

Spending Powers Algorithm

- o 1. Has a valid appropriation act been passed (81 and 83) (this should be fairly obvious-procedural hurdle)
- o 2. What is the actual source of the power to spend?
 - Reasoning from pape and Williams
 - Recall that 81 and 83 are not sources of power (pape)
 - Is there some legislation (pape and Williams)?
 - Is the executive relying on the bare head of power (s51) without actual legislation?
 - Port of Portland and Brown v west may be useful in here too
- o 3. If the expenditure is supported by legislation, is the legislation validly based on ahead of power (including incidental power s 51 (xxxix) (French in Pape)?
- o 4. Even if the subject falls within a head of legislative power, does the executive nevertheless have power to spend in the absence of actual legislation?
 - Probably not, see French in Williams 55 and 64
 - Only way likely to be able to support spending without legislation is in a crisis situation.
- o 5. If the expenditure is not supported by legislation, did the executive have the power, in times of emergency to act in a way peculiarly adapted to the needs of the nation (French in pape)
 - Seems that when read together 61 and 51(xxxix) confer a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.

Executive Powers Algorithm (more generally):

1. Note that there is no golden rule/ overarching principle of what is/ isn't executive power
2. However, French sets out some legitimate exercises of power in Williams? (para 22)
 - i. Is the power necessary or incidental to the execution and maintenance of the law of the commonwealth?
 - ii. Is the power clearly conferred by statute?
 - iii. Is the power one of the prerogatives originally exercised by the British Crown, granted to the Cth Executive by s 61?
 1. Use the reasoning of French in Ruddock – necessity of determining whether prerogative exists
 2. Consider whether scope affected by war or other emergency
 - iv. Is the power defined by the capacities of the Cth common to all legal persons?
 - v. Is the authority inherent in the character and status of the Cth as a national government? (commonwealth executive the only one who can do it- no one else who could do it as well or at all)

Executive power to spend - from steps in Brown v West: (take similar steps in a hypothetical)

- 1. Is there money being spent?
 - If so it needs to be supported by a valid appropriation (under s 83 constitution)
 - this is emphasised again in Brown v West
- 2. Were the procedural aspects complied with?
 - Did the Bill originate in the correct house? (s53 constitution)
 - If the law is for the ordinary annual services of the government, did it deal with any other matters (s54 constitution- these sorts of legislation must be in their own right- must be in separate appropriation acts- can't just hide in another act)
- 3. Did the appropriation designate the purpose for the expenditure (Brown v West)
 - 'an appropriation, whether annual or standing, must designate the purpose or purposes for which the moneys appropriated might be expended'
- 4. Is it an appropriation for a purpose of the Cth (Isaacs J in CSWv Cth, cited in Brown v West)
 - "Appropriation of money to a commonwealth purpose means legally segregating it from the general mass of the consolidated fund and dedicating it to the execution of some purpose which either the constitution has itself declared or the parliament has lawfully determined, shall be carried out.'
- 5. Is the purpose of the appropriation consistent with existing legislation (Brown v West)?
 - Appropriation must be read in context of existing legislation- must specifically say if it means to override existing legislation
- 6. If the appropriation Act operates beyond the limits of existing legislation, does it say so expressly (Brown v West)
 - Is there sufficient evidence of an intent to override existing legislation (see page 211 of judgement)

Taxation Algorithm – From Approach taken/ questions asked in Air Caledonie:

- Is there some payment (no matter what it calls itself) being extracted and paid to the Cth? (any payment from corporation or natural person should raise flag as potential tax)
- If so then prima facie it might be a tax, and special requirements might apply.
- Does the payment meet the requirements of a tax set out in Mainland Dairy
 - 3 elements of a tax
 - Compulsory
 - For public purposes
 - Enforceable by law
- Is it a payment for services?

- Objective test; what is the substance of the payment? It 'will not be necessarily be precluded from being properly seen as a tax merely because it is described as a fee for services' (Air Caledonie)
- Is there anything special about the circumstances to suggest the payment is not a tax?