Public Law – Scaffolds

Topic 6: A Responsible Executive

CONSTITUTIONAL POWERS (Governor-General)

- **Section 2 – Governor General** – appointed by Queen, as the Queen's representative in the Commonwealth
- **Section 61 – Executive Power** – vested in the Queen, exercisable by the Governor-General
- **Section 62 – Federal Executive Council** – to advise the Governor-General
- **Section 63 – Provisions referring to Governor-General** – construed as referring to the Governor-General acting with the advice of the Federal Executive Council.
- **Section 64 – Ministers of State** – may be appointed by the Governor-General
- **Governor-General's power:**
  - **Section 5** – proroguing and dissolving Parliament
  - **Section 32** – issuing writs for a general election
  - **Section 58** – assenting to legislation
  - **Section 68** – command of the military
  - **Section 72** – appointing of judges
  - By **CONVENTION**, none of these powers are exercised by the Governor General alone – Governor General acts on advice of Ministers – which is a fundamental aspect of responsible government

RESERVE POWERS (Governor-General)

- **Principle:** As a convention, the Governor-General acts on the advice of Ministers (**Hardie-Boys, New Zealand's Governor-General);** ***FAI Insurances Ltd v Winneke,*** Wilson J)
- But, the reserve powers can be exercised independently by the Governor-General, without (or contrary to) advice, in the exercise of his/her constitutional powers, to support fundamental constitutional principles – such as to safeguard system of responsible government, representative democracy, the rule of law

Settled Reserve Powers:

(1) Commission a new Prime Minister
  - If PM loses confidence of the House, the G-G must discern where the House's confidence lies to commission a new PM
  - Departing PM may advise G-G on who to pick, but G-G doesn't have to follow his advice since the PM no longer holds responsibility for advising the G-G on the House's behalf

(2) Refuse request to dissolve parliament by a PM who has lost the confidence of the House where another MP has confidence of the House.
  - Dissolution = go into an election

(3) Dismiss a PM who has lost the confidence of the House
  - By convention, PM must resign if loses the confidence
  - For PM who refuses to resign, G-G may dismiss

Debatable Reserve Powers

(1) Refuse to prorogue parliament.
(2) Dismiss a PM who retains the confidence of the lower House but is – or is perceived to be – acting illegally.
(3) Dismiss a PM who retains the confidence of the lower House but is unable to obtain supply from the Senate (and refuses to resign or advise an election)

Refusing Prorogation of Parliament

- **Principle:** The Governor-General's power to prorogue Parliament is entrenched in **s 5, *Constitution***
  - As a convention, the Governor-General acts on the advice of Ministers when proroguing Parliament (Anne Twomey, *Prorogation*)
  - But, there is a reserve power to refuse prorogation if it would cause a breach of fundamental constitutional principles, like responsible government (Anne Twomey, *Prorogation*)

nationhood power to spend appropriated money can be established (***Pape*** – Gummow, Crennan and Bell JJ)
  - Contra – **Heydon, Hayne and Kiefel JJ (dissent)** held that national emergencies could not enliven the nationhood power – Heydon J was concerned that the Executive could declare national emergencies and circumvent constitutional limits to exercise of power
  - Contra - ***Williams (No 1)*** which is distinguished from ***Pape*** on the basis that it was a ***national emergency*** that was also ***supported by legislation***. This was not the case for the NSPC program.
- **LIMB 2** of ***AAP case***
  - The activity cannot otherwise be carried on "for the benefit of the nation" by the states or others
  - ***Pape*** → states did not have enough money to give a stimulus of that size, and could not act quickly enough
  - ***Davis*** → states would not be able to organise that national commemoration
  - Contra - ***Williams (No 1)*** and ***Williams (No 2),*** → spending on Chaplaincy program not adapted to federal government → **States** were well placed to administer a program for chaplaincy services in State schools; this is an area where there is real competition with the States.

Limits on Nationhood Power (*Williams (No 1)*)

- Convenience is not enough – the fact that it can be "***conveniently formulated and administered*** by the national government" is ***not sufficient*** to render it on a "truly national endeavour" (Crennan J)
- No competition with States – The Cth's exercise of executive or legislative power must **involve no real competition of the states**
  - ***Williams (No 1)*** – the chaplaincy funding program to schools involves direct competition with the State executive and legislative action (Hayne J)
- **S 96, *Constitution*** – the power to make state grants ***must not be rendered useless***. The legislation must not bypass **s 96** for no adequate reason. **S 96** ensures consensual funding; State authority is retained as they are free to reject funding.

STEP 2: Legislative Incidental power

- ***Davis*** (purposive and proportionate test for incidental legislative power in **s 51(xxxix)**
  - Legislation made under the nationhood power is valid if they are ***reasonably incidental, adapted or proportionate*** to the Commonwealth's **legitimate national purpose**
  - ***Davis*** – Commemoration of Bicentenary was within the Cth's executive power, however the limit on freedoms of speech in which the use of 1788, 1988, 200 years were invalid as they were ***grossly disproportionate***.

INHERENT EXECUTIVE POWER – DETENTION FOR BORDER CONTROL

2) Is there a prerogative power to detain for border control?

- The Majority in ***Tampa*** (and French CJ in ***CPCF***) found there was a prerogative power to exclude aliens from Australia, and to undertake necessary action to affect that exclusion, including detaining and deportation.
  - However, Black CJ in dissent in ***Tampa*** found that any such prerogative had become expired due to its disuse, and had become incompatible with modern jurisprudence, and had been overtaken by statutory enactment in the same area
  - Black CJ's dissent was adopted by Kiefel J, a dissenting judge in ***CPCF***
  - Kiefel, Hayne and Bell JJ in ***CPCF*** held that ***Lim*** was authority for the proposition that the Executives cannot detain without judicial mandate and without statutory authorisation by a valid Commonwealth law, and that extended to offshore detention or detention on the high seas
  - Gageler J in obiter in ***Plaintiff M68/2015*** held that habeus corpus in **s 75, *Constitution*** meant that there could be no executive power to authorise arrest or detention; it could only be authorised by statute

6) **Sub-delegation** – not appropriate for Parliament to authorise Executive to sub-delegate their delegated legislative powers, but is valid to do

Question 2: Is the regulation valid?

Step 5: Compliance with the *Legislation Act* (Cth)

- The ***Legislation Act* (Cth)** provides mechanisms that enable Parliamentary scrutiny of legislative instruments (**s 3(e)**).

1) **s 8(4):** A 'legislative instrument' includes delegated legislation which determines the law and creates rights and obligations (**s 8(4)**).

2) The ***Legislation Act* (Cth)** provides that a 'legislative instrument' is not effective unless it is registered and tabled (**ss 15K(1), 38**), and remains effective until disallowed by Parliament (**ss 42, 45**). The rule-maker should undertake 'appropriate' and 'reasonably practicable' consultation before making 'legislative instruments' (**s 17(1)**), but a failure to consult does not affect the instrument's validity or enforceability (**s 19**).

3) **Public Participation and Consultation Requirements**
   a. Consultation is not mandatory – the extent of consultation, if there is any, is up to the rule-maker
   b. **s 17(1):** Rule-makers should undertake appropriate and reasonably practicable consultation
   c. **s 19:** Failure to consult does not affect validity or enforceability of instrument
   d. **s 15J(2):** requires an explanatory statement of the legislative instrument to include a description of consultation undertaken, or explanations for lack of consultation.
   e. **s 15K(2):** a failure to lodge an explanatory statement for registration does not invalidate the instrument

4) **Registration and Commencement**
   a. **S 15K(1)** – a legislative instrument is not enforceable by or against any person unless registered
   b. **S 12(1)** – a legislative instrument commences the day after it is registered unless it provides otherwise
   c. **S 12(1A)** – the instrument can commence before registration
   d. **S 12(2)** – but if commencement is earlier than registration, the instrument does not apply to a person (except the Commonwealth) to the extent that its retrospective operation disadvantages a person or imposes liabilities for conduct done before registration

5) **Tabling**
   a. **s 38(1):** Registered legislative instruments must be tabled in each House of Parliament within 6 sitting days after registration (**s 38(1)**)
      - Note: the 6 days starts to run from when parliament is sitting – so if regulation is made when Parliament is not sitting, there is more time to table!
   b. **s 38(2):** If the instrument is not tabled within 6 sitting days, the instrument is immediately repealed after the 6th day, and ceases to have effect (**s 38(2)**)
   c. **NOTE:** after tabling, the Senate Standing Committee for Scrutiny of Delegated Legislation may scrutinise the instrument for its compliance with all legislative requirements, whether it is supported by a constitutional head of legislative power, adequate consultation… (**Senate Standing Order 23**)

- Scrutiny principles of delegated legislation - **Senate Standing Order 23(3)**
  (a) Is in accordance with its enabling Act and complies with all legislative requirements
  (b) Is supported by constitutional head of legislative power, and constitutionally valid
  (c) Makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers
  (d) Affected persons not adequately consulted
  (e) Drafting is defective or unclear
  (f) Documents incorporated can be freely accessed and used

    - The provision in ***Lim*** required Court "not to" order release of asylum seekers from custody was thus invalid → Courts are vested with jurisdiction to determine federal matters or matters involving the Cth as a party – and the provision removed the court's independence to exercise its jurisdiction and to control ultra vires acts of the Executive
- ***Totani*** (**state law**) → mandating the courts (with the use of the word "must") to give a control order on members of declared organisations if requested by the Executive
    - That impaired the decisional independence of the courts in areas going to personal liberty and criminal liability which are at the heart of judicial functions
    - The executive had enlisted the court to implement its decisions in a manner that is inconsistent with institutional integrity
- ***Kable*** (**state law**) → provided ad hominem rules that applied to "Kable" (as an individual) only
    - Invalid law – since the court was required to enforce the decisions of the legislature/executive, instead of making its own determinations about Kable's rights and obligations
    - The Supreme Court was made to look like the instrument of executive government policy
    - Attempt to dress up proceedings as judicial process makes a mockery of that process
    - Court required to grant detention order in a manner that is removed from the judicial process
        - Criminal law is based on standard of beyond reasonable doubt – applies to past actions – and applies uniformly to all people
        - Here, the standard was lower (more likely than not) – applies to future acts – and only to Kable → it was very contradicting to ordinary criminal law under judiciary power

3. Judicial Process/Procedural Fairness [natural justice]

- Judicial process involves:
    - procedural fairness
    - open court principle
    - reason-giving
- Law that modifies these principles MAY be incompatible with institutional integrity → at the Federal level, departure from these principles will more likely be incompatible
- Risk of invalidity is most significant where the law detracts from the courts' decisional authority in relation to its process.
    - Procedural fairness = decisional ability to determine the processes which the court makes those decisions
    - Decisional independence = decisional ability to determine the outcome/result of the case
- **Law struck down** – ***International Finance Trust Co v NSW Crime Commission*** (**state law**)
    - The court was **mandated** to have closed hearing, ex parte hearing (without other party) – for a freezing order of assets against persons suspected of engaging in serious crime-related activity
        1) No discretion to make/not make 'ex parte' hearing – departure from open court and procedural fairness required in criminal law
        2) Indefinite freezing period – significant departure from ordinary criminal law processes
        3) Court "must" make an order based on "reasonable grounds" → that is a departure from the ordinary standard of "beyond reasonable doubt"
        4) Other party is able to argue their case, but the onus is on them → departs from the ordinary criminal law processes of requiring the prosecution to prove beyond reasonable doub
- **Law upheld** – ***Condon v Pompano*** (**state law**)
    - The court had discretion as to whether to conduct closed hearing – and could discontinue proceedings for procedural fairness
    - "Special closed hearings of criminal intelligence" regarding members of declared "criminal organisations"
    - Departure from open court and procedural fairness – but still valid, since court retained its decisional independence and powers necessary to mitigate extent of unfairness (French CJ):
        1) Court had discretion as to whether the information submitted by Commissioner of Police was criminal intelligence information
        2) Court had discretion to discontinue proceedings if unfair

    - The power to grant preventative orders that restrict individual's liberty should be a judiciary function, not executive function – since it is guarded by the impartiality and independence of the court, along with procedural fairness (open court, legal representation, opportunity to be heard, reason-giving)
    - The decision by Parliament to confer this power on the judiciary reflected a "parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government"
    - **Gageler J (dissent)** – constraining personal liberty based on what a person might do in the future is not compatible with judicial power – it was not based on ascertainable tests, there was too much scope for discretion by the courts – so essentially an executive function
- REQUIREMENT 1: ***Benbrika*** **(Federal Law)**
  - Power to order detention without adjudication of criminal guilt demands constitutional justification
  - The detention must be 'reasonably capable of being seen as necessary for a legitimate non-punitive purpose'
  - ***Benbrika*** confirms 'the ***Lim*** principle', i.e., the default characterisation of detention is punitive:
    - Aside from exceptional cases, detention is permissible only as a consequential step in adjudication of criminal guilt.
  - Exceptional cases:
    - Arrest and detention pending trial
    - Detention of persons suffering from mental illness or infectious disease
    - These exceptions can be expanded
  - ***Benbrika*** majority – legislation was for a valid non-punitive purpose to protect community against risk of terrorism (a rising social threat) – and it is the **protective purpose** that makes a power an exception to ***Lim*** and safeguards to liberty
    - Edelman J (agreed with majority for different reasons) → power to grant continuing detention order was comparable to criminal punishment, so fell within exclusive judicial powers
    - Gageler and Gordon JJ (dissent) → invalid, since lack of close correspondence between the ultimate non-punitive purpose to protect the community from terrorist acts and the immediate statutory objective of the detention order - to prevent crimes, some of which have a remote connection to a potential terrorist act (e.g. preparatory works)
  - ***Thomas v Mowbray*** (federal law) → valid – legitimate protective purpose against terrorism
  - ***Vella*** (state law) → valid – legitimate protective purpose against serious crime activities
  - ***Fardon*** (state law) → valid – legitimate protective purpose against sexual offenders
  - ***Wainohu*** (state law) → 2nd step was valid – legitimate protective purpose against criminal organisations
  - ***Pompano*** (state law) → valid – legitimate protective purpose against criminal organisations
- REQUIREMENT 2: Ascertainable standards [goes to **decisional independence**]
  - The power must be governed or bounded by ascertainable tests or standards capable of strictly judicial application
  - ***Vella*** (state law) → valid
    - Court had discretion to make the order according to ascertainable standards – unlike ***Totani*** where the court was mandated to make the order
    - Open-textured criteria – gives rise to rules which courts must assess future risk and balance conflicting interests → so room for wide judicial discretion and application before making an order
    - "Real or significant risk and reasonable grounds to believe and appropriate for protecting public by preventing crime – and could determine if it was appropriate to make any orders
    - **Gageler J (dissent)** – constraining personal liberty based on what a person might do in the future is not compatible with judicial power – it was not based on ascertainable tests, there was too much scope for discretion by the courts (opposite to ***Totani)***