

## FISCAL POWERS: s 96 Grants Power

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The Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

### Seminal Case

#### • **First Uniform Tax Case**

- The wartime uniform-tax scheme (reimbursing States that ceased to levy income tax) was supported by s 96, **Latham CJ** commented:
  - **Economic inducement is not compulsion**, strong inducement is still a choice
  - The **Commonwealth may itself create the need** for assistance
  - **Commonwealth cannot coerce**, could not compel a State to surrender, or forbid it to exercise its taxing power

### Limits on s 96 – First/Second Uniform Tax Case

- No legal compulsion to accept, economic inducement is permitted – **1<sup>st</sup> Uniform Tax Case**
- No unconstitutional or illegal conditions
  - Abdication of powers or binding future Parliaments invalid – **2<sup>nd</sup> Uniform Tax Case** (Dixon CJ)
  - Requiring breach of a constitutional guarantee, such as compelling a State to breach IFPC
    - **Is the condition something the State is constitutionally capable of fulfilling?**
      - If yes it may be valid
      - If no, it may be severed without striking the whole grant
- Cannot be used to evade limits on Commonwealth power
  - s 96 does not extend, for example, to a grant on terms requiring the State to acquire property otherwise than on just terms; s 51(xxxi) cannot be outsourced to the States via s 96 – **ICM**
  - The Court looks to the legal and practical operation of the grant
- Cannot be a ‘colourable device’
  - s 96 might in theory be used colourably to discriminate in taxation (circumventing ss 51(ii)/99); hard to prove; courts examine legal and practical operation, not political motive – **WR Moran**
- Discrimination between States is allowed
  - Federal flour tax with grants back to States for wheat-growers; Tasmania (no wheat-growers) received a grant to flour-millers instead, held valid, as the tax applied identically and s 96 grants may lawfully discriminate – **Moran**
    - s 96 is a means of evening inequalities, not limited by discrimination (**Latham CJ**)
- Intergovernmental immunities cannot be run against a s 96 condition
  - Grant is consensual (the State may always refuse), the doctrine does not apply

## s 96 APPLICATION

1. Identify the grant (law giving financial assistance to a state contingently on conditions)
2. Apply **Williams** – s 96 ordinarily will supply the constitutional basis for expenditure
3. Apply the limits
4. Advise strategically – which conditions can be severed rather than refusing the grant

## s 51(xix) ALIENS POWER

*The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to naturalization and aliens.*

### Breadth of the Aliens Power

- Understood as a wide power, equipping Parliament with the capacity to decide on formal membership to the Australian community – **Meng Kok Te (Gleeson CJ)**
- It is a plenary-but-limited power – **Bank Nationalisation**
  - Parliament has a wide scope to legislate on aliens
  - However, Parliament cannot redefine aliens to capture those who *could not possibly answer the description* in the ordinary understanding of the word – **Pochi**
    - In **Love**, Gageler J posited it was the legislature's role to redefine the definition of 'alien' as it is currently unrestrained

## STEP 1 – IS THE LAW A POWER W.R.T. ALIENS?

### Meaning of 'Alien'

- *Belonging to another person or place* – **Nolan; Love**
- It is a legal status – **Meng Kok Te**
- While an alien within Australia enjoys the protection of the law, the alien's defining vulnerability is to exclusion or deportation – **Chu Kheng Lim (Brennan, Deane, and Dawson JJ)**

### Category (1) – Absorbed Into Community

- **Pochi**
  - Born overseas and migrated, being absorbed into Australian society; accepted for citizenship but never notified and so did not claim; before acceptance convicted on drug charge and deportation ordered
  - *Absorption alone does not defeat alienage; Parliament can treat as an alien any person who has not been naturalised as an Australian (Gibbs CJ)*
    - Naturalisation **only achievable through statutory citizenship provision**
- In **Alexander, Edelman J** comments that he believes absorption is sufficient to be categorised as a 'non-citizen, non-alien' (with **Steward J** agreeing)
  - **Gordon J** also suggests that *Pochi* may be differently decided today

## Category (2) – British Subjects

### • Shaw

- Overruled **Patterson** and restored **Nolan**
  - Aliens power **reaches all** who entered after the *Nationality and Citizenship Act 1948* (Cth) commenced (26 Jan 1949), **born out of Australia of non-citizen parents and not naturalised**
- Now extended to pre-1949 British subjects – **Chetcuti**

## Category (3) – Born in Australia to Non-Australian Parents

### • Singh

- Born in Australia to Indian parents; not a citizen by statute
- *Central characteristic of alienage is owing obligations to another sovereign power*; she had that characteristic; therefore could be deemed an alien (**Gummow, Hayne and Heydon JJ**)
  - There is no constitutional citizenship by birth
  - Parliament may exclude children of non-citizens

## Category (4) – Indigenous Australian Persons

### • Love

- Love (b PNG) and Thoms (b NZ) had visas cancelled, were detained (Indigenous Australians)
  - Held that an **Indigenous Australian person** (on the tripartite test) **cannot be an alien, even without citizenship**
- Tripartite (*Mabo*) test for Aboriginality
  - (1) Biological descent; (2) Self-identification; (3) Recognition by the relevant community
- The majority held that a non-citizen, non-alien can exist because Aboriginal Australians **connection to land survived the assertion of sovereignty** (**Gordon J**)
- The minority held the plaintiffs confuse *spiritual connection to land with political/legal connection to the polity* (**Keane J**); and that letting elders decide alienage attributes a sovereignty rejected in *Mabo*; the power is largely for Parliament (**Gageler J**)
  - *Must be part of the 'body politic'* (**Kiefel CJ**)

## STEP 2 – NATURALISATION AND DENATURALISATION LIMB

- The naturalisation/denaturalisation limb permits Parliament to confer citizenship, and in certain instances, revoke it; this is not a general power to denationalise however – **Jones** (**Edelman J**)
- The **grounds for valid denaturalisation** are – **Alexander** (**Gordon J**)
  - (1) **Change in sovereign identity or territory**
    - For example, PNG natives becoming citizens upon independence – **Ex Parte Ame**
  - (2) **Express or implicit renunciation of allegiance to Australia** – **Alexander**

## Rule Against Statelessness

- A person holding only an Australian citizenship cannot be denaturalised – **Alexander**

## Threshold for Conduct-Based Renunciation – *Alexander* (Steward and Edelman JJ)

- Conduct which amounts to *lasting rebuttal of allegiance to Australia* would be authorised
  - Waging a war against Australia
  - Conduct which seeks to destroy or gravely harm the fundamental features of the nation
- The threshold for *extreme wrongdoing* sufficient for renounceable conduct is uncertain (**Edelman J**)
- Potentially an additional form from **Jones**
  - Failure to disclose past criminal conduct

## Effect of Chapter III

- Ch III operates to make punishment of criminal conduct exclusively judicial, even if the punishment is separated from the adjudication of guilt – **Benbrika** (Kiefel CJ, Gageler, Gleeson and Jagot JJ)
- Even a law supported by s 51(xix) **can be invalidated if it impermissibly vests judicial power** (such as punishment) **in a minister** – **Benbrika**
- Where a citizen is stripped of their citizenship, **is the power properly characterised as punitive?**
  - **PUNITIVE** if the powers' purpose is denunciation and retribution to criminal conduct
    - Such as in **Alexander; Benbrika**
  - **NOT PUNITIVE** if the power is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose
    - Such as maintaining the integrity of the citizenship process – **Jones**

## s 51(xix) APPLICATION

1. Identify the issue
  - Who is the person (place of birth, parents' status, citizenship, residence)?
  - What is the Commonwealth doing (deportation, visa cancellation, citizenship-strip)?
  - State the plenary-but-limited scope – **Bank Nationalisation** and the **Pochi** limit
2. Characterise by category
  - (1) Absorbed persons can be aliens – **Pochi** – **WITHIN POWER**
  - (2) British subjects can be aliens – **Shaw; Chetcuti** – **WITHIN POWER**
  - (3) Australian-born to non-citizen persons can be aliens if owing allegiance to a foreign sovereign – **Singh** – **WITHIN POWER**
  - (4) Aboriginal Australians on the tripartite *Mabo* test are not aliens – **Love** – **OUTSIDE POWER**
3. Citizenship-stripping (If Relevant)
  - (1) Apply **Gordon J** grounds – **Alexander**
  - (2) Apply **Steward and Edelman JJ** threshold test – **Alexander**
  - (3) Check statelessness
  - (4) Assess Chapter III overlay
    - If power is punitive and not within the **Jones** integrity of purpose exception, it is **INVALID**, even though it is supported by s 51(xix)

## Attack Plan – Aliens Power

Aliens are subject to {deportation/visa removal} per s 51(xix). Per *Nolan*, an alien is defined as someone who *belongs to another place or person*. Parliament has a wide scope to legislate on aliens (*Bank Nationalisation*) but is subject to the *Pochi* limit and as such cannot redefine aliens to capture those who could not possibly answer the description in the ordinary understanding of the word. **See steps above.**

## IMPLIED FREEDOM OF POLITICAL COMMUNICATION (IFPC)

### Key Characteristics of IFPC

- IFPC is confined to political communication, not expression generally and operates as a limitation on legislative power, not a personal right
  - A litigant does not sue for breach of a right; they argue the law is invalid for exceeding power
- **Nationwide News**
  - Constitution rests on federalism, SoP and representative government; these are unworkable unless the people can communicate (**Deane and Toohey JJ**)
- **ACTV**
  - Struck down a near-blanket ban on paid political advertising during elections
  - A restriction imposing a burden disproportionate to the competing public interest indicates the purpose and effect is to impair political communication (**Mason CJ**)
- Application is broad; applies to Cth, State, Territory and local laws – **Unions NSW**, as well as the common law – **Theophanous**

### LANGE TEST (BROWN; COLEMAN; MCCLOY)

1. Does the law effectively burden the freedom in its terms, operation or effect?
  2. Is the purpose of the law legitimate? (Compatible with the constitutionally prescribed system of representative and responsible government)
  3. Is the law reasonably appropriate and adapted to advance that legitimate purpose in a manner compatible with that system?
- A further threshold question exists: **is the communication political?**
    - Constitutional questions will not arise if not – **Clubb; Preston**

### Defining 'Political Communication'

- *All speech relevant to the development of political opinion on the whole range of issues which an intelligent citizen should think about* – **Theophanous**
- Look at the true character of the communication as a whole – **Rabelais Case**
  - A newspaper article outlining how to shoplift was not sufficiently political – **Rabelais**
- Communication about **what the law/rules should be is political**; communication **about a particular individual's choices is not**; protests can sit in between (**Nettle J**)
  - Abortion protests within a close proximity to a centre not considered political – **Clubb**