

PUBLIC LAW FINAL EXAM NOTES

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Executive Power and Royal Prerogative

Sources of Executive Power

1. Constitution
 - a. Extends to the 'execution and maintenance of the constitution and the laws of the commonwealth (s 61 AC)
 - b. eg power to dissolve parliament, appoint ministers, judges, issues election writs and recommend appropriations
2. statute
 - a. conferral of power to make regulations and ministerial powers to grant visas
3. royal prerogative
 - a. power to make treaties, declare war, grant pardons
 - b. Dicey 'residue of discretionary or arbitrary authority'
 - c. Now seemingly fall under s 61
4. Capacities of a polity
 - a. eg power to enter into contracts, own property, employ people and spend money
5. inherent powers (nationhood power)

Royal Prerogative (Evatt's categorisation)

1. Executive prerogatives
 - a. e.g. international powers, such as the power to enter into treaties, declare war and make peace, command the armed forces and appoint diplomatic representatives. It includes the power to coin money, incorporate bodies, pardon offenders, confer honours and hold inquiries, such as royal commissions. •
2. Immunities and preferences
 - a. e.g. the priority of Crown debts over other creditors, immunity from suit. •
3. Property rights
 - a. e.g. the ownership of royal metals (gold and silver), royal fish, royal swans, treasure trove, ownership of the foreshore, the sea bed and subsoil. Includes radical title to land – see Mabo.

Statutes may abrogate or regulate the prerogative. Whether this has happened will be determined by relying on express works, necessary implication, or whether the statute is made for the public good in advancing justice and preventing injury (*A-G v De Keyser's Royal Hotel*).

In *Cadia Holdings*, the court held that it remains an orthodox approach to statutory interpretation that the prerogative **can only be displaced by express words or necessary implication**.

Bancourt

- Prerogative powers are not immune from judicial review. When reviewing the legality of an exercise of a prerogative, the court will ask:
 - Does the power exist?
 - Has it been abrogated, regulated or modified by legislation?
 - Was it exercised according to its terms?
- Thus, prerogatives will be reviewable on the 'ordinary principles of legality, rationality, procedural impropriety in the same way as any other executive action' (per Hoffman L)
- Prerogatives erode and they cannot be enlarged

Ruddock v Vardalis (Tampa Case)

- French J held the question is: *does the statute operate in a manner that is inconsistent with the existence of the prerogative?*
- What is the intention?

CPCF v Minister of Immigration

- Argued power to exclude aliens is a right of the state, relying on Lord Atkinson in *Cain*: ““One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien”.
- In this case there was statutory authority so did not need to consider whether the prerogative still existed

Plaintiff M68/2015

- Retrospective amendment may turn non-statutory power into statutory
- Two types of non-statutory executive power
- Prerogatives which are capable of interfering with legal rights of others
- Capacities which involve the ability to act in the same way as others, in general accordance with the law

Miller

- “[The residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.”
- **The fact that the exercise of prerogative powers cannot change the domestic law** does not mean that such an exercise is always devoid of domestic legal consequences. There are two categories of case where exercise of the prerogative can have such consequences.
 - The first is where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others.
 - The second category comprises cases where the effect of an exercise of prerogative powers is to change the facts to which the law applies. Thus, the exercise of the prerogative to declare war will have significant legal consequences: actions which were previously lawful may become treasonable (as in *Joyce v Director of Public Prosecutions* [1946] AC 347)

Nationhood Power

s 61 Executive Power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and **extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.**

s 51(xxxix) Legislative Power of the Parliament

'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.'

Implied power – from very existence of the commonwealth (*Sharkey*) and to protect against internal threat (*Communist Party* Dixon J minority view)

AAP Case

Mason J: Commonwealth executive should have '**capacity to engage in enterprises and activities peculiarly adapted to the government of a nation**' if:

1. Truly national in nature
2. Cannot otherwise be carried on for the benefit of the nation
 - a. Not enough that programmes can be conveniently formulated and administered by the national government

NB: does not affect or destroy constitutional distribution of powers (*AAP Case* Barwick CJ, Gibbs and Mason JJ)

Tasmanian Dam Case

Deane J expanded Mason J test:

1. Commonwealth could now exercise nationhood powers **within State areas of jurisdiction** as long as:
 - a. Did not involve competition with States
 - b. Confined to 'truly national endeavours'

Davis v Commonwealth

Mason CJ, Deane and Gaudron JJ:

1. Laws cannot be disproportionate.
2. Must be '**reasonably and appropriately**' adapted to achieve the constitutional power.
 - a. I.e. in this case they limited freedom of speech in a manner not necessary to achieve valid ends

Pape v Commissioner of Taxation

French CJ: executive power extends to

1. 'short term fiscal measures to meet adverse economic conditions affecting the nation as a whole'
 - a. cannot be invoked to set aside distribution of powers but this short-term measure to meet national economic problem did not do that

Gummow, Crennan and Bell JJ:

2. '**national emergency**' and '**fiscal means of promptly responding to that emergency**'
 - a. an example of program by exec peculiarly adapted to government which couldn't otherwise be carried out for benefit

Hayne and Kiefel JJ dissented:

3. Concerned about the conflation of ends and means
 - a. I.e. Not enough there was an emergency and only Commonwealth had the financial resources to deal with it and therefore they have the power to deal with it.

In ss 81 and 83 the power to appropriate money does not mean the power to spend, a head of power is necessary to authorise spending

Williams v Commonwealth No 1

1. Actual legislation is needed to support expenditure, unless it was made pursuant to:
 - a. Prerogative power
 - b. Ordinary functions of government, such as the admin of departments under s 64 Constitution
 - c. Nationhood power
2. Commonwealth can't spend money where:
 - a. States can do it
 - b. Cannot be expanded just because convenient
 - c. Not national endeavour – no emergency
 - d. Not supported by legislation
3. Confirmed tests in *AAP*, *Tasmanian Dam*, *Pape*

Williams v Commonwealth No 2

1. even with statutory authority to spend the chaplaincy program still didn't fall within a relevant head of power