

## PART XV – FEDERAL CONSTITUTIONAL FRAMEWORK

### I **Federal Financial Framework**

#### A **Spending Powers**

Under ss 81 and 83 of the *Constitution*, all government expenditure must be appropriated from the Consolidated Revenue Fund by valid Act of Parliament. Section 81 makes clear that such appropriations are ‘to be ... for the purposes of the Commonwealth’:

##### **Section 81 — Consolidated Revenue Fund:**

All revenue or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Importantly, such appropriations are expressed as being ‘subject to the charges and liabilities imposed by [the] *Constitution*’, which means that an appropriation cannot be used to circumvent another express or implied limitation on Commonwealth power.

By s 83, the executive cannot spend money from the Consolidated Revenue Fund without statutory authorisation. This ensures that the executive is subject to the control of Parliament and hence accountable for its use of moneys.

##### **Section 83 — Money to be appropriated by law:**

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

The limits on government spending imposed by ss 81 and 83 exist for several reasons:

- **Responsible government**  
The executive is accountable to Parliament for its use of money;
- **Representative government**  
Because Parliament maintains control over government spending, the citizens, through their representatives, control the executive branch of government; and
- **Constitutionalism**  
Spending occurs ‘subject to’ the higher law of the *Constitution*, the rule of which is endorsed by the requirement that spending be only for ‘the purposes of the Commonwealth’ (and hence the *Constitution*, though the phrase’s ambiguity arguably lessens the constitutional nature of appropriations).

## B [P]urposes of the Commonwealth'

The Parliament may only appropriate money under s 81 'for the purposes of the Commonwealth'.

### ***Victoria v Commonwealth and Hayden (1975) HCA ('AAP Case'):***

#### Facts

- One of the Whitlam government's major projects was to setup a national body to provide social services to people in various regions
- There were to be funded and established Regional Councils for Social Development, which would replace the existing equivalent state services
- No supporting statute exists other than the *Appropriations Act (No 1) 1974* (Cth)
- The particulars of the plan were specified only in vague terms: \$5.97bn were purported to be appropriated
  - Eg, '02. Development and Evaluation: \$350 000'
  - A vast amount of money was spent in this way with only perfunctory justification: '01. Grants to Regional Councils for Social Development ... \$5 620 000'
- The Victorian government challenges the validity of the plan, seeking a declaration that the appropriation was beyond power and an injunction against expenditure of the funds

#### Issues

- Does the *Appropriations Act (No 1) 1974* (Cth) authorise execution of the AAP Plan?
- Is the appropriation for the purpose of the AAP Plan for the 'purposes of the Commonwealth'?
  - Victoria argued that the money was not for the purposes of the Commonwealth and that the supporting statute was therefore invalid
- Is execution of the AAP Plan authorised by *Appropriations Act (No 1) 1974* (Cth)?
  - Even if the Act is constitutionally valid, it may be that its implementation of the plan was not authorised by the statute

#### Reasoning

- Constitutional validity: 'purposes of the Commonwealth' s 81 *Constitution*
  - Whether this is so depends on the meaning of the phrase 'purposes of the Commonwealth'
  - Jacobs, McTiernan, Mason and Murphy JJ:
    - On a broad view: the purposes are whatever purposes decided by the Commonwealth legislature: see McTiernan, Mason and Murphy JJ (also Latham CJ in *Pharmaceutical Benefits Case*)
      - Under this view, the phrase does not impose any additional limitation
      - It is satisfied simply by virtue of the fact that a valid statute exists
      - This suggests that the appropriation is valid
  - Barwick CJ and Gibbs J:
    - On a narrow view: purposes include only 'a purpose for or in relation to which the Parliament may make a valid law': Barwick CJ (see also Gibbs J)
    - If the supporting legislation is within a head of power then the appropriation will be valid
  - Which is the better view?
    - Barwick CJ and Gibbs J use federal principles to limit the scope of federal spending

- The Commonwealth government does not have plenary power (only specified heads) in order to preserve the states' legislative capacities
- Mason J
  - Arguments against a broad interpretation of 'purposes'
    - '[393] The existence of an unlimited power of appropriation would, it was said, be quite inappropriate to, and inconsistent with, the distribution of powers so carefully contrived by the *Constitution*. A limited power of appropriation would play a powerful part in keeping the Commonwealth within the bounds assigned to it by that instrument.'
    - By s 94, the states are 'very much at the mercy of the Commonwealth' so far as distribution of surplus is concerned; by giving the Commonwealth a power to spend on purposes for which they cannot legislate, the possibility of there being surplus is reduced
  - These arguments have force but are outweighed by others
    - 'even if [394] the power of appropriation be unrestricted, its exercise is necessarily influenced by the limited scope of the Commonwealth's legislative, executive and judicial powers...'
    - 'Consequences more detrimental and prejudicial to the process of Parliament [than a narrow interpretation] would be difficult to conceive. Any item in the Act would be subject to a declaration of invalidity after Act is passed, even after the moneys in question are withdrawn from Consolidated Revenue and perhaps even after the moneys are expended...'
    - 'The adverse consequences of a narrow view of s 81...'
    - 'How is the short description of an item contained in the scheduled to the Act to serve as the fulcrum of constitutionality?'
    - 'it would deprive the Commonwealth of the power to make grants for purposes thought to be deserving of financial support by government, yet standing outside the area of Commonwealth power...'
    - If the phrase 'purposes of the Commonwealth' was restricted, it would interfere with the operation of federal Parliament
    - The brevity with which purposes were described in appropriations legislation is not conducive to accurate judicial determination of a law's constitutional validity
  - '[396] It follows, then, that I would give to the words "for the purposes of the Commonwealth" in s 81 the meaning ascribed to them by Latham CJ in the *Pharmaceutical Benefits Case* ..., that is, for such purposes as Parliament may determine.'
- Authorisation of the plan
  - Mason J: not supported by the legislation
    - 'An appropriation ... may provide the necessary parliamentary sanction for the withdrawal of money ... but it does not supply legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent. Whether the Commonwealth can

engage in any specific activities depends upon the extent of the Commonwealth's legislative, executive and judicial powers.'

- Thus, all a valid appropriations Act does is give the Commonwealth authority to lawfully spend money; however, it does not give the government permission to engage in activities in connection with how the money is spent
- The plan is not supported by the appropriation legislation
- A separate piece of legislation would be required to legitimise actions in connection with spending of money
- Such legislation is unlikely to be within a head of power
- In the absence of valid such legislation, the Parliament cannot use a back door to enact what it cannot via the front
- Advancement of the nation: CSIRO
- Mason J: would have issued an injunction to prevent the spending of the money

#### Decision

- (4:3) The Commonwealth was successful and Victoria's action fails:
  - McTiernan, Jacobs and Murphy: no basis for impugning the appropriation and execution of the Plan
    - Within power even on a s 51 reading
  - Stephen J: Victoria did not have standing to challenge the Act
  - Barwick CJ, Gibbs and Mason JJ:
    - No, the Act is either invalid or does not support the Plan
    - Purposes of the Commonwealth means s 51 purposes
    - AAP scheme is outside of these purposes, so the appropriation Act is itself invalid
- (4:3) The phrase 'purposes of the Commonwealth' should be given a broad construction

The *AAP Case* shows the difficulty of undermining an appropriation based on attacking the legislation itself. It will normally be easier to challenge the executive action implementing the spending.

Justice Mason's conclusion is referable to a question of characterisation. An appropriation Act authorises the 'withdrawal of money from Consolidated Revenue and the payment or subscription of money to a particular recipient or for a particular purpose *but* it does not supply legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent'. On the facts, his Honour found no legal authority for the Commonwealth's direct involvement in AAP Plan because no head of power existed to support the legislation that would have been required to establish the bodies.

The *AAP Case* was subsequently interpreted in *Davis v Commonwealth*. There it was stated that the former case 'stands as an authority for the proposition that the validity of an appropriation act is not ordinarily susceptible to effective legal challenge' (*Davis* per Mason CJ, Deane and Gaudron JJ).

Whether an activity is authorised by an appropriation law was an issue raised in the recent *Industrial Relations Advertising Case*. The key argument raised by the plaintiffs, who challenged the validity of Commonwealth advertising appropriations, was that the advertisements themselves were not authorised by the item in the relevant appropriations Act ('higher-productivity, higher pay workplaces'). The High Court rejected the challenge by majority and it does not appear that they addressed this argument.

## C Nationhood Power

The 'nationhood' power is a source of both legislative and executive power. Even when there is no statutory authority, it can legitimate executive conduct (*Ruddock v Vadarlis*). It can also support Commonwealth legislation (eg, in connection with an appropriation).

### AAP Case (1975) HCA:

#### Reasoning

- Mason J:
  - 'So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on or the benefit of the nation.'
    - Eg, national science and the CSIRO
    - Eg, national health inquiries and advocacy (*Pharmaceutical Benefits Case*)
    - Eg, *Wooltops Case*; *R v Sharkey*; *Burns v Ransley*; *Communist Party Case*
  - 'enterprises and activities appropriate to a national government'
  - 'The functions appropriate and adapted to a national government will vary from time to time'
  - 'However, **the executive power to engage in activities appropriate to a national government**, arising as it does from an implication drawn from the *Constitution* and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, **is limited in scope**. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the states achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a **radical transformation** in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power **merely because these programmes can be conveniently formulated and administered by the national government...**'

#### Decision

- On the facts, the programme relates 'to the co-ordination on as national basis of welfare services otherwise provided and to be provided'
- 'the elements of the scheme are to be a direct responsibility of the Commonwealth, acting not through the states and their agencies, but independently of them.'
- **[400]** in my view the activities which call for the expenditure of this money, the elements which comprise the scheme known as the Australian Assistance Plan, stand largely, if not wholly, outside the boundaries of the executive power of the Commonwealth.'
- 'The carrying into execution of that Plan is in my view outside the realm of the executive power of the Commonwealth and should be restrained by injunction.'

In *Davis v Commonwealth*, Barwick and Gibbs JJ noted that there must be extraordinary circumstances to attack the Act appropriating funds from the Consolidated Revenue Fund. However, it is often much easier to impugn the legislation giving effect to its spending. The most common line of argument is that it falls outside a given head of power. The nationhood power is commonly used to prop up a floundering piece of legislation. The issue here is when the execution of an appropriation will be supported on the basis of furthering the nation, as distinct from being a merely convenient way to sideline the states (as the AAP minority noted).

### ***Davis v Commonwealth* (1988) HCA:**

#### Facts

- The *Australian Bicentennial Act 1980* (Cth) ss 22–3 prohibited the use of various words in connection with the bicentenary, including ‘Australia 1988’, ‘Bicentenary 1988’, and the like (very broad)
- The Commonwealth argues that the legislation is supported by the nationhood power; this is its only possible basis

#### Issue

- Is the Act supported by the ‘nationhood’ power?

#### Reasoning

- What are the sources of the ‘nationhood’ power?
  - Section 61 confers prerogative executive power upon the government
  - Section 51(xxxix) of the *Constitution* operates upon s 61 to create legislative power with respect to powers vested in the government of the Commonwealth
  - In this sense, the ‘nationhood’ power encompasses both executive and executive powers
  - Wilson, Dawson and Toohey JJ:
    - Not an ‘implied’ power
- What is the scope of the ‘nationhood’ power?
  - ‘such powers as may be deduced from the establishment and nature of the Commonwealth as a polity’
  - ‘clearest where . . . no real competition with State executive or legislative competence’: Mason CJ, Deane and Gaudron JJ
    - Is an activity ‘peculiarly adapted’ to national execution?
- Validity of the Act
  - ‘the commemoration of the Bicentenary is a matter falling within the peculiar province of the Commonwealth’: Mason CJ, Deane and Gaudron JJ
- However, the Act is invalid because the means employed could not be supported
  - It is grossly disproportionate to the aim of commemorating the bicentenary: Mason CJ, Deane and Gaudron JJ (see also Wilson, Dawson and Toohey JJ)
  - Issues about proportionality (considering the means employed)
    - Is there a rational connection between the means employed and the overall objective?
      - Here, how does prohibiting the use of certain words promote the bicentenary
    - Assuming such a connection exists, is the effect of those means excessive or disproportionate in light of the benefits they secure?
  - The use of penal laws to supplement what the executive intends to do is inappropriate: Brennan J

- Criminal legislation is not usually supported by the ‘nationhood’ power (but see below in relation to self-protection)

Decision

- The legislation is invalid

As *Davis* and the *AAP Case* illustrate, the scope of the nationhood power has not been precisely fixed. It seems to encompass the Commonwealth’s ‘right of self-protection’ and supports sedition and subversion laws, even where criminal: *Burns* and *Sharkey*. However, it will not normally support criminal offences unless directed towards protecting the *Constitution* itself, its institutions and activities: *Davis* per Brennan J.

The nationhood power includes power to legislate for Australian territorial sea (Barwick CJ in *Seas and Submerged Lands Case*).

However, the nationhood power is not a power to protect the country as a nation. Sedition and subversion laws have been upheld, but these laws were directed at conduct inciting the overthrow of the *Constitution*. General criminal laws are unlikely to be supported (*Davis* per Brennan J): the case law doesn’t suggest that the power will support coercive laws. It is, in short, a ‘facilitative’ power (Tham). It is therefore very unlikely to support laws that are penal, coercive and intrusive: *Tasmanian Dams Case*.

**Example:** establishing the Commonwealth Scientific and Industrial Research Organisation; this organisation clearly promotes activities adapted to the status of the Commonwealth as a nation.

## II Taxation

### A Constitutional Powers

The Commonwealth Parliament has concurrent legislative power with respect to taxation. However, the grant is limited to situations which do not discriminate against the states:

#### **Section 51:**

The Parliament shall, subject to this *Constitution*, have power to make laws ... of the Commonwealth with respect to: —

- (ii) Taxation; but so as not to discriminate between States or parts of States...

Section 53 prevents the Senate from introducing or amending taxation or appropriation bills:

#### **Section 53:**

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

... Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation and taxation bills may only deal with appropriation and taxation matters:

#### **Section 54:**

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

If a law deals with both taxation and non-taxation matters, the other matters are of no effect:

#### **Section 55:**

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein



dealing with any other matter shall be of no effect. ...

Section 55 thus stipulates a legal consequence flowing from a failure to separate taxation from non-taxation matters. Since the senate can't amend taxation bills, tax bills can only contain tax provisions. (Otherwise the House of Representatives could include other provisions in tax bills which the senate could not amend.)

Because the Senate may not amend a tax or annual appropriation bill, it can effectively 'block supply' by refusing to pass such enactments. If double dissolution does not resolve a deadlock, the Governor-General may call a joint sitting. This favours the party with a majority in the House of Representatives, since that House has twice the number of members. It also implicitly favours the larger states, who have proportional representation in that House.

## B *Justiciability and Invalidity*

Section 53 concerns 'proposed laws' and therefore the internal workings of the Parliament. For this reason it is non-justiciable (unarguable before a Court).

### ***Osborne v Commonwealth (1911) HCA:***

#### Reasoning

- Sections 53 and 54 are non-justiciable because they deal with proposed laws
- Section 55 is justiciable because they stipulate a legal consequence, namely, that the law 'shall be of no effect'; this section also deals with 'laws' not 'proposed laws'
- Section 57 is also justiciable

Because s 55 is justiciable, it can be raised before the Court to invalidate non-taxation portions of an enactment that contains taxation matters (*Air Caledonie International v Commonwealth*).

### ***Air Caledonie International v Commonwealth (1988) HCA:***

#### Facts

- The plaintiff challenges an amendment to immigration legislation which purported to require a fee 'for immigration services'

#### Issue

- If the fee is a tax, what is the effect of s 55 of the *Constitution*?

#### Reasoning

- The fee is a tax (see below for analysis)
  - The amending statute thus includes both tax and non-tax matters, contrary to s 55 of the *Constitution*
- Either the migration provisions are invalid in favour of the taxation provisions, or the taxation provisions are invalid
- The latter would cause far less inconvenience

- Interpreting s 55: contains two limbs
  - The first restricts legislative power to solely taxation matters
  - The second invalidates contrary legislation
- Here, the first limb was never satisfied so the invalidation provision never has operation

#### Decision

- The amendments are invalid, but the remainder of the *Migration Act* stands

*Air Caledonie* suggests that where it would be extremely inconvenient to invalidate an entire Act because of a few newly-introduced taxation provisions, the amendments — and not the rest of the Act — are all that will be invalid.

### C      ‘Tax’

In *Matthews v Chicory Marketing Board (Vic)*, Latham CJ described a ‘tax’ in the following terms (at 272):

*a compulsory exaction of money by a public authority for public purposes, enforceable law, and is not a payment for services rendered...*

Whether a provision is characterised as imposing a tax is significant for two reasons:

- **Whether the law is within power**  
Section 51(ii) supports laws with respect to taxation; taxation need not be the primary purpose of a statute; it need not even be intended to raise revenue (*Northern Suburbs*), but, objectively, it must be a tax;
- **Implications of s 55 of the Constitution**  
If a piece of legislation imposes a tax, does it conform to the requirement that only taxation matters are considered?

If a law is a law with respect to one particular head of power, it is valid notwithstanding that it may be characterised outside that power.

#### ***Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) HCA:**

##### Facts

- A challenge is brought against a training levy that purported to tax employers in proportion to the amount which they spent on training their employees, up to a certain threshold
- Purpose was not to raise money but to encourage employers to implement training programmes
- The challenge alleged that because the purpose of the law was not to tax, it could not be characterised as a law with respect to taxation

##### Issue

- Is the law a law with respect to taxation?

Reasoning

- Parliament's purposes are irrelevant to determining whether a law is within power

Decision

- It is valid even though it does not intend to raise revenue

*Air Caledonie* provides an example of an exaction of funds that is characterised as a tax, notwithstanding that Parliament intended it to be a fee for services provided to the taxpayer. The basis of the reasoning is that there was no service provided, and that, in any event, the profits were put to other purposes:

***Air Caledonie* (1988) HCA:**Facts

- The *Migration Amendment Act 1987* (Cth) imposes a 'fee for immigration clearance' upon all international airline passengers entering into Australia
- The Commonwealth argues that because the money was payment for a service rendered (processing passport, providing importation services), it was not a tax

Issues

- Is the 'fee' a 'tax'?
- If so, the Act cannot insert provisions into *Migration Act* by virtue of *Constitution* s 55

Reasoning

- Starting point: Latham CJ's definition of 'tax' from *Matthews v Chicory Board*:
  - compulsory exaction of money;
  - by a public authority for public purposes;
  - enforceable by law; and
  - not a payment for service rendered
- However, even if the money is collected by a private entity, it may still be characterised as a tax
  - The list is thus not exhaustive, especially with respect to the second element
  - 'Payment for services' is an example of 'various special types of exaction which may not be taxes'
  - Thus, other kinds of exactions besides fees for services may also not be taxes
  - Other exactions of money which are not taxes:
    - Charge for the acquisition or use of property
    - Fee for a privilege
    - Fine or penalty imposed for criminal conduct
- What is the service?
  - Must be a particular fee for a specifically requested service
  - The right to enter one's own country is not a service because the right to do so is inherent in citizens
  - Here there is no service
  - Even if there was, the money wasn't being used to pay for the passport processing itself (but rather other aspects of the immigration infrastructure)
- What is the effect of this being a tax?

- If an amending Act introduces tax provisions into an existing piece of legislation, only the amendment will be invalid
- Somewhat arbitrary reasoning

#### Decision

- The provision is a tax and the amendment is invalid

*Australian Tape Manufacturers Association v Commonwealth* suggests that compulsory fees enforceable by statutes are probably taxes if not a payment for services. The requirement that it be levied for public purposes is not defeated by virtue of its being collected by a private body.

### ***Australian Tape Manufacturers Association v Commonwealth (1993) HCA:***

#### Facts

- *Copyright Amendment Act 1989* (Cth) inserted Pt VC into *Copyright Act 1968* (Cth)
- The 1989 Act provided for the payment of a 'royalty' by vendors of blank tapes to a 'collecting society', a private body
- Its members were owners of copyright in musical products

#### Issue

- Is the requirement that vendors pay a 'royalty' a 'tax'?
  - The Commonwealth argued that on the basis of Latham CJ's description in *Matthews* the royalty goes to a private, not a public, body, and so could not be a tax
  - It is also money which goes to the copyright owners and so not for a public purpose

#### Reasoning

- Arguments rejected
  - Applying *Caladonie*, having a non-public body receive the money is insufficient to render it something other than a tax
  - 'not essential to the concept of tax that the exaction should be by a public authority'
  - 'the fact that a levy is directed to be paid into the Consolidated Revenue Fund ... a **conclusive indication** that the levy is exacted for public purposes'
  - Section 81 requires that all moneys raised go to the CRF; therefore, the fact that money goes to the CRF indicates that it forms a part of Commonwealth revenue
  - This has the effect of ignoring the public purposes requirement: just look to where the money is paid

#### Decision

- The royalty payment is a tax and the legislation is invalid
- Minority:
  - Eg, McHugh J:
    - No, not a tax
    - Exaction of royalties must 'be raised for some public, that is, governmental, purpose'

## D Arbitrariness

A tax cannot be arbitrary and must be imposed by reference to criteria.

### ***MacCormick v Federal Commissioner of Taxation (1984) HCA:***

#### Reasoning

- ‘For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which the liability to pay the tax is imposed . . . it must (also) be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner’
- There must be specific requirements and ascertainable criteria on which a tax will be imposed
- Those criteria must be enforceable in a court – a taxed person must be able to contest the tax’s imposition on those grounds

#### Decision

- Recoupment tax not arbitrary

*Truhold* affirms the approach taken in *MacCormick*.

### ***Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd (1985) HCA:***

#### Facts

- Involves a recoupment tax
- Tax evasion schemes would strip the assets of companies to avoid paying tax: legislation attempted to shift liability onto the persons onto whom the assets were shifted

#### Decision

- Valid; not arbitrary

## D ‘Fee for Services’

Certain types of financial imposts are not taxes for constitutional purposes. A ‘fee for services’ is one example of a class of imposts not treated as such a tax. When will an impost be characterised as such?

### ***Air Caledonie (1988) HCA:***

#### Facts

- An impost is labelled as a ‘fee for immigration clearance’
- The Commonwealth argues that because the impost is a fee for services it is not a tax and hence valid legislation

Issue

- Is the impost a 'fee for services' or a 'tax'?
- Was 'fee for immigration clearance' a 'fee for services'?

Reasoning

- Meaning of 'fee for services'
  - 'a fee or charge exacted for **particular identified services** provided or rendered **individually to**, or at the **request or direction of**, the **particular person required** to make the payment'
  - Must be some degree of specificity

Decision

- Fee is not a 'fee for services' because it did not differentiate between citizens and non-citizens
  - Citizens have a right of re-entry, and this is not a privilege for which they need to pay
  - Additionally, the Commonwealth could not identify any particular services: a right to enter the country is ascertained easily (producing a valid passport)
- Therefore invalid by s 55

***Airservices Australia v Canadian Airlines International Ltd (1999) HCA:***Facts

- The Civil Aviation Authority ('CAA') is a statutory body in charge of regulating the aviation transport industry
- The legislation in question granted the CAA the authority to charge aircraft operators
- This allowed it to carry on its regulatory functions
- The charge 'shall be reasonably related to the expenses incurred' by the CAA across the entire network
- One of the airlines becomes insolvent and is taken over by Canadian Airlines ('CA')
- CA contests the validity of the charge, a statutory lien: it argues that the fee does not directly correspond to the services provided by CAA, and thus not a fee for services (and hence a tax and invalid by s 55 of the *Constitution*)

Issue

- Is such a charge a 'fee for services'?

Reasoning

- There is no requirement that an impost be proportionate to services rendered
- Broad correlation sufficient – not a direct accounting on an individual basis
- Here, accounting for expenses 'across the network' is sufficient
- Gleeson CJ and Kirby J: an impost will not be a fee for services if a revenue raising purpose can be ascertained from the provision; if such a purpose can be ascertained and it is reasonably related to the expenses incurred, this will make the impost a tax

Decision

- No need for amount of charge to strictly correlated with value of services provided to individual aircraft operator

## E Discrimination

**Issue:** when does a taxation law ‘discriminate between States or parts of States’?

The power conferred by the *Constitution* upon the federal Parliament is granted subject to a qualification that a taxation law does not ‘discriminate between states or parts of states’.

Sections 51(ii) and 99 must be considered and read together. However, the practical effect of s 99 is minimal because it does not apply to Commonwealth grants.

### ***Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd (1939) HCA:***

#### Reasoning

- The s 99 qualification does not apply to s 96 grants

The justification for the qualification is that states should be able to provide services of similar scope and standard to their citizens. States should be treated equally, so people should be able to live equally in any region.

### ***James v Commonwealth (1928) HCA:***

#### Reasoning

- Focus on form: consider (Higgins J)
- ‘[462] where the rule laid down is general, applicable to all the states alike, but it is found to operate unequally in the several states, not from anything done by the Commonwealth Parliament, but from the inequality in the conditions exist in ... the states themselves. .. the Commonwealth Parliament has not been guilty of discrimination or preference between states...’

Thus, a tax which imposes a rate of 20% in one state and 30% in another would be discriminatory. However, if the tax is set at 25% for both in respect of, say, mining proceeds, and the former state’s primary industry is mining (while the latter’s is not), then the tax would not be discriminatory, despite its dramatically greater impact in the former state (*Colonial Sugar Refining Company Limited v Irving*).

### III Grants

#### A Constitutional Provisions

The *Constitution* contains several provisions which deal with the distribution of taxation powers and revenue from taxation between the Commonwealth and states. For example, s 96 confers power upon the Commonwealth to make conditional grants of money to the states. Section 90 also vests exclusive legislative power in the Commonwealth to impose customs, excise and bounties.

Section 114 also requires that the Commonwealth and states do not tax one another's property:

**Section 114:**

A State shall not, without the consent of the Parliament of the Commonwealth, ... impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

For the first 10 years following federation, transitional provisions were in force to assist the states in adjusting to the changed financial conditions. For example, s 87 of the *Constitution* provided for certain redistributions to take place.

The following provisions continue to have effect today and are still used to distribute revenues between the federal and state levels of government.

#### 1 Section 94 — Surplus revenue

Section 94 allows for distribution of surplus revenue (revenue raised by the Commonwealth less expenditure):

**Section 94:**

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

In the *Surplus Revenue Case*, expenditure can include 'notional expenditure'. For example, if the Commonwealth puts aside sums for anticipated future expenses (in 10 years' time, say), it can effectively zero out any available surplus.



## 2 Section 96 — Financial assistance

**Section 96:**

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Key issue: are there any constitutional limitations on the use of s 96 financial grants? Or do the words 'on such terms and conditions as the Parliament thinks fit' have their literal meaning (ie, that there are no such limitations)?

Essentially, s 96 allows the Commonwealth to exercise control over areas in which it does not have legislative power. (However, the state governments are not legally bound to accept the grant and perform the attached condition, though they may feel politically obliged.) This is constitutionally significant because it means that the limited legislative power granted to the federal Parliament can effectively be extended.

**Victoria v Commonwealth (1926) HCA ('Federal Roads Case'):**Facts

- The Commonwealth enacts a law granting funding to a state on the condition that it be used for maintaining roads; the other states challenge the law
- Those states argue that the law contravenes s 99 and s 51(ii)

Issue

- Is the law supported by s 96?

Reasoning

- It is so obviously supported by s 96 that 'exposition is unnecessary'

Decision

- The enactment is valid

**Moran (1939) HCA:**Reasoning

- Even uniform — and thus non-discriminatory — laws can produce unfair or unequal results between states, since they are of different sizes and capacities
- 'Section 96 is a means ... which enables the Commonwealth Parliament, when it thinks proper, to adjust inequalities between States ...'

In the *First Uniform Tax Case*, the majority agreed that the Commonwealth may induce states to exercise their powers by offering a money grant attached to certain conditions in areas not within the Commonwealth's domain of legislative power.

***South Australia v Commonwealth (1942) HCA ('First Uniform Tax Case')***Facts

- During World War II, the Commonwealth government sought to effect a redistribution of national personnel and resources to help with the war effort
- The challenged scheme consisted of four pieces of legislation:
  - *Income Tax Act*: fixed Commonwealth income tax rates at relatively high levels
  - *State Grants (Income Tax Reimbursement) Act*: provides that states will receive s 96 grants in the event that they do not charge their own income tax
  - *Income Tax Assessment Act*: gives priority to Commonwealth income taxes so that they must be paid first
  - *Income Tax (War-time Arrangements) Act*: transfers state public servants to the Commonwealth for the War
- Several states challenge the laws on the basis that they are not supported by s 96

Issue

- Were the Acts as a scheme or separately constitutionally valid?

Reasoning

- Latham CJ:
  - The statutes do not deny the abilities of the states to exercise their exclusive powers to make laws with respect to certain matters outside the exclusive purview of the Commonwealth
  - If the statutes did purport to deny such powers of the states, they would be invalid
  - However, they don't require that the states abdicate their powers to the Commonwealth
  - The statute is simply an inducement to the states not to exercise their powers in certain respects
  - Carrots, not sticks: an offer to the states to do something, but not a requirement so to do
  - 'The Commonwealth may properly induce a State to exercise its powers ... by offering a money grant.'
  - 'identification of a very attractive inducement with legal compulsion is not very convincing'
  - Whether this reward process is abused or used unfairly is not for the Court to decide; it will not adjudicate on the value or otherwise of a policy or political scheme
  - 'The remedy for alleged abuse of power ... is to be found in the political arena and not in the Courts'
- Starke J (dissenting):
  - Acts are invalid because they are directed at objects not contemplated by s 96
  - They are intended to have the effect of 'making the Commonwealth the sole effective taxing authority in respect of incomes...'

Decision

- All four acts are, when evaluated separately, valid

Thus, all Acts, except the *State Grants (Income Tax Reimbursement) Act*, were supported by ss 51(ii) (taxation power) or 51(vi). The defence power, being purposive power, has an

application of variable scope according to the circumstances; it expands during wartime and contracts during peacetime. What is supported in a time of war may not be supported in a time of peace. Following the end of World War II, a second litigation was brought by the states, again challenging the validity of the uniform tax provisions. It was argued that, wartime having come to an end, the Acts were no longer supported by the defence power.

### ***Victoria v Commonwealth (1957) HCA ('Second Uniform Tax Case')***:

#### Facts

- The revised Commonwealth income tax scheme is again challenged

#### Issue

- Are the Acts constitutionally valid?

#### Reasoning

- Dixon CJ:
  - In relation to s 96 grants
    - If the Court was interpreting s 96 for the first time, perhaps a narrower interpretation would have been adopted
    - However, as a result of the *Federal Roads Case*; *Moran's Case*; and the *First Uniform Tax Case*, precedent dictates that a broader construction be favoured
    - Such cases 'involve the entire exclusion of the limited operation which might have been assigned to the power as an alternative'
  - The s 96 is a power to grant money, not to make laws
    - Specifically, it cannot be used to make 'coercive laws' (ie, grant conditions cannot be forcibly accepted)
  - Besides the fact that the *Second Uniform Tax Case* took place during peacetime, it also followed the *Melbourne Corporation Case*, which developed the doctrine of intergovernmental immunities
    - However, such limitations do not apply to s 96 or to any limitations on conditions imposed upon grants
    - That is, there are virtually no constitutional limitations and none stemming from the *Melbourne Corporation Case*
    - Grant conditions can be almost anything

#### Decision

- All legislation except the legislation giving priority to the Commonwealth tax is valid
- There are no limitations upon s 96 that derive from s 51(ii) or the doctrine of implied immunities

Thus, there is nothing preventing a state from levying income tax. The Commonwealth legislation cannot prevent that. However, it would be political suicide: the state's citizens would need to pay *additional* income tax (since the Commonwealth taxation law could not be overridden), and the state would lose its grants (and hence share of revenues) under the uniform taxation laws, meaning that state taxes would need to be much higher.

## B Limitations on the Scope of s 96

Section 96 is not affected by the limitations contained in ss 51(ii) or 99 (*Moran*). There are, however, some (very small) limitations upon the exercise of s 96, namely, the express constitutional freedoms.

For example, as s 116 provides that '[t]he Commonwealth shall not make any law for establishing any religion', a grant cannot require

### ***Attorney-General (Vic); Ex rel Black v Commonwealth (1981) HCA ('DOGS Case')***

#### Reasoning

- Gibbs J:
  - Section 96 of the *Constitution* is limited by s 116
  - 'It is one thing to say that the Parliament, by condition imposed under 96, could achieve a result which it lacks power to bring about by direct legislation, but quite another to say that the Parliament can frame a condition for the purpose of evading an express prohibition contained in the *Constitution*' (Gibbs J)
  - This means that grant conditions cannot be used to evade express prohibitions
  - The laws in question were not 'establishing any religion'
  - This is because they were not directed at *establishment* of a religion but rather *related* to a religion
  - However, this reasoning indicates that s 96 does have limitations

#### Decision

- Challenge fails on the facts

## C Types of Grants

### 1 'Specific purpose' grants

Specific purpose grants are the conditional grants discussed above. If a state fails to meet the conditions specified in a grant, two consequences follow:

- **Practical consequence**  
Commonwealth might not make a grant in the next financial year; and
- **Legal consequence**  
The grant might specify that the Commonwealth can recover the grant money if it is not spent in the stipulated manner.

### 2 'Special assistance' grants

These are simply unconditional grants given when the Commonwealth deems it necessary.

### 3 Vertical financial imbalance

The term 'vertical financial balance' refers to

*a situation in which governments at each level can command the financial resources necessary for them to carry out their expenditure responsibilities and be held accountable for both spending and taxing decisions.*

Vertical financial imbalance arises when there is a differential between the revenue-raising capacity and expenditure of two levels of government (eg, state and federal).

In Australia, there is strong vertical financial imbalance:

- The Commonwealth has significantly greater revenue-raising capability; it has a monopoly over income tax: s 90 (grants a monopoly in relation to excise, which is construed broadly as encompassing most taxes on goods) and *Ha*
- By contrast, the costs of providing services at a state level are increasing (health, education, aged care, for which the Commonwealth does not bear financial responsibility)

Vertical financial imbalance is a problem for two reasons:

- **Federalism**  
If the states had a strong revenue base, they would be better able to refuse Commonwealth conditional grants under s 96. However, if they don't have enough money to meet their expenses, they may be forced to accept conditions imposed by the Commonwealth without any practical choice in the matter. For the Commonwealth to have such power over the states is contrary to federal principles.
- **Responsible government**  
Federal Parliament cannot hold the state executive legally accountable for its non-compliance with conditions, except by political means (threatening to cut off grants). Similarly, the state Parliament cannot hold the state executive accountable for accepting conditional grants, since it is the executive which bilaterally negotiates with the federal branch. Grants are made by the Commonwealth Parliament to the state executive. Acceptance of these grants is not subject to state parliamentary control.
- **Representative democracy**  
Instead of being responsible to the state electors, state governments become responsible to the federal Parliament by having to implement their conditions. Because of this 'loss of accountability and a weakening of democratic controls over all the governments concerned' (Mathews), the observance of responsible and representative government is undermined.

[Why couldn't the Commonwealth simply contract with a private company to pursue anything beyond its constitutional purview?]

#### 4 *Vertical financial imbalance*

Horizontal financial imbalance arises when two governments at the same level (eg, state level) are unable to provide equivalent levels of service or infrastructure to their citizens while taxing their citizens at a comparative rate. This is usually caused by unequal financial capacity and the differential costs of providing services in differing areas.

For example, the cost of providing internet access to citizens in each state varies with the size of the state, the density of its population and other geographical and structural factors. Similarly, the earning capacity and median wage of citizens in different states varies with the population, and geographical and social factors, so the earning capacity of governments differ significantly.

Horizontal financial imbalance poses a significant problem to federalism:

- **Erodes equality of states within the federation**  
Different levels and costs of services between the states results in internal migration and further devaluation of less equipped states; similarly, differing levels of taxation discriminate against citizens of certain states

The way horizontal financial balance is maintained is via s 96 grants from the Commonwealth and unequal distributions of revenue to the states, which is calculated according to the financial equalisation principle (a mathematical formula).

#### D *Implications of the Goods and Services Tax*

Before the introduction of the Goods and Services Tax ('GST'), Fraser's 'new federalism' and 'specific purpose' grants formed the primary way in which money was distributed to the states.

Key elements of the GST scheme:

- Imposition and collection of GST by the Commonwealth alone;
- Distribution of GST revenue according to fiscal equalisation principle with scrapping of 'special assistance' grants;
  - Distribution is unconditional
- Abolition of some State taxes;
- No change to 'specific purpose' grants.

**Effect upon vertical financial imbalance:** imbalance is increased. However, the effects are ameliorated since distribution is unconditional.

**Effect upon horizontal financial imbalance:** reduces imbalance since distribution occurs according to the financial equalisation principle.

## IV Excise Duties

### A Constitutional Provisions

Section 51(ii) provides concurrent power to tax while section 90 states:

**Section 90 — Title:**

...the power of the Parliament to impose duties of customs and of excise . . . shall become exclusive.

Importantly, s 90 does not confer power to impose customs and excise. Section 52 provides that power, which is concurrent (shared with the states). Section 90 makes this power exclusive; it can only be exercised by the Commonwealth.

Categories of financial impost:

- Taxes
  - General taxes
  - Excise duties
  - Licence fees
- Not taxes
  - Fees for services

An excise is a type of tax. If it is not a tax (eg, if it is a fee for services), then it cannot be an excise. Similarly, if an impost is a licence fee, then it cannot be an excise (though it is still a kind of tax).

### B The Meaning of 'duties of customs and excise'

An excise is a type of tax. This means that, logically, if an impost is not a tax, it cannot possibly be an excise. Thus, in *Air Caledonie*, a fee for services could not be considered an excise. If a financial impost that is levied with respect to goods is a 'mere license fee', it cannot be an excise because it is not a tax.

Common to these cases is that state imposts are being challenged by the Commonwealth. The Commonwealth argues that they are excises and therefore contravening s 90.

Note that taxes can be calculated in one of two ways: *flat fees* (does not change with the quantity of goods); or *ad valorem* (proportional to the quantity of goods or a relevant factor).

Early cases adopted a narrow construction of s 90 (*Peterswald v Bartley*).

***Peterswald v Bartley* (1904) HCA:**Facts

- A state sets a licence fee on brewers of beer
- The fee is set at a flat, nominal (a small) rate

Issue

- What type of tax on goods is an excise?

Reasoning

- What is the meaning of the term 'excise'?
  - An excise is a tax which operates in relation to the production or manufacture of goods and is calculated in a particular manner, such that there is a correspondence between the quantum of the tax and the amount of goods being manufactured
- When is an excise imposed?
  - Excise 'is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to *quantity or value* when *produced or manufactured*' (emphasis added)
  - The point at which the tax must be levied is *production or manufacture*

Decision

- Thus, the term 'excise' does not encompass fees imposed upon persons as a condition of carrying on a particular commercial activity, such as a brewer's licence fee
- The licence fee is not an excise but a 'licence fee proper'
  - It is a fee paid by a particular person in order to be permitted to engage in an activity
  - In any case, this cannot possibly be an excise because it is not a tax

*Matthews* and *Parton* illustrate the expansion of the High Court's interpretation of s 90.

***Matthews* (1938) HCA:**Facts

- A levy is imposed upon chicory producers in Victoria
- The levy is calculated according to area of land planted with chicory
- This system is challenged

Issue

- Is a levy an 'excise'?

Reasoning

- The levy is clearly imposed at the point of production
- However, is the tax calculated according to the quantity of production?
  - There is a broad correlation between plantation area and amount of chicory produced; however, there will not always be a direct connection in that biological, climactic or other conditions may reduce crop yield



- Dixon J: yes, the levy is an excise
  - 'A definition which makes quantity and value the only basis of taxation which would satisfy the notion of "excise" has no foundation ... The basal conception of an excise in the primary sense which the framers of the *Constitution* are regarded as having adopted is a tax directly affecting commodities'
  - 'The tax ... must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce'

#### Decision

- Yes, the levy is an excise

The cases continue to reflect tension between competing views about the nature of an excise: the first view is that it only comprises the production and manufacture of goods within a state (narrow definition). The second is that it includes all stages up to and including sale: production, manufacture, distribution and sale of goods (the broader definition).

### ***Parton v Milk Board (Vic) (1949) HCA:***

#### Facts

- A levy on persons selling and distributing milk in metropolitan areas by the Victorian government
- Amount of levy is calculated by reference to several factors, including the amount of milk sold and distributed

#### Issue

- Is this levy an 'excise'?

#### Reasoning

- Dixon J: yes, the levy is clearly a 'tax'
  - It is a levy 'tax upon goods' and not 'a license fee payable as a condition of a right to carry on a business' (a trading tax)
  - 'probably is essential [to excise] that it should be a tax upon goods before they reach the consumer'
    - However, this significantly weakens the requirement that the tax be imposed at the point of manufacture
  - 'In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities' (goods)

#### Decision

- Yes, the levy is an excise

Current approach: *Ha*. The majority adopts the broad view of an excise. while the minority reverts back to the narrow *Peterswald* view. The scope of s 90 is strongly influenced by the manner in which it is interpreted.

**Ha v New South Wales (1997) HCA:**Facts

- Tobacco franchise 'licence' fees are challenged by the Commonwealth
- Under the scheme, a fee is imposed on a seller of tobacco; the amount is calculated as being \$10 + amount equal to %value of tobacco sold in month two months before license expired
  - In 1989, this percentage value was 30%; in 1995 it was 100%
- Similar schemes were in place in other states; so an outcome of invalidity would have wide-reaching implications

Issue

- Is the licence fee an excise?

Reasoning

- Majority
  - Duties of excise are taxes on the production, manufacture, sale or distribution of goods whether of foreign or domestic origin'
  - They produce 'inland taxes on goods'
  - The broad view is adopted
    - Precedent: 'a long and consistent line of authority' supports this view
    - A consideration of the fee's substantive operation and economic effect suggests a broad view is appropriate
    - If this is a tax, it will be an excise (issue is whether it is a tax)
    - States argue: this is a fee for services not a tax; the licence fee is imposed on sellers of tobacco in return for the right to sell tobacco
    - The 'license' fee is therefore an 'excise'
  - The intent of the framers was to establish one common tariff on goods imported into Australia (as opposed to different tariffs in different states); similarly, the reason for giving exclusive power to impose excises to the Commonwealth was to prevent the states from exacting differing levels of excise duty, thus destroying the purpose of a uniform external (import) tariff
    - Uniform external tariffs only operate effectively if the states aren't able to set inconsistent tariffs
    - If states could set a tax on local manufacturing only, then there could be a situation where the Commonwealth universal import tariff is less than the state manufacture tariff, which would subvert the Commonwealth's tariff entirely
    - Cf minority: the differential between external and internal tariffs is still maintained (internal tariffs will always be less than external ones regardless of state taxes, so long as the narrow view of an excise is adopted so that the tariff applies to production and manufacture only, not sale), so the integrity of the external tariff system contemplated by the *Constitution* is maintained
- Minority:
  - 'A State tax which fell selectively upon goods manufactured or produced in that State would be an excise'
  - 'Whether a tax which falls upon locally produced goods discriminates against those goods in favour of imported goods is a question of substance'
  - Why?
    - Section 90 not intended to give the Commonwealth 'real control over taxation of commodities', but to allow the Commonwealth to establish a 'customs union' (a uniform national customs policy)
    - Tax upon commodity at any point before distribution may or may not

- have same effect as tax upon manufacture and production: whether a tax is able to be passed onto consumers depends on market forces
- This means that retailers, but not certain distributors, may be able to pass on the tax: this is relevant because the effect of an excise depends on whether it is able to be passed on
  - License fee not excise because non-discriminatory
    - Does not affect the external tariff
  - Exemption for licence fees because not taxes: recall *Air Caledonie*
- How can a mere licence fee be distinguished from an excise?
    - Minority did not consider this issue because the franchise fee did not distinguish between local and foreign goods, it was not an excise so it is unnecessary to decide whether it is a licence
    - Majority test: an impost will be a licence fee if it bears
      - 'no closer connection with production or distribution than that it is exacted for the privilege of engaging in the process at all'
      - A licence fee is a fee to gain permission to do X
    - Relevant factors:
      - Proximity of 'relevant period' to licence period;
        - If the licence was imposed ex post facto (tobacco sold 5 years ago), this may suggest that it is not a direct tax on tobacco because there is such a gap between the liability and the sale
        - The closer the impost is to the sale, the more likely it is to be a tax
      - Length of licence period
        - Taxes are periodic: shorter length implies tax
        - Here only one month licences
      - Size and basis of fee
        - Larger the fee, more likely it is to be a tax
        - If it is a low, flat rate, more likely to be a fee; taxes tend to be higher and linked with quantity
      - Regulatory mechanisms
        - If so, points towards being a mere licence fee
        - If no such mechanisms, more likely to be a tax
      - Revenue-raising purposes
        - If so, tax not licence
        - Licence fee might cover associated activities (externalities) and so not necessarily revenue-raising
    - Tobacco 'licence' fee not mere fee for licence to carry on business

#### Decision

- The impost is not a licence fee, therefore a tax, therefore an excise
- The fee (100% of sale value) raised revenue for the states
- There was a short licence period (1 month)
- Few regulatory mechanisms attached to the fee: apart from payment, just one provision providing that persons convicted of a serious offence could not sell tobacco
- Therefore, the fee is not a mere licence fee, and is therefore a tax
- Because it is a tax on goods before consumption, it is therefore an excise

As a result of *Ha*, the states lost \$5bn annually. The Court was somewhat apologetic. The Commonwealth had to draft emergency relief legislation to provide aid to the states.

When is a tax on goods *not* an excise? When is it a mere licence fee or a consumption tax?

***Hematite Petroleum Pty Ltd v Victoria (1983) HCA:***Facts

- Annual pipeline operation fee challenged on basis that it's 'excise'

Issue

- Is the annual pipeline operation fee an 'excise'?
  - If it is, then the Victorian Parliament could not impose the fee and it is invalid

Reasoning

- Majority (especially Mason J):
  - **Note:** justifications for a broad meaning
    - Role of precedent (broadly interpreted)
    - Purpose of s 90 (conferring real control over taxation of commodities to the Commonwealth Parliament)
    - Economic factors (effect of a tax on retail sale and distribution is the same as that imposed on supply and manufacturing)
  - The circumstances suggest that the impost is a tax
    - No relationship between cost of operating pipeline and fee
    - No mathematical relationship between amount transported and fee charged
    - Fee to operate a pipeline which they already had a permit to use and operate
    - Suggest revenue raising, therefore a tax
  - Not 'mere fee for the privilege of carrying on an activity'
    - Size of the fee
    - Revenue raising purpose
    - Not taxing the quantity or value of goods being transported
- Minority (especially Gibbs CJ):
  - Rests on the principle of vertical financial imbalance: to adopt too broad a meaning of 'excise' would substantially reduce the states' powers of revenue-raising
  - This would further exaggerate the financial imbalance between federal and state levels
  - Ultimately states are within their rates to require companies to pay a fixed fee to operate a pipeline
  - Notes the limited purpose to s 90
  - Therefore, the fee is simply a 'fee for licence'

Decision

- Majority: yes, it is an 'excise'
- The definition of 'excise' should be construed broadly as this is most consistent with its constitutional purpose

## C Consumption Tax

Consumption taxes are imposts imposed at the point of consumption. It is unclear whether they comprise a kind of excise. In *Ha*, the majority noted simply that it was ‘unnecessary to decide whether a tax on the consumption of goods would be classified as a duty of excise’.

The issue was previously considered in *Dickenson’s Arcade*.

### ***Dickenson’s Arcade Pty Ltd v Tasmania (1974) HCA:***

#### Facts

- A ‘consumption tax’ is challenged
- It purports to impose a 7.5 per cent tax of the value of tobacco on persons smoking or chewing tobacco

#### Issue

- Is this a consumption tax?

#### Reasoning

- Majority (especially Gibbs J):
  - ‘The criterion of liability is consumption’ hence not excise
  - Chewing or smoking is consumption, even though the regulations provide for an alternate way of collecting the tax
- Minority (especially Barwick CJ):
  - The tax is not a consumption tax
  - This is because ‘the Act imposes a tax not upon consumption of tobacco in any and all circumstances by any person, but only upon the consumption by or at the instance of a purchaser of tobacco purchased by retail’
  - No necessary relationship between the amount of tobacco people buy and the amount consumed
    - Note bizarre exegesis on the practices of tobacco consumption
  - Therefore, the tax cannot be interpreted as one taxing consumption
- **Note:** the fact that the impost is called a ‘consumption tax’ is irrelevant

#### Decision

- Majority: the impost is a consumption tax

Even today, it is unclear whether a consumption tax is actually an excise. It may be that a proper consumption tax levied by the states will not be an excise.

Note the incredible difficulty of enforcing (ie collecting) a consumption tax.

## V **Emergency Powers**

### A *Hypothetical*

'Kylie and Ahmed are law students studying Constitutional and Administrative law at Melbourne University. They are also boyfriend and girlfriend and have been going out for several years. They are concerned about the new anti-terrorism legislation and Ahmed has given many talks for human rights organisations about the disproportionate impact that the legislation has on Muslims. Ahmed, who is Muslim, decides to organise a series of talks at mosques in Victoria to explain the new legislation to the local Muslim communities and to try to encourage people to lobby the government for its repeal or modification. This activity has attracted the attention of ASIO, which is monitoring activity in mosques.

ASIO is particularly interested in the friendship that seems to be growing between Ahmed and Shazaad. Shazaad, another opponent of the legislation, is suspected by ASIO of having links to a terrorist organization in Lebanon. ASIO has traced money from his bank-account to that of a well-known financier of international terrorist groups. They do not want to bring him in for questioning yet because they wish to continue to build up a case against him and to learn more about his network. They believe that Ahmed has useful information about the people with whom Shazaad associates and the views about the government that Shazaad expresses in private.

They do not believe that Ahmed himself is directly associated with terrorists, but are concerned that he might be sympathetic to terrorist causes because of the speeches that he has made criticising the anti-terrorism legislation.'

#### 1 **Warrant**

ASIO wants a warrant to detain Ahmed and question him about Shazaad. They want to be able to detain Ahmed immediately so that he will not be able to warn Shazaad that he is being investigated. Would a warrant be available in these circumstances? What procedures would ASIO have to go through in order to be granted such a warrant?

Refer to *ASIO Act* ss 34AB, 34C and 34D

- Under 34C the Director-General ('DG') of ASIO must seek the Minister's consent to request the issue of the warrant: s 34C(1)
- The DG must provide the minister with: draft warrant, statement of facts and grounds, and other information if a warrant had previously been requested (which it had not here): s 34C(2)
- Minister may consent in writing but only if satisfied that grounds in 34C are made out. Some issues in relation to this case might be whether the request would 'substantially assist' in information important to a terrorism offence and that other methods would be ineffective
- Also need to make out grounds in 34C(3)(c) to request a warrant that includes immediately being taken into custody
  - Here the issue is probably 34C(3)(c)(ii) that he might not appear given his opposition to the ASIO legislation
- Minister must ensure that the warrant includes provision for requests for a lawyer: s 34C(3)(b)
- If the minister consents, the Director-General may request a warrant in the same terms as approved by the minister
- Request is made to an issuing authority (defined in 34AB)

- Note *persona designata* exception to separation of powers: authorities are federal magistrates or judges
- Issuing authority then can issue a warrant: s 34D(1), but only if the request in proper form and the issuing authority also satisfied that there are reasonable grounds
- The warrant would have to authorise that Ahmed be taken into custody and permit him to contact particular persons such as a lawyer: ss 34D(2)(b) and 34D(4)
- The warrant must also specifically authorise questioning (s 34D(5)) and must be signed by the issuing authority (s 34D(6))
- It is only in force for 28 days, so if Ahmed remains in Brazil for more than a month, the whole process will have to be undertaken again.

## 2 Custody

Coincidentally, at the same time that ASIO is trying to obtain a warrant to question Ahmed, Ahmed decides to spend the summer working on a human rights project in Brazil. He leaves the country and this makes ASIO suspicious that Ahmed may also be involved in terrorist activities. They are concerned that he may have been 'tipped off' about their plans to question him and have left the country to avoid detention. Assume that ASIO is granted a warrant and permission to take Kylie into custody to question her about her knowledge of Ahmed's whereabouts and who told him that he was going to be detained. Once she has been taken into custody, what steps have to be taken?

Refer to *ASIO Act* ss 34B, 34DA, 34E

- Once taken into custody she must be brought immediately before a prescribed authority ('PA'): s 34D(a)
- PA is defined in s 34B (ex-judge of a superior court unless there are not enough in which case a current State or Territory Supreme Court judge)
- The PA must explain the warrant and its effects to Kylie including her write to complain to the Inspector-General of Intelligence and Security or the Ombudsman
  - Note increasing role of the Ombudsman in independently auditing these types of agencies to ensure that they have complied with the statutory requirements when using their coercive powers
- The PA must also explain the roles of the people present but not their names: s 34E(2)(a)
- At least every 24 hours PA must inform Kylie of her right seek a remedy from the federal court if she has a complaint about the warrant or her treatment: s 34E(3)

## 3 Questioning

For how long can ASIO question Kylie? What steps are necessary to extend the time for which she can be questioned?

Refer to *ASIO Act* ss 34B, 34D(3), 34HB, 34HC

- The questioning time begins when the person is first brought before the PA under the warrant (s 34D(3))
- It ends when:
  - Section 34D(3)(a): someone from ASIO (in this case) informs the PA that there are no further questions
  - Given Kylie's refusal to cooperate, this is unlikely
  - Section 34D(3)(b): s 34HB prohibits ASIO from questioning her any further (more below); or

- Section 34D(3)(c): 168 hours (7 days) expire from when she was first brought before the PA
  - Note that this time would be extended if she required an interpreter
- Section 34HB(1) requires that the PA must give permission just before 8 hours and (34HB(2)) just before 16 hours of questioning for questioning to continue
- Note that the request to continue the questioning may be made in the absence of Kylie or her legal adviser: s 34HB(3)
- Extension may only be granted if satisfied that the two conditions in s 34HB(4) are made out reasonable grounds for believing that continuation would substantially assist etc and that ASIO has conducted themselves properly and without delay
- Permission may be revoked, but this does not affect the legality of anything that happened before revocation: s 34HB(5)
- Cannot question for longer than a total of 24 hours: s 34HB(6)
- Once further questioning is prohibited, Kylie must be released: s 34HB(7)
- Section 34HC makes it clear that Kylie cannot be detained for more than 168 hours continuously
  - Note distinction between total duration of detention (168 hours) and total duration of questioning (24 hours)

#### 4 Release

Kylie refuses to co-operate with ASIO. All she will say is that 'you people are completely paranoid. I'm not a terrorist and nor is Ahmed. I love him and I'm not going to let you get your hands on him so you can put him through what you're doing to me.' After this she says nothing. She is eventually released and warned not to tell anyone about what has happened to her. She immediately calls Ahmed in Brazil and tells him everything. She also calls a lawyer and asks if there is any action that can be taken against ASIO.

What consequences might flow for Kylie from

- 1) her failure to answer questions;
- 2) informing Ahmed; and
- 3) a lawyer

about what happened to her in detention?

Refer to *ASIO Act* ss 34G, 34VAA, and 34VA

- Section 34G(3) says that a person who is before a PA for questioning 'must not fail to give any information requested in accordance with the warrant' – the penalty is imprisonment for 5 years
- Kylie has breached this provision unless she can prove (burden is on her) that she does not have the information
- In informing Ahmed of what has happened she may be in breach of s 34VAA(1) — as she has disclosed the existence of the warrant and other information outlined in ss 34VAA(1)(c) and 34VAA(3)
- Makes the offence a strict liability one because she is the person specified in the warrant (34VAA(3)(a))
  - The penalty is 5 years jail
- The disclosure to the lawyer may be a permitted disclosure (which is exempted from the criminal provision by s 34VAA(1)(f))
- A permitted disclosure is defined (34VAA(5c)) to include a disclosure to a lawyer for the purposes of obtaining advice about the warrant or remedies relating to the warrant or treatment under it



- Assuming that this is the purpose of the call, she is not liable to prosecution for making it

## 5 Search

Once Kylie is in custody and she refuses to answer any questions, the Director-General of ASIO decides that having her strip searched might intimidate her into co-operating. He orders two male officers to conduct the search in the open corridor. When she protests about this, one of the officers slaps her across the face. Are the actions of the Director-General and the officers permitted under the ASIO Act? What options of complaint does Kylie have about this behaviour and what are the possible legal consequences for those involved?

Refer to *ASIO Act* ss 34F(9), 34J, 34L, 34M, 34NB

- Under 34J Kylie has the right to humane treatment while in detention
- In particular she must not be subject to ‘cruel, inhuman or degrading treatment’ (query if the treatment goes this far) and must be treated with respect for human dignity (probably is a breach of this requirement).
- Here she was assaulted: this is a criminal offence; the rule of law requires that this be a crime for a police officer as much as an ordinary person unless permitted by the statute
  - In no way does this Act authorise assaults
- There are also particular provisions regarding strip searches — s 34L2 sets out the circumstances in which a strip search is permitted
  - None of them are made out here and there is no indication that it can be used for punishment
  - There is also a requirement for permission from a PA which has not been fulfilled here
- Section 34M sets out the rules of conduct which include that it must be in a private area (s 34M(1)(a)) and performed by a person of the same sex and out of sight of those of the opposite sex of the person being searched (s 34M(1)(b) and (c))
  - All of these provisions have been breached
- Kylie has the right to contact the Inspector-General of Intelligence and Security or the Ombudsman during or after her questioning and her right to do that must be facilitated by ASIO if she requests it while being held in detention (s 34G(9))
- The people may help her to exercise her rights and make complaints against those involved
- Sections 34NB(5) and (6) penalise breaches of the strip search requirements; up to 2 years’ imprisonment is possible

## 6 Retaliation

Ahmed is furious at the way in which Kylie has been treated. He flies back to Melbourne and discovers that the Attorney-General will be talking at the law faculty the next day. He rings the Attorney’s staff and says, ‘You people have no respect for human rights — you just do whatever you want. Well perhaps its time that we stopped respecting rights too and we just did whatever we want to. Maybe that’s the only way to get rid of this government.’ He attends the talk by the Attorney the next day and finds the Attorney’s car unattended. He uses a large nail and scrawls across the paint-work — ‘ASIO not Muslims are the criminals. Time for a new government.’ He then lets down the tyres. He leaves a note saying that, unless the ASIO legislation is repealed, he will continue to carry out such acts. He is caught a few minutes later with the nail still in his possession.

Are these actions terrorism under the definition in the Criminal Code? Do they fall into any of the exceptions? What penalties would apply Ahmed was convicted of a terrorist offence?

Refer to *Criminal Code Act* ss 100.1, 101.4, 101.6

- Terrorist acts are defined in s 100.1 to include
  - ‘an action or threat of action’ that is done to further a ‘political, religious or ideological cause’; and
  - it is done with the intention of ‘coercing or influencing the government of the Commonwealth’
  - Intention is probably made out here
- The action must fall within sub-s 2 (here (b) causes ‘serious damage to property’)
  - But is the damage to the car (clearly damage to property) serious enough?
- An action is not terrorist if it falls into sub-section 3, which requires that the action not cause serious physical harm and that it be ‘advocacy, protest, dissent or industrial action’
  - Arguably Ahmed’s actions fall into this category as protest that does not endanger life etc
- Could possession of the nail amount to possession of a thing connected with a terrorist act under s 101.4 (assuming that the vandalism is a terrorist action)?
  - If so, the penalty is 10 years’ imprisonment
- Was the phone call an act done in preparation for or in the planning of a terrorist action, even if the terrorist act does not occur? (s 101.6)

## VI *Thematic Consolidation*

### A *Constitutional Law*

As we have seen above, constitutional law is a form of public law. Unlike private law, which regulates relationships between individuals, constitutional law is concerned with the relationships between the three arms of government and the people they govern.

### B *Parliamentary Sovereignty*

Federal Parliament is not sovereign. It is subject to the *Constitution* that created it, which provides that only certain kinds of power may be legislated with respect to only particular subject matters. Practical and political exigencies operate to further constrain parliamentary sovereignty; conventions play a large role in determining how constitutional powers are actually exercised.

State parliaments are also constrained by the federal *Constitution*, and additionally by their own state constitutions (though these are often capable of legislative amendment). However, by s 109 of the federal *Constitution* they are subject to valid laws of the Commonwealth, which prevail in the event of inconsistency. State parliaments retain only some measure of sovereignty in areas of exclusive (state) control: convention and political considerations significantly affect the exercise of legislative power at a state level.

### C *Rule of Law*

The rule of law restricts government action. Governments must act according to law. Laws must be prospective and clear. All people — even rulers — must be subject to law, and subject to the same laws and courts. Individuals must only be prosecuted for breach of laws, and such prosecutions must proceed according to law.

There is some inherent tension between the rule of law and parliamentary sovereignty. Protection from arbitrary laws entails that absolute sovereignty cannot exist: parliaments are excluded (if not by any technical requirement then by convention) from legislating retrospectively or creating laws which apply to one person only. Thus, in *DPP v Kabal*, for example, legislation which provided for the continued detention of one person was struck down as invalid.

### D *Responsible Government*

The federal Executive Council is Cabinet in its formal decision-making capacity. It forms a subset of the lower house, and is therefore responsible to the legislature and can act only on the advice of Parliament: *Constitution* s 62. See also ss 61, 64 (the Council is constituted by Members of Parliament), 83 (supply control: money appropriated from the Commonwealth treasury must be authorised by Parliament; the executive cannot take money directly). The Parliament, in turn, is responsible to the people by way of democratic mandate and fixed term elections.

## E *Representative Government*

The *Constitution* leaves the method election up to the Parliament, simply providing for ‘direct election by the people’. Like other theoretical notions about government, representation is not explicitly mentioned in the *Constitution* but is nevertheless implied by its text and structure. However, universal suffrage is not guaranteed (and, indeed, was specifically not intended at the time of federation).

The 1975 ‘constitutional crisis’ provides an example of this theme (and Australia’s constitutional processes) in action. The opposition effectively blocked supply (refused to allow the government of the day to appropriate from treasury), and the Governor–General dismissed the Whitlam government. This had the effect of dismissing a democratically elected government. Arguably the government no longer had the confidence of the people (since a majority of the Parliament, representing the people, did not support their legislation). However, the legitimacy of unilateral dismissal of a government has been questioned on more than one occasion.

Nevertheless, if the basis of such a dismissal is that to allow supply in those circumstances would be contrary to s 92 of the *Constitution*, then the Governor–General’s decision is perfectly consonant with the rule of law and indeed simply an example of the observance of a higher law. However, if the basis was *intra*-state movement, then it may be seen as capricious and arbitrary.

## F *Discerning Broad Themes*

Themes in constitutional law are rarely explicit. They must be discerned from judgments and constitutions, implied from their text and structure.

## VII **Determining the Validity of a Law**

### A *Commonwealth Law*

#### 1 **Is the law supported by a head of power?**

- (a) Section 51(20)?
- (b) Section 51(26)?
- (c) Section 51(29)?
- (d) Section 51(xxxv)?
- (e) Section 51(xxxvii)?
- (f) Section 51(xxxix)?
- (g) Et cetera
- (h) If no head of power can be adduced, the law is *ultra vires* and invalid

#### 2 **If so, does the law breach any express or implied constitutional limitations?**

- (a) Express rights and freedoms
  - (i) Sections 7 and 24
  - (ii) Section 80
  - (iii) Section 92
  - (iv) Section 116
  - (v) Section 117
- (b) Implied freedoms
  - (i) Intergovernmental immunities
  - (ii) Separation of judicial power
  - (iii) Implied freedom of political communication

### B *State Law*

#### 1 **Is the law within state legislative competence?**

The state Parliaments have plenary legislative power: *Victorian Constitution* s 16

#### 2 **Does the law breach any Commonwealth constitutional limitations?**

- (a) Exclusive heads of power
  - (i) Section 51
  - (ii) Section 52
  - (iii) Section 90
- (b) Separation of judicial power
- (c) Section 117
- (d) Section 92

#### 3 **If not, is the law nevertheless inconsistent with a Commonwealth law?**

Apply s 109 of the *Commonwealth Constitution* to the inconsistency