

Final Exam

Assessable Topics:

- Topic 6: Executive in parliament
 - executive and responsible government
 - delegated legislative power
- *Topic 7: non-statutory Executive Power
 - non-statutory executive power in Constitutional context
 - Prerogative powers and capacities
 - Statutory authorisation for non-prerogative capacities
 - nationhood and breadth of Cth non-statutory executive power
 - Detention in border control
- Topic 8: National judiciary and separated judicial power
 - ChIII of Constitution
 - 'Judicial power'
 - Institutional Integrity
- Topic 9: Punishment as exclusively judicial function
- Topic 10: Judicial power to interpret legislation
 - modern approach to statutory interpretation
 - constitutional context and statutory interpretation
 - principle of legality
 - selected presumptions
 - limits of judicial power in interpreting legislations
- Topic 11: Ngara (2) – Constitutional Interpretation
 - Mabo (No 2) and its limitations
 - Constitutional Consequences of Mabo (No 2)
 - Australian Public Law – distinct and complementary institutions

Exam Format

- BYOD
- 30 mins reading time (no typing) + 150 mins (2 hr 30 m) writing time
- Total weight: 60%
 - Q1: Essay on Topic 11 (10%)
 - Q2: PBQ (25%)
 - Q3: PBQ (25%)

Topic 6: Executive in Parliament

6.1 Responsible Gov

- constitution ss 2, 61, 62, 63, 64
- winterton

6.1 Executive and Responsible Government

From Readings

Constitution

section	Form	Substance
s1	Legislative power vested in Federal parliament, consisting the Queen, Senate and house of Rep	
s2		
s61	Executive Power Exec power of Cth vested in Queen and exercisable by GG as Queen's representative, and extends to execution and maintenance of this Constitution, and of the laws of Cth	Except for residual powers, Crown can only act on advice of ministers who are responsible to the legislature, being members of legislature and whose confidence they must continue to maintain
s62	Federal Executive Council There shall be Fed. executive council to advise GG in Cth and members of council shall be chosen and summoned by GG and shall hold office during his pleasure	In reality, Fed. Executive Council is a legal conduit for making laws, but the full body does not actually participate in policy decisions (rather it's the council that does that)
s63	Provisions referring to GG GG in council shall be construed as referring to GG acting with advice of Federal Executive Council	
s64	Ministers of State GG may appoint officers to administer such departments of Cth as GG in council may establish Such officers shall hold office during the pleasure of GG. They shall be members of the Fed. Exec. Council, and shall be the Queen's Ministers of State for the Cth. <u>Ministers to sit in Parliament</u> 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 House of Rep	Imposes the constitutional requirement for Ministers to be MPs, and so be held accountable to the parliament.

^ss 62-65 prescribes basic structure of Executive Branch

Gleeson CJ – *Re Patterson; Ex Parte Taylor* (2001, HCA)

- analysing the Constitution ss 61-65
 - Constitution is interpreted ***consistent with the basic requirements of responsible government***
 - GG was to act upon advice of Federal executive council, chosen by GG and holding office during his or her pleasure.
 - GG in council was empowered to establish departments of state, and to appoint, from among the members of the Federal Executive Council, officers to administer such departments
 - They were to be Queen's ministers of state for Cth. A minister was to be either senator or member of House of Representatives → thus answerable to Parliament for matters re: administration of gov
- Explaining the level of abstractness in Constitution
 - framers deliberately framed Constitution in high level without going into greater specificity to avoid imposing unnecessary and inappropriate degree of inflexibility upon constitutional arrangements that need to be capable of development and adaptability
 - These actual practices (e.g. administration of state) are to be refined over time.

'Responsible government' in Constitution

- considered as a 'central feature of the Australian constitutional system' (*R v Kirby; Ex parte Boilermakers' Society of Australia*, 1956)
- 'doctrine of responsible government, for instance, is invisibly but none the less inextricably and powerfully interwoven with the texture of the written word, and any interpretation of the document which disregarded the implication for that doctrine would be false and misleading' (*Cth v Colonial Combing*, 1922)

System of Responsible Government

1. While executive power is vested in Queen exercisable by GG, he can only exercise power (except for reserve powers) on advice of its Ministers;
2. Ministers must be members of the parliament, and is answerable and accountable to the Parliament (**s64 Constitution**);
3. Members of Parliament are elected by the public, and is thus accountable to the public.

Classical theory of responsible government – executive should be 'chosen by, is answerable to, and may be removed by a popularly elected Parliament'

Line of accountability from the people to the executive

By convention, responsible gov encompasses twin notion:

- collective ministerial responsibility
 - requires that ministers support decisions of cabinet and uphold collective gov position
 - ministers must not speak against gov policy in public
 - ministers must not reveal deliberations of cabinet (secrecy)
 - Also requires the whole government (all ministers) to resign if a vote of no confidence if a vote of no confidence is passed against it in Parliament
- individual ministerial responsibility

- Ministers are accountable to the Parliament for their policies, their own performance and performance of people or entities within their portfolios
- Ministers are expected to explain their actions and policies to parliament, inform parliament of developments in portfolio, take action to correct problems, and if required, resign their ministerial position.

In practice, whilst parliament supposedly scrutinises executive action, the party politics nowadays and the fact that the governing executive must have majority confidence in the lower house → lower house is often being controlled by the executive, not the other way around.

→ Senate becomes more active role in scrutiny of gov, acting as a house of review.

BTW: for NSW – legislative assembly = lower house; legislative council = upper house

Reserve Powers – power to dismiss PM

Introduction

- note: such power has not been exercised by other jurisdictions (e.g. UK and Canada) since 1834 and 1903 respectively
- Clearly acceptable situations
 - PM defeated in lower house in no-confidence vote
 - where gov is persisting in illegal or unconstitutional conduct
- Considerable debate: whether PM can be dismissed for inability to secure supply bill passage in upper house whilst maintaining confidence in lower house?
- **No-confidence Motion**
 - convention: where lower house passes no-confidence vote, PM must either i) resign (thus terminating appointment of all other ministers), or ii) advise the GG to dissolve the Parliament
 - (although PM is probably entitled to reasonable time to attempt to reverse vote)
 - Reserve power: if the defeated PM does not take either courses, GG has reserve power to dismiss PM
 - ^however, note that even this power is not exercised recklessly and only has last resort.
- **Illegality**
 - No clear convention, but seems to be accepted by commentators?
 - Professor Winterton – power of dismissal can only be exercised where:
 - a) clear that the gov has persisted in breaching a fundamental constitutional provision;
 - b) gov has ignored calls from GG to desist from this conduct; and
 - c) contravention is not ‘justiciable’ – it cannot be brought before the courts
 - **cf: Dismissal of NSW premier Lang**
 - what:
 - Lang’s NSW gov sought to cease interest payments on State’s debts
 - Federal gov enacted law in attempt to seize the state’s revenue to discharge that interest liability
 - Lang’s government issued circular to forward all moneys to the Treasury where it would be inaccessible by the Federal Gov
 - However, this is in contravention to Federal law that state money is to be dealt with in manner directed by Federal Treasury

- Exercise of reserve power
 - Governor Game wrote to Lang warning to dismiss him if he did not retract the circular
 - Lang refuse to retract circular
 - Game dismissed Liang on grounds of illegality and appointed leader of opposition to advise on dissolution of parliament
- Critique
 - most opinion is that Governor's decision was improper because while Lang's government was acting illegally, the question of illegality could have been dealt with by the courts → it is a justiciable problem
- **PM cannot obtain supply (In Lower House)**
 - A refusal by lower house to pass bill would be regarded as expression of no confidence in Gov → generally leads to resignation / dismissal
- **PM cannot obtain supply (in Upper House) but has confidence of Lower House**
 - Difficult issues arise if supply bill was refused in the Upper House!
 - **cf: 1975 Dismissal of Whitlam's Government**
 - What:
 - Whitlam's labour party has majority in lower house, but minority in upper house. However, in a deadlock, it was unable to secure supply in the Upper House.
 - GG John Kerr, without prior notice or warnings, dismissed Whitlam and installed Malcom Fraser's government to advise on dissolution and re-election of parliament
 - Controversies – arguing justified dismissal
 - arguing that it was necessary to dissolve deadlock which was threatening economic fabric of nation, and GG acted properly
 - Controversies – arguing unjustified dismissal (*probably stronger*)
 - Conventions is that PM only requires majority confidence in Lower house, not upper house.
 - *Financial disaster not a sound reason* – while financial disaster may result from failure to resolve deadlock, it was for the Whitlam government to explain it to parliament and its electors, not for GG to make such judgment.
 - *No justified dismissal until point of illegality* – if Whitlam government was unable to secure supply, and attempted to stay in office after supply ran out, it would necessarily have to make payments out of Consolidated Revenue Fund without authority of parliamentary appropriation → this would be illegal in breach of fundamental constitutional principle, which would be justifiable ground for dismissal (but until then, no)
 - *GG should have warned Whitlam government of intention to dismiss* – if Whitlam gov was warned, its action could have been different – e.g. it would maybe put on stronger political means in resolving deadlock or would have advised the dissolution of parliament.