

CHAPTER 4

The Executive and Law-making by Administrative Agencies

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THE BUSINESS CONTEXT

The function of the executive branch of government is to administer and enforce the laws enacted by parliament. In a complex society such as Australia where the law impacts on virtually all aspects of our lives, the executive branch of government wields considerable power in administering these laws. However, the executive's function extends beyond administering the law. The range and detail of legal regulation in modern society makes it impracticable for parliament. A range of legislative power is delegated by the parliament to the executive. "Delegated legislation" – the laws made by those to whom limited legislative powers are delegated by parliament – impacts heavily on all citizens. These regulations are extensive and far-reaching and have a significant impact on the conduct of business. They form a significant part of business law. It is therefore important to understand both how they come into existence and how they are subject to control.

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4.1 THE EXECUTIVE GOVERNMENT

[4.10] In all systems of government a distinction may be drawn between the legislative function, the executive function and the judicial function. This chapter deals with the executive function of government – the carrying out, administration and enforcement (the “execution”) of the law. The body entrusted with this function is known as “the Executive” or “the executive government”. Under the Commonwealth Constitution, executive power is conferred on the Governor-General (who represents the Queen) and the Ministers of the Crown appointed by the Governor-General who form the Executive Council and whose function it is to advise the Governor-General on the government of the Commonwealth. The term “Crown” is frequently used to mean the executive government – the Governor-General acting as Head of State on the advice of the Executive Council. Constitutional arrangements are very similar at State level, with executive power residing in the Governor.

IN CONTEXT

Responsible government

[4.20] One of the most important characteristics of the system Australia inherited from Britain is that of *responsible government*. The Prime Minister and the other ministers entrusted with the role of executive government are responsible to parliament. The ministers are members of parliament and hold office only so long as the government from which they are drawn has the confidence or support of the House of Representatives – the house which directly represents the people. Under the long established *conventions* of responsible government (which are not expressly included in the Constitution), the government of the day need not resign if defeated in the lower house on a minor matter but if, for example, it loses a vote of no confidence it must resign or seek a dissolution.

[4.30] The organisation and system of executive government is a matter of some complexity. The bare bones of the Constitution provide an incomplete picture of the process and reliance must be placed on the unwritten conventions – practices which have developed over centuries in the case of the Westminster Parliament – which are recognised as obligatory but which are not expressly contained in the Constitution. The bald proposition that the “executive power of the Commonwealth is vested in the Queen and is exercisable

by the Governor-General ... advised by the Federal Executive Council” (a summary of ss 61 and 62 of the Constitution) may be thought quite unhelpful in explaining the system as it actually works. Similarly, the Constitution makes no reference to the Prime Minister or the Cabinet – the parties who in practice are most central to executive power. A fuller account of executive government requires consideration of a number of institutions.

IN CONTEXT

The Constitution: Chapter II Executive Government

[4.40]

s 61 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 62 There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

s 63 The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

s 64 The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen’s Ministers of State for the Commonwealth.

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 Representatives.

What is the Crown? One of those fogs of ambiguity so dear to the laws of England surrounds our usage of the words “King” and “Crown”. The “Crown” in this country is the symbol not only of Royalty but of the State, and distinguishes not only the palace but the village post office and police station. When we speak of the Crown we sometimes mean the Monarch himself; but more often we mean the Government or some Department of it, or some department of some Department, and sometimes in practice, it is to be feared, some subordinate clerk in some department of some Department. *Bold v The Attorney-General* in *Herbert AP, Uncommon law* (Methuen, 1935).

The Monarch and the Governor-General

[4.50] A Commonwealth Parliament booklet, *Parliament and the executive government* (1987) p 20, explains that:

Australia is a constitutional monarchy. The Queen of Australia is nominally its Head of State, but her head of state functions are actually performed by her representative, the Governor-General. The Head of State of a country is the person who is the formal head of the Executive Government. The head of government is the principal administrator of the Government – in Australia this person is the Prime Minister.

Although the Constitution makes the Governor-General head of the executive government it provides little opportunity for the Governor-General to exercise powers independently of the government of the day acting through its formal instrument, the Federal Executive Council.

[4.60] Under the Constitution, certain powers are vested in the Governor-General in Council – that is, the Governor-General acting on the advice of the ministers who are

members of the Executive Council (eg s 32 in relation to issuing writs for general elections and s 72 in relation to the appointment of judges to federal courts). Other powers are vested in the Governor-General alone (eg ss 5 and 57 in relation to proroguing (discontinuing) and summoning parliament and dissolving the House of Representatives and/or the Senate, s 58 in relation to assenting to or withholding assent to legislation, s 64 in relation to appointing and dismissing ministers). Constitutional convention nevertheless demands that governors-general will generally act only on the advice of their ministers in the exercise of these powers. The extent and nature of powers that may be exercised by governors-general independently of the advice of their ministers – their *reserve, discretionary or prerogative powers* – are not clearly settled. However, the situation of 11 November 1975 when the Governor-General dismissed the government against the advice of its ministers is a powerful, albeit debatable, example of their powers.

The Federal Executive Council

[4.70] The Federal Executive Council established by s 62 of the Constitution comprises all the ministers of the government. It is a formal advisory body which also has substantial powers to make laws under powers delegated to it by parliament.

The Cabinet

[4.80] The Federal Executive Council constitutes the formal power of the government of the day. The actual power is wielded by the Cabinet. Whereas the Executive Council comprises all the ministers, the Cabinet comprises only the senior ministers. It is the centre of the government's decision-making process and is vital to the practical operation of government. However, the significance of the Cabinet is not referred to in the Constitution. *Parliament and the executive government* (1987) p 24 explains that:

Despite its importance as the decision-making centre of government, the Cabinet is not mentioned in the Constitution. Nor is the position of Prime Minister, the Prime Minister being the "chairman" of Cabinet. The institution of Cabinet and the position of Prime Minister are part of the conventions of responsible government, reflecting the fact that the Government is drawn from the Parliament and that it is responsible to the Parliament for its administration and its decisions. At the time of Federation these conventions were firmly established in Britain and in the Australian colonies; the constitution-makers thus took for granted their application in the Commonwealth and considered it necessary to write into the Constitution only the formal mechanisms for decision-making.

There can be said, then, to be two structures of government – the structure set out in the Constitution, comprising the Governor-General and the Federal Executive Council, which provides the formal or legal framework for government decision making and implementation, and the political structure based on the conventions of responsible government, comprising the Prime Minister and Cabinet, which provides the actual or practical framework. The two come together through the fact that the ministers who are members of Cabinet are also the members of the Federal Executive Council, and through the convention that the Governor-General acts only on the advice of his ministers, with some exceptions.

The Governor-General should be put in his proper place – as a ceremonial figure on leave from The Merry Widow. Bill Hayden, subsequently Governor-General of Australia, *The Age* (14 November 1981).

The Prime Minister and the ministers

[4.90] Ministers are appointed by the Governor-General, on the advice of the Prime Minister. Although the institution of Prime Minister is not mentioned in the Constitution, the conventions of responsible government demand that the Governor-General appoints a person who can form a government enjoying the confidence of the House of Representatives (that is, the leader of the party or coalition of parties with the majority in the House of Representatives).

The public service

[4.100] Although the executive power of the Commonwealth is entrusted to the Governor-General and the Executive Council, the ministers obviously cannot carry out the complex and varied operations involved in the administration of government. This is the role of the Australian Public Service which is divided into departments each having functions in a particular policy area. The minister is the parliamentary head of the department (the public servant who heads the department is known as the permanent head) and is responsible both to the parliament and to the government of which he or she is a member for the department's activities.

Statutory authorities

[4.110] Unlike departments which are established by the government of the day through the formal machinery of the Governor-General appointing a minister for each department on the advice of the Prime Minister, statutory authorities are established by Acts of Parliament of the government of the day. The Australian Broadcasting Corporation is just one of the hundreds of statutory authorities that exist at the federal level, although it may not be a typical example. The vast majority of statutory authorities have a lesser public profile and few employees. Statutory authorities have a degree of independence from government control which varies according to their function.

The debate as to the need for and the number of authorities has a large heritage. In *Parliament and the executive government* (1987, p 34) it is noted that:

While all statutory authorities are in theory accountable to Parliament, the Parliament in practice cannot adequately oversee them all. A partial solution which has been suggested is to return the functions of a number of the authorities to departments. This would place them under direct ministerial control, with accountability to Parliament then being achieved through the relevant Minister. The Senate Standing Committee on Finance and Government Operations, for example, found that a number of authorities had ceased to perform any really useful function, or performed mainly residual functions which could be more efficiently performed within departments. On a broader front, the committee suggested that Parliament make greater use of "sunset clauses" in legislation creating new authorities (a "sunset clause" provides that an authority will automatically go out of existence after a certain period unless the Parliament makes a positive decision at that time to continue it).

Quangos

[4.120] The term *quango* (quasi autonomous non-government organisation) refers to "the hazy world of non-government bodies, statutory authorities and government companies,

If a traveller were informed that such a man was leader of the House of Commons, he may begin to comprehend how the Egyptians worshipped an insect. Benjamin Disraeli.

I do not rule Russia; ten thousand clerks do. Czar Nicholas I.

often lumped together as quangos” (Richardson N, *The Bulletin* (28 November 1995) p 15). Federal Government statutory bodies, non statutory bodies and companies number many hundreds. All of these bodies have the capacity to affect the rights of individuals.

[4.130]

The executive government of Australia

	How achieved	Formal appointment pursuant to Constitution	Constitutional functions	Conventions applying / functions in practice
Sovereign	Inherited.		Head of Executive Government and one of constituent parts of the Parliament, but these functions are delegated to the Governor-General. Appoints the Governor-General. May disallow an Act of Parliament (but this has never been done).	Head of State. Only necessary personal function is to appoint the Governor-General. May on occasion perform acts normally carried out by the Governor-General, such as opening a session of Parliament or assenting to an Act of Parliament. Acts as advised by the Prime Minister.
Governor-General	Selected by the Prime Minister.	By the Sovereign, as her representative in Australia.	Represents the Queen as head of Executive Government and one of constituent parts of the Parliament. In most matters must act as advised by the Federal Executive Council.	Performs functions of Head of State. Normally in all matters acts as advised by the Prime Minister and Ministers. Has reserve powers to act independently in emergencies. The extent of these and way they should be exercised are not agreed on.

	How achieved	Formal appointment pursuant to Constitution	Constitutional functions	Conventions applying / functions in practice
Prime Minister	Leader of the party which has the support of the most Members of the House of Representatives. Is elected leader through internal party processes.	By the Governor-General as a Minister of State. By the Governor-General as a member of the Federal Executive Council.	As for Ministers. The position of Prime Minister is not recognised by the Constitution.	The Governor-General commissions the leader of the party (or coalition) with the largest number of Members of the House of Representatives to form a Government. The Prime Minister chairs Cabinet and is in practice the Head of the Executive Government.
Ministers	Selected by the Prime Minister from Members of the House of Representatives and Senators from the party or coalition of parties in government. The Prime Minister's selection may be constrained by internal party processes.	By the Governor-General as Ministers of State. By the Governor-General as members of the Federal Executive Council. (Ministers must be appointed to the Federal Executive Council. Ministers must be Members of the House of Representatives or Senators, or become so within three months of appointment).	As Ministers, to administer Departments of State. As Executive Councillors, to advise the Governor-General. The Cabinet is not recognised by the Constitution.	Senior Ministers are in charge of larger or more important departments, and are normally members of the Cabinet. Junior Ministers may be in charge of a small department, or assist another Minister in the administration of a larger department. The Cabinet is, in practice, the heart of the Executive Government. All major policy and legislative proposals are decided by the Cabinet.

	How achieved	Formal appointment pursuant to Constitution	Constitutional functions	Conventions applying / functions in practice
Parliamentary Secretaries	As for Ministers.	As for Ministers (Parliamentary Secretaries are a class of Ministers designated as Parliamentary Secretaries).	As for Ministers.	Parliamentary Secretaries assist Ministers in the administration of their departments.
Executive Councillors	As for Ministers.	By the Governor-General (there is no constitutional restriction on who should be appointed).	To advise the Governor-General.	Only Ministers and Parliamentary Secretaries are appointed (generally for life). Only Executive Councillors who are members of the current Government advise the Governor-General.

Source: http://www.aph.gov.au/About_Parliament/House_of_Representatives.

4.2 THE INCREASING POWER OF THE EXECUTIVE

[4.140] The following words of Professor Geoffrey Palmer (then a law professor and later New Zealand's Prime Minister), provide a challenging start to this section (Palmer G, *Unbridled power* (2nd ed, Oxford University Press, 1987)):

I suggest that it is a fundamental truth of our existing constitutional arrangements that the executive has got out of control, and Parliament, the traditional check on the powers of the executive, is not performing that function in a satisfactory manner ... Too often the paramount reason for introducing the regulation is the convenience of the administering department not the welfare of the citizen ... The regulation is one of the most fearful instruments of executive domination. For sheer speed, lack of warning, absence of consultation and debate, nothing beats regulations ... We have witnessed the eclipse of Parliament. We should try to restore its supremacy as a law-making body.

New Zealand is not alone in this trend. Under the Westminster system of parliamentary government, the essential purity of the doctrine of separation of powers is diluted because the executive is drawn from Parliament. The members of the Federal Executive Council are required to be Members of Parliament, if not when appointed then at least within three months of taking office. Indeed, Parliament is under the substantial control of the executive because the government in power holds the necessary majority to secure such control.

In Germany, under the law everything is prohibited except that which is permitted. In France ... everything is permitted except that which is prohibited. In the Soviet Union, everything is prohibited, including that which is permitted. And in Italy ... everything is permitted, especially that which is prohibited.
Newton Minow.

Many are critical of the “seriously flawed” system Australia inherited from England. In “The fatal flaw: Has the Westminster system produced a form of executive dictatorship?” *Time Magazine* (16 September 1991), Patrick O’Brien, said:

In Australia [the Westminster system] is labelled “parliamentary democracy” and “responsible government” by its supporters. But it has grave deficiencies as far as democracy is concerned. In theory, Parliament is supposed to be master and the executive the servant. The system no longer works that way, and hasn’t for a long time. In reality, premiers and their cabinets – not to mention prime ministers and theirs – now form a sort of “elective dictatorship”, with vast, and often unchecked powers.

[4.150] The Westminster system stands in stark contrast to the United States model. O’Brien is not alone in arguing that the current debate as to Australian republicanism lacks real substance if the power of the executive is not addressed. Although Queensland may be regarded as a special case because of its unicameral legislature – a situation in which the executive always dominates the Parliament – it is interesting to note that the Fitzgerald corruption inquiry in that State placed at least some of the blame for the unfortunate state of affairs disclosed by the inquiry on the politicised system of government dominated by the executive under which Parliament was a compliant, powerless and largely irrelevant institution.

Many consequences flow from the political reality that executive government is increasingly powerful. The two most obvious manifestations – the conferring of substantial law-making powers on the executive through the device of delegated legislation and the conferring of administrative discretion of the executive – are discussed below.

IN CONTEXT

Executive power in action

[4.160] A Department of Water representative stopped at a Canberra farm and talked with an old farmer. He told the farmer, “I need to inspect your farm for your water allocation.” The farmer said, “OK, but don’t go in that field over there.”

The water representative said, “Mister, I have the authority of the Federal Government with me. See this card? THIS CARD MEANS I AM ALLOWED TO GO WHEREVER I WISH on any agricultural land. No questions asked or answered. Have I made myself clear? Do you understand?”

The farmer nodded politely and went about his farm chores. Later, he heard loud screams and saw the water rep running for the fence and close behind was the farmer’s huge-horned prize bull.

The bull was gaining on the water rep with every step.

The rep was clearly terrified, so the old farmer threw down his tools, ran to the fence and shouted out.

“Your card! Your card! Show him your card!”

As an ordinary Australian, he was naturally suspicious of authority. Grainger P, Solicitor, Defending man in court in Wollongong NSW, 1970, cited by Hornadje B, *The ugly Australian* (Kangaroo Press, 1985).