LAW2111

Constitutional Law

Exam Summary Notes

Topics

Week 5: Financial Powers

Key Cases Summary

Section 96 — Grants Power

- ***Victoria v Commonwealth (1926) 38 CLR 399 ('Federal Roads Act Case')***
  - Law held VALID under s96 grants power. Commonwealth may attach conditions to grants to states. Grants were 'plainly warranted by the provisions of s96' and not limited by s99 or any other provision. KEY RULE: s96 conditions can reach beyond s51 heads of power.
- ***Deputy Commissioner for Taxation (NSW) v Moran (1939) 61 CLR 735***
  - Law held VALID. Confirmed and expanded Federal Roads. Tax laws can have differential burdens — discrimination only invalid if it breaches s51(ii). s96 grants CAN treat states differently; s96 is NOT subject to s99. A state can act as a conduit, passing grant money to private individuals.
- ***Victoria v Commonwealth (1957) 99 CLR 575 ('Second Uniform Tax Case')***
  - Law held VALID. Confirmed broad use of s96 grants, even if they may be financially coercive to states. ONE CLEAR LIMIT confirmed: states must be constitutionally capable of fulfilling the conditions. Dixon CJ: 'I might have decided differently, but I can't.'
- ***Attorney-General (Vic) (ex rel Black) v Commonwealth (1981) 146 CLR 559 ('DOGS Case')***
  - s96 grants can fund private bodies VIA the states; not invalid under s116 (religion). Shows the breadth of spending via state grants. Grant was valid because it was financial assistance to the state, not a law 'for establishing any religion.' s116 does NOT limit s96; the limit is only that states must be capable of complying with conditions.
- ***ICM Agriculture v Commonwealth (2009) 240 CLR 140***
  - s96 supports conditional grant schemes, even affecting property rights, if structured through states.

Limits on s96

- ***South Australia v Commonwealth (1942) 65 CLR 373 ('First Uniform Tax Case')***
  - Law held VALID because combination of s51(ii) (tax) and s96 (grants) can effectively centralise taxation. Each act assessed individually and deemed valid under a separate head of power. Latham CJ: 'temptation is not compulsion' — states simply not tempted to impose income tax, not compelled to.

Taxation

- ***Pye v Renshaw (1951) 84 CLR 58***
  - Reaffirmed that tax laws are valid if they fit s51(ii). Courts focus on LEGAL CHARACTER, not economic effect.
- ***Deputy Commissioner for Taxation (NSW) v Moran (1939) 61 CLR 735***
  - Tax Act did not discriminate (uniform rate on all millers). Confirmed the valid characterisation approach to taxation.

Appropriation Powers

- ***Attorney-General (Vic) (Ex rel Dale) v Commonwealth (1945) 71 CLR 237 ('Pharmaceutical Benefits Case')***
  - Law NOT supported by appropriation alone. Appropriation does NOT equal substantive power. A separate constitutional basis is always needed for spending.
- ***Victoria v Commonwealth and Hayden (1975) 134 CLR 338 ('AAP Case')***
  - Appropriation (s81) does NOT itself authorise spending. A substantive power or executive basis is also required. Parliament controls spending but appropriation alone is not enough.
- ***Pape v Federal Commissioner of Taxation (2009) 238 CLR 1***

- Spending supported by executive nationhood power and s81 appropriation. Commonwealth CAN spend for national emergencies/economic crises under s51(xxxix) as incidental to the nationhood power (s61). French CJ: 'substantive power to spend…is not to be found in s81 or s83, but elsewhere in the constitution or statutes made under it.' CAVEAT: nationhood power is VERY NARROW.

- ***Combet v Commonwealth (2005) 224 CLR 494***
  - BROAD interpretation of appropriations. Parliament controls spending; courts do not closely supervise purposes if authorised. Very little specificity is needed in appropriation purposes (government advertising on workplace relations was valid).
- ***Wilkie v Cormann (2017) 349 ALR 1***
  - Confirmed wide scope of appropriations; legality depends on statutory authority, not merits of spending. Advance to Finance Minister for 'urgent and unforeseen' needs held VALID (marriage equality postal survey).

Executive Spending — Williams

- ***Williams v Commonwealth (No 1) (2012) 248 CLR 156***
  - Executive CANNOT spend public money without statutory authority or constitutional head of power. BROAD argument (executive has unlimited autonomous power to spend like any natural person) REJECTED. NARROW argument (executive can spend autonomously within scope of any s51 head of power) REJECTED. HELD: executive spending requires legislative authority.
- ***Williams v Commonwealth (No 2) (2014) 252 CLR 416***
  - Legislation must be supported by a head of power — appropriation and statute alone are INSUFFICIENT. Parliament tried to fix Williams No 1 by enacting a specific Act. s32B of the new Act held invalid — no head of power under which school chaplains could be funded. The parliament's fix FAILED because the underlying problem was a lack of power, not a lack of statute. CANNOT WORK AROUND A CONSTITUTIONAL PROBLEM WITH A STATUTE THAT HAS NO CONSTITUTIONAL BASIS. Ultimately, s96 was used to work around this issue by giving a conditional grant to the states.

Theory & Doctrine

Context — Vertical Fiscal Imbalance

Vertical fiscal imbalance is the mismatch between the shares of revenue collection and expenditure among tiers of government

Section 96 — Text and Types of Grants

s96: 'During a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit.'

THREE TYPES OF GRANTS:

- General revenue: budget support, no conditions attached (e.g. GST revenue grants)
- Special assistance: equalise financial inequalities based on need and population (e.g. grants commission adjustments)
- Specific purpose: designated spending with conditions attached (e.g. education, health, roads)

Section 96 — Scope and Limits

S96 is virtually unlimited — it is not confined to s51 heads of power and is not subject to s99 (non-discrimination between states). TWO CATEGORIES OF LIMITS:

- **LIMIT 1 — Commonwealth cannot require states to breach the Constitution**
  - States must be constitutionally capable of complying with conditions (Second Uniform Tax Case)
  - VALID conditions: 'adopt uniform curriculum,' 'set minimum educator pay'

    - INVALID conditions: 'impose customs duties' (s90 prohibits this) or 'establish a religion' (s116 prohibits this)
    - This limit is NARROW — most policy conditions are within state capacity
- **LIMIT 2 — Can the Commonwealth evade its OWN constitutional limits via s96?**
    - E.g. 'just terms' (s51(xxxi)) requires fair compensation when Cth acquires property — can it pay a state to acquire property instead?
    - DOGS Case: grant was valid financial assistance to the state, not a law 'for establishing any religion' — s116 does not limit s96
    - Ongoing area of uncertainty — not fully resolved

The Uniform Tax Scheme — Historical Transformation

BEFORE 1942:

- States and Cth both imposed income tax
- Taxpayers filed separate returns
- Rates varied between states
- States were financially independent

AFTER 1942:

- Only Cth imposes income tax
- Single tax return; uniform rate
- States dependent on Cth grants

THE FOUR-ACT SCHEME:

- (1) Income Tax Act 1942 [s51(ii)]: raised Cth tax rate to cover State + Cth needs
- (2) Grants Act 1942 [s96]: offered states grants if they stopped taxing income
- (3) s221 Income Tax Assessment Act [s51(ii)]: required taxpayers to pay Cth tax FIRST
- (4) Wartime Arrangements Act [s51(vi)]: transferred state tax offices to Cth

No single Act prohibited state income tax — all together, they collectively made it practically impossible.

FIRST UNIFORM TAX CASE (1942): Each Act was assessed individually and held valid under a separate head of power. Latham CJ: 'temptation is not compulsion.'

SECOND UNIFORM TAX CASE (1957): Grants Act reaffirmed as valid under s96. s221 priority provision held INVALID (overturning First Uniform Tax Case on this point). s96 reaffirmed as virtually unlimited.

Appropriation Powers — ss81 and 83

These provisions guarantee parliamentary control and are pillars of responsible government:

- s81: all revenues or moneys raised or received by the Executive Government shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth
- s83: no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law

CRITICAL PRINCIPLE: Appropriation is NOT a spending power. It is parliamentary authorisation to draw money — but a separate HEAD OF POWER is always required to authorise the spending itself.

French CJ in Pape (2009): 'substantive power to spend…is not to be found in s81 or s83, but elsewhere in the constitution or statutes made under it.'

What the Executive CAN and CANNOT Spend On

- **CAN: pursuant to a valid s51 statute authorising the spending**
- **CAN: exercise of prerogative (narrow — e.g. defence, foreign affairs)**
- **CAN: grants under s96 with conditions**
- **CANNOT: directly in a state area with no s51 power and no s96 structure**
- **CANNOT: under a bare appropriation without authorising legislation**

WHY UNRESTRICTED EXECUTIVE SPENDING IS DANGEROUS:

- Parliamentary supremacy — parliament, not the executive, controls the public purse

- Federalism — executive cannot circumvent constitutional division of powers
- Responsible government — executive must be accountable to parliament for spending

The Five Spending Pathways for Parliament

- **(1) s96 GRANT TO STATES [LOW RISK]: grant conditions structured through states**
- **(2) LEGISLATION + APPROPRIATION [LOW RISK IF HEAD OF POWER EXISTS]: s51 head of power + s81/83 appropriation**
- **(3) s64 DEPARTMENTAL SPENDING — 'ordinary government business' [MEDIUM RISK]: uncertain scope**
- **(4) NATIONHOOD POWER via s61 [HIGH RISK]: very narrow and uncertain**
- **(5) EXECUTIVE SPENDING ALONE — NO BASIS after Williams No 1 and No 2 [INVALID]**

The Spending Framework — Step-by-Step Exam Test

STEP 0 – WHICH PROBLEM IS IT: is it a grants problem (s96), an appropriation and expenditure problem (ss81,83), or both. Then test each grant condition separately.

STEP 1 — APPROPRIATION: Has parliament appropriated the money? (ss81, 83)