

PART VIII – THE EXECUTIVE

I Introduction

A History of Terminology

1 Executive as Head of State

The term ‘executive government’ is used in several senses, each with differing connotations. One usage, commonly associated with early British constitutional discourse,¹ describes the executive using metonymy: ‘the Crown’. The Crown, as figurehead of the State, was seen as comprising the ultimate source of executive power. By convention, reference to ‘the Crown’ or ‘the Queen’ was seen to be symbolic, describing those powers attributable to the figurehead but commonly exercised in their name by servants or agents. It was, according to Lord Penzance, ‘an abstraction’.²

With the decline of monarchical power, historical terminology gave way to more modern usages, such as ‘the State’ and ‘the Government’, each describing ‘the executive’ and each referring to the body responsible for executing ‘traditional government functions’ (*Town Investments Ltd v Department of the Environment* per Lord Simon of Glaisdale). However, phrases like ‘the Crown’ and ‘Her Majesty’ continue to be applied symbolically; Lord Simon describes them as ‘terms of art in constitutional law’. For example, the expression ‘the Crown’ is often used to denote a government’s ‘international personality’.³

2 Executive as Bearer of Public Power

In one sense, the term ‘executive government’ describes all entities capable of exercising ‘public’ (as distinct from private) power. The monarch, as wearer of the crown, was once bearer of this power; the term can in this way describe only the apex of public power. Today that apex is the Queen or her representative in council (in Australia, the Governor-General).

Used more generally, the term refers to the bearer of power, making it a term of very broad signification and encompassing all branches of government. However, the separation of governmental powers has disintegrated executive functions and powers, making this usage somewhat anachronistic. Today, ‘the executive’ is seen as referring to a single, distinct branch of government: that responsible for administering laws implemented by the Parliament and applied by the courts. ‘The Crown’ is also used in this sense: it identifies the executive (as distinct from either the legislative or judicial) branch of government.

B Executive Hierarchy

The executive branch embodies a hierarchy of governmental positions and functions. To properly understand the meaning of the term, the roles it encompasses must be fully described. Enright identifies several constituent components (in roughly descending order):⁴

¹ Blackshield and Williams, 502.

² *Dixon v London Small Arms Co* (1876) 1 App Cass 632, 652 (Lord Penzance).

³ *Sue v Hill* (1999) 199 CLR 462, 498 (Gleeson CJ, Gummow and Hayne JJ).

⁴ Enright, *The Composition of Executive Government* (1985) 13–24.

- **The Crown**

Head of state, embodied by the Queen, represented by the Governor-General (at the Commonwealth level) and the Governor of each state (at the state level)

 - The Crown forms the apex of the executive arm of government
 - By convention, the Crown acts only⁵ on the advice of the government of the day
 - The Queen may also delegate power to agents to Governors-General and state Governors by means of constitutions, letters-patent and royal instructions

- **Cabinet**

An inner group of ministers drawn from the ranks of the government party

 - Cabinet ministers are, by convention, appointed to the executive council, with the effect that these groups are one and the same
 - The cabinet is effectively the government: cabinet creates policy, make political decisions, presents proposals to the Parliament and exercises executive power
 - Most executive power vested in the Governor-General or a Governor is also exercisable by cabinet
 - Two principles govern the operation of cabinet:
 - Collective responsibility; and
 - Cabinet secrecy

- **Executive Council**

The cabinet entity formally prescribed by s 62 of the *Australian Constitution* and state letters patent; the council is simply the formal guise of cabinet ('ministers in morning suits' versus 'ministers in shirt sleeves')

- **Ministers**

Members of the party or coalition with a majority in the house of representatives. They are elected by the people

 - Ministers perform three basic functions:
 - Some are members of cabinet and thus the executive council (but not all)
 - Many are heads of one or more *government departments*
 - They are responsible for administering statutes relating to their function or department

- **Government departments**

A section of government designated an area of responsibility for the administration of Acts, generally controlled by a minister and assigned a portfolio of functions

- **Statutory bodies**

Bodies established by statute to perform various functions. They are often corporate in nature, capable of owning property, being sued, and sometimes endowed with power to make delegated legislation

 - Statutory bodies are usually established to perform specialised tasks independent from the public service
 - Commercial, creative and cultural activities often fall into this category
 - Because they exist independently of the government of the day, and can hold separate title to property, the body is able to carry on a relatively continuous existence

⁵ With the exception of the exercise of reserve powers: see below.

- Being substantially independent, such bodies are also able to concentrate on efficiency rather than politics and policies
- **Statutory offices**
A species of statutory body, the statutory office is simply a body with a single office holder (though they may have assistants)
 - Examples: the ombudsmen and the Auditors-General
- **Quasi-Autonomous Non-Government Organisations ('Quangos')**
Quangos are part public, part private organisations; they are quasi-public entities
 - How much they can be considered government entities is uncertain: their public aspects clearly warrant public regulation, but their private aspects may point to doctrines of private law (eg, contract) as better modes of regulation (see below)
- **Local governments**
Elected councils are separate statutory corporations established by town planning legislation; they have limited legislative powers to make 'by-laws' (local regulations), but can regulate a wide range of public matters (eg, public safety, health, advertising, nuisances, draining, town planning, etc). The scope of a local government's power is limited to that conferred by its enabling legislation
- **Administrative tribunals**
Tribunals, boards or commissions are statutory authorities that carry out the quasi-judicial function of administering determinations and reviewing administrative decision-making.
 - Examples: migration review tribunal, legal practitioners board

As can be seen, the executive branch comprises a large number of entities and sub-classes of entities, each responsible for a diverse array of functions and powers.

C *Boundaries*

As a result of this diversity, the boundary between state and non-state actors is difficult to demarcate precisely. Certainly, it seems clear that many bodies comprise the executive:

- State bodies (eg, ministers, cabinet and government departments)
- Statutory bodies (eg, VCAT, VTAC, Centrelink)

It seems equally clear that many bodies do *not* comprise the executive:

- Other branches of government (eg, Parliament, police, military, judiciary and courts)
- Private, non-state bodies (eg, corporations not owned or regulated by the government)
- Non-government organisations (eg, charities, clubs and societies)

However, between these two extremes lie several areas of uncertainty:

- Entities established for a public purpose but not directly controlled by the government (eg, privatised utilities, other privatised services such as transportation and telecommunications)
- Corporations acting under the authority of the government or otherwise having legal (such as contractual) relations to the government
 - Example: private detention centres (acting under authority of state, contracted to state departments, but financially and operationally independent)

The extent to which public authorities and corporations established for a public purpose are rightfully to be grouped within the executive remains unclear. In *Lange v Australian Broadcasting Corporation*, the High Court of Australia noted that

The conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.

This suggests that the precise boundaries of ‘the executive’ are entwined with concepts of responsible government: that is, that the executive represents any entity which is, directly or indirectly, constitutionally responsible to the people (as distinct from shareholders or beneficiaries).

One criterion for distinguishing state from non-state entities might be whether they have the authority to exercise ‘public’ power (public power being power exercised for a public, or governmental, purpose). However, this would be unhelpful for its circularity; determining what constitutes public power itself requires an assessment of the scope of government. That criterion also fails to offer any guidance in weighting the various public and private functions served by a corporation.

The idea of a democratic mandate (or public accountability) has also been offered as a way to demarcate public from private exercises of power. However, this cannot be the sole criterion of government; by this logic totalitarian regimes would not be considered ‘states’. It would be highly presumptuous to make this claim.

A more positivist definition, and one which I favour, might be that a government corporation or organisation is one established, substantially controlled or otherwise specifically authorised by laws created or amended by the government. Thus, private corporations exercising power *conferred* by the government would be exercising a quasi-public power, as would any corporation established by the government, but ‘purely private’ entities without a legal relationship to the government would not.

Nevertheless, it must be conceded that the line between ‘quasi-public’ and ‘private’ functions remains unhelpfully blurred. Quasi-public power has been treated inconsistently by courts, sometimes seen as falling within the regimes of administrative but at other times deemed to fall wholly outside its procedures. Some examples of this are examined in more detail below.

D *Functions and Purpose*

The functions of government entities are as diverse as the executive is broad. In general, however, executive bodies are tasked with carrying out the mandate of the government, their controlling minister or department. In turn, they have the power to administer, implement and, in some circumstances, create laws.

For example, administrative tribunals’ principal function is to administer law by controlling the direct implementation of law by other bodies. In reviewing the decisions of government departments, they perform court-like functions, but their functions are not judicial in nature, and they form a clearly part of the executive.

By contrast, the principal function of cabinet is to set broad directives, proposals to put to Parliament, and other like matters. It might be described as carrying out a partly legislative function, but again, it is squarely within the realm of the executive.

Administrative law applies to all executive bodies. It regulates the exercise of executive power. However, because the content of executive power varies with the purpose being performed, administrative law encompasses several modes of regulation.

E Powers

Government entities may also be characterised by reference to the kind of power they wield. The precise scope of executive power 'has often been discussed but never defined'.⁶ Justice Mason has described this power as that which

*enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.*⁷

The various powers conferred upon the executive and its constituent entities may be broadly grouped into the following headings:

- Legislative power
 - Delegation (where the Parliament delegates legislative power to the executive, to create laws pursuant to that power or to further delegate it to a sub-agency)
 - Regulation (to create regulations and by-laws as a result of delegated legislation)
 - Nationhood (to undertake activities appropriate to the existence of the Australian nation and to protect the Commonwealth against subversion and sedition)
- Powers of enforcement
- Adjudication (judicial)
- Administration (non-judicial: powers to administer and implement laws)
- Common law and prerogative powers (to enter contracts, own property and form companies)

F Constitutional Basis

The *Constitution* does not exclusively define the power of the executive:

Chapter II THE EXECUTIVE GOVERNMENT

Section 61 — Executive power:

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.

Section 68 — Command of naval and military forces:

⁶ *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ).

⁷ *Barton v Commonwealth* (1974) 131 CLR 477.

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Other sections in Chapter II set out the composition of the executive:

- *Constitution* s 61: vests executive power in Queen and Governor-General as Her Majesty's representative
- *Constitution* ss 62–3: refer to a 'Federal Executive Council'
- *Constitution* s 65: refers to 'Ministers of the State'

However, in practice, the vast majority of executive bodies have been subsequently created and continue to be regulated outside constitutional provisions. That is to say, they are informal conventions. There is, for example, no mention in the *Constitution* of the prime minister, cabinet, or other core components of the executive. Perplexingly, such components, in particular the cabinet, now comprise the 'apex of executive govt'. The cabinet, for example 'set[s] broad directions of government, takes the most important decisions facing a government' (Cabinet Handbook). What this demonstrates is that the practical importance assumed by the executive branch is not one prescribed, or even foreshadowed, by the *Constitution*.

G Responsible Government

1 Executive Responsibility to Parliament

Who can exercise executive power? Are there (or should there be) any restrictions placed upon how it can be exercised? In short, the doctrine of responsible government is a set of conventions which regulate exercises of state and federal executive power. It makes the executive branch responsible to the legislature and, indirectly, the people, for governmental actions, and prevents the exercise of arbitrary, discretionary power.

While the *Constitution* contains no express requirement that members of the executive behave in a responsible manner, there are several implicit references:

- The Governor-General normally acts on the advice of the Federal Executive Council: s 63
 - Ministers 'shall be members of the Federal Executive Council': s 64
 - Ministers 'shall hold office' as members of the house of representatives (and shall be responsible to Parliament for their department's actions): s 64
 - The government, from which Ministers are drawn, is to enjoy the confidence of the popular house
 - Therefore, the executive is accountable to Parliament
- These implicit references have effect in constitutional conventions
- Responsible government is enhanced by further scrutiny of executive action by the ombudsmen and parliamentary committees
 - Various ancillary elements complete the picture (see Lindell and the Cabinet Handbook), including cabinet solidarity and secrecy

2 Purpose of Responsible Government

The doctrine attempts to make the executive branch democratically accountable. It thus implements the notion of representative government by enforcing (through convention) a chain of

responsibility to the people. This promotes democratic control of governmental action. Thynne and Goldring argue that the doctrine helps promote responsible conduct more broadly:

- Government officials are responsible for performing acts attendant upon their position within the governmental system: if they do not perform the tasks required of them, they will be reprimanded;
- Officials are expected to perform their tasks and discharge their responsibilities responsibly (the standard of behaviour according to which they are expected to consider implications of their conduct and pursue efficiency and public interests);
 - Officials are expected to be responsive to community interests and to the views of other members of government (whilst themselves maintaining an independent perspective and not allowing conflicts of interest to arise); they must not be inactive where inactivity would be inappropriate; and
- Officials are responsible to discharge the responsibilities they have been allocated (they maintain a relationship with a subordinate or a superior capable of calling them to account for their acts or omissions).

Representative democracy entails the people's representatives acting responsibly and with propriety. They must do this in order to satisfactorily respond to citizens' interests.

Dicey and others were so convinced in the power of the doctrine of responsible government that they thought administrative law to be unnecessary. If responsible government operates effectively, they said, the bureaucracy (through the people) keeps itself in check, making external regulation redundant. Since Dicey's times, however, the structure of government has become increasingly complex. Particularly at lower levels, such as local government planning and tribunal decision-making, there remains a need for review and other regulatory mechanisms.

2 *Decline of Responsible Government*

It has been suggested that, in recent times, the operation of the doctrine of responsible government has become increasingly ineffective. Several reasons have been offered for this: the complexity of modern government, strong partisanship in Parliament (which replaces accountability to Parliament with party discipline), and decreasing ministerial scrutiny of the executive.

- 1 **Power of Australian political parties**
Ministers can depend on their party's vote, so unless there is substantial public outcry they will be supported regardless of the merits of their actions.
- 2 **Complexity of modern bureaucracies**
Because ministers cannot reasonably be expected to supervise the activities of all subordinates and public servants, they cannot logically be held accountable for their activities.

What these arguments ignore is that, whilst parties are more loyal and bureaucracies more complex, it is correspondingly much easier to publicly voice concern about irresponsible executive actions. If parties want to maintain political power, they must maintain a public perception of responsible conduct. In an age dominated by powerful, decentralised media networks, it has never been easier to denounce irresponsible conduct and publicly call governments to account — whether by members of Parliament or private citizens.

Further, the increased role of parliamentary committees, industry watchdogs and ombudsmen have — despite reduced funding, and often being made up of party members — been effective to

identify and eliminate improper conduct (eg, consider recent investigations into ministerial spending, departmental inefficiency, etc). The opposition party has also assumed increasingly importance. For these reasons, it seems difficult to describe responsible government as being in decline (whatever the political circumstances of the day).

III **Executive Power**

A Sources of Executive Power

- s 61 Const: 'executive power' 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'
 - Statutory executive powers: key source of exec power
 - s 61: no exhaustive definition (executive power 'extends to' ... [inclusive definition])
- Powers conferred by the Constitution: expressly: e.g. s 68 (command of navy etc); proroguing and dissolving Parl (s 5)
 - implicitly: implied 'nationhood' power
- Issue: what is the meaning of 'executive power' under s 61?

Three sources identified: *Constitutional*, statutory and prerogative.

1 *Australian Constitution*

- Powers conferred by the *Constitution*
 - Express
 - Eg, s 68 (naval and military directives)
 - Eg, s 5 (proroguing and dissolution of Parliament -- powers vest in G-G)
 - Implied: there also exist executive powers implied by the *Constitution's* text and structure
 - 'Implied nationhood' power: being a national government, the Commonwealth has certain executive powers befitting of such a government
 - Eg, establishment of national research bodies (eg, CSIRO)
 - Eg, national celebrations (eg, 1988 bicentenary)

2 *Statutes*

- Statutes ('laws of the Commonwealth') [major source]
 - Manner of exercise and extent of power will depend on terms of legislation
 - Legislative power creates executive power

3 *Prerogative (Common Law) Powers*

- Prerogative/common law powers (unclear whether synonymous or distinct powers: see readings)
- Prerogative and/or common law powers: executive prerogatives; immunities and preferences; property rights
- *Note* existence of these powers also amplify legislative power by virtue of s 51(39) (*Farey* per Isaacs J)
- These encompass powers to hold property and enter into contracts; and
 - Eg, ability to enter into contracts
 - Eg, holding radical title over continental Australia (ultimate sovereignty; capacity to make tenurial grants)

- Eg, ability to recover debts before other parties in bankruptcy proceedings (Crown has priority)
- Immunities and executive prerogatives
 - Eg, appointment of diplomatic figures (ambassadors, etc)
 - Eg, declaration of war/peace
 - Eg, entrance into treaties
 - Somewhat problematic in the context of s 51(xxix); can assume international obligations without Parliamentary approval
 - Importantly, these powers can be exercised without legislative involvement
- Incidental powers
 - s 51(xxxix): matters incidental to the exercise of any *Constitutional* power
 - Executive powers are *Constitutional* powers
 - Therefore, Parliament has power to legislate with respect to any matter incidental to the exercise of executive power
 - Thus, executive power gives rise to legislative power (cf above)
 - See *Farey* (Isaacs J)

B *Relationship between Prerogative and Statutory Powers*

- *Issue*: where a statute exists conferring executive power and there is also a common law/prerogative power covering the same or similar functions (possibly relevant)
- *Question*: can the executive act in reliance on the prerogative power, even where this involves acting beyond the power conferred by the statute?
- *Significance*:
 - If the executive can act in a manner unregulated by Parliament (outside the statute), it might be thought to undermine the doctrine of responsible government
 - Relatedly, democratic control of the executive would be diminished (since the statute is, presumably, a true expression of the democratic will)
- The vast majority of statutes leave this question unanswered
- What is at stake: parliamentary sovereignty; responsible govt; representative govt

Ruddock v Vadarlis (200x) Court ('Tampa Case')

Facts:

- Some 400 Afghan asylum-seekers are aboard a Norwegian vessel, the MV Tampa
- The Australian government decides to prevent the ship entering Australian waters (to avoid processing the refugees' Visa applications)
 - The vessel is prevented from landing on Christmas Island
 - The Navy (unusually, assisted by the SAS) blocks the ship's passage, and it is successfully diverted to Nauru
- A writ of *habeas corpus* is subsequently brought on behalf of the refugees ('produce the person': the writ would demand appearance of the detainees before a court to demonstrate that they are being lawfully held)
- Vadarlis seeks to release the asylum-seekers from what is alleged to be unlawful detention

Issue:

- (1) Are the asylum-seekers being 'detained'?
 - Did diversion of the ship constitute 'detention'?
 - Government argues that because they were free to go to Nauru, they were not

- being 'detained'
- (2) Is their detention and expulsion from Australia lawful (ie, is it a lawful exercise of executive power)?
 - (i) Does s 61 confer upon the executive power to prevent entry by persons to Australia?
 - (ii) If yes, has this power been abrogated by the *Migration Act*?
 - The Government conceded that there was no statutory source of power
 - The *Migration Act* did not authorise the detention or diversion
 - However, the government argued that s 61 of the *Constitution* conferred common law/prerogative powers to engage in that conduct

Reasoning:

- Trial judge (North J):
 - The asylum seekers were detained because Nauru was not the destination of their choosing
 - Detention was unlawful
 - No power authorising detention under prerogative powers or s 61
 - Even if there was, it would have been abrogated by *Migration Act*
- Full Court of the Federal Court: French J:
 - Detainment
 - The asylum-seekers are not being detained: diversion is not a form of detention; just expulsion
 - Lawfulness
 - The Government acted lawfully because s 61 conferred a prerogative power
 - However, the issue does not just concern prerogative powers: s 61 gave rise to a national government and national powers central to its sovereignty (determining who enters)
 - 'The power to determine who may come into Australia is so central to its sovereignty'
 - Abrogation
 - In any case, the *Migration Act* is not inconsistent with the prerogative power to determine who comes into Australia
 - This is a 'matter of construction' (interpreting the Act)
 - The Act leaves the parallel prerogative power intact
 - The Act simply creates 'facilitative provisions' (non-compulsory, non-exclusive mechanisms for denying entry: permissive and not exhaustive provisions)
 - Thus, the government could prevent entry to Australia under the procedures set out in the *Migration Act*, or they could use any other available prerogative/common law power
- Black CJ (dissenting):
 - Detainment
 - Asylum seekers were being detained
 - Lawfulness
 - Detention and expulsion was unlawful
 - It is unclear whether s 61 confers any power upon the executive to prevent entry into Australia
 - It is also unlikely at common law or under a prerogative power
 - It would be 'strange' if the power 'should emerge in a strong modern form from s 61 of the *Constitution* by virtue of general conceptions of "the national interest"' (the basis of the majority)

- Abrogation
 - However, even if there was a power, it has been abrogated (displaced) by the *Migration Act*
 - 'The regime is comprehensive in its coverage'
 - The source of executive power is uncertain

Decision:

- Appeal allowed; government action is valid
- Highlights the difficulty of characterising a statute as permissive or exhaustive
 - Black CJ: exhaustive because so detailed
 - French J: purely facilitative, optional procedures

C *Order of Enquiry*

- *Statutory* powers: using principles of statutory construction, determine whether the exercise of the power is *ultra vires* (outside)
- *Constitutional* powers: constitutional interpretation/implication
- *Prerogative/common law* powers: historical analysis; determine whether previously exercisable common law power

D *Reserve Powers*

- Key element of doctrine of responsible govt is that G-G acts upon advice of responsible Minister/s
- Exception: reserve powers: what are they? power to:
 - appoint PM
 - dismiss PM
 - refuse to dissolve Parl; and to force dissolution of Parl.
- Reserve power to dismiss PM recognised to exist when:
 - no-confidence motion passed by lower house;
 - certain forms of illegality.
- Reserve power to dismiss when PM cannot obtain supply, i.e. money for funding ordinary services of govt?
 - Consider 1975 constitutional crisis:
 - Facts
 - Arguments for constitutionality of dismissal
 - Arguments against constitutionality of dismissal
- Demonstrates at least lack of certainty regarding constitutional conventions in relation to this reserve power

E *Problem 1*

- Order of enquiry
 - What was done?
 - A. Detaining Texans by setting up a quarantine facility on the vessel and preventing it from leaving
 - B. Preventing the vessel being boarded by Australians
 - Was it lawful?

- Is there a statutory source of executive power (A)?
 - Yes, *IDCA*
 - Authorises the Minister to request attendance at a hospital
 - If they refuse, can petition Federal Court for order compelling them to remain in quarantine (but need 'conclusive medical evidence')
 - Exercise of power clearly goes beyond scope of Act
 - Didn't comply with the *IDCA*'s procedure (no request, no court order)
 - Act confers broad, intrusive powers
 - Should be given restrictive scope (confined to stated diseases -- otherwise, what is the point of the list?)
 - Didn't act upon a disease mentioned in the Act
 - Unclear: does it need to be a listed disease to attract the operation of the procedures?
 - Purpose of Act to prevent spread of infectious diseases; arguably not restricted to listed diseases -- uncertain
 - Not supported by Act: doesn't authorise Minister's actions
 - Also consider *Migration Act*:
 - Doesn't authorise action -- passengers have valid tourist Visas
- Is there a non-statutory source of power authorising action (A)?
 - Implied constitutional
 - s 61 -- border control (*Tampa*): implied constitutional power to prevent entry
 - But here, already in Australian waters -- can't be excluded from 'Australia'
 - Argue by analogy: prevent entry to mainland?
 - Essentially, just restricting movement *within* Australia
 - Effectively detaining the passengers (can't leave, can't disembark)
 - Does it extend to detention? Unclear
 - Prerogative powers
 - Doesn't appear to be relevant
- Does the Act abrogate these other powers?
 - Facilitative or exhaustive?
 - *IDCA*
 - Geographic ambit of operation? (Australian mainland)
 - Executive action here consistent with purpose of the Act (preventing spread among Australian populace)
 - Arguably operates in a different physical area to that where the detention took place (argument for abrogation weaker)
 - Act not as detailed as migration act (cf French J in *Tampa*)
 - Facilitates disease control -- to be used in conjunction with other procedures (suggests optional)
 - Limits executive action -- need 'strong medical evidence', request, court warrant, etc -- public (judicial) scrutiny important when broad powers of detention available (suggests exhaustive)
 - *Migration Act*
 - Facilitative (parallel) procedures (French J)
- Action (B) -- preventing Australians boarding
 - No statutory source authorising exercise of power
 - Unlikely that *IDCA* permits control of Australians as an incidental exercise of power

A v B (200x) Court:

Facts:

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Issue:

- ?

Reasoning:

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Decision:

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Section X — Title:

(1) A