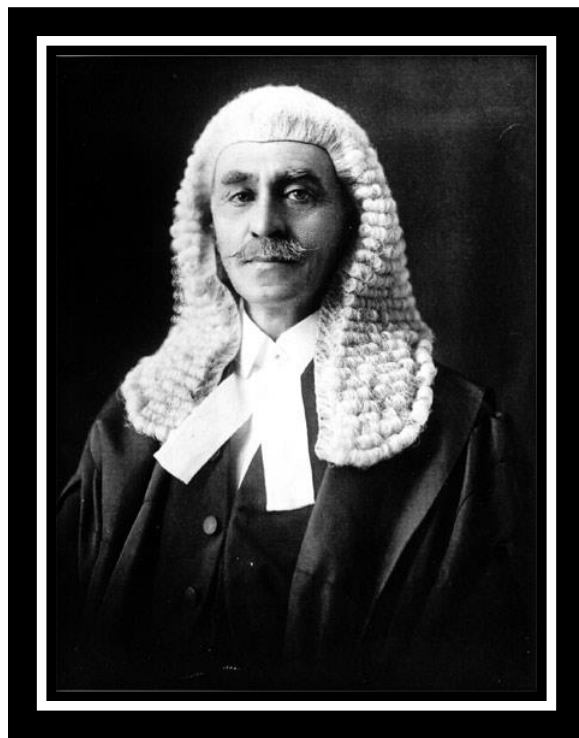


LAWS 5101

Constitutional Law



SAMPLE EXTRACT

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Corporations Power (CC s51(xx))

“with respect to foreign corporations, and trading or financial corporations formed within the limits of the Cth”

Significance:

- ❖ “Corporations affect almost every aspect of Australian life” (Stewart & Williams).
- ❖ Capacity/potential to empower Cth to infringe on traditional domains of State power.

1. WHICH CORPORATIONS COME WITHIN CTH POWER UNDER s51(xx)?

- ❖ Activity Test = engaged in substantial trading/financial activities (*Adamson's Case*; *SSB*).
- ❖ Purposes Test = determine true character; apply where no activities (*Fencott v Muller*; *SSB*).
- ❖ No power for Cth to incorporate companies under s51(xx) (*Incorporations Case*).
- ❖ No limitation of power to types of corporations at time of Federation (*Queensland Rail Case*).

Foreign Corporations:

- ❖ A corporation formed outside the limits of the Cth (*Incorporations Case*).

Trading Corporations:

- ❖ *St George CC* (1974) HCA – SGCC established as public utility & claimed it was a local government corporation (only function = sale of electricity & appliances). Held: **SGCC not a trading corporation**.
 - Gibbs J (maj): **purposes test** (constituted for purpose of providing essential service).
 - Barwick CJ: activity test (predominant/characteristic activity is trading).
 - ❖ *Adamson* (1979) HCA – A applied for SA club, WA refused, A brought action under *TPA 1974* (Cth) claiming restraint on trade, legislation applied if football leagues/clubs are CC trading corporations.
 - Mason J (maj): **purpose & character not determinate, trading must form a sufficiently significant proportion of overall activities (question of fact & degree), leagues** (business activities to earn revenue) **& clubs** (food, merchandise, ticket sales) **are trading corporations**
 - Stephen J (dissent): members do not receive profits & committee members are unpaid, trading is only a means to promote principal activities (football).
 - ❖ *Tasmanian Dams* (1983) HCA - Mason J: trading less prominent feature of overall activities than *SGCC*, Commission sells electrical power in bulk by retail on a large scale (therefore trading), **law prohibiting certain activities of trading corporations still a law about trading corporations (even if no connection to their trading nature)**, cannot use limited construction as it is implausible to limit regulation of foreign corporations to ‘foreign’ nature and financial corporations to ‘financial’ nature & therefore **irrational to conclude power in these fields is plenary but power WRT trading corporations is limited**, also contrary to principle that Cth legislative power should be liberally construed & that a similar power WRT natural persons would naturally extend to their acts/activities.
 - Gibbs CJ (dissent): activities include trading, but it discharges a public function of vital importance to the State (even though significant, its trading activities do not indicate its true character), true character of the law is not WRT trading corporations (incidental).
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Financial Institutions:

- ❖ State Superannuation Board 1982) HCA – query whether SSB was a financial institution due to engagement in investment.
 - Mason J (maj): **same test applied** for financial corporations as trading corporations (**substantial activity required, need not be the predominant**).
 - Gibbs CJ & Wilson J (dissent): dealing in finance only incidental to primary activity of administering a superannuation scheme.

2. WHICH ASPECTS/ACTIVITIES OF A CORPORATION CAN BE REGULATED UNDER s51(xx)?

- ❖ Narrow = must be related to the characteristic that brings the corporation under Cth power.
 - ❖ Broad = no limits (provided the corporation has characteristics that bring it under Cth power).
 - ❖ Fontana Films (1982) HCA.
 - Gibbs CJ: narrow – nature of the corporation must be significant.
 - Mason J: broad – power not expressed as limited to activities of a particular kind (reflects majority approach in *Engineers Case*).
 - ❖ Tasmanian Dams (1983) HCA – Commission classified as ‘trading’ corporation & not permitted to carry out its activities under *World Heritage Properties Conservation Act 1982* (Cth).
 - Mason, Murphy & Deane JJ: broad (provisions valid).
 - Gibbs CJ, Wilson & Dawson JJ: narrow (provision invalid)
 - Brennan J: only necessary to determine validity of one provision.
 - ❖ Re Dingjan (1995) HCA – provision provided that IRC could examine unfair contracts imposed on independent contractors (set aside or vary), extended to CC corporations. Held: provision invalid.
 - McHugh J (maj): narrow, jurisdiction to intervene in a contract that may have no significance or effect on a CC corporation merely because it relates to its business is not enough.
 - Brennan J (maj): narrow, discriminatory operation test (CC corporations must be affected in some respect sufficiently material to give significance to their discriminatory treatment).
 - Gaudron J (dissent): broad, **once accepted that CC s51(xx) extends to business functions, activities & relationships of CC corporations, it follows that it extends to persons** through whom they carry out those functions/activities & with whom they enter into relationships.
 - ❖ Work Choices (2006) HCA – Held: valid, adopted Gaudron J in *Re Dingjan*, favoured ‘**object of command test**’ (**broad; CC corporation an object of the command of the law**) over ‘distinctive character test’ (narrow; character of corporation should be significant in the way the law relates to it).
 - Interpretation **should not be constrained by implicit/express assertions of federal balance**.
 - Interpretation **should not be narrowed by apprehension of extreme examples/possibilities**.
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Appropriation & Spending Powers

- ❖ CC s61 = Executive power extends to the execution & maintenance of the CC & Cth laws.
- ❖ CC s81 = all revenue the Executive receives shall form one CRF to be appropriated for Cth purposes.
- ❖ CC s82 = revenue of the Cth shall be applied to Cth expenditure.
- ❖ CC s83 = appropriation made by law required to draw money from the Treasury.

STANDING

- ❖ **State.**
 - Cth Appropriation Act.
 - Yes (*AAP Case*; Barwick CJ, Gibbs & Mason JJ).
 - No (*AAP Case*; Stephen J).
 - Possibly yes if breach of constitutional prohibition alleged (*AAP Case*; Murphy J).
 - Cth Expenditure.
 - Yes (*Williams (No 1)*; French CJ, Gummow, Bell & Crennan JJ).
- ❖ **State Attorney General.**
 - Cth Appropriation Act.
 - Yes (*AAP Case*; Gibbs J).
 - No (*AAP Case*; Stephen J).
- ❖ **Individual Tax Payer.**
 - Cth Appropriation Act.
 - No (*AAP Case*; Mason J) (*Williams (No 1)*; Heydon J).
 - Cth Expenditure.
 - Yes, provided they have a special interest (*Pape*; French CJ).
 - Possible (*Williams (No 1)*; Heydon J).

JUSTICIABILITY

- ❖ **Cth Appropriation Act.**
 - Yes (*AAP Case*; Barwick CJ & Gibbs J).
 - In extraordinary circumstances (*Davis*).
 - At least implicitly (*Pape*).
 - No (*AAP Case*; McTiernan, Mason & Jacobs JJ).
 - General rule that it is not (*Davis*).
 - ❖ **Cth Expenditure.**
 - Yes (*Pape*) (*Williams*).
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APPROPRIATION

- ❖ AAP Case (1975) HCA – legislation provided for certain funds to be appropriated to the Australian Assistance Plan to enable grants to be made to Regional Councils for Social Development, argued Cth had no power to appropriate. McTiernan, Murphy & Jacobs JJ: challenge unsuccessful (valid).
 - Barwick CJ:
 - **Power under CC s81 is limited to Cth purposes.**
 - Surplus appropriated revenue should be made available to States (CC s94).
 - **Parliament cannot decide what is a Cth purpose** (not confined to CC ss51 & 52, but unclear about outside these provisions; must fall within confines of CC power).
 - Describing a problem as national does not attract power.
 - **AAP not a purpose of the Cth** (no power to rearrange community into regions or integrate social welfare schemes etc.).
 - Mason J:
 - Existence of unlimited power inappropriate & inconsistent with distribution (restrictions would increase monies that could be allocated to States).
 - Priority over appropriated revenue is given to Cth despite CC s94; States have no interest in monies appropriated but not expended (*NSW v Cth* (1908)).
 - Though not likely framer's intention to circumscribe legislative process by subjecting appropriation to judicial scrutiny & declarations of invalidity.
 - **Cth purposes should be such purposes as Parliament may ascribe.**
 - No legislation giving effect to AAP means only option is CC s61 (nationhood).
 - **Executing the AAP is outside Executive power.**
 - Stephen J: Victoria had no standing to challenge (legislation only appropriation legislation that has no impact on any State, does interfere with public rights & has no ordinary law-making function) [**Barwick CJ, Gibbs & Mason JJ held that standing arose from an interest in ensuring that the Cth did not exceed its powers**].
 - ❖ Pape (2009) HCA – response to GFC through 'fiscal stimulus package' (one-off bonus payments to taxpayers), no appropriation clause but a provision under *Taxation Administration Act 1953* (Cth) makes a standing appropriation to cover any amount required under a taxation law. Held: CC ss81 & 83 do not confer a substantive 'spending power' upon Cth Parliament (**another source of power must support expenditure/activities even if appropriation valid**).
 - French CJ: valid through CC ss61 & 51(xxxix), fiscal stimulus package in response to GFC fell within nationhood power (supported by incidental legislative power), **'purposes of the Cth' should be understood as words of constraint** (CC ss81 & 83 are seen as parliamentary controls of the exercise of Executive power to spend).
 - Gummow, Crennan & Bell JJ: agreed with French CJ on validity, not a law WRT taxation, **'purposes of the Cth' not a limit on legislative power.**
 - Hayne & Kiefel JJ: valid through CC s51(ii), fiscal stimulus package not within Executive power, law regulating/defining rights of refund of amounts necessarily/mistakenly paid to the Cth in discharge of asserted taxation liabilities was a law WRT taxation, **unnecessary to define 'purposes of the Cth' as even if broadest view taken for appropriation, it does not follow that expenditure will be valid.**
 - Heydon J (dissent): invalid (federalism), fiscal stimulus package not within Executive power, not a law WRT taxation, if CC ss81 & 83 did create a grant of legislative power to authorise expenditure it would be necessary to read 'purposes of the Cth' narrowly.
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EXPENDITURE

Traditional Views:

- ❖ Broad: power to spend unlimited, subject to express/implied CC prohibitions (i.e. Executive could contract to do anything & spend money on any subject provided there was a valid appropriation).
- ❖ Narrow: power included power to enter into contracts & spend money without statutory authority provided Parliament has express/implied legislative power to enact a valid statute authorising the contract/expenditure.
- ❖ Williams (No 1) (2012) HCA – Cth introduced National School Chaplaincy Programme to provide Cth money to school chaplaincy programmes, not created or administered by legislation, CC s96 not used. Held: invalid, expenditure legislation needed as well as appropriation, **funding a school chaplaincy program was not within the power of CC s61**, no breach of CC s116 as the Chaplain did not hold an office under the Cth, agreement & payment of money unconstitutional.
 - Hayne J: regulating such programs avoids the difficulties of applying tests to a hypothetical as opposed to an actual law, but to conclude that the Executive can never spend money lawfully available for expenditure without legislative authority is to decide a large & complex issue (better that it not be decided until it is necessary).
 - Heydon J: valid, the Common Assumption that the Executive can spend money on anything within Cth legislative powers was correct, Senate still able to check expenditure (able to identify/critique/monitor proposals to spend money, can return or reject Bills, may initiate legislation to control expenditure of appropriated funds, can influence change in government).
 - **Valid Appropriation Legislation + Valid Expenditure Legislation.**
 - Exceptions (non-exhaustive).
 - Contracts/payments under Executive's prerogative powers (treaties; wars).
 - Contracts/payment for administration of departments of State.
 - Within the meaning of CC s64.
 - Application to contracting of public service functions unclear.
 - Contracts/payments in execution/maintenance of Cth laws (even if they do not expressly authorise it).
 - Federalism.
 - Division of power between Cth & States.
 - It is for Parliaments & not Executives to control expenditure.
 - Senate must have some control over expenditure (little over appropriation).
 - CC s96 would be undermined if traditional Executive power accepted.

[did not decide on validity of appropriation (even if invalid, Executive could still enter into an agreement to spend money on the condition that it was to be appropriated)].

- ❖ Williams (No 2) (2014) HCA – Cth enacted legislation to validate the National Schools Chaplaincy Programme & other similar Cth spending programs. Held: invalid, legislation & regulations were not supported by Cth legislative power including CC ss51(xx) & 51(xxiiiA), **affirmed Williams (No 1)**.
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