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LAWS2150 Federal Constitutional Law

A. Constitutional Interpretation and characterization; reading down; severance; purposive and non-purposive powers; incidental power; The *Engineers* Case; using s 51(i) Trade and Commerce Power as an illustration and also as a basis for an introduction to the constitutional consequences of Australian federalism

NOTE: Cases in GREEN are mandatory reading; cases in YELLOW are additional – either included in the casebook, referenced in mandatory cases, or otherwise referenced in lectures.

Characterisation: Determines whether impugned legislation falls within the scope of the subject matter of a relevant head of power.
Interpretation: Defines the relevant head of power.

Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: general principles to apply to determine whether a law is '**with respect to**' a head of legislative power under s 51.

1. The text of the Constitution is '**to be construed with all the generality which the words used admit**'. When validity of a law is challenged, purpose and object are ignored – look simply to whether the words **'answer the description'** of the head of power.
2. '**The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates**.'
3. Sufficient connection between the law and the head of power – look to the **practical** as well as **legal** operation of the law.
4. If a law answers the description of being a law with respect to a s 51 and a non-s 51 power, the law is valid even if there's no connection between the two subject matters.
5. If there is sufficient connection, it is a matter of **legislative choice**.

Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1 at 6-18 per Kitto J: discusses the appropriate question to ask when discussing constitutional validity under s 51.

→ 'Under [s 51] the question is always one of **subject matter**, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say **by reference to the nature of rights, duties, powers and privileges which it changes, regulates or**

abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, '**with respect to'**, one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?'

→ Quoting Dixon in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79, Kitto discussed the 'dual characterisation' principle, that is, so long as it falls under one head of constitutional power, a law will not be invalidated if there is another discernible purpose outside the area of federal power.

Reading Down: Court attempts to save legislation by reading it in a way which is within power.
Severance: Court investigates whether the invalid parts of an Act can be deleted leaving the rest to be enforced. For both severance and reading down, the fundamental principle is to leave the **original character of the law from Parliament unchanged, not to create new law**.

Severance Statutes

→ *Acts Interpretation Act 1901* (Cth) s 15A: Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it **shall nevertheless be a valid enactment to the extent to which it is not in excess of that power**. (See *Industrial Relations Act Case (Victoria v Cth)* (1996) 187 CLR 416, *Work Choices Case (NSW v Cth)* (2006) 229 CLR 1and *Airlines Case* (*Australian National Airways Pty Ltd v Commonwealth*) (1945) 71 CLR 29 below.)

→ *Interpretation Act 1987* (NSW) s 31(2): If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament: (a) **it shall be a valid provision to the extent to which it is not in excess of that power**, and (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

Industrial Relations Act Case (Victoria v Cth) (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ: discussion of the application of s 15A of the above Act. Held that s 15A applies in two scenarios:

1. Particular provisions/clauses: s 15A applies if 'the operation of the remaining parts of the law remains unchanged'

2. General terms: s 15A does not apply where 'the law was intended to operate fully and completely according to its terms, or not at all.' If multiple limitations are possible, then the law is invalid.
    - 'The limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject-matter. Thus, a law which is 'clearly made with the intention of exercising the power to make laws with respect to trade and commerce' can be read down 'so as to limit its application to inter-State and foreign trade and commerce.' (Quotes Latham CJ in *Pidoto v Victoria* (1943) 68 CLR 87 at 108-11.)
    - Also, can be read to be subject to a clear limitation of Parliament's legislative power: 'Thus, if any provision of the Act would otherwise operate to prevent the States from determining for themselves any of those matters which were held in *Re Australian Education Union* to be beyond the legislative power of the Commonwealth, the reading down of s 6 precludes invalidity for infringing the limitation on Commonwealth legislative power.'

Work Choices Case (NSW v Cth) (2006) 229 CLR 1 at 240-243 per Kirby J (dissenting): more discussion of s 15A:

→ The Court's limit in using s 15A is where 'faced with a conclusion of apparent constitutional invalidity of particular provisions, a court "**cannot separate the woof from the warp and manufacture a new web.**"…[The Court] has expressed a willingness to undertake **amputation and excision, where necessary, but not to perform judicial "plastic surgery" upon the challenged law**.'

→ 'It is not the function of this Court to save bits and pieces of the new law. The Cth might, if it chose, proceed to resubmit for re-enactment its substantive amendments to federal law on IR in relation to the territories where its powers, under s 122 of the Const., are extremely largely and arguably unrestricted. **However, were this Court to attempt to uphold those particular provisions of the new Act…the outcome would be a law quite different from that propounded by the Government and enacted by the federal Parliament. In accordance with the established principles that I have identified, in the conclusions that I have reached, severance is not available.**

Trade and Commerce Power

Section 51(i) Aus. Const.:

> 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

Section 92 Aus. Const.:

> **Trade within the Commonwealth to be free**
> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free...

W&A McArthur Ltd v Queensland (1920) 28 CLR 350: Transportation being an aspect of trade and commerce was held to be a 'truism'; takes an expansive view of 'trade and commerce among the States' to be determined based on the 'distinctive character' of the transactions.

→ Knox CJ, Isaacs and Starke JJ at 546-9: 'Commercial transactions are multiform, and each transaction that is said to be inter-State must be judged by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated.'

- Trade and commerce includes (but not exclusively) 'mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery'.

'*Transport Cases*': What followed in the 1930s in the HCA – especially Evatt J – was a position that 'buying and selling' were the 'essential elements' of commerce, with a view that *McArthur* took an 'extremely wide' view, privileging 'matters "relating to" or "with respect to" trade and commerce, rather than trade and commerce itself.' (See *Willard v Rawson* (1933) 48 CLR 316 at 337; *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30 at 88 – both per Evatt J.) But this view in the 'transport cases' was unequivocally rejected by the HCA in the *Airlines Case* (1945).

Airlines Case (*Australian National Airways Pty Ltd v Commonwealth*) (1945) 71 CLR 29: Section 19(1) of the *Australian National Airlines Act 1945* (Cth) empowered the ANA Commission to transport for reward passengers and goods by air: (a) between States; (b) between Territories and other States or Territories; and (c) within Territories – Part IV effectively gave a monopoly over these airline services.

→ 'A law authorizing the government to conduct a transport service for inter-State trade, whether as a monopoly or not, appears to me to **answer the description** (see *Grain Pool* above), a law with respect to trade and commerce amongst the States.'

→ *Contra* the '*Transport Cases*', and persuaded by US cases, Dixon held **transportation to be 'anything but subsidiary'**, as being something 'inseparable from the movement of things and people'. Therefore, '**if not all inter-State transportation, at all events all carriage for reward of goods or persons between States is within the legislative power, whatever may be the reason or purpose for which the goods or persons are in transit**.'

Part IV was held to be invalidated by s 92 of the Constitution. The question then became whether the whole Act was brought down, or whether the void provisions can be **severed** from the valid ones.

→ Section 15A of the *Acts Interpretation Act 1901-41* 'has, in effect, **introduced a rule of construction whereby unless an intention affirmatively appears to the contrary, the provisions of a statute are to be taken as independent of one another and not interdependent**.'

→ There is a **presumption of 'independence'** of an enactment's provisions '**unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions**' (at 92; quoting from *Fraser Henleins Pty Ltd v Cody; Crowther v Cody* (1945) 70 CLR 100 at 127).

→ Key question: 'Was the intention that the air service be exclusive paramount, so that the intention there should be a government air service was completely dependent on it?'

- In this case, the '**arrangement and text of the enactment** appear to me to support, rather than weaken, the presumption that the main provisions are, so to speak, to stand on their own feet in a question of *ultra vires*…The draftsmen of the *Airlines Act*, whatever may have been in the minds of the authors, seems to have been at pains in the formal structure of the Act to give it the **appearance of separability**.'

→ Held: s 46(2) and s 47(b) are capable of full operation and are not invalidated by s 92 of the Constitution. Therefore, Part IV was held to be **'internally severable'**, with s 46(1) and s 47(a) invalidated. **However, even is the whole of Part IV were invalidated, it was held that the rest of the Act would not have been brought down.**

Purposive v Non-Purposive Powers: Purposive powers (e.g. defence power under s 51(vi)) need to be exercised pursuant to a **specific constitutional purpose** as well as being with respect to the stated subject matter. Non-purposive powers – i.e. an activity (trade and commerce); a type of person (aliens, corporations); recognised categories of legislation (taxation; bankruptcy); or an object (lighthouses; fisheries; currency) – deal with **subject matter alone**.

Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1 per Mason J at 18-20: The trade and commerce power is non-purposive, i.e. defined by subject matter, not purpose. Here, the power was used for apparently environmental purposes, extraneous to trade and commerce, yet it was held valid since the subject matter concerned licences to export to other countries.

- → '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 does not follow, for example, that because the subject of the power is trade and commerce, selection of the exporter or of the goods to be exported must be made by reference to considerations of trading policy…It is far too late in the day to say that a law should be charactized by reference to the motives which inspire it or the consequences which flow from it.'
- → Followed *Huddart Parker v Commonwealth* (1931) 44 CLR 492 per Dixon J (Rich J agreeing) at 515-516, in which a law giving transport authority for union members was held to be legitimate 'notwithstanding its industrial aspects'. 'Once the [legislative] power over the matter is established, it becomes irrelevant how, or upon what grounds, or for what motives it is exercised…It obtains [its character as a law with respect to trade and commerce with other countries and among the States] from the circumstance that it directly regulates the choice of persons to perform the work which forms part of or is an incident in inter-State and external commerce.'
    - In 1986-7, the Constitutional Commission's Distribution of Powers Advisory Committee decided against introducing a 'purposive criterion' in 'subject matter powers'.

Incidental Power – Express Incidental Power: s 51 (xxxix) (applies only to legislative 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:...
>
> (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Implied Incidental Power: (doctrine applies to executive, judicial and legislative power) *D'Emden v Pedder* (1904) 1 CLR 91 at 110, adopting what had been said by Marshall CJ in *McCulloch v Maryland* 4 Wheat 316; 4 Law Ed 579 (1819) at 321-323: 'Where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the

grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective.'

→ **Old standard**: '**necessity**' – a high standard, but one which, nonetheless, extended Cth power.

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 per Mason CJ at 27: 'It is enough that the provision is **appropriate** to effectuate the exercise of the power; one is **not confined to what is necessary** for the effective exercise of the power.'

→ **New standard**: '**appropriateness**' – expansion of *D'Emden v Pedder*.

- Incidental power is **just as strong and valid** as if it were to be directly within a head of power. Incidental power applies to every s 51 head of power.

Two key questions *vis-à-vis* the trade and commerce power:

1) Can the Cth regulate intrastate trade?
   → Critically: this is **exclusively trade and commerce**. The definition of the subject matter as being trade and commerce is not at issue. What is at issue is whether or not a given law can regulate **intrastate** trade and commerce.
2) Can the Cth regulate matters antecedent or subsequent to interstate or overseas trade?
   → Critically: this is **not trade and commerce**.

1) *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 627-677 per Latham CJ; Dixon J; Evatt and McTiernan JJ: rejected the 'intermingling' argument, upholding the distinction between intrastate and interstate trade, however artificial, as a key constitutional definition of power.

→ Latham CJ at 628-629: 'Although foreign and inter-State trade and commerce may be closely associated with intra-State trade and commerce, the court has uniformly held that the **distinction drawn by the Constitution must be fully recognized**, and that **the power to deal with the former subject does not involve an incidental power to deal with the latter subject**.'

- But Latham (at 629) left an opening: 'A new problem would be raised if in any given case it were established by evidence in respect of a particular subject that the **intermingling** of foreign and inter-State trade and commerce with intra-State trade and commerce was such that it was **impossible for the Commonwealth Parliament to regulate the former without also directly regulating the latter**.'

(Compare with Barwick CJ's comments on 'integration' in *NSW Airlines Case* below)

→ Dixon J at 671: 'The **express limitation of the subject matter** of the power to commerce with other countries and among the States **compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce**. The express limitation must be **maintained no less steadily in determining what is incidental to the power** than in defining its main purpose.' (Compare with his judgment in *Wragg* quoted in *NSW Airlines* below)

→ **Undistributed expressions**: The impugned regulation could not be 'read down' because it was an undistributed expression i.e. it contained both **constitutional** and **non-constitutional** elements. Undistributed expressions are often fatal.

- Reg 6 of the Cth Act prohibited an unlicensed person from flying 'within the limits of the Commonwealth'. An unlicensed pilot was prosecuted for an intra-State flight within NSW.
- If, for example, after reg 6 there was a reg 7 which defined 'within the limits of the Commonwealth,' then it would **distribute** the expression i.e. it could not be read down, but it could be **severed** to allow the provision to stand.

Class 2

NSW Airlines Case (Airlines of NSW Pty Ltd v NSW (No 2) (1965) 113 CLR 54: Reg 6(1)(f) applied Cth legislation to intrastate air navigation. Reg 198 prohibited public transport by air, except with a licence issued by the D-G of Civil Aviation. Reg 199(4) required the D-G to have regard to 'the safety, regularity and efficiency of air navigation and to no other matters'. Reg 200B stated that 'an airline licence authorizes the conduct of operations in accordance with the provisions of the licence', subject to the Act and Regulations and to other Cth laws. The Cth laws were challenged after a licence for intrastate flights (Sydney to Dubbo) was denied. Regs 198 and 199 were held to be valid; 200B was unanimously held to be invalid insofar as it applied to intrastate air navigation.

→ Barwick CJ at 77: '**No so-called "integration" of inter-State and intra-State air navigation or air transport, commercial or otherwise, no intermingling or commingling of the two to any degree, however "complete", can enlarge the subject matter of the Commonwealth legislative power in the relevant field.** It remains a power to make laws with respect to inter-State and foreign trade and commerce.' (Compare with Latham CJ leaving an opening for this in *Burgess* above)

→ But, at 78: intra-State activities can be validly included in the sweep of Cth laws e.g. where the '**particular subject matter of the law and the circumstances surrounding its operation** require that if the Commonwealth law is to be effective as to inter-State or foreign trade and commerce that law **must operate indifferently over the whole area of the relevant activity, whether it be intra-State or inter-State**.'

→ Barwick CJ, at 78-79, quotes *Wragg v State of New South Wales* (1953) 88 CLR 353 at 385-6 per Dixon J: s 51(i)'s distinction may be '**artificial and unsuitable to modern times**' but it must be observed to uphold the Constitution. Even in the application of the *D'Emden v Pedder* principle to s 51(i), **the distinction 'makes impossible any operation of the incidental power which would obliterate the distinction**.' (Compare with his judgment in *Burgess* above)

→ At 92: s 51(i) '**includes power not merely to protect but to foster and encourage inter-State and foreign trade and commerce**. Thus, in relation to inter-State and foreign commercial air transport, both as itself commerce and as a vehicle for commerce, the **power extends to the making of laws both to secure its safety and to encourage its growth**.'

- At 93: efficiency = safety; regularity = safety; maintenance of schedules = safety – 'but as well, such efficiency and regularity is an encouragement to the development of inter-State and foreign commercial air transport.'

→ 'It is thus in my opinion within the competence of the Cth under s 51(i) to make laws to **secure and promote the safety of the air, including the efficiency and regularity of inter-State and foreign air operations, as a means of protecting and fostering inter-State and foreign trade and commerce**. Because of the **intrinsic factors connected with flight** and of the **factual situation in which air navigation takes place in Australia**, such laws may validly in my opinion **include within their operation intra-State air navigation**.'

→ Earlier, at 84-88: Barwick CJ held reg 200B to be invalid because it, '**so far from purporting merely to authorize the use of specified aircraft in public air transport operations, affects to authorize those operations themselves**.' This stimulation/authorization of intra-State commercial air services is not a safety measure that would secure the safety of inter-State or foreign trade and commerce. Therefore, reg 200B cannot rely on s 51(i) in its operation on intra-State air navigation – 'In my **opinion in its purported operation in respect of intra-State commercial air transport it is invalid**.'

→ Kitto J: 'Where the intra-State activities, if the law were not to extend to them, would or might have a **prejudicial effect upon matters merely consequential upon the conduct of an activity within federal power** (e.g. where the **profit or loss** likely to result from inter-State commercial air navigation would or might be affected), that **mere fact would not suffice, in my judgment, to make the law a law 'with respect to' that activity itself**. But, by contrast, where the law, by what it does in relation to intra-State activities, **protects against danger of physical interference** the very activity itself which is within federal power, the conclusion does seem to me to be **correct that in that application the law is a law within the grant of federal power**.' (Contrast this with Murphy's judgment in *WA Airlines*, in which he says economic considerations are permissible under the commerce power)

→ Held regs 198 and 199 valid, despite their application to intra-State air navigation, at 116-117: '…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 the actual carrying on of air navigation**, and therefore is, in every application that it has, a law 'with respect to' such air navigation as is within federal power, and **none the less so because it is also legislation with respect to that intra-State air navigation which is not within the power**.'

→ But, in this case, the Cth did not **produce evidence**: it was **self-evident** that air navigation was far more common and, therefore, was impossible to guarantee without interference with intrastate trade.

→ Furthermore, it is important to note that the HCA did not accept reasons other than safety of the interstate and overseas trade – not the safety of people, per se – from **physical interference**, not from economic factors or efficiency.

- Economic viability: unresolved from *NSW Airlines* is the question in *Burgess* asked by Latham CJ of what would happen if it were 'impossible' to regulate interstate trade without regulating intrastate trade. This argument of economic viability as opposed to mere efficiency or profitability on the basis of necessity could be put – though it is uncertain whether it would be accepted. The argument in favour of it though is strengthened by constitutional considerations and the unresolved state of the case law.

→ **In the US**: case would have been held more broadly, questions directed at the facts to determine that the Sydney-Dubbo route was part of interstate trade (see p. 456 casebook).

WA Airlines Case (Attorney-General (WA) v Australian National Airlines Commission) (1976) 138 CLR 492: The ANAC added a route from Perth → Port Headland → Darwin and back. The question for the HCA, articulated by Stephen J at 508, was whether s 51(i) '**incidentally includes a grant of power to legislate for intrastate trade** and commerce when its **only relationship** to interstate trade and commerce lies in the fact that **the purpose of engagement in such intrastate activity is to conduce to the efficiency, competitiveness and profitability of the interstate activity**?'

→ Stephen J answered in the negative, saying that '**the nature and subject of the particular head of power in question will be critical in determining what is incidental to that power**' (referring to Dixon CJ in *Victoria v Commonwealth* (1957) 99 CLR 575 at 614 [this is ***not* the *Industrial Relations Case* from above**]; and to Dixon CJ again in *FCT v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 316).

→ At 509-510, Stephen J gives a summary of the positions in every leading case, esp. the various judgments in *NSW Airlines* (including Taylor, Menzies and Windeyer JJ who are not extracted). He concludes (at 510-511) that s 19B is ultra vires: its 'incidental' claim extends beyond the s 51(i) head of power. '…nor can the resultant deficiency of power be wholly made good by recourse to s 122, those deficiencies do not lie only in areas related to Commonwealth Territories, where alone s 122 can be called in aid.'

→ Section 15A of the *Acts Interpretation Act* operates 'to confer *pro tanto* validity upon s 19B'. The support of s 122 of the Const. sees the provisions relating to territories (s 19(2)(b) and (c)) being able to stand. 19B is otherwise invalid, meaning that there is no authority to conduct the intrastate flight.

→ Barwick CJ: 'The submission that the Court should treat economic success of the activity of interstate carriage by air as an object within the legislative power is, in my opinion, unacceptable.' The use of s 15A Barwick CJ described as a '**distributive operation**'.

→ Murphy J makes heavy use of US authorities, denying the rigidity of the constitutional distinction between intra- and interstate trade and commerce as merely 'keeping the pre-*Engineers'* ghosts walking'. Furthermore, he held that 'It is permissible for Parliament to take account of commercial effects in legislating under the commerce power…**I find no basis in the Const. for the distinction that Kitto J drew between physical and economic effects upon 'interstate commercial air navigation' in *NSW Airlines***.'

→ Mason did not see any reason to distinguish physical and economic considerations: 'In essence the conception of what is necessary or reasonably necessary includes all those factors which must be accounted for or satisfied so as to achieve the end in view. **Physical and economic considerations cannot be divorced or separated from the other**.'

- Furthermore, he **found it unnecessary to refer to s 51(i) since there was actually no interstate trade involved**. He said, however, even if s 19B was ultra vires, 'the operation of the section in relation to transport operations falling under s 19(2)(b) is severable and saved by s 15A of the *Acts Interpretation Act*'.

Mason, 'The Australian Constitution: 1901-88' (1988) 62 *Australian Law Journal* 752 at 755-756.

→ Argued that the division between intra- and interstate trade evident at Federation has eroded into an 'intricately integrated' system in modern times.

→ Referring to the *Margarine Cases* (*Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; *Beal v Marrickville Margarine Pty Ltd* (1966) 114 CLR 283), he argued that the HCA has applied a '**narrow and formalistic construction**' of the power, construing the power as one about delivery and sale, but **not extending to production generally – though 'the court has conceded that in some circumstances the power might extend to production'**.

→ 'More recently, members of the Court have taken account of the practical effect of legislation in its application to interstate trade and that may perhaps be an indication that in time to come the Court will take account of commercial realities in construing the trade and commerce power. This is not to suggest that the Constitution is a facile instrument which alters its complexion like a chameleon with each change in background. Rather, it is to recognise simply that the Constitution words, or, more accurately, the ideas those words capture, have a different impact in different circumstances.'

→ In a nutshell, Mason opposes a vision of constitutional law as being removed from reality, preferring a less narrow, less textual, less formal and more practical approach to constitutional interpretation.

American Example: *United States v Wrightwood Dairy Co* 315 US 110 (1942) at 115-121 per Stone CJ: an illustrative American case where economic considerations provided a realistic causal link between intra- and interstate trade and commerce.

→ 'The commerce power is not confined in its exercise to the regulation of commerce among the states. **It extends to those activities intrastate which so affect interstate commerce,**

or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce…no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. **Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.**'

→ Lists at 119-120 a number of applicable fields: safety appliances on railroad cars; regulation of the sale and marketing o f tobacco; competitive practices and marketing thereof – '**As the court below recognised, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped interstate would tend seriously to break down price regulation of the latter.**'

→ Importantly: '**It is the effect upon interstate commerce of upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power**.' Therefore, regulation of intrastate milk prices in Chicago was valid **'as is necessary and appropriate to make the regulation of the interstate commerce effective'**. This was justified on economic grounds: on the basis that the sale and competition of intrastate milk with interstate milk affected its price structure and, therefore, affected adversely the Congressional resolution.

Production: To what extent can the Commonwealth regulate the production of commodities to be exported? And, to what extent can it regulate the use of imported goods (drugs, porn, literature)? The cases tend to focus on antecedent matters of production – less guidance is available for matters subsequent to trade and commerce i.e. the distribution or use of goods **after** they have been imported.

O'Sullivan v Noarlunga Meat Ltd (1954) 92 CLR 565 at 595-598 per Fullagar J (Dixon CJ and Kitto J agreeing):

→ At 595: Fullagar, first, characterises the law as one **clearly with respect to overseas trade and commerce**. 'The power given by s 51(i) extends to **authorising the total prohibition of the export of any commodity**, **and a fortiori it includes a power to prohibit the export of any commodity except upon compliance with prescribed conditions**.'

→ But the question – which Fullagar answers affirmatively – is: does the s 51(i) power authorise **legislation regulating and controlling the slaughter of meat for export**?

- Understanding the breadth of what he was discussing, Fullagar made it clear to limit himself to the case at hand, defining 'slaughter for export' as **'understood objectively in the trade'**. For other commodities, there may be **no 'definitive objective conception**' to distinguish domestic consumption from overseas export (e.g. the meaninglessness of 'mining metals for export' or 'sowing wheat for export').

→ Referring to the American cases, Fullagar concluded that the US would be likely to hold valid legislation regulating the killing and treatment of stock, perhaps even going so far as to say they were 'themselves **part of the course of commerce**' – in Aus., '**even if the counsel for SA be right in saying that the course of commerce with other countries does not begin until a later stage**' Fullagar stated the *D'Emden v Pedder* principle.

→ At 98 – Fullagar's Limitation: '…**all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must 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.'**

→ 'How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case **depend on the particular circumstances attending the production or manufacture of particular commodities**. But I would 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.**' In this case, 'slaughter for export' was considered a process done or carried out 'for export' and, therefore, the Cth legislation was within the s 51(i) power.

→ Important to note: **Regulation 4B operated at the point of export and, therefore, was valid**. **Regulation 5, however, required the registration of premises used for slaughter, and that was what triggered the need to consider whether s 51(i) allowed the regulation of such matters.**

→ Also, the **implied incidental power is only needed because Fullagar J held slaughter to be antecedent to trade** and commerce and not trade and commerce itself.

→ **The key principle: Is there, within the industry, an understood notion of production for export?**

O'Sullivan v Noarlunga Meat Ltd (No 2) (1956) 94 CLR 367 at 272 per Dixon CJ, Williams, Webb and Fullagar JJ: Returning to the HCA, the Court commented on the exaggerated arguments that relied on the previous judgment: '**Indeed it was even suggested that as a necessary consequence the commerce power would extend over all production, whenever the goods were intended to go into the flow of inter-State or overseas commerce. As to this it is enough to refer to the express limitation which Fullagar J made in the concluding remarks of his judgment** (1954) 92 CLR 565 at 598.'

→ Hypothetically: One could argue that industrial relations – workers' hygiene, maintenance of conditions etc.) are necessary as it would adversely or beneficially affect Australia's foreign trade. One could also argue that the method of slaughter be regulated, in that humane treatment of animals may beneficially affect trade.

Mixed Production: Can the Cth regulate the production of a commodity when only some of the goods in the process are for export, while others in the same process are for home consumption?

Swift Australian Co Pty Ltd v Boyd Parkinson (1962) 108 CLR 189 at 226 per Owen J (dissenting): Owen J was the only judge who concluded that reg 5 of the Cth Act was intended to covered mixed production operations, determining that it was also within s 51(i) power. The other judges read reg 5 down to say it did not cover mixed production and, therefore, did not consider s 51(i).

→ Owen J held, essentially, that since the regulation covered **matters which may beneficially or adversely affect the meat export trade**, in an industry where there was an **objectively identifiable procedure for 'slaughter for export'**, the Cth had to regulate abattoirs where there was 'mixed production' in order to make their regulations effective.

→ Swift mostly slaughtered chickens in Qld, with a small proportion exported. At the point of production he had no idea which would go where – '**mixed production scenario**'. HCA held that the Cth legislation was **not intended to cover mixed production scenarios** i.e. there was no inconsistency argument – the Qld Act was operative and Swift was prosecuted.

→ But**, if it did intend to cover mixed production scenarios as Owen J held, then the Cth can validly regulate production for home consumption if it is the same as production for export.**

Redfern v Dunlop Rubber Australia Ltd (1964) 110 CLR 194 at 220-222 per Menzies J (Taylor and Owen JJ agreeing): 'It is true that the constitutional distinction between overseas and inter-State

trade would enable a person engaged in trade to make arrangements relating to his intra-State trade free from control under Commonwealth legislation but it **does not enable such a person, by making arrangements relating to trade generally, to put those arrangements beyond Commonwealth control if they do relate to inter-State or overseas trade**.'

- → i.e. in this case: s 4 of the *Australian Industries Preservation Act* (Cth) which made it an offence to enter a contract which was in restraint of trade (e.g. price control; collusion etc.) was validly applied to contracts or combinations in relation to interstate or foreign trade notwithstanding that they applied to intrastate trade too.
- → Prima facie: applies to interstate/overseas trade – valid use of the power
- → Unanimously, HCA held: Cth legislation cannot be avoided by way of intrastate elements – the whole contract (including the intrastate elements) is void.
- → It is wrong to analogise this with *Swift*: *Swift* was mixed production; *Redfern* is **expressly dealing with export in the context of overseas or interstate trade and commerce** – but, importantly, both cases do take practical as well as legal considerations into account.

Import: some s 92 cases suggest that some point after the importation goods cease to be within interstate or foreign commerce. But this does not readily apply to s 51(i) interpretation, especially when considering the s 51(i) incidental powers. Section 92 is a **prohibition, not a power**. Only one exceptional case on s 51(i) in the context of incidental power for import:
R v Smithers; Ex parte McMillan (1982) 152 CLR 477 at 484-485 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ (unanimous joint judgment): 'It would be a **legitimate exercise of the power** – and this is conceded – **to make it an offence to engage in dealing in narcotic goods, being prohibited imports, that have been imported in contravention of the Act** and to impose severe penalties in respect of that offence. Similarly it would be **a legitimate exercise of the power to make that conduct the occasion for liability to a civil action for penalties of the traditional kind**. Section 243B, in providing for the imposition of pecuniary penalties of the class provided for in Div 3, stands in no different position. It penalizes dealings in narcotic goods that have been imported in contravention of the Act. In so doing it constitutes a **deterrent to importation** in breach of the statutory provisions and provides **a further sanction** with a view to ensuring compliance with the statutory provisions in governing importation. Its importance in this respect is that it seeks to **deprive the dealing in narcotic goods of the considerable financial rewards which are the chief inducement for importing them into Australia and for dealing in them**.'

→ The Court, however, did not say where the line is to be drawn.

→ US cases: *United States v Singletary* 268 F 3d 196 at 200 (2001) accepted as good law the position in *Scarborough v United States* 431 US 563 at 568 (1977) that: 'The transport of a weapon in interstate commerce, ***however remote in the distant past***, gives its present intrastate possession a sufficient nexus to interstate commerce to fall within the ambit of [a statute which prohibited a convicted felon from possessing a firearm in or affecting foreign or interstate commerce].' That is to say, **Congress can criminalise activity using a good which, *at some point*, has crossed interstate boundaries**.

Pape v Federal Commissioner for Taxation (2009) 238 CLR 1 at 128 per Hayne and Kiefel JJ; at 150-153 per Heydon J – *Pape* was decided on a different issue, with these three judges issuing judgments in dissent on the main point of the case. In doing so, they considered the legislation with reference to s 51(i). This is the most recent case to refer to s 51(i).

→ Hayne and Kiefel JJ: The Impugned Act is not a law with respect to trade and commerce with other countries and among the States as there was **no estimation as to how the GDP increase would flow on to effect such commerce**. The question is whether the Act would 'have a substantial economic effect on the flow of commercial transactions, good, services, money, credit, among the states?' But no answer to that question of fact posed by the Cth was necessary since the materials submitted gave no answer to it.

→ Heydon J: **Even if there is an eventual connection** with trade and commerce with other countries or among the states, '**it has not been demonstrated that the connection is more than 'insubstantial, tenuous or distant'**. Hence 'the legislation cannot be described as made with respect to' that kind of trade and commerce' (citing Dixon J in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79). Possibly shows **influence from the US in maybe allowing economic considerations for using the incidental power**.

The United States Commerce Clause

Art I, § 8(3): Congress is empowered 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes'.

→ *Gibbons v Ogden* 22 US 1; 9 Wheat 1 (1824): Interpreted broadly in this case, but thereafter interpreted narrowly until 1937. Several mentions made of it in Australian case law:

- *Airlines Case* at 82 per **Dixon J**: quoted Johnson J concurring with Marshall CJ – 'When speaking of the power of Congress over navigation, I do not regard it as a

power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.'

- *WA Airlines Case* at 529-530 per **Murphy J**: twice quoted from the case:
    a) '"Trade and commerce…among the States" is a comprehensive phrase and should not be construed narrowly. Although usually abbreviated to "interstate trade and commerce", it means trade and commerce which concerns more than one State (*Gibbons v Ogden* 22 US 1; 6 Law Ed 23 (1824)).'
    b) In the context of denying the division or mutual exclusivity in the Constitution of intra- and interstate trade: "Commerce among the States must be of necessity be commerce with the States…" (*Gibbons v Ogden* at 70).
- *US v Lopez* (American case, below) at 553 and 566 in the majority opinions: 'The **enumeration presupposes something not enumerates**; and that something, if we regard the language or the subject of the [commerce clause], must be the exclusively internal commerce of a state.' Used as a retreat from the liberal interpretation of the commerce clause.

→ *Wickard v Fillburn* 317 US 111 (1942): Since 1937, a liberal construction of the power prevailed (arising from FDR's threats to stack the Supreme Court) – in this case, at 125: 'Even if the activity be local and though it may not be regarded as commerce, it may still, **whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce**.'

- This includes **matters antecedent to commerce** – in this case, production of wheat.
- Furthermore, the **doctrine of aggregation** or **aggregation principle**: the federal government could validly set wheat quotas that included wheat wholly grown for personal consumption on the farm itself since, **if one were to take this 'together with that of many other similarly situated** (at 128)**, the amount of wheat which was reserved for such personal consumption (while trivial on its own) would have a substantial economic effect on interstate commerce**. In order to make the federal power to regulate the price of interstate wheat effective, the Court thus held that it was necessary to regulate the personal wheat of a farmer since such wheat would otherwise have been purchased on the market.

→ At 128-9: 'Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.'

→ *Wrightwood Dairy*: This case came **before** *Wickard v Fillburn*, and it illustrates an obvious example of where this 'substantial economic effect on interstate commerce' was held to exist as part of the post-1937 trend. *Wickard v Fillburn* adds the doctrine of aggregation and thus expands what can be said to be 'substantial'.

The Substantial Affects Test or The Margin of Appreciation Test: The Supreme Court distilment of the test for commerce clause validity – balances deference to the legislature with the final say of the Court:

1) Did Congress have a **rational basis** for finding that the regulated activity affects interstate or foreign commerce?
2) If so, were the means chosen to regulate the activity **reasonable and appropriate**?

→ *Heart of Atlanta Motel, Inc v United States* 379 US 241 (1964): **Implementing desegregation** was held to be a **rational basis** for Congress – having segregated hotels affected interstate travellers – including food, a substantial amount of which has already been part of interstate commerce. (See also *Katzenbach v McClung* 379 US 294 (1964))

- Even held this to apply to private clubs on the grounds that it would be '**unrealistic to assume' that none of its visitors was an interstate traveller**, as well as (tenuously) deriving interstate provenance of some of its food and entertainment facilities: *Daniel v Paul* 395 US 298 (1969).
- i.e. perhaps an **untapped use of the Australian commerce power as a source of legislative power regarding civil rights**.

→ *Hodel v Virginia Surface Mining and Reclamation Association* 452 US 264 at 276 (1981) at 277-281: Protecting the environment in a case of surface coal mining was likewise held to be a rational basis.

→ *Russell v United States* 471 US 858 (1985): The **above cases saw the Supreme Court show great deference to congressional findings** to establish whether there was a rational basis for regulating the activity. But, in this case, the Court found it unnecessary to rely on such findings for the statute, which penalised arson in 'any building…used …in any activity affecting interstate or foreign commerce.' The Court held unanimously that the **local rental market was part o a broader**

commercial market – 'The **congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class**.'

US v Lopez 514 US 549 (1995): By a 5:4 majority, the Supreme Court retreated from this liberal interpretation of the commerce power – a statute which penalised the knowing possession of a firearm within 1000ft of a school was held *ultra vires* of the trade and commerce power.

→ Rehnquist J at 559, 561: The legislation failed the '**proper test**' i.e. 'whether the regulated activity **"substantially affects" interstate commerce'** because 'it **had nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms**'.

- Margin of Appreciation test not applied: the statute lacked congressional findings and so the Court could not inquire Congress's 'rational basis' as they could in *Heart of Atlanta Motel*.

→ Majority quoted *Gibbons v Ogden* to say that the enumeration of the commerce clause implies something not enumerated i.e. exclusively intrastate trade. The majority rejected the argument that the **literature (with no congressional findings)** could show a link to interstate trade, saying **this 'lacks any real limits'** and could be expanded indefinitely.

→ But the dissenters (esp. Souter J), by and large, saw this as an application of existing law, and not challenging the law directly. Souter at 614-615 held it to be a 'misstep' and 'hardly an epochal case'. **Souter and Breyer JJ held that the absence of congressional findings should not affect 'the standard of review'** and that the law fell well within the post-1937 interpretation of the commerce clause as having a 'rational basis' for its enactment.

→ In the minority view, Congress had a rational basis for finding a significant or substantial connection between gun-related school violence and interstate commerce since the literature established a connection with the quality of education which in turn substantially affects interstate and foreign commerce.

United States v Morrison 529 US 298 at 608-664 (2000): Identically constituted court invalidated a law – 5:4 again – as beyond the commerce clause power which provided a civil remedy for victims of gender-motivated violence. Rehnquist CJ at 608-613 expressed the Court's reasoning in *Lopez* first in four key points:

1) 'Where **economic activity** substantially affects interstate commerce, legislation regulating that activity will be sustained.' (*Lopez* at 560) i.e. the criminal statute in *Lopez* was not economic in nature.

2) No express jurisdictional element: i.e. nothing confining the reach of the law to firearms with an explicit connection with or effect on interstate commerce – this was added in the amended version of the law, upheld by the Court in 1999/2000.
3) No Congressional findings were presented: not normally required of Congress, but helpful.
4) Attenuated links between gun possession and a substantial effect on interstate commerce – the Court rejected the 'costs of crime' and 'national productivity' arguments as too broad and dangerous types of 'but-for' reasoning that could cover too many other fields.

Applied to the facts:

1) '**Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity**. While we **need not adopt a categorical rule** against aggregating the effects of any noneconomic activity in order to decide these cases, **thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.**'
2) §13981 contains no 'jurisdictional element'.
3) The law was supported by congressional findings, but '**simply because Congress may conclude that a particular activity substantially affects interstate activity does not make it so**.' Rather, 'whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is **ultimately a judicial rather than a legislative question, and can be settled finally only by this court'** (*Lopez* at 557).
4) Critical of the 'but-for causal chain' (at 615) used to justify the link, restating the potential undesirable expansions of the commerce clause power to all other fields of law.

Rehnquist CJ concluded at 617-618: '**We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.** The Constitution requires a distinction between what is truly national and what is truly local.'

Thomas J (concurring) at 627 went even further, arguing that the substantial effects test and the aggregation principle should be rejected outright.

Souter J (dissenting): quotes extensively from the congressional findings at 631ff., holding that the findings are 'far more voluminous' than those used to support the findings that saw the court uphold the desegregation of hotels in the 1960s. Also held that the key issue in *Wickard v Filburn* was not whether wheat production was 'commerce' or not, but rather the fact that 'if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?'

Obamacare Case (National Federation of Independent Business v Sebelius 132 S Ct 2566 (2012): Obamacare was upheld using the tax power (5:4), but Roberts CJ joined the minority (also 5:4) in holding that it was not supported by the commerce power.

- → Roberts CJ at 2588: 'The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.'
- → At 2590: 'We have said that Congress can anticipate the *effects* on commerce of an economic activity (desegregation cases)…But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce…Each one of our cases involved pre-existing economic activity (*Wickard* for wheat production; *Raich* for growing marijuana).'
- → Ginsburg J (dissenting on the commerce power from 2614): Restated the two question test, adding that legislation can only be struck down if there is a 'plain showing' that Congress acted irrationally (citing *Morrison* at 607). 'Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to 'doing nothing'; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.'
- → Furthermore, it could be argued that what is being regulated are activists in the self-insurance market – analogy drawn with *Willard* – did the law there target inactivity in the growing of too much wheat, or the inactivity of the farmer who failed to purchase wheat in the marketplace? Ginsburg argues the Court held the latter.
- → Held that the logic that belied *Lopez*, *Morrison* and the CJ's statements in *Sebelius* regarding the 'broccoli horrible' were such as to 'pile inference upon inference'. 'Yet no one would offer the 'hypothetical and unreal possibility' of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. The CHIEF JUSTIC accepts such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate.'
- → All this was predicated on the 'unique attributes of the health care market' which renders everyone active in it.