

Section 51 Characterisation of 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:

- (i) ***Interstate Trade and Commerce Power*** - trade and commerce with other countries, and among the States;
- (ii) ***Taxation Power*** - taxation; but so as not to discriminate between States or parts of States;
- (iii) ***Tariffs Power*** - bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- (iv) ***Commonwealth Loan Power*** - borrowing money on the public credit of the Commonwealth;
- (v) ***Communication Services*** - postal, telegraphic, telephonic, and other like services;
- (vi) ***Defence Power*** - the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
- (vii) ***Sea Observation Power*** - lighthouses, lightships, beacons and buoys;
- (viii) ***Astronomy Observations Power*** - astronomical and meteorological observations;
- (ix) ***Quarantine Power*** - quarantine;
- (x) ***Fisheries Power*** - fisheries in Australian waters beyond territorial limits;
- (xi) ***Statistics Power*** - census and statistics;
- (xii) ***Currency Power*** - currency, coinage, and legal tender;
- (xiii) ***Banking Power*** - banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) ***Insurance Power*** - insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- (xv) ***Measurement Power*** - weights and measures;
- (xvi) ***Instruments Power*** - bills of exchange and promissory notes;

- (xvii) ***Bankruptcy Power*** - bankruptcy and insolvency;
- (xviii) ***Intellectual Property Power*** - copyrights, patents of inventions and designs, and trade marks;
- (xix) ***Citizenship Power*** - naturalization and aliens;
- (xx) ***Corporations Power*** - foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) ***Marriage Power*** - marriage;
- (xxii) ***Divorce Power*** - divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- (xxiii) ***Pensioners Power*** - invalid and old-age pensions;
- (xxiiiA) ***Pensions, Allowances and Benefits Power*** - the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
- (xxiv) ***Service and Execution Power*** - the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) ***Record Power*** - the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxvi) ***'Race' Power*** - the people of any race for whom it is deemed necessary to make special laws;
- (xxvii) ***Migration Power*** - immigration and emigration;
- (xxviii) ***Criminal Migration Power*** - the influx of criminals;
- (xxix) ***External Affairs Power*** - external affairs;
- (xxx) ***Pacific Island Power*** - the relations of the Commonwealth with the islands of the Pacific;
- (xxxi) ***Acquisition of Property Power*** - the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxii) ***Transport Power*** - the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

- (xxxiii) **State Transport Acquisition Power** - the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxiv) **Railway Construction Power** - railway construction and extension in any State with the consent of that State;
- (xxxv) **Conciliation and Arbitration Power** - conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) **Constitution Power** - matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) **Interstate Parliamentary Power** - matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) **Exercise of Powers of the United Kingdom** - the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- (xxxix) **Express Incidental Power** - 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.

1) Definition

- i. If the law can be described as a law 'on' or 'with respect' to a Cth head of power then it is within the Cth power and valid
- ii. If not then it is *ultra vires* (beyond the power) and invalid
- b. Exclusive power: those legislative powers that the Cth holds exclusively
 - i. S 51 – defence, admin, etc
 - ii. S 52 – power to make laws with respect to the seat of government, Cth places or the public service
- c. Concurrent power: powers that Cth has over topics that are also available to State control
- d. Residual powers: topics remaining to the States after the Cths enumerated powers are accounted for
 - i. Roads, transport, land, education etc

2) What does the text of the section say? *Engineers Case*

- a. The Constitution should primarily be interpreted according to express words

- b. Implied meanings are allowed only where such a meaning is necessary/logically implied from the text
- 3) Determine if the law is within the power according to the text
 - a. Can the law be properly described as a law ‘with respect’ to a power(s)?
Fairfax v FCT
 - b. Key point: What obligation, right or privilege is imposed by that law?
 - i. Focus on the direct effect of the law, not the economic/social consequences or purposes
 - 1. Motive for law is irrelevant *Workchoices case*
 - ii. Dual/multiple characterisation permissible so long as the law fits under at least one Cth head of power
 - 1. *Workchoices case*: fit under s 51(xx) so valid despite regulating industrial
 - iii. Rejection of the sole characterisation test in *R v Bagners*
 - 1. Rejection of sole characterisation in its entirety *Workchoices*
 - a. Callinan J in *Workchoices* of dual/multiple characterisation explaining it as an accidental bullseye proposition
 - c. Case examples
 - i. *Fairfax*: since obligation to pay tax it is valid s 51(ii)
 - ii. *Murphyores*: law held to be about exports so within s 51(i). It was irrelevant that the law was being used to impact on the environmental arena
- 4) If law can’t be characterised as being ‘with respect’ to the core of a topic
 - a. Still valid if falls within incidental scope of head of power
- 5) Incidental power
 - a. Purposive or Non-purposive?