### Trade and Commerce Power

**Direct Legal Effect**

**Head of Power**

Section 51(i)
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:

(i) **Trade and commerce with other countries, and among the States**

**Scope**

**Meaning of ‘trade and commerce’?**

**Rule 1:** The words ‘trade’ and ‘commerce’ are to be understood in their current and popular sense -

- W & A McArthur v Qld
  
  “Trade and commerce are not terms of art, they should have the ordinary meaning of the term trade and commerce and should be interpreted to include the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations …which the world calls 'trade and commerce'”

**Rule 2:** The words ‘trade’ and ‘commerce’ are to be interpreted broadly and flexibly, to adopt to changing circumstances – Australian National Airways v Commonwealth

Trade and commerce includes:

- The interstate/overseas purchase or sale of commodities (W & A McArthur v Qld)
- The interstate/overseas movement of people (Australian National Airways v Cth)
- The creation of government-owned transport services (ANA v Cth)
- Putting goods on a ship, (re)fuelling a ship and taking goods from a ship (Huddart Parker v Commonwealth)
- The regulation of the employment conditions of crews on ships (Re Maritime Union of Australia; ex parte CSL Pacific Shipping)
- Intangibles (Bank of NSW v Commonwealth)

**Bank of NSW v Cth**

- **It covers intangibles as well as the movement of goods or persons.** The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of press agencies and the transmission of all intelligence, whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. **But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments…**

**Trade and Commerce ‘with other countries’**

**Murphyores v Cth**

Facts: Murphyores (M) held a lease under the Qld Mining Act to mine and export rutile from Fraser Island. The Customs (Prohibited Exports) Regulations (Cth) [enacted under the Customs Act 1901 (Cth)] prohibited the export of rutile without the written consent of the Minister for Minerals and Energy. M’s sand mining could have been ecologically detrimental to the fragile environment on Fraser Island. The Minister advised M that he would wait until the environmental report was completed before determining whether approval would be given to export. M sought an injunction to prevent the impact study and report from proceeding. It was likely that it would have recommended the rejection of M’s mining proposal. Were the Regulations a valid exercise of the power in s 51(i)? Could the Minister have regard to environmental issues before consenting to the export of rutile overseas?

**Held:** (1) s51(i) permits the Cth to regulate the export and import of goods into and out of Australia. (2) the Cth can impose any condition it thinks fit on the export and import of goods

- “There is nothing in the subject matter of the constitutional power which justifies the implication of any limitation on Parliament’s power of selection…It is enough that the law operates on the topic of trade and commerce with other countries. A law which absolutely or conditionally prohibits exportation of goods is a law that operates on that topic”

**O’Sullivan v Noarlunga Meat**

The power may even be wider than simple authorisation or refusal to export

- “All matters which may affect beneficially or adversely that export trade of Australia in any commodity produced or manufactured in Australia may be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it”

In other words, the power of the Commonwealth extends to the supervision and control of all acts or process, which can be identified as being done or carried out for export

**Trade and Commerce ‘among the States’**

**Wragg v NSW:** Strict distinction between inter and intra state trade or commerce

- A direct relationship to the interstate Trade and Commerce must be must be demonstrated to satisfy necessary characterisation requirement
  - Sufficient connection between the LAW and HOP

**R v Burgess: Ex Parte Henry** – it is important to remember that the Cth lacks a direct power to regulate intra state trade and commerce – Granville v Marrickville Margarine

“…the power is to legislate with respect to trade and commerce. The words ‘with respect to’ ought never be neglected in considering the extent of a legislative power conferred by s. 51 or s. 52. For what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament…every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter

Recognised situation where it might be possible to establish a sufficient connection between the intrastate and the interstate/overseas trade and commerce

(1) **Activities Preparatory to Trade**

The incidental scope of the power might be sufficient to enlarge the ambit to include the regulation of activities carried out within a state if those activities are “tied” to the interstate or overseas trade of the commodity

**O’Sullivan v Noarlunga Meat**

- “It may very reasonably be necessary to go further back, and even to enter the factory, or the field or the mine. How far back the Commonwealth can constitutionally go…must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export”
Commercial Transactions that are inseparably connected and cannot be extricated

Redfern v Dunlop Rubber Aust

- Facts: Redfern (R) were retailers of car tyres in Victoria. R sued Dunlop and others (manufacturers and suppliers of car tyres) under the Australian Industries Preservation Act 1906 (Cth) for having a price-fixing agreement, whereby no supplier would agree to sell R tyres at wholesale prices because R offered discounts on the retail price. Parts of the Act prohibited price-fixing arrangements that related to interstate trading activities. Dunlop objected on the basis that the commercial agreements were in relation to both intrastate and interstate trade, which in this context only pertained to a contract between Dunlop and R within Victoria.

- Held: The trade and commerce power could be used to regulate an intrastate commercial transaction because the commercial agreements dealt with matters relating to both intrastate and interstate trade (i.e. restraint of trade) that were 'inseparably connected' (some tyres were arriving from "interstate").

- “It is, of course, clear that the Commonwealth power over trade and commerce can only extend to such intrastate trade and commerce as is inseparably connected with interstate trade and commerce, but full acceptance of this limitation is quite consistent with, according to the Commonwealth, power to prohibit or regulate acts which relate to intrastate trade and commerce if they relate to interstate or overseas trade and commerce as well”

Protective safety measures that contemplate both intrastate and interstate regulations

Airlines of NSW v NSW (No.2)

The Commonwealth Air Navigation Regulations were valid intrastate insomuch as they related to the use of airspace, departures and landings.

Held: The “danger to the physical safety of interstate and international aircraft posed by intrastate aircraft using the same airspace justified the Commonwealth regulating those intrastate aircraft” (Price, 2010)

- “A clear conclusion must be drawn that the safety of air operations in Australia does not admit of any distinction being drawn between aircraft engaged in intra-State and those in inter-State or international air operations in all those matters...call[ed] safety precautions and procedures” (at 92-3 per Barwick CJ)
- “A federal law which provides a method of controlling regular public transport services by air with regard only to the safety, regularity and efficiency of air navigation is a law which operates to protect against real possibilities of physical interference [i.e. danger]...and is therefore, in every application that it has, a law “with respect to” such air navigation as is within federal power”

Economic Connection?

Minister for Justice (WA) (Ex rel Ansett Transport Industries) v Australian National Airlines Commission

- The Australian Airlines Commission (the federal government body tasked with the responsibility of regulating air navigation and licencing airlines to travel on particular journeys interstate and overseas) made regulations enabling the commencement of a service between Perth and Darwin, with a stopover in Port Hedland, to pick up passengers and freight.
- What is the constitutional problem with this scheme?
- The majority of the High Court held that the journey as it operated between the NT and parts of WA to be a valid exercise of the territories power (s 122). But the intrastate journey between Perth and Port Hedland was held to be invalid.
- An economic connection alone is insufficient to regulate intrastate trade and commerce

Characterisation

- A ‘sufficient connection’ between the law and the subject matter of the head of power

The Corporations Power

Direct Legal Effect

.......LOOK AT THE FACTS......RELATES TO THE PROVISIONS BEING IMPLEMENTED ..............

Head of Power

Section 51(xx)
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:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth