

# 1. CONSTITUTIONAL INTERPRETATION & CHARACTERISATION

## Core Framework

The Commonwealth Parliament is limited to heads of power in ss 51 and 52 of the Constitution. States have plenary power (peace, order and good government). Where both legislate, s 109 applies.

### Three-Step Characterisation Test

1. Examine the law — identify rights, duties and liabilities created; legal and practical operation.
2. Interpret the head of power — determine its scope (connotation/denotation); core and incidental.
3. Evaluate the connection — is there a sufficient connection, or is it 'insubstantial, tenuous or distant'?

**Re Dingjan (McHugh J)** — Sufficient connection test — law is valid unless connection is insubstantial, tenuous or distant.

**Grain Pool v Commonwealth** — Character determined by rights/duties created; examine practical + legal operation; dual characterisation permitted.

### Key Interpretive Principles

PRINCIPLE	APPLICATION
<b>Engineers Case (1920)</b>	Overtaken reserved State powers. Constitution read naturally, without implied limits unless logically necessary. Federal balance tilts to Cth.
<b>Jumbunna Principle</b>	Lean to broader interpretation — enables heads of power to evolve (e.g. 'postal services' now covers internet; 'marriage' covers same-sex marriage).
<b>Dual Characterisation</b>	A law may have multiple characters; only one needs to fall within power. (Fairfax v FCT — tax law valid even if purpose is behavioural modification; Murphyores — environmental purpose irrelevant if law fits trade & commerce.)
<b>Purpose vs Subject Matter</b>	Subject matter powers (corporations, taxation): sufficient connection test. Purpose powers (defence, external affairs): proportionality test.
<b>Saving Provisions</b>	s 15A Acts Interpretation Act: reading down (choose valid interpretation), severance (cut invalid parts), partial disapplication (limit words to valid circumstances). (Clubb v Edwards — Edelman J.)

# 2. TAXATION POWER — s 51(ii)

**Buzzwords:** tax, fee, levy, charge, impost, payment

**ISSUE:** Is this financial impost a valid exercise of s 51(ii)? Does it satisfy the Matthews definition of a tax, and does it comply with all constitutional limits?

## STEP A — IS IT A TAX? (Matthews Test)

**Matthews v Chicory Marketing Board (1938) (Latham CJ):** 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.' (Not exhaustive — Air Caledonie.)

### POSITIVE INDICIA — must show

ELEMENT	KEY CASES & APPLICATION
<b>Compulsory</b>	No realistic choice to avoid. Air Caledonie (immigration fee — no choice); Homebush Abattoir (activity one naturally seeks to avoid). Even one payer can satisfy if legislatively compelled: MacCormick. If person can elect a higher or lower rate, voluntary portion may lose compulsory character.
<b>Public purpose</b>	Revenue for CRF = public purpose, but not conclusive (Roy Morgan — protecting superannuation is public purpose). Tape Manufacturers — copyright royalties counted (minority disagreed). Need not go to CRF (Air Caledonie obiter).
<b>Public authority</b>	Not strictly required (Tape; Air Caledonie) but doubted in Roy Morgan. Apply and note the uncertainty.
<b>Enforceable by law</b>	Once enacted: Matthews. Standard element — generally satisfied.

### NEGATIVE INDICIA — must NOT be

ELEMENT	KEY CASES & APPLICATION
<b>Not a fee for service</b>	No genuine quid pro quo. Air Caledonie: immigration processing = tax (no service). Airlines Services: air traffic control charges = fee for service (rational relationship to service value via economic pricing model). Look for a discernible relationship between amount charged and service provided.
<b>Not a fine/penalty</b>	Liability does not arise from breach of antecedent obligation. (Dawson J in Northern Suburbs Cemetery.) A high tax on undesirable activity ≠ penalty: Fairfax (Kitto J) — the law did not prescribe or forbid conduct. Menzies J's contrary view disavowed in Second Fringe Benefits Tax.
<b>Not arbitrary</b>	Criteria determining liability must be sufficiently general and ascertainable. Must be able to identify the criteria AND show they are applied consistently. (Gibbs CJ in MacCormick.) Vague 'risk ratings' or ministerial discretion = arbitrariness risk.

## STEP B — SUFFICIENT CONNECTION + DUAL CHARACTERISATION

Apply sufficient connection test (Re Dingjan). A law may regulate another subject matter AND be a valid tax — 'raising of revenue may be of secondary concern' (Kitto J in Fairfax). Even where purpose is primarily regulatory (Northern Suburbs Cemetery — training guarantee charge), it is still a tax if compulsory and for public purposes.

## STEP C — CONSTITUTIONAL LIMITS

LIMIT	RULE & CASES
s 51(ii) Non-discrimination	Law must not discriminate between States or parts of States. Difference must be produced by the Cth law itself — not external factors like State royalties (Fortescue Metals) or where people choose to live. Geographic variation = constitutional only if caused externally.
s 99 No preference	No preference to one State over another in laws of trade, commerce or revenue. 'Preference' = tangible advantage (Crowe v Commonwealth). 'Discrimination' requires the law itself to produce the difference (Moran v Commonwealth).
s 114 No tax on State property	Commonwealth cannot impose tax on property belonging to a State.
s 53 Origination	Tax bills must originate in the House of Representatives. Senate may not amend (only reject or suggest).
s 55 Anti-tacking	A law imposing taxation must deal ONLY with imposition of taxation and only ONE subject of taxation. Non-taxation machinery = tacking → those provisions of no effect. Tax may survive if severable (s 15A AIA).
s 81 CRF	All revenue must flow into the Consolidated Revenue Fund. Bypassing CRF = scheme defective (Tape Manufacturers; Luton v Lessels). Revenue still constitutes a tax, but scheme must be rectified.
s 83 Appropriation	No money drawn from CRF without appropriation by Parliament.

## QUICK CASE REFERENCE

CASE	PRINCIPLE
<b>Matthews v Chicory Marketing Board (1938)</b>	Definition of tax — compulsory exaction, public purpose, enforceable by law, not a fee for service.
<b>Air Caledonie v Commonwealth (1988)</b>	Immigration fee = tax. No real choice; no genuine service for citizens entering as of right. Matthews not exhaustive.
<b>Airlines Services v Commonwealth</b>	Air traffic control charges = fee for service. Rational economic pricing model — flexible relationship to service value.

CASE	PRINCIPLE
<b>Fairfax v FCT (1965)</b>	Tax law valid even if purpose is to influence investment behaviour. Dual characterisation. Revenue raising may be secondary (Kitto J).
<b>Northern Suburbs Cemetery v Commonwealth (1993)</b>	Training guarantee charge = tax even though revenue-raising is secondary to training policy objective.
<b>MacCormick v FCT</b>	Arbitrary criteria = invalid. Must be sufficiently general and ascertainable by those affected.
<b>Tape Manufacturers v Commonwealth</b>	Royalty on blank tapes = tax, even paid to private collecting society (not CRF). Public purpose = protecting copyright holders.
<b>Roy Morgan Research v FCT</b>	Superannuation guarantee charge = tax. Wider public purpose of protecting superannuation. 'Public authority' requirement doubted.
<b>Moran v Commonwealth (1940)</b>	Flour millers tax valid. Discrimination requires the Cth law itself to produce the difference — not external factors.
<b>Fortescue Metals v Commonwealth (2013)</b>	MRRT valid. Differential treatment based on State royalties = external factors, not discrimination by the Cth law.

## 3. APPROPRIATION & SPENDING — ss 81, 83

**ISSUE:** Is the Commonwealth's spending/program constitutionally valid? Is there a valid appropriation AND a separate head of power to support the spending?

**▲ KEY LIMIT:** ss 81 and 83 are NOT a spending power — they are the source of the power to appropriate (earmark) money only. (Mason J in AAP; Heydon J dissent in Pape.)

## Two Requirements for Valid Spending

- Valid appropriation under ss 81 and 83.
- Separate constitutional basis — a head of s 51 power, valid legislation under a head of power, or in limited cases: prerogative, nationhood power, or ordinary functions of government. (Williams v Commonwealth (No 1) (2012).)

**STEP 1**

### Valid Appropriation?

Parliament determines specificity of appropriation — generally not justiciable unless extraordinary circumstances (Combet v Commonwealth (2005); Wilkie v Commonwealth (2017) — postal survey upheld; 'urgent' = relative concept; 'unforeseen' = unforeseen by Executive Government).

**STEP 2**

### Constitutional Basis for Spending?

Identify head of legislative power (s 51[X]). If none — try nationhood power (s 61 + s 51(xxxix)); must be 'peculiarly adapted to national government' (Pape — GFC stimulus)

upheld). Prerogative covers war, treaties, foreign affairs, paying public servants.  
 Ordinary functions of government: paying public servants, maintaining courts.

### The Williams Rule

Post-Williams: Commonwealth generally cannot contract for services in areas outside its legislative power without supporting legislation. That legislation must itself be constitutionally supported.

SCENARIO	OUTCOME
Chaplaincy in State schools (Williams No 1)	No s 51 head; not prerogative, nationhood or ordinary function → INVALID. Must use s 96.
Williams No 2 re-legislation attempt	Enabling legislation also lacked constitutional basis → INVALID.
GFC stimulus payments (Pape)	Upheld on nationhood power — national economic emergency is peculiarly adapted to national government.
Postal survey funding (Wilkie)	Upheld under Appropriation Act — Parliament determines specificity; 'unforeseen' = unforeseen by Executive.

## 4. GRANTS POWER — s 96

Buzzwords: grant, financial assistance, funding, conditions, terms, SPP

**ISSUE:** Is the Commonwealth's conditional grant to the State a valid exercise of s 96? Is it genuine financial assistance? Are the conditions constitutionally valid?

**s 96:** "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

Treated as permanent despite transitional language (Dixon J in Second Uniform Tax Case). Scope is almost unlimited (Federal Roads Case, Moran, First and Second Uniform Tax Cases).

KEY POST-WILLIAMS ROLE: s 96 is now the principal mechanism for Commonwealth spending in areas outside its direct legislative power (e.g. schools, hospitals, roads).

**STEP 1** **Genuine Financial Assistance?**  
 Must genuinely be financial assistance to a State — not a colourable device to achieve another unconstitutional purpose. (Moran v Commonwealth.)

**STEP 2** **Consensual (Not Coercive)?**  
 'Temptation is not compulsion' (Latham CJ in First Uniform Tax Case). Economic pressure alone does not make a grant coercive. Courts treat this as political, not judicial — States 'can always say no.' (Often a legal fiction in practice.)

**STEP 3** **Are the Conditions Valid?**  
 Parliament may impose any conditions 'as it thinks fit' — very broad. Conditions may be tied to State policy in areas of State competence (health, education, roads). BUT conditions cannot require States to act unconstitutionally.

### KEY LIMITS on s 96 Conditions

**⚠ KEY LIMIT:** 'Forever' condition = abdication of State legislative power = INVALID. A State cannot bind its future Parliaments to permanently surrender a sovereign power. (Second Uniform Tax Case.) A temporal condition ('while grant continues') is VALID.

CONDITION TYPE	VALIDITY
Amend own law during grant period	VALID — State constitutionally capable; not binding future Parliaments. (Second Uniform Tax Case.)
'Forever cease' to levy a tax / make laws	INVALID — requires abdication of sovereign legislative power; binds future Parliaments. (Second Uniform Tax Case.)
Discriminate between States (give more to one)	VALID — s 96 expressly permits grants to 'any State'. Commonwealth can favour particular States. (First Uniform Tax Case.) Contrast s 51(ii) where discrimination is prohibited.
Condition requiring unconstitutional State action	INVALID — e.g. conditions breaching s 92, s 116, implied freedom, or requiring acquisition without just terms (ICM Agriculture v Commonwealth (2009)).
Grants to achieve what Cth cannot do directly	Post-Williams: courts may scrutinise more carefully; but s 96 expressly contemplates conditions in State competence areas.

### Discrimination Between States

s 96 allows discrimination in SPENDING (can give more to one State). s 51(ii) and s 99 prohibit discrimination in TAXING. These operate independently.