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LAWS2202: Commonwealth **Constitutional Law**

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Commonwealth legislation:

Is there a head of power to support the law?

Does the law infringe on a express/implied limitation on cth legislative power?

State Legislation

Does the law fall within the general grant of legislative power under state constitution?

Does law infringe an express implied limitation on state legislative power?

Corporations Power

Interpreting s51(xx) broadly (*Jumbunna*), this Act [refer to act] may rely upon this head of power if it can be found (a) that [] is a constitutional corporation and (b) there is a sufficient connection with the constitutional corporation power.

(a) Is [] a constitutional corporation?

For [] to be a constitutional corporation, it must be a trading or financial corporation.

(i) Activities test

As per *WorkChoices* acceptance of the rule in *Adamson's case*, if trading or financial activities form a sufficiently significant proportion of []'s activities, it will be considered a trading/financial corporation.

What are trading activities?

- Has no specific legal definition- Mason J in *Adamson's*
- Trading 'extends to business activities carried on with a view to earning revenue'
 - Mason J *Adamson's Case*
- Includes activities not undertaken for profit – Mason J *Adamson's Case*
 - In *Adamson's Case*, no profit was made by trading activities of AFL clubs, but they were still trading corporations

What are financial activities?

- Not a term of art with special meaning- Majority in *State Super*
 - A financial corporation is one which engages (or trades) in financial products and services (eg a bank) Or finance corporation that lends/borrows/invests money'
 - A financial corporation may be – and often is - a type of trading corporation (ie trades in financial products)

What constitutes 'sufficiently significant proportion'?

- Question of fact and degree- Mason J *Adamson's Case*
- The trading activities must be more than 'slight and incidental to some other principal activity'
- Mason J (*Adamson's*) gave the example of religion for churches, or education for schools as examples of 'sufficiently significant proportion'
- 'Not insubstantial' - Barwick CJ and Murphy J in *Adamson's Case* (this was a different test, but HCA in *Work Choices* said it was same as Mason J's test)
- Must be 'substantial' or a 'significant part of its overall activities' – *State Super*
- Provided the test is satisfied, the corporation will not lose its character as a trading/financial corporation simply because:
 - Trading/Financial Undertakings are not its primary or dominant activity – *State Super*
 - In *Adamson's Case* the fact that the primary purpose of AFL clubs was sport did not prevent them from being trading corporations (fees, catering, broadcasting and sponsorship rights etc)

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- Trading/Financial Activities are for non-trading/non-financial purposes (*Tas Dams*). For example -
 - government purposes
 - Corporation was established by legislation
 - Corporation closely connected with, or subject to control of, government
 - Has a public policy role
 - Provides a public service
 - Conducts its trading activities in the public interest

Taxation Power

Where the cth seeks to impose a tax is must rely upon s51 (ii), but so as to not discriminate between states or parts of states (ii). [remember do not need to look at proviso]

Dual Characterisation: *Fairfax v Commissioner of Taxation*- a law can be a law with taxation even if it concerns other things- 'As s51(ii) was a non-purposive head of power, like all such powers, it operates on the subject matter.'

NB Other Constitutional Provisions Relating to Tax:

- **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 53** – a law is not taken to impose a tax by reason only that it includes 'fines or other pecuniary penalties, or for the demand of payment...of fees for license, or fees for service.'
- **Section 81** – All revenues raised by the Executive shall form part of a single Consolidated Revenue Fund, which is appropriated for the purposes of the Cth.
- **Section 81** – No money shall be drawn from the treasury (ie the Consolidated Revenue Fund) except under an appropriation made by law.
- **Section 53** – Proposed laws ... imposing taxation, shall not originate in the Senate... [nor may the Senate] amend proposed laws imposing taxation.
- **Section 90** – Cth Parliament has exclusive power to impose duties of customs and excise.
- **Section 114** – A state shall not...impose a tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose a tax on property of any kind belonging to a State.

Remember s53- tax cannot originate in senate

- So better represented smaller states cant take advantage

WHAT IS A TAX?

To fall within s51(ii) the provision proffered by Latham CJ in *Matthews* is a serviceable starting point which states that a tax is a compulsory exaction of money by a public authority for public purposes, enforceable by law, is not a payment for services rendered (Latham CJ In *Matthews*).

While later cases have highlighted some flaws with this test, due to some exceptions, it is nonetheless the accepted starting point for analysis as to whether a statute is a tax as opposed to a conclusive test (*Air Caledonie v Cth*).

1. Compulsory exaction enforceable by law to a public authority

Not only is [law] imposed by legislature, but in it's substance (Latham CJ in *Matthews*), the exaction is compulsory as:

- Legal/ practical compulsion- even if courts provide for alternate courses of action other than payment, where there is no 'practical alternative' but to pay, it is still a tax- must look at practical effects of law. (Dixon J *Homebush Flour Mills*)

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- ‘When the desired contributions are obtained not by direct command but by exposing the intended contributor if he does not pay, to worse burdens or consequences which he will naturally seek to avoid the payment becomes an exaction.’

Money- In *Air Caledonie*, in obiter the court noted that any exaction does not need to be money.

To a public authority

- *Tape Manufacturers*- the court said that it is not an ‘essential’ component of a tax that it be paid to a public authority. The majority also said that a broad view should be taken of ‘public authority’
 - Majority indicated society was a public authority because it expended money on a public purpose
- But *Roy Morgan*, disagreed to an extent with *Tape Manufacturers*, saying the suggestion would be a ‘large and controversial step beyond what was said in *Matthews*’
 - But nonetheless sans receipt of funds into CRF does not necessarily mean tax

2. Exaction is for public purposes

Indicators of public purpose:

Payment/non-payment into public authority CRF?

- Payment into other public body, or into consolidated revenue funder per s81 may also be useful to determine whether money is for public purposes (*Tape Manufacturers*) but is not conclusive (*Luton*)
 - ‘neither principle nor Australian authority provides any support for the converse proposition that an exaction is not a tax if it is not to be paid into the Consolidated Revenue Fund...’ (*Luton*)
- *Tape Manufacturers*- majority held non public authority is fine
 - ‘there is no reason in principle why... the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public.’

Public purpose/ public interes:

- Has been doubted by other judges *Roy Morgan*- doubting how wide public purpose is ‘is not synonymous with public interest’
 - Does not matter if it conferred ‘a private and direct benefit’
- Persuading employers to make super contributions is public purpose (*Roy Morgan*)
- *Tape Manufacturers*- court took a very broad view finding that it essentially means in the public interest rather than being a government purpose
 - Complex solution to a complex problem was held to be in the ‘public interest’ even though involved only two parties

Enforcing private rights

- Where legislation creates and enforces private rights it is not a public purpose, evn if money is deposited into CRF
 - *Luton v Lessels*

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- Where child support payments were deposited into CRF
- Note- was very unusual scenario- facilitating the transfer between private citizens so despite the fact it was CRF does not count

3. Not arbitrary or incontestable

For [] to be a tax, it must be possible to differentiate it from an arbitrary exaction (*Maccormick*)

Right of appeal

- Right of appeal, i.e. internal or administrative to prevent it being arbitrary (*Truhold*)

Criteria

- Must be ascertainable criteria with sufficiently general application, or way to show it may not be applicable (*McCormick*)
 - It cannot be 'imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation'
 - **Criterion cannot be result of administrative decision unrelated to criteria → ministerial discretion could be indicator if does not reflect criteria** (*Truhold*)
 - *Tape manufacturers*- inclusion of administrative discretion does not render it arbitrary
- Decision made by reference to clear and detailed criteria can said to be harsh, but not arbitrary (*Truhold*)

4. Not a payment for service

Where an exaction is for a particularly identifiable service rendered at the request of the payer and it bears a reasonably related relationship to that service, it is a fee for service as opposed to a tax (*Air Caledonia*). Tax can be harsh and not benefit people taxing from it (*Truhold*).

- Labelling an exaction as a fee for service does not preclude it from being a tax *Air Caledonia*
- Still a service even if it was practically compulsory (they have no choice but to accept the service)- *Harper*
 - Grading eggs was compulsory for egg sale, still fee for service

What is fee for service?

- **Relationship between fee and service**
 - Approximate relationship (*Air Caledonia*)
 - So long as some correlation, services only need be reasonably related to expenses occurred
 - In *Air Services*, this meant fee for fire services, even if they used it was sufficient
 - *Parton v Milk Board* dairy farmers paying fee for general advertising was said to be a close enough relationship

Compulsion

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- *Air Caledonie*- if they have no choice in the matter, is more likely to be seen as a tax
 - *Air Caledonie* ‘a requirement that a returning citizen submit, in the public interest, to the inconvenience of such administrative procedures at the end of a journey cannot be properly be seen as the provision or rendering of ‘services’ to or at the request or direction of the citizens concerned.’
 - i.e. Australians who have right to return

Amount of fee

- *Air Caledonie*- has to be some relationship with fee and with services rendered
 - i.e. *Harbor*, eggs graded for money and all surplus refunded
 - *Air Caledonie*- money used to offset cost of customs

5. Not a penalty

Exaction not a tax if it is a penalty, ie, if it applies to a failure to discharge an antecedent obligation (*Northern Suburbs General Cemetery Reserves Trust*).

- In this case if employers didn't spend a specific proportion of earnings on training employees then money would go into fund and be used to train employees
 - **Intended to be incentive**
 - But court agreed that was tax
- **Penalty pivots on mandating or proscribing conduct**

Could analogize *Roy Morgan*- forcing 9% tax on earnings to be passed onto employees who did not get super was found not to be penalty

Discussion points:

Consider way other s's interact- in *Luton v Lessels* court did not want parental support fund to be a tax because did not want to risk it being invalidated by s55.

ANY OTHER LIMITATIONS???

S55- Under s55 any cth law attempting to impose taxation may only deal with the imposition of taxes.

- Therefore if taxation is an amendment to a non-taxation principal act then it will be invalid since it seeks to amend the act to insert a provision to an act which deals with another subject matter.
- If the act implements provisions imposing taxation and provisions not dealing with taxation

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