Executive Power

Writing in 1910 Professor Moore, noted that the colonial constitutions were 'almost silent on the subject of the powers as of the organisation of the Executive'. Almost a century later Dr Waugh noted that little had changed with the state constitutions and that 'had little to say about the executive branch of government'.

Strictly speaking The Crown of Tasmania wields executive power in the state; however the Constitution says nothing about this, nor does it explain the form, nature, or scope of the executive power of residing in the government of Tasmania. Instead this must be identified from convention and common law. There is actually very little common law, particularly Supreme Court or High Court jurisprudence on the nature of State executive power. Recently the cases of Williams v Commonwealth (both 1 and 2) have focused attention on these matters. While the High Court was careful to confine its reasoning to the Commonwealth Executive, the cases raise significant questions about how and when State executive power can be exercised, particularly in the absence of Parliamentary support and control. These questions impact on the current Constitution of Tasmania and any reform relating to it.

**Current Arrangements**

As noted in The Crown of Tasmania, while the Crown is as a matter of constitutional law, the Queen and Governor General, constitutional convention dictates that the actual practice is that the legal crown is merely a conduit for the exercise of executive power by the Premier and Cabinet. That is:

> The sovereign, being a constitutional monarch, acts, as the term indicates, in accordance with the limitations developed over time as part of what is identified as the British Constitution. In Australia, this involves, save in limited matters of personal choice and in the exceptional circumstances associated with the contentious question of “reserved powers” ... the sovereign acting upon the advice of Ministers, in particular the... Premier.

Just what powers the Crown possesses that are exercised under direction is not clarified by the Constitution, Letters Patent or Parliamentary legislation in Tasmania.

Unlike section 61 of the Constitution which vests executive power in the Commonwealth Governor-General, there is no like provision in the Constitution Act 1934. Section 7(2) of the Australia Act 1986 (Cth) vests 'all powers and functions of Her Majesty in respect of a State in the Governor General', but does not mention executive power per se, or describe the confines of its exercise in the manner of the Commonwealth Constitution. Similarly the Letters Patent imply that the Governor will 'administer the government of the State', but that is arguably not executive power in the conventional sense, or in a way that reflects what occurs in practice; specifically to execute the laws of the State, to protect the constitutional system and to exercise what prerogative powers have not been extinguished by statute.

The High Court has never provided a definitive definition of what State executive power entails. However, in Williams No 1, French CJ stated that 'federal executive power and State executive power were of the same nature and quality'. That is, section 61 of the Commonwealth Constitution reflects what the founders considered to be the nature of the executive powers and capacities of the Crown at common law. These are to: execute Parliamentary legislation; to protect the constitutional system; and to exercise the executive power that resided in the historical Crown prior to constitutional independence (the prerogatives).

**Executing Parliamentary legislation**

Citing Isaacs J in R v Kidman, French CJ noted that, in Australia at least, '[t]he Executive cannot change or add to the law; it can only execute it'.

**Protecting the constitutional system**
This is not referred to in the *Constitution* or Letters Patent. It is unclear how executive power interrelates with the legislative power, although to the extent that power is plenary in Tasmania it probably does not create the same constitutional implications as the intersection of section 51 and 51 (xxxix) of the Commonwealth *Constitution*.

Prerogatives
Historically the prerogatives of the Crown were divided into three main categories:

- Proprietary - royal metals, treasure etc;
- Privileges - preferences, immunities and exceptions;
- Executive - declarations of war and peace, coins etc.

The executive prerogatives were transferred to the Crown in the Right of the Commonwealth with the federation under the Commonwealth Constitution, with the remaining prerogatives shared between the Tasmanian and Commonwealth Government in their areas of competency and jurisdiction.

In *Williams No 1*, the majority held the narrower view of the Crown's prerogative powers prevails, meaning the Crown may only exercise the prerogative powers that attach to it as the sovereign. Twomey argues that the majority rejected the broader view (the Diceyan view), so that the prerogative powers do not authorise the 'general exercise of the capacities of the Crown as a legal person.'

Juristic powers and capacities.

The notion that Crown has all the powers and capacities of an ordinary person is derivative of British convention and common law. In Australia the position has been assumed as being articulated in Griffith CJ's (sometimes misquoted) statement:

> We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle. ... and that which is lawful to an individual can surely not be denied to the Crown

What may have been overlooked in this statement is the 'unlawfully' limitation on the general principle. Clearly every person is not free, and their freedom can be limited by law. So too can the Crown, which is bound by the rule of law, and subject to any legal restrictions upon it. Indeed, immediately above this oft quoted passage is Griffith CJ's explanation that:

> It is clear that the Executive Government cannot by its Commission make lawful the doing of an unlawful act. If an act is unlawful—forbidden by law—a person who does it can claim no protection by saying that he acted under the authority of the Crown. Nor can the Crown enforce the answering of a question by an individual, unless some law confers the authority to do so.

Moreover, the Crown in the right of the Commonwealth and Tasmania has always been more limited than the Crown of England, particularly after the enactment of the Commonwealth *Constitution*, which divided all sovereign power (pursuant to section 109), and limited the Commonwealth aspects of it to the provisions of section 61 of the *Constitution* (which creates a similar effect to section 109 in relation to state executive power [citation needed]). This means that, if the Crown in right of these polities is to be considered a person, then, in addition to the general laws restricting ordinary persons, the Crown is further restricted in its freedom to act by the specific restrictions imposed by the Commonwealth *Constitution*, and any found within State constitutional or statutory law addressed to it.

Other executive 'capacities' include: the power to make inquiries, the power to obtain and transfer property, the power to incorporate, the power to declare trusts etc.

The overarching issue that symposium considered was what Crown jurisidic powers need to be described, expanded or limited.

To spend and power to contract

There is uncertainty as to whether the power to spend and contract are actually different powers. However, they are generally treated as a composite power. In *New South Wales v Bardolph* Dixon J remarked:

> It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts ... But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.
Williams (1 & 2) raised significant uncertainties about the power of the Commonwealth Executive to spend and contract absent legislative authority. Specifically, that subject to some exceptions, the Commonwealth executive requires statutory authority to spend money, in addition to an appropriation of that money, and that invalid spending could not be retrospectively validated when the Parliament lacked a relevant head of power other than appropriation.

What that means for the Crown of Tasmania is uncertain. The High Court made it clear in Williams (No 2) that:

*the decision [Williams (No 1)] does not consider any question about State expenditure powers: no such question was put in issue in that proceeding or in this [emphasis added].*

Conversely, His Honour French CJ did state in Williams (No 1), as noted above, that Commonwealth and state executive power ‘of the same nature and quality’, indicating that those parts of the decision which circumscribed spending powers based on the general constitutional assumptions arising from the common law and conventions - notably responsible government - are likely to be equally relevant to State executive power. In regards to the wider considerations, not limited to the specific restrictions found in the Commonwealth Constitution (especially in respect of the intersection of ss 61 and 51), the case raises a series of considerations in relation to the States.

**The general power to contract**

The sole High Court authority on State power to contract is found in New South Wales v Bardolph. That authority remains valid as it was not overturned by the either Williams case, given the focus on Commonwealth executive power. As noted, the ratio in Bardolph stands for three primary propositions:

- The Crown of Tasmania has the capacity to enter contracts;
- These contracts may be entered into in advance of parliamentary expenditure;
- Such contracts are enforceable as between natural persons (subject to the Parliament's making money available to the Executive).

This was generally viewed as the High Court affording State executives the status of corporate persons, in a similar manner to the British Crown. As noted above, that is probably never correct; the Crown in the right of the Commonwealth and states has always been more limited (and less) limited than ordinary citizens. However Williams No 1 appears to act as a fetter on the power to exercise the capacity of entering into the contract in the first place because it involves an exercise of public power relating to expenditure, which is the province of the legislative branch.

A number of commentators have noted that the basis for the restriction on entering the contract is based on considerations arising from the constitutional structure of Parliament and the convention of responsible government common to both the States and the Commonwealth. Specifically the bicameral arrangements and limitations on spending, the requirement that taxes cannot be imposed without legislative authority, and the restriction on executive dispensation found both within the Commonwealth and Tasmanian Constitutions. Most importantly a primary responsibility of the Parliament in both polities is the supervision of public expenditure as a consequence of a shared requirement for representative and responsible government. Underwriting this concept of executive accountability is the fact that when governments enter contracts, they spend public money, as opposed to private money.

However, there are reasons to question the applicability of Williams, not least because of the continued authority of Bardolph and the specific limitation on the ratio to the States by the Chief Justice in Williams (No 2). Moreover, much of the case turned on the Commonwealth being a polity limited by the express heads of power in the constitution; that the Senate is differently constituted to the Legislative Council; and there have been subsequent decisions of the Federal Court which question the applicability of the case to the States.

Importantly, if the Williams jurisprudence is seen to create uncertainty, it might be one that the Tasmanian government can overcome. Hill, for instance, argues:

*In addition, State Constitutions can generally be amended by another State law, which means that any validating legislation can be made part of a State’s organising structure. By way of example, the Constitution Act 2001 (Qld) provides that the State “has all the powers, and the legal capacity, of an individual” (s 51(1)), and confers authority on the State executive to carry out ‘commercial activities’ without further statutory authority (s 53(3)).* 

A possibility for reform is amending the Constitution Act 1934 (Tas) to expressly confer statutory authority on the State Executive to have all the legal powers of an individual. This may be subject to the majority’s narrow interpretation of the executive as juristic person in Williams (No 1); that is, as Twomey (2014, at 27) writes:

*It will be interesting to see whether other States are enticed into adopting equivalent provisions in their Constitutions, at least where no manner and form provisions would require a referendum for such an amendment. It will also be interesting to see whether the Courts draw implications from those provisions in a State Constitution that are entrenched, which impose principles of parliamentary accountability, similar to those discussed in the Williams case.*

**Would this be valid pursuant to Williams no.2?**
General limitations on State executive power

Federal/State division of prerogative powers

In Williams v Commonwealth (2012) 248 CLR 156 the High Court held that there is a division of Federal and State prerogative powers. Gummow and Bell JJ supported Evatt J’s analysis that in Australia, the division of prerogative powers is roughly equivalent to the division of Federal and State legislative power prescribed by the Constitution. Heydon J at [355] also expressly approved Evatt J’s thesis, posthumously published as The Royal Prerogative in 1987, which argued that the division of prerogative powers follows the contours of the legislative division of powers. Further support for this proposition was given by Knox CJ, Issacs, Rich and Stearke JJ in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 29 CLR 129 who stated at 148 that executive power is ‘necessarily correlative to legislative power’.

Williams (No 1) opens with the following quote by the French CJ:

In 1901, one of the principal architects of the Commonwealth Constitution, Andrew Inglis Clark, said of what he called "a truly federal government": "Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the jurisdiction of each of the States." In this case, that essential and distinctive feature requires consideration of the observation of Alfred Deakin, another of the architects of the Commonwealth Constitution and the first Attorney-General of the Commonwealth, that: "As a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced."

Issues

• Whether the State Executive as a juridic person has the plenary power of a legal person or whether this is limited after Williams (No 1);
• Whether the limitations propounded in Williams (No 1) and upheld in Williams (No 2) on spending and contracting by governments apply to the States (where there exists a commonality between State and Federal governments with respect to the reasons given for the limitations);
• What the implications are of Williams (No 2) regarding the extent of the Tasmanian Crown’s power to contract;
• What the effect of the current Constitution Act 1934 (Tas) is upon retrospective legislative validation of State Executive spending/contracting;
• Whether the Constitution Act 1934 (Tas) should be amended to confer express statutory authority upon the State Executive to have all the legal powers of an individual, akin to s 51(1) of the Constitution Act 2001 (Qld), including consideration of whether the current Constitution Act 1934 (Tas) impliedly authorises entry into contracts and expenditure of public money;
• The extent to which the Tasmanian Executive has an immunity from suit?

Questions

• Could the Tasmanian Executive enter contracts, with or without legislative authority, to:
  • Empower a non-judicial body to exercise judicial or quasi-judicial power;
  • Require a party to the contract to interfere with political discussion;
  • Empower a party to the contract to deprive a person of liberty without the exercise of judicial authority;
  • Empower a party to the contract to:
    • To act in a manner which is contrary to an entrenched constitutional provision;
    • Mandate unilateral confidentiality or secrecy - that is not report back to the Crown on information arising under contract or report it to any other person, including parliamentary officers?

References


Footnotes


Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in Liq) (1940) 63 CLR 278 per Evatt J at 320-1: 'In the first place, there are many royal prerogatives by virtue of which the King or his representative (the question of the extent to which the King's representative in self-governing Dominions and Crown Colonies may be entitled to exercise the prerogatives of the King is of course a separate question which cannot here be discussed) is entitled to act, e.g., to declare war, to make peace. Such prerogatives may be said to be executive in character, and, for want of a better phrase, they may be described as "executive prerogatives." In the second place, the Crown is, by virtue of its common-law prerogatives, entitled to the benefit of certain preferences, immunities and exceptions which are denied to the subject. Illustration of such prerogatives are the right of the King to be paid by the City of London, and the right, before all other creditors, of the duty of the King that the King is immune from the processes of his courts. In the third place, there are certain royal prerogatives which partake of the nature of property, e.g., the right to escheats, the prerogative right in relation to royal metals, the right to treasure trove, the ownership of the foreshore and of the bed of the ocean within territorial limits.'


Clough v Leahy (1904) 2 CLR 139, 157. [a b]

Clough v Leahy (1904) 2 CLR 139, 155-7.


Selena Bateman, 'Constitutional Dimensions of State Executive Power: An analysis of the power to spend and contract' (2015) 26 Public Law Review 255, 255. Bateman notes that there is still ongoing debate as to whether the power to spend and the power to contract are two separate limbs of executive power - see Hayne J in Williams (No 1) (2012) 248 CLR 156 at 259. They will be referred to as a composite power here.

(1934) 52 CLR 455. [a b]

(1934) 52 CLR 455, 509 (Dixon J).


Williams v Commonwealth of Australia [2014] HCA 23 (19 June 2014) [63]


Anne Twomey, 'Post-Williams expenditure: when can the Commonwealth and States spend public money without Parliamentary authorisation?' (2014) 33 University of Queensland Law Journal 9, 16.

Williams (No 1), 236 (Gummow and Bell JJ), 258-259 (Hayne J), 352 (Crennan J), 368-369 (Kiefel J).

Selena Bateman, 'Constitutional Dimensions of State Executive Power: An analysis of the power to spend and contract' (2015) 26 Public Law Review 255, 270. Bateman argues that the following common features of responsible government between the Commonwealth and States means that the limitations on Executive contracting propounded in Williams (No 1) may be applicable to State executives. These common features include: (i) the role of the Senate/State upper houses; (ii) that analogously to the Commonwealth a State Executive's power to enter into contracts is not unlimited (citing Hayne J at 257 in Williams (No 1)); and (iii) that there may be entrenched within State Executives a minimum level of responsible government. Bateman concludes that in order for these features 'to limit State power directly, there needs to be some constitutional basis for the assertion that responsible government is entrenched at a State level' (at 273).


Hill, writing post-Williams (No 2), raises a number of arguments. First, he argues that the concept of the 'depth' of executive power traversed in Williams (No 1) is analogous to considerations of the extent of State executive power. This is by virtue of similar constraints on executive power, such as being unable to impose a tax without legislative authority or being unable to dispense with the operation of the law.' Second, he argues that 'notions of responsible government, and the need for the Parliament to supervise the expenditure of public money' are essentially the same with respect to both State and Federal governments.


Twomey (writing in 2014 before Williams (No 2) was handed down) also identified the key issue of whether the limitations on Commonwealth spending held to be extant in Williams (No 1) apply to the States. In support of the proposition that the limitations do apply to the States, Twomey puts forward a number of arguments.

First, she notes the comments of Gummow and Bell JJ at [136] in Williams (No 1) where their Honours state: 'But there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process'. It is submitted that adopting this line of Twomey's argument, the States, like the Commonwealth, are subject to the Westminster convention of representative and responsible government. The degree of comity between the State and Federal polities in this regard is high, meaning that if the Commonwealth Executive is subject to a limitation on executive spending because of the principle of responsible government, this is a strong indication that State executives must be also subject to this limitation.

See, eg, Williams (No 1) (2012) 248 CLR 156, 236 [151] (Gummow and Bell JJ).


First, Hill argues that degree of the High Court's reasoning in Williams (No 1) explicitly relied on exclusive federal considerations such as the role of the Senate (see French CJ at [60]-[61] and Gummow and Bell at [220]) and s 96 of the Constitution (see Gummow and Bell at [147]-[149] and Crennan J at [497]). This suggests that the High Court's analysis is related solely to the province of Commonwealth power and that the reasoning is unable to be simply transplanted onto the States to determine the boundaries of State executive power. See further Gabrielle Appleby and Stephen McDonald.

Second, Hill notes that the States may be able to side-step the reasoning in Williams (No 1) to validate executive spending for the reason they do not have s 51 subject-matter constraints as a determinant of legislative validity. This means that such spending in Tasmania could be validated retrospectively by the enactment of authorising legislation, free from the threat of subject-matter invalidity due to Tasmania's wide legislative power in this regard (subject of course to s 109 of the Constitution, s 92 of the Constitution and any implied limitations derived from the Australian Constitution's text and structure).

There is no equivalent to s 61 in the Constitution of the State and the executive power of the State is not referable to limits like those with respect to the Commonwealth arising from the specific heads of legislative power. ... These kinds of concerns are not capable of ready translation to consideration of the State’s executive power.

Her Honour went on to state at [26] that, on the facts of the case before the Court (whether the State Executive’s announcement of policy and non-enforceable guidelines gave rise to any legal right or obligation), that:

It may be that implications about parliamentary accountability similar to those referred to by Crennan J in Williams (at [516]) will be drawn from provisions of the State Constitution; and that these implications may impact on the outcome of another case concerning the application of the Code and Guidelines.

Therefore Kenney J left open the possibility of Williams (No 1)-type considerations of parliamentary accountability being implied from the Victorian Constitution (see further Twomey 2014, at 26). Twomey concludes by acknowledging that when it ‘comes to funding third parties, it may be the case that some kind of legislation is needed’ (at 27).


