

- *the power to call for documents should at least on the base of determination that the power is reasonably necessary (namely executive accountability derived from responsible government), be restricted to documents which do not, directly/indirectly, reveal deliberations of Cabinet. It may be that there are other Cabinet documents, access to which would contradict the collective responsibility of minister – does not elaborate*
- The Legislative Council has power to require the production of State papers for which claims of immunity are made unless this would conflict with the doctrine of ministerial responsibility, i.e. Council cannot order the production of documents that disclose internal deliberations of Cabinet
- The test is whether disclosure is inconsistent with the principles of responsible government — not a balancing exercise between conflicting public interests.
- Rationale for making cabinet documents an exception is that is in accordance with responsible government as cabinet confidentiality of internal deliberations being kept from government is derived from responsible government
- Underlying understanding is that for cabinet will take collective responsibility = differences of opinion expressed within Cabinet not disclosed, to better ensure Cabinet acts as a collective authority, issuing a single decision.
- *'The obligation to accept collective responsibility for decision...and acts of government, involves, as a necessity the non-disclosure of different or dissenting views held by members of the govt prior to the making of decisions' AG v Hamilton (Ir) cited in Egan v Chadwick (1999)*

Current Issues: Egan v Chadwick

- Dissenting view of Priestley JA is that there is no denial of collective responsibility, if one differs from the majority that should not give rise to a legal right to absolute secrecy – it can be dealt with like legal privilege is by the courts (same deal of trust to not publish beyond itself if inimical to public interest)
- The legislature is entrusted with the carrying out of the fundamentally important task of reviewing, changing and adding to the statute law of the State. To carry out that task it must have the power to call for any information relevant to carrying out its task e.g. executive documents – doesn't necessarily mean anything detrimental to public interest will occur as house can take steps to prevent info being disclosed if thought best in public interest
- Ongoing debate on scope and existence of limitation on power to order cabinet documents of NSW govt position vs NSW parliament

2018 controversies re 'business case' for Sydney Stadiums and Powerhouse Museum

- Legislative council was seeking business cases about the controversial decisions of the refurbishment of Sydney stadiums and relocation of Powerhouse Museum
- **NSW parliament** argued that at its broadest, cabinet documents exception should apply to documents disclosing the actual deliberation of parliament NOT documents prepared for deliberation
- **NSW government** drew on statute of Government Information (Public Access) Act 2009 tries to frame it as parliament should be in same position as a general member of public seeking disclosure – not sure about appropriateness of this equation – this legislation has great breadth
- The motion asserted the power of the House to require the production of Cabinet documents such as those produced on this occasion, and that the test to be applied in determining whether

a document falls within this category is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick*

Just appreciate breadth e.g. 1b goes way beyond just deliberation and c for prepared for purpose of

7. NON-STATUTORY EXECUTIVE POWER

NON STATUTORY EXECUTIVE POWER

Executive Power

= most capacious of the three branches of government (legislative, executive and judicial)

- E.g. executive power includes the delivery of government services, the formulation and implementation of policy – across competition law, native title, aged care, immigration etc
- Is largest, most powerful branch of government, more subject to scrutinisation and accountability of its exercise

Statutory vs non-statutory

- Statutory powers: Powers identified by reference to a specific enactment prescribing or authorizing action by the executive – actual provision prescribing or regulating powers
- '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 – no authority in statute
- Atypical: Most of the powers exercised by executive branch officials are conferred by legislation. Our focus in these classes is on atypical, but important, non-statutory sources of executive powers.

Two dimensions of commonwealth executive power

- Breadth
- = the subject matters with respect to which the Executive Government of the Commonwealth is empowered to act having regards to the constraints of the Federal system (goes to the relationship between the Commonwealth and the States)
- *How far how wide it extends when related to power of states and commonwealth and how they limit each other*
- Depth
- = the actions the executive is empowered to take in relation to those subject matters without statutory authorisation (goes to the relationship between the Commonwealth and the other branches of government, particularly the Commonwealth Parliament).
- *What can commonwealth executive actually do in areas without executive authority*

Categories of Non-Statutory Executive Power

This lesson looks at second and third

1. Executive power pursuant to statute;

2. Prerogative (non-statutory) powers;

= those non-statutory executive powers that are unique to the Executive and not shared with natural persons (not shared with natural persons like you and I)

- E.g. prerogative powers about international relations like declare war or enter treaties
- This does not mean always exercise by executive but historically, powers executive can authorize without statute (then can later be regulated by statute but historically it has not been)

3. Non-statutory executive capacities.

- (for this tripartite categorisation see Brennan J in *Barton v Cth*, adopted by Gageler J in *Plaintiff M68*)
- a power that the Executive shares with natural persons
- E.g. power to enter contract and to spend
- Capacities are non-prerogative acts of executive which they can legally do without parliament

Another distinction between prerogatives and capacities

- Prerogatives capable of interfering with the rights of others (though usually non-coercive);
- Capacities is something executive can do and shares
- Capacities a 'bare capacity of permission', in the exercise of which govt subject to same substantive law as anyone else exercising those capacities.

We're also looking at the concept of a 'nationhood power' – an Executive power 'to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation' (Mason J in the *AAP* case).

RULE: Non-statutory executive powers are subject to law

- the absence of any dispensing power on the part of the executive; i.e. the executive does not have any power to dispense with the law simply by virtue of being 'the government'.
- **A v Hayden (HCA) (1984)**
- 'foolish exercise' (James Bond like) in the Sheraton Hotel, carried out under the purported authority of the Commonwealth, they smashed hotel doors, paraded weapons through lobby and police were not impressed but plaintiffs resisted disclosure of authorities saying they acted under direction of commonwealth government
- **Ratio:** No obsolete rule, executive from time to time does advance a variant of the claim that its not bound by ordinary law as its executive
- Without express statutory authority, the claim of defense to law being applied to you because you're acting in direction of executive government

- Commonwealth executive is subject to the same laws, no dispensation, whereby laws did not apply to it simply as it was not the government
- neither crown or executive has any common law right or power to dispense with observance of law or to authorize illegality – to this fact – Gibbs – this foolish exercise carried under commonwealth authority would in itself provide no reason in law why commonwealth should not disclose identities to plaintiff
- The fact that exercise was carried with authority does not give any way of exempting them from providing names to authorities

Extent of executive power as the product of history

1. Executive incapacities

- These are things that the executive either cannot do, or can only do with statutory authority. They include:
 - Power to dispense with the operation of the law;
 - powers of detention, and powers to deport, extradite and detain without statutory authority (though note Tampa case, discussed in 7.5).
 - The power to create an offense; or
 - The power to impose a tax has to be created by statute
- Note also that the government cannot appropriate money from consolidated revenue without statutory authorisation (parliament 'controls the purse strings').

2. Prerogative powers

- Those powers once possessed by the monarch.
 - Residual in nature; the residual of power left to the crown
 - New prerogatives cannot be created (need historical basis that has never been superseded by statute)
 - '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 United Kingdom without any statutory authority are now well settled and incapable of extension' Lord Diplock, *British Broadcasting Corp [1965]*
 - Any prerogative can be extinguished, regulated or limited by statute
 - '...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.' *Miller [2017] UKSC*
 - Reference Katie Holdings and Attorney Generals and hotel
- (a) A statutory regime may regulate a prerogative;
- So it may determine how prerogative is exercised, it may be source of power but regulated by statute
- (b) Alternatively, a statutory regime may wholly supplant or extinguish a prerogative, so that now the power depends wholly on statute

- What used to be governed by prerogative is now all by statute

EXECUTIVE POWER - CATEGORY 1 - PREROGATIVE POWERS

Allocation of prerogative powers

- Issue in the Australian context – question on the allocation of prerogative powers inherited from United Kingdom as between the Commonwealth and the States
- Allocative principle is that majority of proprietary prerogative were given to the states
 - where crown used to have ownership of thing by virtue of being the crown – like here the metals of gold and silver were crown property

Cadia Holdings v NSW (2010) HCA

- 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...
- British crown historically had proprietary prerogative over gold and silver
- Question of what happens if royal gold is mixed with other metals
- Two steps:
 1. On review of the common law was the prerogative ever recognised in common law? (does it exist?);
 2. What has been its subsequent fate? – abrogated or modified by statute? Note also 'desuetude'.
 - Here it was yes, there was recognition in 1568 of such a prerogative, and in 1688 there was a statute saying no mine of copper shall be royal mine although gold may be extracted from the same so notwithstanding that there was gold in mine, statute said no longer royal mine
 - Statute supersedes/thins down the prerogative
 - Desuetude of where prerogative has never been used or called on for a long time may cease to exist for this reason

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

- If legislation covers an area or aims to achieve certain objectives that used to be covered by prerogative power then legislation will supersede prerogative
- If executive doesn't like and wants to avoid statutory provisions, it cannot just circumvent then by saying it will go back to using the prerogative
- **Facts**:
 - Under WWI, defense force requisitioned use of hotel for servicemen, regulations provided that it had to pay compensation to hotel
 - Government sought to 'fall back' on prerogative powers, so not bound by conditions contained in the regulations...
- **Ratio**:

- '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'.
 - *If you have given power that used to be regulated by prerogative and now its covered by statute you have to comply with statute, you cannot fall back on prerogative when it suits – otherwise no point in legislature*

NATIONHOOD POWERS

'nationhood power'

= Shorthand for an Executive power 'to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation'

- This judicial formulation, initially provided by Mason J in the AAP Case (1975), was adopted and applied in Davis (1988) and Pape (2009).

Recourse of nationhood

- Recourse to the 'nationhood' power primarily raises issues going to the 'breadth' of Commonwealth power – i.e. its federal dimension, the extent of Commonwealth power in relation to the states.
- In discussion of the executive nationhood power, regard also has to be had to the 'incidental' head of legislative power...

s 51(xxxix)

The Parliament shall, subject to this Constitution, have power to make laws...with respect to: ...(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

- *Where branches of government including commonwealth departments has the power to do something under constitution then s 51(39) supplies legislative power that can support this*
- *If there is a case where there is a non-statutory executive power, legislation can be called out in aid of that no-statutory executive power under this incidental power of s 51(39)*
- *Legislative power in context of non-statutory power is that to use this incidental power in relation to executive, you have to first establish that there is first a non-statutory executive power – incidental arise as a result, prerogative power of power to defend*

Therefore, Section 51(xxxix) enables the Cth parliament to legislate to support non statutory executive power. Legislation can be used to do things that can't be done through executive power alone, e.g. create offences; confer immunity from laws or authorize trespass. To legislate in reliance on s 51(xxxix) – you have to first establish that there is non-statutory executive power in respect of the subject matter.