

Non-statutory Executive Powers and the Exclusion of Procedural Fairness: When Procedural Fairness Doesn't Matter

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This article is a brief introduction (further posts on this topic to come!) regarding an enduring legal question associated with the exercise of 'non-statutory executive powers'. These powers, also called the 'prerogative powers', are exercised by the Commonwealth Government ('Government') by virtue of s 61 of the Commonwealth Constitution and allows the Government to exercise its 'prerogative' over issues that fall outside of the jurisdiction of Parliament and the judiciary – such as decisions involving how to deal with terrorism, declarations of war and so on (more on this below). At times when the Government is exercising these powers, the question that arises is how much, and to what extent must the Government ensure that procedural fairness is given to persons whose interests might be adversely affected by the exercise of those non-statutory powers?

The problem lies in the fact that non-stat powers are exercised generally in absence of specific laws/ regulations that govern an individual's rights. In other words the exercise of non-stat exec powers allows a discretion on the part of the executive and it is these discretionary aspects that pose the greatest threat to freedom – particularly for vulnerable individuals. This situation was highlighted in a recent decision by the High Court of Australia ('HCA') involving a Sri Lankan national detained at sea and later transported to a detention centre on Cocos Islands by the Australian Border Force pursuant to the *Maritime Protection Act 2013* (Cth).

In the decision of *CPCF v Minister for Immigration and Border Protection*, the Court reiterated the long held view that the Government is not entitled to 'unconstrained' exercise of non-statutory executive power and 'must bear in mind its character as an element of the grant of power contained in the Constitution, s 61'. Unfortunately the Court provided no further explanation regarding the limits of excluding procedural fairness at times when the executive is exercising its non-statutory executive powers.

What are non-statutory executive powers?

The exercise of non-statutory executive power—also known as the prerogative power—is provided for in s 61 of the Constitution.^[1] Section 61 provides the necessary 'executive power' to the executive government not otherwise provided for by statute. Non-statutory executive powers are those powers that are used by the Government, for example, in keeping the peace, national security, declarations of war, border protection and a vast array of other issues associated with sovereignty.^[2]

Despite the existence of this prerogative power, Winterton asserts that the executive power 'has been something of a mystery, frequently defined merely as the "residue" of governmental powers after legislative and judicial powers are excluded'.^[3] Winterton, in his seminal volume on the analysis of the executive power in Australia, describes that the limits of executive power are ascertained according to its 'breadth' and 'depth' within the Australian constitutional law framework. The 'breadth' for which Winterton refers is the Commonwealth power ascertained relative to the powers of the States, and the 'depth' being the limits imposed on the executive by the separation of powers.^[5] Accordingly, so long as the power is one that falls within the 'breadth' and 'depth' as provided for under this framework, the exercise of a non-statutory power will be lawful.

An area of executive decision-making where the extent and scope of the executive power is not clear, lies in respect of the powers of the executive regarding situations where the executive may avoid or disregard aspects of procedural fairness in matters affecting individual rights and freedoms. This question was discussed in a recent case involving a Sri Lankan national detained at sea by the newly formed Commonwealth Border Protection Force.^[4] The Sri Lankan man was part of a group of 157 Sri Lankan, mostly Tamil, asylum seekers. The man was later transported to detention on Cocos Islands by the Australian Border Force pursuant to the Maritime Protection Act 2013 (Cth).

One question that arose for the Court was whether the Government could remove aspects of procedural fairness to the individual? As part of the judgment, the Court discussed the history and the rationale of non-stat prerogative powers. However, unfortunately, the Court stopped short of making any pronouncement on the nature and scope of the s 61 prerogative powers and the exclusion of procedural fairness—primarily due to the fact that the Court ultimately held that the Government in this case was acting under statute rather than in exercise of any prerogative powers. The extent of procedural fairness that is to be afforded to an individual when the executive is exercising its prerogative powers remains an unsettled question but one that is crucial in understanding the extent of executive power vis a vis individual rights—particularly in an environment of heightened political anxiety surrounding unlawful maritime arrivals and terrorism.

^[1]*Australian Constitution* 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.

[2] Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 286-292. See also, George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 120-2. Winterton asserts that there is great uncertainty regarding the extent to which the prerogative can be applied to new situations such as terrorism and new forms of warfare. On this point, Winterton appears to equivocate—on the one hand he cites the authority of Lord Reid in *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75, 108 supported by Diplock LJ's judgment in *British Broadcasting Corporation v Johns* [1965] Ch 32 that strongly suggests that new prerogatives are not able to be created. While on the other hand, Winterton acknowledges that the prerogative is part of the common law and therefore has the capacity to develop and evolve with new situations. On this point, he cites *Skelton v Collins* (1966) 115 CLR 94, 134-5 per Windeyer J; *Jolley v Mainka* (1933) 49 CLR 242, 281-2 per Evatt J; *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 565.

[3] George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 21-2.

[4] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207.

[5] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29-30. For a detailed analysis regarding the 'depth' and 'breadth' aspects, see, especially chapters 2 and 3.