpose of regional immigration processing meets the requirement of the limit.

Non-Statutory Executive Powers

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Nationhood Power

Is this an exercise of the executive power under s 61, being facilitated by s 51(xxxix)?

- Nationhood power is a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation: *AAP Case*.
- It is found in **Constitution s 61** as inherent or implied.
- Parliament has power to facilitate under **Constitution s 61** with legislation under **Constitution s 51(xxxix)**.
- Scope: Executive power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth: **Constitution s 61**.
- Test: Is it a power to (1) engage in enterprises and activities peculiarly adapted to the government of a nation and (2) which cannot otherwise be carried on for the benefit of the nation: *AAP Case*.
 - o Limits
 - A coercive law must be ‘reasonably and appropriately adapted to achieve the ends’ (i.e., must be proportionate): *Davis*.
 - **Application:** Creation of criminal offences is disproportionate to achieving celebration of the centenary. There was a prohibition on the use of words: *Davis*.
 - **Application:** The law in question did not create rights or impose duties, which is conducive to its recognition as an incidental power: *Pape*.
 - Must be truly and exclusively national and States cannot carry it out: *AAP Case*.
 - Cannot be competitive with State executive or legislative areas: *AAP Case*.
 - Convenience is insufficient: *AAP Case*.
 - **Application:** School chaplaincy programmes that States could do was insufficient: *Williams (No 1)*.
 - Cannot conflict with fundamental constitutional principles (separation of powers; federal character of the Commonwealth): *Pape*.
 - The action must be necessary such that other action could not be carried out for the benefit of the nation: Heydon J (dissent), *Pape*.
 - Cannot be used to detain in the absence of legislation and such legislation cannot be supported by Constitution s 51(xxxix) appealing to s 61: Gageler J, *PM68*.
 - o Established categories
 - Advancement of the nation: *Davis*.
 - **Symbolic aspects** of nationhood (flags, emblems, etc.): *Davis*.
 - **National celebrations** and commemorations including the means of carrying them out (e.g., establishing a body for this purpose): *Davis*.
 - o But not coercive regulation that is disproportionate to the celebration activities: *Davis*.
 - o **Application:** Celebration of the bicentenary of European arrival in Australia: *Davis*.
 - **Public holidays:** *Tasmanian Dam Case*.
 - Protection
 - **Responding to crisis** (*Pape*):
 - o War (obiter).
 - o Natural disaster (obiter).
 - o Financial crisis

- **Application:** Short-term fiscal measures to stimulate the national economy during the GFC; the national government is the government with the resources to address this: *Pape*.
- Note *Pape* dissent (Hayne and Kiefel JJ):
 - Creates expansive and unbounded executive power because words like ‘crisis’ and ‘emergency’ do not yield criteria of constitutional validity.
 - Alternatives were available, e.g., tax rebates.
- **Conservation of national heritage:** *Tasmanian Dam Case*.
 - Excludes extensive regulation of the use of those properties: *Tasmanian Dam Case*.

CONSTITUTIONAL CHANGE

STATE CONSTITUTIONAL AMENDMENT

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Constitutional amendment

- ***Taylor v Attorney-General of Queensland* (1917) 23 CLR 457**
 - **Facts:** Section 2 of the *Constitution Act 1867* (Qld) required both Houses of the Queensland Parliament to approve proposed legislation. In 1908, the *Parliamentary Bills Referendum Act 1908* (Qld) was enacted. The Act established an 'alternative' legislative procedure: if a Bill was twice passed by the Legislative Assembly in two successive sessions, and twice rejected by the Legislative Council in two successive sessions, it might then be submitted to a referendum and, if approved by a majority of voters, might then be presented for royal assent. Pursuant to this alternative procedure, A bill to amend the constitution of Queensland by abolishing the Legislative Council was put to referendum and produced a majority vote against the proposal. Despite the referendum result, the High Court gave judgment on the issues of principle involved.
 - **[Authority that state parliaments can amend their constitution] State parliaments have full power to legislate in relation to the constitution, powers and procedures of state parliaments**
 - Barton J
 - The Parliament of Queensland... has had from 1865, 'full power within its jurisdiction... to alter the constitution thereof...'
 - ... in general, the legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government, and that therefore attempted legislation merely at variance with the charter or constitution, cannot be held an effective law on the ground that the authority conferred by that instrument includes a power to alter or repeal any part of it.
 - **Application:** The *Parliamentary Bills Referendum Act* is a law 'respecting the powers' of the legislature in certain cases... Imperial sec 5 cover such a case.
 - **Application:** It is clear that [the *Parliamentary Bills Referendum Act*] was a law within the competence of the then existing legislature, and that after its passage the Legislature of Queensland still remained a representative legislature within the meaning of the *Colonial Laws Validity Act*, and therefore competent to make laws...
 - **Application:** It follows from [this] that a law to abolish the Legislative Council of Queensland would be such a law, for it would leave the Legislature of Queensland still a representative legislature within the meaning of the *Colonial Laws Validity Act*.
- ***McCawley v The King* [1920] AC 691**
 - **Facts:** The *Industrial Arbitration Act 1916* (Qld) created a Court of Industrial Arbitration and envisaged that its President could also be appointed to the Supreme Court of Queensland. Appointment was to be for a renewable seven-year term. However, after the commissioning of McCawley as the first President, it was argued that the relevant section was unconstitutional if it was capable of authorising an appointment of a Supreme Court judge for a seven-year term. Section 15 of the *Constitution Act 1867* (Qld) declared that the commissions of all present and future Supreme Court judges 'shall be, continue and remain in full force during their good behaviour'.

- [Authority that state parliaments can amend their constitution] The Queensland legislature has plenary legislative power to amend *Constitution Act 1867 (Qld)*, including by implied repeal
 - Lord Birkenhead (for their Lordships)
 - **Application:** Appointment to the Supreme Court for a limited 7-year term was authorised, even though the 1916 legislation was inconsistent with the provision for ‘life’ tenure for Supreme Court judges made in the *Constitution Act 1867 (Qld)*.

Manner and form requirements

- Manner and form requirements restrict the legislative powers of the parliament by requiring that laws on certain topics may only be enacted by a special and more difficult procedure.
- When an issue arises under s 5 of the *Colonial Laws Validity Act*, or nowadays under s 6 of the *Australia Act*, the first question to be asked is whether the law that is later in time is a law “respecting the Constitution, Powers, and Procedure of such Legislature.” If an only if it is such a law, it then becomes necessary to ask whether the earlier law has prescribed any ‘manner and form’ in which the later law must be passed.
- ***Attorney-General (NSW) v Trethowan (1931) 44 CLR 394***
 - **Facts:** Following the success of the Queensland Labour Party in abolishing the Queensland upper House, the Labour Party in NSW attempted to follow suit. The conservative government sought to forestall any future attempts by amending the *Constitution Act 1902 (NSW)* to insert s 7A that meant that the Legislative Council could not be abolished without a referendum and also, by virtue of sub-s (6), that s 7A itself could not be amended or repealed without a referendum. Thus, if s 7A ‘entrenched’ the constitutional status of the Legislative Council, sub-s (6) made this a ‘double entrenchment’.
 - **Double entrenchment is valid for state law, but the entrenching provision needs to be drafted to expressly apply to itself**
 - Dixon J
 - Section 5 of the *Colonial Laws Validity Act* both confers power and describes the conditions to be observed in its exercise. It authorises a representative legislature to make laws respecting its own constitution, its own powers and its own procedure.
 - The law proposed by the Bill to repeal sec 7A of the *Constitution Act 1902 to 1929* answers the description ‘a law respecting the powers of the legislature’ just as the provisions of sec 7A itself constitute a law with respect to those powers.
 - Unless it be void, sec 7A is undeniably a prior law of the NSW Legislature.
 - **Submission of a proposed bill to ‘the people’ is a valid manner and form requirement**
- ***South-Eastern Drainage Board (SA) v Savings Bank of SA (1939) 62 CLR 603***
 - **Facts:** The Real Property Act 1886 (SA), s 6, provided: — “No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act — nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply ‘notwithstanding the provisions of the Real Property Act 1886’”. The sections of the South-Eastern Drainage Acts (SA) creating first charges did not contain the expression, “notwithstanding the provisions of the Real Property Act 1886”.
 - **[Bad law] A mere requirement of content words was not a ‘manner and form’ requirement**
 - Latham CJ, Starke, Dixon and McTiernan JJ
 - The *Real Property Act* s 6 was not a law respecting the constitution, powers or procedure of the legislature.
 - The *Colonial Laws Validity Act* s 5 did not require the use of the expression, and, as it was passed only to aid in the interpretation of subsequent legislation, if the legislature manifested clearly its intention to make stator provisions apply to land under the *Real Property Act*, then the omission to use the form did not prevent the provisions so applying.

- ***West Lakes Ltd v South Australia* (1980) 25 SASR 389**
 - **Facts:** A company was contracted by the SA Government to develop a residential locality with the development agreement ratified and given force of law by State legislation. The ratifying legislation provided that any changes to the development terms required the consent of the company,
 - **Parliament cannot abdicate power**
 - King CJ
 - To enter into a contract containing a provision purporting to fetter members of parliament in their deliberations and to attempt to enforce any such contractual provision would be the clearest breach of the privileges of the parliament and of the members thereof.
 - **An entrenched provision needs to relate to the manner and form of the exercise of law-making power, not its substance**
 - King CJ
 - A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure does not prescribe a manner or form of law making.
 - Such a provision relates to the substance of the law-making power, not to the manner or form of its exercise.
 - **The entrenching clause also needs to be entrenched to avoid being repealed**
 - Zelling J
 - For an entrenchment statute to avoid being repealed by a subsequent Act of the same Parliament passed without any special manner and form, the entrenching clause must itself be entrenched.
- ***Attorney-General (WA) v Marquet* (2003) 217 CLR 545**
 - **Facts:** The *Electoral Distribution Act 1947* (WA), s 13, provided that a Bill to amend that Act could only be passed with an absolute majority of both Houses of Parliament. The Bills for two Acts (one for the repeal of the Electoral Distribution Act and the other for the amendment of electoral boundaries) were not passed by an absolute majority of the members of the Legislative Council. The respondent, as Clerk of the Parliaments of Western Australia, sought declarations from the Supreme Court of Western Australia as to whether it was lawful for him to present the Bills to the Governor for assent.
 - **Electoral distribution provisions go to the representative nature of Parliament**
 - Gleeson CJ, Gummow, Hayne and Heydon JJ
 - The use of the expression ‘constitution, powers or procedure’ in the *Australia Act* is evidently intended to build on the provisions of the *Colonial Laws Validity Act*.
 - The ‘constitution’ of a state parliament includes its own ‘nature and composition’: *Attorney-General (NSW) v Trethowan*.
 - The repeal bill and the amendment bill were respectively to do away with, and then provide an alternative structure for, the constitution of the two houses of the WA Parliament.
 - **‘Constitution of parliament’ includes:**
 - Bicameral or unicameral (e.g., *Trethowan’s Case*).
 - Whether the people participate in exercise of leg power by referendum (e.g., powers with respect to money bills).
 - Relationship between the houses.
 - Provisions which give the parliament a representative character (e.g., electoral distribution).
 - **‘Not necessary to decide’:**
 - Qualification for membership of parliament.
 - Qualification to vote.
 - Compulsion to vote.
 - Length of parliamentary terms.
 - **‘Powers and procedures of Parliament’ includes:**

- Alternative procedures for legislating (e.g., deadlock procedures in *Trethowan's Case*).
- Standing orders and rules which have the force of law for the parliament's own conduct.
- **'Powers and procedures of Parliament' excludes:**
 - Privileges and immunities of individual MPs (e.g., freedom of speech and debate in parliament).
- **Absolute majorities in each house is a valid manner and form requirement**
- **State entrenching provisions need to be on the basis of s 6 of the *Australia Acts***
 - Gleeson CJ, Gummow, Hayne and Heydon JJ
 - The express provisions of s 6 can leave no room for the operation of some other principle, at the very least in the field in which s 6 operates, if such a principle can be derived from considerations in *Bribery Commissioner v Ranasinghe*.
- ***Bribery Commissioner v Ranasinghe* [1965] AC 172**
 - **Facts:** The appellant Commissioner was a special prosecutor appointed under the *Bribery Act 1954* (Ceylon). His office had been created by the *Bribery Amendment Act 1958* (Ceylon), which had also created a new Bribery Tribunal. Ranasinghe argued that members of the Bribery Tribunal were 'judicial offices' whose appointment had not involved the Judicial Services Commission and hence did not comply with s 55 of the Constitution. The question was whether non-compliance with the manner and form provision of s 29(4) of the constitution was fatal to validity.
 - **A legislature has no power to ignore the conditions of law-making which are imposed by the instrument which itself regulates its power to make law**
 - Principle: The process of making law is itself a process necessarily regulated by law, and accordingly... nay purported exercise of law-making power will be valid only if it complies with the law-making procedures which the law for the time being requires.

***Constitution Act 1902* (NSW) ss 7A and 7B**

- Impose a referendum requirement for laws to amend provisions dealing with
 - Independence of judges (part 9)
 - Points left open by Marquet:
 - Qualification for MPs.
 - Qualification to vote.
 - Compulsory voting.
 - Length of parliamentary terms.

Scaffold

- Three elements to manner and form questions
 - Entrenched provisions
 - Entrenching provisions
 - Provide that certain sections cannot be amended or repealed, or laws on certain matters cannot be enacted without following a particular manner or a particular form.
 - Amending law
- (a) Does the amending law seek to amend or repeal an entrenched provision contrary to the requirements of the entrenching provision?
- (b) Is the entrenching provision doubly entrenched?
 - That is, can the entrenching provision itself be amended by ordinary legislation, or does it protect itself by requiring that the manner and form requirement it imposes also applies to amendments or repeals to itself.
 - If it is not doubly entrenched, then the amending law will also have the effect of impliedly amending the entrenching provision so that it does not need to comply with manner and form requirements.
- (c) Is the entrenching provision really a manner and form provision or is it really an abdication of legislative power?

- Any provision that says that the houses of parliament cannot enact a law without getting the permission of some external body other than the people in a referendum is a purported abdication of legislative power.
- The parliament has no capacity to abdicate its power, so such a provision would be ineffective.
- (d) Is the amending law one respecting the ‘constitution, powers or procedure’ of the parliament?
 - That is, does it concern how the parliament or its houses are comprised?
 - If it relates only to the judiciary, or local government or some other subject, then the effectiveness of the manner and form provision will not be supported by the *Australia Acts*.
 - Query whether there is any other source of entrenchment, e.g., s 106 of the Commonwealth *Constitution* or the *Ranasinghe* principle.
- (e) Consider the consequences of a breach of the manner and form provision.
 - Under the *Colonial Laws Validity Act*, there was no power to enact the entire amending law.
 - Under the *Australia Acts*, the entire amending law is of ‘no force or effect’.
- Consider also, if relevant, the issue of justiciability.
 - Should the court intervene before the Governor gives assent to the amending bill, or wait for it to be challenged once it has become a law?
 - In general, courts prefer to deal with the issue of validity of a law after it is enacted: *Cormack v Cope*.
 - However, exceptions are sometimes made if the law expressly prohibits a bill being presented to the Governor unless it complies with a manner and form procedure (*Trethowan*) and where there would be no remedy or it would not be in the public interest to wait until the bill received assent (*Marquet*).

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