

# CONSTITUTIONAL LAW EXAM NOTES

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## Head of power:

- The Act may be supported by the 'corporations power' under s 51 (xx).
- s 51(xx) refers to foreign, trading and financial corporations.

## Which corporations come within Commonwealth power:

### (1) Trading corporations:

- The applicable test is the current activities test as seen in **Adamson's Case**.
- Importantly, the current activities test **extends** the reach of this power.
- **Adamson's Case**
  - Question whether the WAFL, SAFL, West Perth FC were trading corporations.
  - **Held:** applied the current activities test & they were considered trading corporations.
  - **Mason:** considered a trading corporation to be one whose trading activities form a 'sufficiently **significant proportion** of its overall activities as to merit its description as a trading corporation'.
  - However, 'not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation **may be so slight and so incidental to some other principal activity**, viz religion or education in the case of a church or school, that it could not be described as a trading corporation'.

### (2) Financial corporations:

- The applicable test is also the current activities test.
- **State Superannuation Board Case**
  - 'The facts demonstrate that the appellant engages in financial activities on a very substantial scale'.

## Which aspects or activities of a constitutional corporation can be regulated:

- **Work Choices Case**
  - Arose from legislation which related to industrial relations. Sought to establish a national system.
  - Previous system of industrial relations was shared between the Commonwealth & the states.
  - New legislation shifted responsibility away from the states & relied upon s 51 (xx).
  - **Held:** adopted the broad view. **Note:** it is very difficult to see any limitations here.
  - Essentially **no limits** on what can be regulated.
- **Majority:** 'the power conferred by s 51(xx) extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of **those whose conduct is or is capable of affecting its** activities, functions, relationships or business.'
- **Kirby (minority):** concerned with the Cth invading areas that had historically been the subject of the states.
- **Majority:** section 51(xx) should not 'be given a meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application to future laws'. i.e. the fact the power might be used to pursue consequences that are socially undesirable is not for us to determine and that should not affect the court's interpretation of the power.
- Referred to the **Engineers Case** regarding the potential impact on the federal balance. You do not approach the constitution with a preconceived idea of the powers the states should have – rather you start with its text and ordinary meaning to determine what the scope of Commonwealth power is.
- Emphasised that what was 'discarded in **Engineers** was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution'.

## Head of power:

- The Act may be supported by 'taxation power' under s 51 (ii).

## Taxation power steps:

1. What is a tax?
2. Characterisation – is it a 'law with respect to taxation'?
3. Do any special tax limits apply?

### (1) What is a tax?

- Referring to **Latham** in **Matthews** – a tax is 'a compulsory exaction of money by a public authority for public purposes, enforceable by law and ... not a payment for services rendered'.
- Importantly, while this provides some positive/negative elements for a tax the court in **Air Caledonie** explained this definition is NOT definitive or exhaustive.

## Positive elements:

1. Compulsory exaction of money.
2. Enforceable by law.
3. Exacted by a public authority for public purposes.

## Negative elements:

1. NOT a fee for a service or license fee.
2. NOT a fine or penalty.
3. NOT arbitrary.

## Compulsory exaction of money & enforceable by law:

- Usually means there is a legal compulsion to pay tax.
- Consider whether there is a choice to pay or not.

## Exacted by a public authority for public purposes:

### CRF:

- Imposition can still be a tax if it is NOT paid into the CRF - **Australian Tape**.
- **Note:** members of the court in **Luton** cast doubt upon the **Australian Tape** decision.
- Funds paid into the CRF provide a strong indication it is for a 'public purpose' - **Roy Morgan**.
- However, simply being paid into the CRF is not conclusive the imposition is a tax - **Luton**.

## Public authority:

- Not essential to be paid to public authority if it's for 'public purpose' or 'public interest' - **Australian Tape**.
- Majority adopted a **broad** definition of 'public purpose' in **Australian Tape**.
- It was considered to be a 'public purpose' if it was imposed to serve a 'public interest'.
  
- However, the court adopted a **narrow** view of 'public purpose' in **Roy Morgan**.
- Emphasised that 'public purpose' does NOT equate to 'public interest' - public interest is narrower.

## Raising revenue:

- **Gleeson** in **Luton** raising revenue is not a 'universal determinant' of whether or not something is a tax.
- BUT it is 'often significant in deciding' and it is 'the most usual form of public purpose involved'.
  
- **Luton v Lessels**
  - Related to unpaid child support payments.
  - Payments were collected through the consolidated revenue fund & then passed onto the mother.
  - **Held:** NOT a tax – was not revenue raising for the Commonwealth.
  - Rather, the Act simply provided a mechanism to enforce existing **private** obligations (not a public purpose).

## 'Cover the field' 3 stage test:

### (1) What field does the Commonwealth law regulate, control or deal with?

- A question of characterisation.
- Consider the rights, duties and obligations that are created or affected.
- **Ansett v Wardley**
  - Ansett had adopted a policy of not employing women as pilots.
  - They sought to prevent Wardley from becoming a female commercial pilot.
  - Victorian legislation made sex discrimination or dismissal unlawful.
  - Ansett argued that Cth industrial award gave them power to dismiss pilots of less than 6 months service.
  - i.e. arguing the Cth industrial award was inconsistent with the Victorian legislation.
  - **Held:** no inconsistency - the laws were NOT operating in the same field.
- **Stephen:** the right to termination given to Ansett is not an absolute right.
- Rather, the right should be read against the background of state laws.
- Identified that the field covered by the Commonwealth law as the **procedure** for dismissal of pilots.
- 'The Vic legislature has concerned itself **quite generally** with the social problem of discrimination based upon sex ... The disputes with which the [Cth Act] are concerned are disputes as to industrial matters, pertaining to the relationship of employer and employee; **they have nothing inherently to do** with questions of discrimination on the grounds of sex.'

### (2) Commonwealth intention to cover the field:

- Importantly, this can be an implied OR express intention to cover the field.
- Even if the Commonwealth and state laws or 'fields' overlap this is not an automatic inconsistency.
- It must be established that that Commonwealth intended to cover the field on the subject matter.

### (A) Implied intention:

- **Kirby** in **Flaherty** noted an **implied** intention to cover the field is a legal fiction.

### Alter, impair, detract from the Cth law:

- **Goulden**
  - Goulden had been blind since birth & took out a life insurance policy with AMP.
  - He sought to vary the policy by adding a 'waiver of premium benefit'.
  - AMP refused to add the provision as Goulden was blind.
  - NSW legislation made it unlawful to discriminate against physically handicapped people.
  - Cth legislation stated a company shall not issue a policy unless approved by an actuary as suitable.
  - **Held:** implied intention to cover the field present.
  - The state law 'would **alter, impair or detract** from the Commonwealth scheme of regulation'.
  - i.e. it would undermine the life insurance business if the state law was to operate.
- Contrast with **Ansett** – HCA not of the opinion that state law altered/impaired the Cth industrial award.

### Level of detail:

- Detailed and comprehensive provisions may be an indication of an implied intention to cover the field.
- **O'Sullivan**
  - Cth legislation prohibited the export of meat unless the slaughter was carried out in registered premises.
  - **Held:** implied intention to cover the field.
  - **Fullagar:** the Cth regulations 'constitute an extremely **elaborate and detailed** set of requirements'.
- **Williams v Wreck Bay Aboriginal Community Council**
  - Inconsistency between Commonwealth & ACT legislation regarding leased properties.
  - **Held:** NO implied intention to cover the field.
  - Referred to the absence of detail in the Cth legislation to infer there was no intention to cover the field.
  - **Majority:** the provisions of the Commonwealth Act 'do not purport to state **comprehensively and exhaustively** what shall be the rules in relation to the rights and obligations of the parties to a lease