

4

The Executive

Introduction

4.1 Charles de Montesquieu described executive power as the power by which 'the prince ... makes peace or war, sends or receives embassies, establishes security, and prevents invasions'.¹ Hence, executive power has been referred to as 'the power of the sword'.² Harrison Moore put it more prosaically when he said that 'the typical executive officers had been the sheriff and the constable',³ and described executive power in the following terms:⁴

It is for the King to put the law into operation and to admonish his subjects that they keep it; to execute the law by bringing offenders to justice, by maintaining and supporting Courts of justice, and by carrying out the judgments of those Courts ...

But there is much more in government than mere execution of the law ... The State is a going concern; it has affairs which must be managed with prudence and judgment and which are not necessarily related to law in any sense other than that in which all conduct may be bounded by legal restraints.

4.2 Those descriptions of the concept of executive power highlight some of its important aspects. First, it is fundamentally concerned with action — carrying things out, putting things into effect, getting things done. Second, one of its central concerns is protecting the state, wartime being the most obvious case where protection is required. Third, its association with princes and kings is of more than historical interest — because executive power in Australia is still formally vested in the Queen and because

-
1. C Montesquieu, *The Spirit of the Laws*, ed and trans A M Cohler, B C Miller and H S Stone, Cambridge University Press, Cambridge, 1989, bk 11, ch 6, pp 156–7.
 2. See, for example, L H Tribe, *American Constitutional Law*, 3rd ed, University Textbook Series, Foundation Press, New York, 2000, vol 1, pp 4–12, 730.
 3. W H Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, C F Maxwell, Melbourne, 1910, p 293.
 4. *ibid.*

the scope of executive power in Australia depends in part on the powers historically exercised by the monarch (known as the 'prerogative powers') and the powers historically denied to the monarch.

4.3 Additionally, in Australia, the idea of the Executive as 'the person or body who acts on behalf of the whole'⁵ must be reconciled with the federal context: the Commonwealth is a polity of limited powers, and the whole is made up of separate polities.

4.4 This chapter addresses the following questions.

- (a) Who exercises executive power in Australia and what is the relationship between those who make up the executive government?
- (b) What is the relationship between the Executive and the Parliament and, more briefly, what is the relationship between the Executive and the courts?
- (c) What is the scope of the Commonwealth's executive power?

4.5 Before turning to these questions, we should introduce some key concepts.

4.6 The executive government of each of the States and of the Commonwealth reflects a tension between legal technicality and political reality. Many legal powers and discretions are formally vested in the Queen or in the Governor-General and governors; yet, generally speaking, the latter do not act except on the advice of ministers. This is one aspect of 'responsible government', the system which evolved during the late 17th and the 18th centuries in England and Britain to link the executive government with the Parliament, allowing the dominant political forces in the Parliament to control the agenda and the personnel of the government.⁶ This system was adopted by the Australian colonies when they achieved substantial self-government from the middle of the 19th century,⁷ and was written into the Commonwealth Constitution by the constitutional conventions of the 1890s.⁸

4.7 The adoption, in the Commonwealth Constitution, of the system of responsible government was complicated by the simultaneous adoption of federalism as a major organising principle for the distribution of political power. As Hugh Emy and Owen Hughes observed, the drafters of the Constitution 'created ... a hybrid, with two potentially incompatible features: a Cabinet responsible to, and dependent upon majority support in the lower House; and an upper House with the power to refuse supply and force the Government to the polls'.⁹ Although some of the drafters of the Constitution recognised this incompatibility ('either responsible government will kill

5. W Anson, *The Law and Custom of the Constitution: Part II — The Crown*, Clarendon Press, Oxford, 1892, p 1.

6. S de Smith and R Brazier, *Constitutional and Administrative Law*, 8th ed, Penguin, London, 1998, pp 166–8.

7. F W Eggleston, 'The Establishment of Responsible Government', in *The Cambridge History of the British Empire*, vol VII, pt I, Cambridge University Press, Cambridge, 1933, pp 272–95.

8. J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, pp 137, 153; G Winterton, *Parliament, the Executive and the Governor-General*, Melbourne University Press, Melbourne, 1983, p 3.

9. HV Emy and O E Hughes, *Australian Politics: Realities in Conflict*, Macmillan, Melbourne, 1988, p 294.

federation', said a Western Australian delegate to the first Convention in 1891, 'or federation ... will kill responsible government'¹⁰), the conflict did not become acute until late 1975, when the Senate deferred consideration of the government's supply legislation until the government agreed to call a general election for the House of Representatives.¹¹

4.8 In 1988, the Constitutional Commission described the system of responsible government as one in which ministers, who are appointed by the Crown to administer departments in the government, 'are individually and collectively answerable to the Parliament and can retain office only while they have the "confidence" of the lower House'¹² — the Commonwealth House of Representatives, the State Legislative Assembly¹³ or House of Assembly,¹⁴ and the Territory Legislative Assembly.¹⁵ This control keeps the government in touch with the elected Parliament and, to adapt the language of the High Court in *Brown v West*,¹⁶ assures to the people the effective control of the executive government.

4.9 Two central ideas or propositions support the system of responsible government.

- (a) The first is the idea that the government is accountable (through its leading members, the ministers responsible for individual portfolios or departments) to the Parliament — or to one of the Houses of Parliament.¹⁷ That idea is largely expressed through the control which Parliament exerts over the government's access to finance: 'The principles of responsible government impose on the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the administration has done.'¹⁸
- (b) The second idea, mentioned at 4.6 above, is that the ministers control all the functions of government, including those formally vested in the Crown.

4.10 We shall return to these ideas below, after describing the structure of the Executive and how the elements in that structure relate to each other.

The Location of Executive Power in Australia

4.11 The Australian systems of law and government are based on the constitutional fact that Australia is a monarchy, despite the political reality that power is exercised by elected governments headed by the Prime Minister (or Premiers, in the States) and the

10. *Official Record of the Convention Debates, Sydney 1891*, G S Chapman, Acting Government Printer, Sydney, p 280.

11. This incident, and the constitutional contradictions which it highlighted, are discussed at 3.44–3.56 above and 4.211–4.241 below.

12. Constitutional Commission, *Final Report*, AGPS, Canberra, 1988, p 84.

13. In New South Wales, Queensland, Victoria and Western Australia.

14. In South Australia and Tasmania.

15. In the Australian Capital Territory and the Northern Territory.

16. *Brown v West* (1990) 169 CLR 195, 205.

17. The problems generated by this issue (is the government accountable to both Houses or to only one House of Parliament?) are discussed at 3.52–3.55 above.

18. *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J).

9.138 In *Hodge v R*,⁵³⁵ the Privy Council described the Ontario legislature as having 'an authority as plenary and as ample within the limits prescribed by s 92 [of the British North America Act 1867] as the Imperial Parliament', including the power to delegate law-making power to a body of its own creation.⁵³⁶

9.139 That proposition was confirmed by the Privy Council in *Cobb & Co Ltd v Kropp*,⁵³⁷ in the course of rejecting a challenge to the State Transport Facilities Acts 1946–1959 (Qld).

- (a) It was argued that the Queensland Parliament had abrogated its legislative power because the Acts authorised the Commissioner for Transport to fix the licence fee to be paid by persons who operated commercial road transport businesses.
- (b) The Privy Council noted that the Queensland Parliament was authorised 'to make laws for the peace, welfare and good government' of Queensland, a power which was, within certain limits not relevant here, 'full and plenary'.⁵³⁸ The present legislation was valid: the Parliament had retained its own capacity intact and had 'perfect control over the Commissioner' because it could repeal the legislation and withdraw the Commissioner's discretion.⁵³⁹ Nor had the Parliament 'create[d] and endow[ed] with its own capacity a new legislative power not created by the Act to which it owes its own existence'.⁵⁴⁰
- (c) The Privy Council concluded with the following statement, from which it is possible to infer some limits on the power of a State Parliament to authorise another body to legislate for the State:

In no sense did the Queensland legislature assign or transfer or abrogate their powers or renounce or abdicate their responsibilities. They did not give away or relinquish their taxing powers. All that was done was done under and by reason of their authority.⁵⁴¹

9.140 However, the courts appear to be willing to tolerate very wide delegations of legislative power by State parliaments. In *Dean v Attorney-General (Queensland)*,⁵⁴² the Queensland Supreme Court rejected a challenge to provisions in the State Transport Facilities Act 1938 (Qld), which authorised the Governor-in-Council to proclaim 'a state of emergency' and, while that state of emergency lasted, to prescribe matters deemed necessary or desirable to secure the peace, welfare, order, good government and public safety of the State. Stable J noted that the State Parliament could disallow the Governor-in-Council's actions and concluded that the Queensland Parliament had not established 'a second legislative body'.⁵⁴³

535. (1883) 9 App Cas 117.

536. *id.*, 132. See also *R v Burah* (1878) 3 App Cas 889; *Powell v Appollo Candle Co* (1885) 10 App Cas 282.

537. [1967] 1 AC 141.

538. *id.*, 154.

539. *id.*, 156.

540. *id.*, 157. The quoted passage was taken from the Privy Council's decision in *Re Initiative and Referendum Act* [1919] AC 935, 945, which had suggested that Manitoba legislation might be an invalid abdication of legislative power, because it authorised the electorate to enact legislation which would override legislation passed by the Manitoba legislature.

541. [1967] 1 AC 157.

542. [1971] St R Qd 391.

543. *id.*, 402.

10

Rights and Freedoms

Introduction

The Commonwealth Constitution

10.1 The Commonwealth Constitution does not contain a bill of rights. Several explanations have been given for the omission: the framers' faith in parliamentary democracy;¹ the 'calamity of the French revolution and the rise of utilitarianism';² the focus of the framers on the division of power in the new federation;³ and the framers' concern, relating particularly to the possible inclusion of equal protection and due process clauses, not to erect constitutional barriers to discriminatory legislation.⁴ John Hirst, in his book on federation, suggests a further perspective:

Modern readers of the constitution look for a stirring preamble or a bill of rights and are disappointed. They miss its distinctive feature. No constitution has given so much attention to pension rights of postmen.⁵

1. See, for example, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 182 (Dawson J); Sir Owen Dixon, *Jesting Pilate*, Lawbook Co, Sydney, 1965, p 102; W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, C F Maxwell, Melbourne, 1910, p 616; J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, pp 227, 231; R C L Moffatt, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 85, 85–6.
2. J Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 *Australian Bar Review* 1, 1–2. See also P Finn, *Law and Government in Colonial Australia*, Oxford University Press, Melbourne, 1987, p 3; S Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 171, 173.
3. A Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights without a Bill of Rights*, Ashgate, Aldershot, 2006, p 152.
4. J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, pp 231–2.
5. J Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth*, Oxford University Press, Melbourne, Oxford, 2000, p 163, referring to s 84 of the Constitution and the Convention Debates.

10.2 Leaving aside, for present purposes, the 'pension rights of postmen', several provisions of the Commonwealth Constitution do contain the kinds of words one might expect to find in a Bill of Rights. For example:

- (a) Sections 7 and 24 provide for each House of the parliament to be 'directly *chosen by the people*'.
- (b) Section 51(xxxi) speaks of 'the acquisition of property *on just terms*'.
- (c) Section 80 provides that the 'trial on indictment of any offence against a law of the Commonwealth shall be by jury'.
- (d) Section 92 provides that 'trade, commerce, and intercourse among the States ... shall be *absolutely free*'.
- (e) Section 116 prohibits the Commonwealth from making 'any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion ...'.

10.3 Those provisions,⁶ and ss 75(v)⁷ and 117,⁸ are addressed in this chapter.⁹ Further, the Commonwealth Constitution provides for, and assumes, a system of representative and responsible government; and the High Court has held that, in order to give effect to that system, the Constitution protects freedom of communication about government or political matters. That freedom of communication is also discussed in this chapter.

10.4 Concepts of fundamental or human rights can also play a decisive role in constitutional cases through the process of statutory construction. This process, together with some other rights-related matters (including citizenship and standing), are the last subject of this chapter.

10.5 The Commonwealth Constitution does not create private rights enforceable by an action for damages.¹⁰

10.6 Last, the absence of a Bill of Rights should not obscure the relevance to individual rights of structural checks and balances (although, of course, their efficacy may be debated): the separation of powers is fundamentally a system designed to protect the liberty of the individual¹¹ and, in Australia, the federal division of powers provides a

6. Only s 92's protection of the freedom of 'intercourse among the States' is dealt with in this chapter: see **10.127–10.147** below. The balance of s 92's protection is dealt with in **Chapter 7**: see **7.250–7.309** above.
7. Section 75(v) provides that 'the High Court shall have original jurisdiction' in all matters in 'which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth': see **10.193–10.205** below.
8. Section 117, headed 'Rights of residents in States', provides: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State': see **10.148–10.169** below.
9. The following are dealt with in other chapters: s 51(ii) and s 99 are dealt with in **Chapter 6**: see **6.54–6.83** above. Sections 100 and 92 (so far as they relate to trade and commerce) are dealt with in **Chapter 7**: see **7.310–7.312** (s 100), **7.250–7.309** (s 92) above.
10. *Kruger v The Commonwealth* (1997) 190 CLR 1, 46–7 (Brennan CJ), 93 (Toohey J), 125–6 (Gaudron J), 146–8 (Gummow J). See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, [40] (McHugh, Gummow and Hayne JJ).
11. See, for example, *R v Davison* (1954) 90 CLR 353, 381 (Kitto J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). The implications drawn from the doctrine of the separation of powers are considered in more detail in **Chapter 9** above.

further check on the oppressive potential of the state.¹² Those checks and balances are, in the main, the subjects of other chapters.

The State constitutions

10.7 The focus of this chapter is on rights and freedoms under the Commonwealth Constitution, which may restrict State legislative power.¹³ However, we note the following aspects of State constitutions.

10.8 First, as explained in **Chapter 1**, State constitutions are for the most part subject to amendment and repeal in the same way as ordinary legislation. It follows that the question whether rights stipulated in those Constitutions operate as a legal constraint on legislative power needs to be approached with care. For example, s 46 of the Constitution Act 1934 (Tas) 'guarantees' freedom of conscience and religion;¹⁴ but the Tasmanian Parliament may amend or repeal that section through its normal legislative processes.

10.9 In contrast to the Commonwealth Constitution,¹⁵ some of the State constitutions do provide for something approaching equality of voting power.¹⁶ Some State constitutions also give a right to vote. For example, the Constitution Act 1934 (SA) provides¹⁷ that '[w]omen shall possess and may exercise the right to vote at parliamentary elections subject to the same qualifications and in the same manner as men' (and also that '[a] woman shall not be disqualified by sex or marriage for being elected to, or sitting or voting as a member of, either House of the Parliament').

10.10 So far as implicit constraints on State parliaments are concerned, the South Australian Supreme Court held, in *Grace Bible Church v Reedman*,¹⁸ that the South Australian Parliament was not constrained, in the exercise of its legislative powers, by a common law right of religious freedom.¹⁹

10.11 In *Stephens v West Australian Newspapers Ltd*,²⁰ Mason CJ, Toohey and Gaudron JJ said that the freedom of communication implied in the Commonwealth Constitution

12. See B Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge, 1995, pp 158–9. See also J Madison, 'The Federalist No 51' in A Hamilton, J Madison and J Jay, I Shapiro (ed), *The Federalist Papers*, Yale University Press, Connecticut, 2009, pp 265–7.
13. See ss 92 and 117 and the implied freedom of political communication.
14. The section reads: '(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and holding of any public office.'
15. The cases that have considered the interaction between the Commonwealth Constitution and voting rights include *McGinty v Western Australia* (1995) 186 CLR 140; and *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1: see **10.209–10.223** below.
16. Constitution Act 1902 (NSW), ss 28 and 28A, and s 7B; Constitution Act 1934 (SA), ss 77 and 88.
17. Constitution Act 1934 (SA), ss 48 and 48A. Section 8 requires an absolute majority of each House to pass 'any Bill by which an alteration in the constitution of the Legislative Council House of Assembly' is made. See also Constitution Act 1975 (Vic), ss 48 and 18(2)(e).
18. (1984) 54 ALR 571.
19. *id.*, 579 (Zelling J), 581 (White J), 585 (Millhouse J).
20. (1994) 182 CLR 211, 232–4.