EXECUTIVE POWER

Step 1: Identify the relevant Constitutional power-head provision

Is characterised **under ChII, ss61 and 63** *Constitution* (1901)(Cth): *The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth*

IMPORTANT AUTHORITIES

Prerogative Power

- ***Barton v Commonwealth* (1974) 131 CLR 477 –** defined prerogative power and discussed its key features
- ***Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27-** State prerogative right to minerals; extinguished here by the 1688 *Mining Act* - indicated that Statute can abrogate – extinguish or limit ambit of these CL powers
- ***Tampa Case — Ruddock v Vadarlis* (2001) 110 FCR 491**

Executive Powers Derived From the Crown's Status as a Person

- ***School Chaplains Case — Williams v Commonwealth* (2012) 248 CLR 156**

Nationhood Power

- ***AAP Case — Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 –** implementation of social welfare services; job training and social welfare schemes
  - Peculiarly adapted to Cth resources etc -
  - Issues of federalism: must not be more appropriate for the States to intervene; cannot be merely convenient for the Cth
- ***Tasmanian Dam Case — Commonwealth v Tasmania* (1983) 158 CLR 1 –** indigenous people were prohibited from performing acts of social significance on WHL sites
  - Went too far – went beyond what was reasonably necessary to protect these sits
  - Also confirmed that events of "social significance" ("artistic, aesthetic, historical, cultural") were beneficial to the nation; falling within the scope of the power
- ***Davis v Commonwealth* (1988) 166 CLR 79** –
  - Purposive test
  - Went too far
    (a) Restrictions of imp freedom of political communication were deemed to be too intrusive etc – punitive in character
    (b)
- ***Pape v Commissioner of Taxation* (2009) 238 CLR 1-** fiscal emergency fell within the scope of nationhood power (majority), vs minority who argued GFC was not sufficiently relevant to Australia, and read it down so it was characterized under the taxation power and not the nationhood power

Step 2(i): Identify the relevant class of executive power (3 types)

- In ***Pape v Commissioner of Taxation (2009) 238 CLR** 1*, French CJ identified **four classes of executive power** that fall within s 61 of the Constitution. The first three classes were:
  1. ~~1.~~ The powers **conferred upon the executive by statutes** enacted by the Commonwealth Parliament pursuant to powers (e.g. s 51 enumerated powers) conferred by the Constitution – NON ~~ASSESSABLE~~
  2. The **prerogative**, being the residue of the monarch's unique powers, privileges and immunities that belong to the Commonwealth
  3. The power derived from the **legal capacities** of the Commonwealth, such as the power to enter into **contracts or agreements, employ staff** etc. (**legal personhood)**
     - French CJ concluded that these three types of powers 'form part of, but **do not complete, the executive power'.** He further stated that the executive power 'has to be capable of serving the proper purposes of a national government'.
  4. While he did not give this fourth type of power a name, it is popularly described in academic literature as the **nationhood power**.(to be discussed as its own power-head). These notes will deal with the nationhood power separately from the other kinds of executive power

- In addition, there are executive powers **expressly conferred upon the Governor-General by provisions of the Constitution outside of s 61**, such as the
  - power to appoint judges (s 72)
  - prorogue the Parliament (s 5)
  - dissolve the House of Representatives (s 5)
  - give assent to proposed laws (s 58),
  - exercise the command of the naval and military forces of the Commonwealth (s 68).

- The exercise of such powers also falls within s 61 to the extent that the Commonwealth is executing the Constitution
- Such powers must be exercised in accordance with the express terms of the Constitution, any implications derived from it and any constitutional conventions regarding the exercise of such powers

1. Executive power type 1: Powers Conferred By Statute - **Not examinable for this subject**

2. Executive power type 2: Prerogative Power

- **Implicit** in the grant of "executive power" in the opening phrase **of s 61** is the vesting of **prerogative power** within the Commonwealth executive (***Barton v Commonwealth***).
    - This is clear from the Convention Debates of the 1890s, which used the term "executive power" in its common law sense and included the prerogatives of the Crown

❖ In ***Barton v* Cth(1974),** prerogative powers were described as executive powers **stemming from the common law rather than statute**, and can consequently **be exercised without statutory authority**.
    - They represent a 'mysterious residue of the King's undefined powers after striking out those which have been taken away by legislation or fallen into desuetude' – **Adam Tonkins, *Public Law***

Split between Cth and States

- In Australia, common law prerogatives are **split between the Commonwealth and State Crowns**, according to whichever body is the more appropriate vessel for the particular prerogative.
    - e.g. the powers to **make treaties**, **declare wars** are with the *Commonwealth Crown*
    - The power to **pardon people convicted of State offences** and the **ownership of royal metals** are with the *State Crowns* (metals = ***Cadia Holdings)***

3 types of prerogative power

1. Prerogative powers	❖ unique powers to *perform various* acts, such as the power to Declare war • Make peace • Execute treaties • Pardon offenders • Request extraditions • Conduct royal commissions
2. Prerogative immunities and preferences	• special rights which vest only in the Crown as opposed to other persons (e.g. the executive has a prerogative priority with regards to debts
3. Proprietary rights	the Crown's special rights of ownership such as its entitlement **to royal fish, royal metals and the seabed – *Cadia Holdings***

Parliament can limit/extinguish prerogative power by enacting a statute

- Since prerogatives are dependent upon common law, they can be subject to modification by statute
    - Indeed, Parliament **may limit/extinguish** prerogative power by enacting a relevant statute (see ***Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978))**

- However, statutes which cover the same area as the prerogative power are **not presumed** to abrogate the prerogative power **unless they expressly state or necessarily imply** an intention to (see ***Barton v Commonwealth***)

PREIVOUSLY….

- Previously, **judicial review** of the prerogative was **very narrow** — the judiciary would only review the existence of a **prerogative (to extinguish** it), but not the manner of its exercise (to regulate it)
- . Now, the judiciary recognises that **the actual exercise of prerogative powers may be subjected to judicial review** (***Council of Civil Service Unions v Minister for the Civil Service* [1985]).**
  - However, certain prerogatives — declarations of war, the ratification of treaties etc. — are seen to be **non-justiciable** due to their "**political"** nature
  - It has been argued that an executive prerogative may not be exercised in a manner that **affects fundamental or "constitutional" common law rights.**
    - However, just as courts will not interpret statutes as affecting or abrogating fundamental common law rights unless the statute expressly so provides or clearly so intends, when interpreting the scope of a prerogative power the courts are likely to do so in a manner that does not affect or abrogate fundamental common law rights unless the purpose of the prerogative clearly requires such an effect (Twomey)

MORE RECENTLY – *CADIA HOLDINGS*

- In ***Cadia Holdings Pty Ltd v NSW* (2010)** concerned the royal **PROPRIETEARY** prerogative to gold, silver and other metals, such as copper mixed with gold and silver (Cadia Holdings par 1).
  - The question before the High Court was whether the prerogative right of NSW extended to copper admixed with gold that the copper could not be mined alone
  - The court held that in relation to a mixed ore body such as Cadia's deposit, the prerogative had long ago been **abridged/abrogated by a 1688 statute**, and thus that the copper under the **Mining Act was a 'privately owned mineral'** not owned or reserved by the crown

***Ruddock v Vadarlis* (2001) (the *Tampa Case*)**

- In the *Tampa Case*, the relationship between s 61 and prerogative powers arose as an issue. It was suggested that **s 61 might augment traditional prerogative powers**.
- **In the majority**, French J (with whom Beaumont J agreed) implied that **Commonwealth inherent executive powers extended beyond those traditionally recognised by the common law**:

  'The executive power of the Commonwealth under s 61 cannot be treated as a species of royal prerogative … While the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government reflected in Chapters I, II and III of the Constitution'.
- In the context of the case, he found that 'the executive power of the Commonwealth, absent statutory extinguishment or abridgment, **would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion**'.
  - This was based on the idea that the power to determine who may come into Australia is **'central** to its sovereignty'.
  - French J further found that the executive power had ***not* been abrogated by the *Migration Act*.**
- **Black CJ dissented**. He felt that s 61 did not augment prerogative power, and concluded that it was at best 'doubtful that the asserted prerogative [to exclude aliens in times of peace] continues to exist at common law'. In his opinion, any such prerogative power had been extinguished by the *Migration Act*.

***Ruddock v Vadarlis* (2001) (the *Tampa Case*)**

Facts

- The facts of the case turned on the Australian Govt preventing 433 asylum seekers, (largely of Aghani background), aboard a Norwegian cargo vessel, MV Tampa, from entering Australia
  - Boat had been sinking in international waters about 140km North of Christmas Island, (in Australian territory).
  - Some of the asylum seekers required medical attention
- The Tampa proceeded to the nearest port, at Christmas Island .

- The Tampa stopped at the boundary of Australia's 12 nautical miles offshore to request permission to enter Australian waters and unload the asylum seekers
    - Permission was denied
- About 4 nautical miles offshore, the Tampa was stopped and boarded by SAS troops- took control of the Vessel and anchored it
- This action saw the Victorian Council for Civil Liberties take action- alongside Eric Vardalis (a solicitor) who also ended up being represented by pro bono barristers like QC Julian Burnside
    - They initiated proceedings against the Federal govt and 3 ministers; the Minister for Immigration and Multicultural Affairs, Phillip Ruddock , the AG of Australia, Daryl Williams and the Minister for Defence, Peter Reith
    - Amnesty International and the HREOC intervened and largely supported the VCCL and Vardalis

***Issue* – see above**

***Held* – see above**

3.Executive Powers type 3: Derived From the Crown's Status as a Person

- Distinct from the Crown's exclusive prerogative powers are the **personal rights enjoyed by the Crown in common with others** (***Pape v Commissioner of Taxation***). These powers extend to anything which can be done by a person which is not prohibited or otherwise regulated by law, such as the power to:
    i) **Form corporations**- ***NSW V Bardolph (1934)***
    ii) Employ and dismiss persons
    iii) Make payment- ***NSW V Bardolph***

❖ The scope of the Commonwealth executive's autonomous power to enter into contracts and spend money was affected by the ***Williams v Commonwealth* (2012) 248 CLR 156 (*School Chaplains Case*).**

- Traditionally, it was argued that the scope of the Commonwealth's capacities in these areas **was analogous** to that of a **natural person**, and so was effectively unlimited.
    - Alternatively, a **more restrained** (but still broad) conception of these capacities might have suggested that they were **limited only in breadth by the federal legislative powers** in ss 51, 52 and 122, and in depth by principles of responsible government, separation of powers, etc.

General rule: Cth's executive power to enter into contracts and spend money is limited to that which is validated, or 'positively conferred' by statute

- However, following the ***School Chaplains Case***, **it** is now accepted that Commonwealth executive's power to enter into **contracts or spend public** money is in most cases limited to that for which it has authority **positively conferred on it by statute**.
    - The majority in that case **REJECTED THE EXISTENCE** of **autonomous executive power to spend**, even within the bounds of the federal Parliament's heads of power
        - Here, the majority, or **French CJ, Gummow, Crennan and Bell JJ**, **rejected the claim** that the executive power extended as widely as the legislative power and said it **must be supported by legislation**
            - They, like ***Williams***, argued that the Cth needs to, if it wants to validly spend money, go through the **proper legislative channels**
                - That is, the government must write their intention into a bill o supply, or budget, and publically announce their intentions in both Houses. – **subjecting proposed funding** to **public scrutiny** is important
        - The same limit seemed to apply to the **power to conclude contracts**
        - However, **it is not known whether this lack of autonomy from the legislature afflicts the executive's other mooted common law powers**, such as that to set up a corporation

Exceptions to this rule

- There are exceptions to this. The Commonwealth executive can still expend money where:
    1) The expenditure can be supported by some **other recognized aspect of the executive power**, such as the **nationhood power** (see below)
    2) The expenditure can be supported by a **prerogative power** (the ***School Chaplains Case***, per French CJ) – **i.e. to make war/ extradite someone**
    3) The expenditure can be supported by the **power to expend moneys** in the **ordinary annual services** of government (***New South Wales v Bardolph* (1934)**)

***Williams v Cth* (2012) 'the School Chaplains case'**
Facts
• Williams (a parent at the school) argued the Cth lacked the power to enter into the funding agreement and make the payments to Scripture Union Queensland.- was concerned that a public school was funding religious programs

Issue

- It was argued that under s **61 the executive had no power to fund**. → Williams agued that s86 and 91 **do not authorize** the executive in this way
- This was based on the alleged limited scope of the executive power in s61 and the following facts:
    - There was **no specific legislation** establishing the NSCP scheme or authorising the payments
    - There was no grant under s96 - ss. 96 **grants power** + 81 **appropriation power** could not be relied on for funding because they relate to parliamentary grants, voted on by parliament, not the executive).
- Note the question of the authority of the executive to pay for the NSCP arose in part because the Court had recently held in Pape that the appropriation power is not a source of spending power

Held

- A majority of the court with Heydon J dissenting struck down the funding agreement. They, like Williams, argued that the Cth needs to, if it wants to validly spend money, go through the **proper legislative channels**
    - That is, the government must write their intention into a bill o supply, or budget, and publically announce their intentions in both Houses. – **subjecting proposed funding** to public scrutiny is important
- French CJ, Gummow, Crennan and Bell JJ **rejected the claim** that the executive power extended as widely as the legislative power and said it **must be supported by legislation**
- Hayne and Kiefel JJ said that *even if it were not necessary* to have legislation but merely to be able to legislate in the area – the NSCP **could not** have been the subject of a valid law under s51

❖ **NB: after case:** Even through the program was initially struck down, Senator wrote a Bill after the case and it was then passed by Parliament; allowing the chaplaincy program to be legitimately funded

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NATIONHOOD POWER

IMPORTANT AUTHORITIES

- ***AAP Case — Victoria v Commonwealth and Hayden*** **(1975) 134 CLR 338**
- ***Tasmanian Dam Case — Commonwealth v Tasmania*** **(1983) 158 CLR 1**
- ***Davis v Commonwealth*** **(1988) 166 CLR 79**
- ***Pape v Commissioner of Taxation*** **(2009) 238 CLR 1**

Step 1: Cite the relevant legislative provision

NATIONHOOD POWER s 61 + s 51(xxxix)- express incidental & purposive head of power

Relies on 2 Constitutional provisions

1. s 61- **THE EXECUTIVE** : *The **executive power** of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth*

AND

2. s 51(xxxix)/**s51(39) THE EXPRESS INCIDENTAL POWER (USED TO CHARACTERISE EXECUTIVE ACTS)**: *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*

- This is like a facilitative power that assists the executive power. It's not about giving the capacity to make separate laws, it is about giving power to execute the powers of those instruments (executive power etc.)

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Step 2: SCOPE: How has the nationhood power been interpreted?

- The nationhood power is derived from a combination of *Constitution* (1900)(Cth, s51(xxxix) and 61
    - Nb: In the ***AAP case***, Murphy JA found the power to spend money (s81) to exist in combination with s51(xxxix) and s51.- which is an **express incidental power**

- The starting point for the nationhood power is the judgment of Mason J in the ***Victoria v Cth and Hayden* (1975)(*AAP Case*).** → here, the Chifley govt wanted to implement social welfare and job assistance schemes
    - Mason J stated that the Commonwealth executive (and by virtue of the incidental power, Parliament) should have 'a capacity to engage in enterprises and activities **peculiarly adapted to the government of a nation', even where they do not fall within any heads of power allocated to the Commonwealth**. This was subject to the caveat that such enterprises and activities 'cannot otherwise be carried on for the benefit of the nation'.

❖ The nationhood power is **not unlimited**.-

- Indeed, although the ambit of power is not defined by Ch II, however '*it is evident that in scope it is not unlimited and that its content **does not reach beyond** the area of responsibilities allocated to the **Commonwealth by the Constitution***'

- The power can only be invoked when the Commonwealth does not have an express power to do so.

- Thus, **exhaust express powers** first and then use the **express nationhood power**.

Benefit & advancement of the nation; not coercive

A. *The legislation in question MUST be for the benefit of the nation*

❖ Before a law can be legitimately characterised as an exercise of the nationhood power the Court needs to determine that the law is for the **benefit of the nation** - ***First Pharmaceutical Benefits Case* (1945); *VIC v Cth (AAP Case)* (1975**

❖ Can extend to the protection of the nation (***Burns v Ransley***) – in Brennan J on s61: Indeed, in ***Pape*, Gummow, Crennan and Bell JJ** held that the *...the phrase "**maintenance of this Constitution**" in s61 imports more than a species of what is identified as the "**prerogative" in** It conveys the idea of the protection of the **body politic** or nation of Australia'*

- In ***Davis*** – with regards to going/not going beyond self-protection:

    - Wilson, Dawson and Toohey dissented, saying that it couldn't go beyond self-protection – they said there was no implied legislative power in the nationhood

powe

- Mason, Gaudron and Deane J said it could go beyond self-protection – they said there is a legislative power.

- Has other meanings, like:

  - Responding to fiscal emergencies – ***Pape v Cth***

  - Issues if public health – ***Pharm Benefits***

  - Celebrating social significance (though overreach cocurred in this case)- ***Davis***

What sorts of matters have been found to 'benefit' the nation?

- In the ***AAP*** *Case*, Mason J stated:
  - 'The functions appropriate and adapted to a national government **will vary from time to time**. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government'.
  - So cramped a construction of the power would **deny to the Australian people** many of the symbols of nationhood — a **flag, or anthem, for example** — or the **benefit of many national initiatives** in **science, literature and the arts" – Mason J in *AAP*; Brennan J in *Davis*.**

- It has been argued that without the nationhood power, the Commonwealth would have no capacity to:
  - **Celebration of Australian nationalism** – ***Davis***
  - Events of **social significance** – ***Tasmanian Dams*** -
    - Look for these words in the legislation's provision or preamble – are key signifiers- "the protection, preservation, promotion of some **artistic, aesthetic, scientific, historic, social significance** etc (***Tas Dams*)"**
  - Can be used in the case of **fiscal emergencies** – overriding the limits on money bill; stimulus package s: ***Papev Commissioner* (2009) C**rennan, Gummow and Bell JJ- **stimulus package of Wayne Swan **

  - Defend itself from **internal subversion or domestic violence** (***AAP Case***, per Mason J), and respond to **emergencies** such as war or natural disasters, or financial disasters (***Pape***)

  - Deal with symbols of nationhood, such as the **national flag and anthem** (***Davis*)**
    - Deane J (only majority judge to comment on Nationhood) said there were definitely inherent powers arising out of Nationhood and s61 and 51(xxxix) but ***they did not arise*** simply because the "*particular physical property or artistic, intellectual, scientific or sporting achievement or endeavour is part of the heritage distinctive of the Australian nation.*" - ***Tas Dams***

  - Enter into **intergovernmental agreements** (***R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983))**

- Undertake planning and inquiries (e.g. in relation to **matters affecting public health**) at the national level (***Attorney-General (Vic) (Ex Rel Dale) v Commonwealth* (1945) (the *Pharmaceutical Benefits Case*)**)
- Establish and fund national institutions, such as art **galleries, museums, scientific research institutes** and the like (see ***Pape***, per French CJ)

National emergency can be a relevant consideration -Pape

MAJORITY – VALID

- In ***Pape*, majority -** Gummow, Crennan and Bell JJ in *Pape*, the **"national emergency"** brought on by the Global Financial Crisis was relevant to the determination that the federal government stimulus package was authorised under legislation passed pursuant to the nationhood power.
  - The majority held that
    - **Adequately national** *It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation*
    - **Peculiarly adapted to federal govt resources:** 'The Executive is the arm of government **capable and empowered to respond to a crisis,** be it war, a natural disaster or a financial crisis on scale here.
      - Indeed, they argued that only the Cth is resourced to meet the emergency by responding on the scale o the *Bonus Act* is why the Executive govt
  - Argued that this represented an instance where the Executive was engage in activities, like the stimulus package, that are **peculiarly adapted** to the govt of the country and are for **public benefit**

MINORITY – PARTIALLY VALID; READ DOWN

- However, the minority (Hayden, Kiefel JJ), held that the bonus payments were **partially valid; read them down** to amount to a form of a tax refund that could be held as **incidental to the taxation power under s51(ii)**
  - The fiscal stimulus package could not, they argued, be validly characterized by the nationhood power – did not agree that it extended to the national economy generally, which is why they read it down so they could be properly characterized under the tax power
- **NOT VALID –** Heydon J held that it was of no relevance to the nationhood power

***Pape v Commissioner of Taxation* (2008)**
BASED ON THE GROUNDS LAID OUT IN AAP CASE
Facts
• The live issue in this case was the Rudd government's fiscal stimulus package which was to give bonus payments of up to $900 as a means to counter the effects of the global financial crisis. • The Act delivering the bonus was the *Tax Bonus for Working Australians Act (no. 2) 2009 Cth*.
Issue
• Issue was whether this Act could be justified as an exercise of executive power • It was argued that it was on the grounds laid out by Mason in ***AAP***.   ○ Ie that the presence of s51(xxxix) and s61 gave the Commonwealth a capacity to

engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.

CONCERNS ABOUT FEDERALISM

- Despite the consensus that the executive power includes a legitimate concern with nationhood issues all seven judges said it had to ***be limited by*** cosiderations of federalism
    - **French CJ** , Referring to the content of s61 he said: *It has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of "national government" cannot be invoked to set aside the distribution of powers between the Commonwealth and the States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions."*
    - ***constitutional theory***. *It conveys the idea of the protection of the* ***body politic*** *or nation of Australia.*

Cannot be used to aggregate control of property/ be coercive

- The scope of the ancillary resort to incidental legislative power is limited
    - Cannot be used to allow the Cth to '**aggregate to itself control of such property, achievement or endeavour'**

***Attorney-General (Vic) (Ex Rel Dale) v Commonwealth (1945) (the Pharmaceutical Benefits* Case(public health)**

Facts

- Concerned the establishment of Pharmaceutical Benefits Scheme (***Pharmaceutical Benefits Act 1944*****).**
- Federal scheme to provide free medicine
- Doctors challenged the Bill Dealt with the appropriation of money under s81. Does the power under s 81 also give the commonwealth the power to choose what the money is spent on?
- Act provided for appropriation of moneys but also **required pharmacists and doctors to do certain acts**

Issue

Held

- Was held to be punitive to doctors; prevent them from accumulating profit from the sale of medicine
- The reasoning in this case similarly characterized under the **appropriate and grants power**

B. *The legislation in question CANNOT possess a coercive and/or punitive purpose*

- The scope of the ancillary resort to incidental legislative power is limited insofar as it cannot legitimism **COERCIVE acts or legislation (Wilson J *Pharmaceutical Benefits case*)**

- Indeed, so long as the regulatory provision is **reasonably incidental** and proportionate to the Cth's legitimate national purpose, then the provision can be validly enforced by a criminal sanction – ***Pharmaceutical Benefis case***
- Consequently, the mere presence or absence of criminal sanctions is **NOT** the issue. Instead, the problem arises if the /÷≥regulatory provisions are **extensive** in scope and **excessively intrusive-** as clarified in ***Davis v Cth* (1988)**
  - **EXAMPLE 1: *Davis:*** Here, the "**extraordinary intrusion**" into Davis' freedom of expression represented by s22 convinced the justices to unanimously find that the law was outside the bounds of the nationhood power – went beyond what was necessary to fill the intended legislative purpose; that is, celebratin the bicentennial
  - **EXAMPLE 2 –*Tas Dams:*** The regulations associated with s62(e) were **coercive** because they **prohibited the performance of certain acts on property which could be identified as having distinctive heritage value**
- All four justices agreed on the existence fthe nationhood power, but none found s62(e) to fall within its ambit

Tasmania Dams

Facts

- The legislation contemplated in this case was the *World Heritage Protection and Conservation Act* 1983.
  - Section 6(2)(e) protected property that "*is part of the heritage distinctive of the Australian nation – by reason of its aesthetic, historic, scientific or social significance; or its international and national renown... Commonwealth argued it came within the nationhood power (despite it being in Tasmania and under the control of the Tasmanian government*)

Held

- The regulations associated iwht s62(e) were **coercive** because they **prohibited the performance of certain acts on property which could be identified as having distinctive heritage value**
  - All four justices agreed on the existence fthe nationhood power, but none found s62(e) to fall within its ambit

***Davis v The Commonwealth* (1988) 1966 CLR 79 *shirts with logos on it – gave Australian Bientennial Authority exclusive power to use the symbols and trade marks'**

***Facts* – short note:**

- Context: was pre ***Lange v ABC***, there was no "*implied freedom to discuss political and governmental affairs"*
- The case concerned Federal legislation enacted to commemorate the bicentennial of Governor Phillip's landing in Australia on January 26, 1788.

- *The Act* set up an Australian Bicentenary Authority which was given ex**clusive power to use particular symbols and trade marks** associated with the event, including '1788', '1988', '88', 'Sydney' with '1988' and 'Melbourne' with '1988'.

- Davis, an Aboriginal political activist, **printed shirts using these symbols within slogans** which **protested against the commemoration of the Bicentennial** on the basis that there was no reason to celebrate the oppression of the Aboriginal peoples occasioned by the arrival of Europeans in Australia in 1788.

Issue:

- Davis challenged the law on the basis that it could not be supported by the **intellectual property power (s 51(xviii)**, the **corporations power,** the Territories power or the **executive or implied nationhood powers.**

***Held:* High Court struck down the regulations (unanimously)**

- Majority (Mason CJ, Deane and Gaudron JJ) with whom the rest of the Court agreed on this point, **struck down the provisions** of the Act which gave the Australian Bicentenary Authority the exclusive power to use these symbols on the following grounds: overstepping of executive power – does not matter that power can be characterized under s51

    - Although the statutory regime may be related to a *constitutionally legitimate end* (satisfying the nationhood power), the **provisions in question reach too far and executive power was over-stepped**

    - **"far beyond the legitimate objects sought to be achieved and impinges on freedom of expression** "

    - **impinged on freedom of expression - by** enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence.. **This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power:** at 100.

Peculiarly Adapted

- The nationhood power only concerns matters that are **truly "national" in nature**.
- Will be truly national if they the particular measure in question must be **peculiarly within the capacity and resources** of the Commonwealth government (***Pape***, per French CJ; ***Vic v Cth and Hayden (AAP)***).
    - ❖ Must be something only Commonwealth government could achieve: ***AAPs Case***
    - ❖ Can't be more appropriate for states to legislate on the matter: ***AAPs Case***
        - ***Pape-*** Court held that the Executive was the only body that was well resourced enough to respond to the national emergency of the GFC and implement that stimulus package .

No competition with States & not more appropriate for states to carry it out

- In the ***Tasmanian Dam Case***, Deane J regarded the nationhood power as being '**confined within areas in which there is no real competition with the States**'; must be a **truly national endeavor**
- Indeed, it must be something more than mere convenience – can't be a **disagreement** OR **competition** between states and federal government – Barwick CJ – subsequently confirmed by Deane J in ***Tasmanian Dams case*** – or where it is more appropriate for states to act – ***Tasmanian Dams case***..
    - However, he **diluted** this principle, suggesting that the Commonwealth could still exercise the nationhood power in fields under State control **provided that there was no competition** and the exercise was confined to '**truly national endeavours'** — 'Even in fields which are under active State and legislative control, Commonwealth legislative or executive action may involve no competition with State authority'

***Victoria v Commonwealth and Hayden* (1975) (the *AAP Case*) (*est of social welfare schemes and job assistance schemes)**

Facts:

- Saw the Whitlam government establish social welfare councils all over the country & implement initiatives related to job creation and training
- Involved the govt allocating money/substantial amount of expenditure to the Australian Assistance Plan
  - Concerned the appropriations power (similarly to ***Pharmaceutical Benefits Case*).**

Issue:

Did the power to appropriate also cover the power to spend under s81 as well?

Held

- Majority of McTiernan, Muprhy , Mason and Tpehen JJ allocation of money to the Regional council was appropriate – however, grounds of this argument has sine been rejected
- Mason J **distinguished** between the **power to appropriate money** (**that contained in s81**) and the **power to spend money** which he found to exist in a combination of s61 and s51 (xxxix)
  - While it was argued that under an appropriate power s81, social welfare councils needed to be able to app money via specific legislation to make laws for he nation
  - Upheld the law, but reiterated the idea of the capacity of the
  - '*there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of s51 (xxxix) (express incidental power) and s61* ***a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'***
- **Kirby – dissent – implied nationhood power is strictly limited in its scope**, would be inconsistent with distribution of power provided by the Constitution if they trespassed on power of states – would **disturb the federal balance → cause of a potential dispute**
- The combination of s 61 of s 51 (xxxix) also gives support for the implied nationhood power

Step 3: Characterising the Nationhood power

C. Proportionality test

- The legislation in question must be proportionate; that is, the regulatory provisions must satisfy a **proportionality test** (Mason and Gibbs J In ***Davis***)
    - Here, the **appropriateness** and ***Davis*** of the law are a relevant concern when considering whether the law is authorised by the nationhood; esp. if the law is potentially coercive ***Davis***
        - Here, the Justices agreed that s2, insofar as it applied to the words '200 years' was **disproportionate to the end of commemorating the bicentennial** and was thus **beyond the scope of the nationhood power.**

- Furthermore, the actions will only fall within the scope of the nationhood power if they are **NOT extensive** in scope and **excessively intrusive-** as clarified in ***Davis v Cth* (1988)**
    - Here, the "**extraordinary intrusion**" into Davis' freedom of expression represented by s22 convinced the justices to unanimously find that the law was outside the bounds of the nationhood power

Step 4 – Consider Limitations

Specific limitations

- The nationhood power is **not unlimited**.-
    - Indeed, although the ambit of power is not defined by Ch II, however '*it is evident that in scope it is not unlimited and that its content* ***does not reach beyond*** *the area of responsibilities allocated to the* ***Commonwealth by the Constitution*****'**

- The power can only be invoked when the Commonwealth does not have an express power to do so.
    - Thus, **exhaust express powers** first and then use the **express nationhood power**.

Distribution of Legislative Power

- The executive power is limited to the distribution of legislative powers between the Commonwealth and the States (effected by the Constitution). ***AAP's Case*** – Mason J:
    - These responsibilities are ascertained from the distribution of legislative powers, '*effected by the Constitution and the character and status of the Commonwealth as a national government*'
    - This is the natural conclusion when considering s 61, the federal character of the Constitution and the Commonwealth v State distribution of powers

Concept of Federalism pp389

- The power is restricted in its application by the concepts of federalism: ***Pape v Commonwealth (2009) –*** French CJ.
    - Must be something only **Commonwealth government could achieve** (**adequate resources)** : ***AAPs Case***

- Can't be **more appropriate for states** to legislate on the matter: ***AAPs Case***

- Something more than **mere convenience** – can't be a disagreement between states and federal government – Barwick CJ – subsequently confirmed by Deane J in ***Tasmanian Dams case*** – or where it is more appropriate for states to act – ***Tasmanian Dams case.***

General Limitations

1. Acquisition of property on just terms

2. Freedom of religion

3. Trial by jury (??)

4. Inconsistency

5. Implied freedom of political communication/freedom of association and movement

TRADE AND COMMERCE POWER

STEP 1: Identify that T& C is the relevant power head

- S 51. The Parliament shall, subject to this Constitution have power to make laws for the peace, o and good government of the Commonwealth with respect to:
    - Sub S (i) Trade and commerce with other countries***, and*** among the states
        - The words 'trade' and 'commerce' also occur in s92, which speaks of 'trade and commer and intercourse'.

❖ Arguably, the trade and commerce power, enshrined under *Constitution* s51(i), could validate xxx legislation

- Note that the phrase 'trade and commence' is to be given the same meaning here as in s92 *Constitution* ***James v The Commonwealth***

STEP 2: How has the T & C power been interpreted?

'*Popular', contextually responsive meaning*

- Under the **principle of harmonious interpretation,** the terms '**trade and commerce'** are "***not terms of art"*** and are to be given their '***popular meaning'***- ***W & A McArthur Ltd v Qld***

- Consequently, the term '**trading'** is not meant to be read as it would have been when Constitution was first written, (in 1900), but as it would be understood today- ***James v The Commonwealth***

Meaning of t & c power must be construed broadly

- Indeed, it has been held that the trade and commerce power should be construed broadly and flexibly in order to accommodate changing circumstances, including (and indeed, unless otherwise indicated, the power is always to be characterized broadly)- ***Australian National Airways v Cth*.**

TRADITIONALLY:

- Was ***traditionally*** held to refer to all the **commercial arrangements** of which **TRANSPORT** is the **direct and necessary result**.- ***W& A McArthur Ltd v Queensland Bank of New South Wales v Commonwealth (1948)*** .

NOW – V. EXPANSIVE

- However, has also been found to extend to:

  - e.g. **bargaining, verbal negotiations** and those by **correspondence**". ***W& A McArthur Ltd v Queensland;***

  - Money and credit (also involves s51(x)- ***Bank of New South Wales v Commonwealth (1948)***

  - Intangibles, as to restrict trade and commerce's application to tangible objects and things would be '***quite out of keeping with all modern developments'*** - ***Bank of New South Wales v Commonwealth (1948***

    a) Supply of **gas** and transmission of **electricity**

    b) Covers **communication** – telephone, telegraph, wireless – (can include television); news information –also involves s51(v)

  - goods in reparation for trade – ***Granall v Marrickville Margarine; Beal v Marrickville Margarine***

  - power **to regulate navigation**, shipping and railways the property of any State - ***W& A McArthur Ltd v Queensland***

    - Section 98 confirms that s 51(i) extends to enable the regulation of navigation, shipping and railways the property of any State

  - **Commonwealth Govt participation in trading is allowed – can involve the movement of goods and people, and be equated with 'transport for reward'-** ***Australian National Airways Pty Tl v Cth*** **(ANA Case) (19450**

Australian National Airways Pty Tl v Cth (ANA Case) (19450 – TRANSPORT FOR REWARD
• **S51(i)** may be used to characterize legislation which not only involves the government regulating trade, but **also the govt founding a trading enterprise (here, an airline), so as to engage in 'transport for reward' in trade/commercial activity. This means it can**

create a company and use said company to accumulate transport for the govt.
Facts:
• Here, the government attempted to introduce the *Australian National Airlines Act* (1945) – to allow it to establish an airline for interstate/territorial air transport services ▪ ANA, the government airline's primary competitor, challenged the legislation's validity, and tried to argue that s51(i) did not allow • the Cth to engage in trading or commercial activities • that the movement of persons (i.e. on an airplaine) did not constitute a trading activity – transport for reward
Held: s51(i) allows the Cth to
(a) create a company for interstate/export trading and commerce – and this company can be used to accumulate profit for government **(b)** Trade and commerce did also extend to **the movement of people/goods** and thus, to transport for reward ▪ However, under s92, the government was not permitted to regulate activity so as to hinder private sector competition with the airline; any attempt to monopolise competition would be contrary to s92.

Direct/core expression of T & C power

❖ **Direct t & c power -**A law is deemed to operate at the heart of a head of power if it ***directly operates*** upon the subject matter at the **heart, or center of the power** which the law is purported to have been enacted under (***Muprhyores***).

- **Licensing scheme regulating exportation**, and the regulation of it, has been held to lie at the **heart** of the trade and commerce power (***Muprhyores***).

Trade with other states (inter-state) and/or countries

- Indeed, to be characterized by the direct trade and commerce power, **(s51(i)),** the law in question must involve trade/commerce with either other states or other countries – ***Re Martime Union; Ex parte CSL Pactific* (2003) CLR 397**
  - *'it is well settled that in the exercise of the power, Parliament can validly regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries among the States'* .
- This has seen the power extend to imposing "prohibitions, **regulations"** and attempting to control the importation and exportation of goods **-** ***Murphyores***
  - Dealt with the *EPIP Act* prohibiting the exportation of mineral sands unless the exporter had a **govt/Minister-granted license**. - was dually characterized by the environmental power and the trade and commerce power. However, it was not relevant that the true

purpose of the law was to protect the environment; merely needed to be sufficiently connected to t &c.

Murphyores **Import and export/trade with other countries**

- **Facts:** The *Environment Protection Impact of Proposals Act* (1975)(Cth) prohibited the export of certain minerals without the granting of a license from the relevant Minister.
    - Murphyores was a mining company (mined the sand on Frasier Island), which they would then export.
    - Government introduced the legislation to protect the island-
    - Murphyores was told they had to stop mining until an environmental study was undertaken
    - Environmental study indicated that some sort of regulatory scheme was necessary to protect the environment

- **Issue:** Murphyores challenged the Constitutional validity of the legislation – held that Parliament was using the trade and commerce power for an ulterior motive (environmental protection) and that the Cth did not have the power to make environmental laws
- **Held:** Held that the power over trade and commerce should be given a broad and plenary construction
    - Asserted that as legislation was valid, as it sought to **limitedly (not absolutely)** prohibit/regulate/control the exportation of minerals; as exportation lies at the heart of **s51(i),** the trade and commerce power, the legislation was valid
        - Was **irrelevant** that the law also **touched on** matters (i.e. environmental ones) that were outside the trade and commerce power's scope
        - Is also irrelevant that the main purpose of the law was to **moderate the exportation of minerals for *environmental protection*;** as the Parliamentary policy and motives are disregarded
        - Affirmed that the HCA is an **objective, clinical, decision making body** and is interested in law, not policy (adherence to legalism)

(1) IMPORT/EXPORT REGULATION & LICENSING SCHEMES – ***Murphy Ores***

(2) **DOMESTIC AND INTERNATIONAL AIR-FLIGHT FEES-** Regulate charges for air flights, travelling to or from Aus to overseas destinations: ***R v Halton; Ex parte AUS Student Travel (1978).***

(3) PAY PECUNIARY PENALITIES POST-IMPORTATION: Compel persons trading and commerce of prohibited imported narcotics to **pay pecuniary penalties**, even transactions that take place after importation process: ***R v Smithers; Ex parte McMillan (1982).***

(4) EXTRATERRIOTIRAL TRADE: Regulation of extraterritorial trading activities connected to overseas trade, incl sale conditions of goods arriving in foreign place: ***Crowe v The Commonwealth (1935)***

(5) FOREIGN INVESTMENT: Regulation of investments in foreign countries: ***R v Hughes (2000).***

Direct power cannot regulate

General economic activity –whether direct power, or implied incidental power

- The trade and commerce power does not allow/cannot be used for general economic regulation- ***Pape v Commissioner of Taxation (2009) 238 CLR 1 –*** **(stimulus package case)**
    - Here, Kiefel and Heydon JJ, in their dissenting judgement, noted that there was no real evidence that indicated the increase in GDP related to trade and commerce with other countries
        - A stronger case could have been developed if the **precise modelling** of the transaction on inter state trade and commerce was supplied

Pape v Commissioner of Taxation (2009)
Facts:
○ Involved the payment of a stimulus package to counter the effects of the GFC – involved giving bonus payments of up to $900 as a means to counter the effects of the global financial crisis. The Act delivering the bonus was the *Tax Bonus for Working Australians Act (no. 2) 2009 Cth*.
Issue:
○ Issue was whether the package had a substantial economic effect on trade and commerce between the states or within other countries? ▪ Needed to show a definable relationship between the payment of the stimulus package and the economy
***Held*:**
○ The law was not a law with respect to s51(i) –

Cannot regulate intra-state trade regulates (via direct power – could under implied incidental power)

- Traditionally, s51(i) is not a ***direct*** power that supports intrastate trade regulations: (***R v Burgess; Ex Parte Henry; Airlines of NSW v The state of NSW & Anor (No2***))

- ***R v Burgess; Ex Parte Henry***

    - Indeed, it is not **practically essential** that the legislative regulations control both interstate and intrastate.

    - Dixon J argued that a distinction must be maintained between inter state and intra state trade, however artificial it may appear

        - The inconvenience that this causes is irrelevant

        - Must instead be a real effect on interstate trade for regulations to fall within s51(i)'s ambit

- ***Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) v Australian National Airlines Commission* (1976); *R v Burgess; Ex Parte Henry***

    - High Court rejected both arguments, and held that **s51(i) was wide enough to make laws to ensure safety, and efficiency and regularity of interstate and overseas air navigation**

        i) With regards to the "**comingling" argument** – Barwick CJ held that the Cth has no legislative power with regards to intrastate trade and commerce.

            - Specifically, there must be **no 'integration'** of air navigation or transport or intermingling or commingling of any degree to enlarge the Cth's subject matter power

                - Echoing Dixon J in ***Ex Parte Henry*** – who argued that a distinction must be maintained between inter state and intra state trade, however artificial it may appear

        ii) With regards to the **financial convenience argument** - Economic or commercial considerations cannot be used to justify the Commonwealth regulating intrastate trading activities.

            - Specifically, Gibbs J argued that mere efficiency, competitiveness and profitability were NOT sufficient grounds for a connection and that the distinctions must be maintained no matter how much interdependence may had existed between them two.

R v Burgess; Ex parte Henry (1936) - navigation regulations

Facts:

- Henry operated joy flights out of Sydney airport.
    - The Commonwealth introduced legislation, (namely, s4 of the *Air Navigation Act* (1920), imposing **navigation regulations** (for the control 'air navigation in the Cth and territories), and relied on the trade and commerce power to do so
        - Introduced legislation sought to regulate **the height at which planes could fly** in the area.

Issue:

- Henry challenged the validity of the law, as it made no distinction between flying across and flying within boundaries of State – arguably implicitly promoting comingling?

***Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) v Australian National Airlines Commission* (1976) - FIRST airlines case – licensing scheme to promote safety and efficiency of air navigation**

- ***Facts*:** Australian National Airlines had set up a route between Perth, Broome and Darwin, (the limb between Perth and Broome would be purely intrastate). The Cth attempted to impose a *Federal Air Nav Act* regulation enabling the GG regulate intrastate air service operators via a **licensing scheme** on the basis of '**safety, regularity and efficiency of air navigation'**
- ***Issue:*** The appellant attempted to argue that s51(i) could regulate intra state matters if it "**comingled**" with interstate or overseas trade and commece to the extent that it was necessary to regulate trade and commerce
    - Was also asserted that notion was **financially convenient;** that is**,** the Airline Commission argued that the route between Broome and Darwin would not be economically viable if it did not include Perth

Cannot via direct power regulate production – direct power (can under implied incidental power)

- The trade and commerce power does is **not a DIRECT power** to regulate production; that is, it does **NOT** enable the regulation of activities preparatory to trade
    - Typically, the trade process starts when the production process has finished - ***Beal v Marrickville Margarine Pty Ltd (1966) 114 CLR 283***
        - **Subjectively intending products** for inter-state/overseas trade is not sufficient
        - There must be some objective indication that this is so – not the case here; intra state and inter state margarine were produced in the same way

Beal v Marrickville Margarine Pty Ltd (1966) 114 CLR 283-

subjective intent that it go interstate not enough; must be obj; products destined for other

states ,which are kept wholly separate from other production lines are not subject to Cth laws
Facts:
• Here, the appellant sought to produced a certain amount of margarine for inside NSW and other to be sent interstate.   ○ Accused of violating the limits on production (imposed by the Govt to protect the dairy industry)
Held

• HC held that the production was still **not within the idea of trade and commerce**, and s 92 did not apply to invalidate NSW legislation.
  ○ The mere fact that the margarine was **subjectively intended** for out of state or overseas markets is **NOT** sufficient grounds to make their production part of interstate trade – and thus, it does not fall within the scope of s51(i)
  ▪ Must be some sort of **objective indication** that the goods are intended for inter-state trade; a subjective intention is not sufficient
  ▪ Here, as the intra state margarine was produced/prepared in a manner that was ***not objectively different*** to that of the margarine destined for **intrastate markets,** its production **could not be governed** by s51(i) legislation
• **Therefore**- if the production process was **objectively**, as opposed to **subjectively,** geared towards the export market the Cth could regulate it.

STEP 4A: If a direct expression/ power- apply subject matter characterisation test (suff connected etc)

- The law will be legitimized by a direct expression of the trade and commerce power if there is, prima facie, a substantial and sufficient connection between it and trade and commerce; specifically, to international or inter-state trade and commerce ***Fairfax v Federal Commissioner of Taxation*** **(1965)**
  - To determine whether or not it is sufficiently connected look at the **rights, duties, powers and privileges that it affects:** ***Bank of NSW v Commonwealth*** **(1948);** ***Cunliffe v Commonwealth*** **(1994).**

❖ The connection must be **substantial, not merely tenuous**: ***Re Dingjan; Ex parte Wagner*** **(1995)** per Toohey J.

STEP 4B: If not t & c power, consider whether it falls within the scope of the implied incidental power –(i.e. regarding preparatory acts

- Attached to every express grant of power in the Constitution is an ***implied grant of power***, (or an implied incidental power) wide enough to make the **express grant effective**, – ***D'Emden***

***and Pedder ;O'Sullivan v Noarlunga Meat* (1954)**

- That is, an implied grant of power allows laws to be made that are **necessary to *achieve* the main purpose**/s of that power (**McHugh J at 100**, ***Nationwide News (1992)***

Key areas

- The implied incidental power has enabled the Federal Parliament to regulate
  - **Vertical -**Activities preparatory to trade ***O'Sullivan v Noarlunga Meat Ltd (No 1) (1954);***
  - **Horizontal -** Activities occurring wholly within a State: ***Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission***

(1) VERTICAL – Regulation of preparatory acts related to trade

- While under s51(i) the Cth has no ***direct power*** to regulate production/manufacturing/acts preparatory to trade, (***Beale v Marrickville Margarine***), regulation of these phenomena may be seen to be **incidental to the regulation of trade**
  - Indeed, '**nothing which has been said** above implies that under the power conferred by s 51(i) of the Constitution ... the Commonwealth Parliament **can never** reach or touch production." ***Granall v Marrickville Margarine***

- **Q of fact/ dependent on individual circumstances -** How far back the Commonwealth may constitutionally go is a question of fact→ must in any case depend on the **particular circumstances** attending the production or manufacture of particular commodities ***O'Sullivan v Noarlunga Meat Ltd (No 1) (1954) 92 CLR 565***

Key test (sufficient connection) & necessity sub-test (proportionality: appropriate and adapted sub-test

❖ Although s51(i) is a subject matter power, this is apparently one instance where the Cth will **apply a purposive test,** and consider whether the legislation in question is reasonably **necessary, 'conceivably desirable', or** reasonably **appropriate and adapted,** to achieving a purpose under the express grant of power; that is, trade and commerce (only apply to production?) ***O'Sullivan v Noarlunga Meat* (1954)**

- **Leading case** – ***O'Sullivan v Noarlunga Meats* (1954)** where the **incidental power** of s51(i) was relied upon when attempting to characaterise the *Commonwealth Regulations* (under the *Customs Act Cth* (1901)(Cth), attempt's to regulate conditions surrounding the slaughtering of meat for export under the trade and commerce implied incidental powers. The regulations related to the **temperature a**
  - The 2 sub-tests below were satisfied and the attemptwas successful.

(b) Will be necessary if the law/regulation's **absence** would **adversely impact** trade and commerce

- (i.e. in O'Sullivan, if the Cth's ability to engage in export, and thus, trade and commerce, would be adversely affected if the regulations were not implemented) ***O'Sullivan v Noarlunga Meat* (1954)** –

drawing on the general principle established in ***Nationwide News*** with regards to implied incidental powers

(c) And/OR if the law/regulation's **implementation would beneficially impact** trade and commerce

- (i.e. Can also argue the inverse; that is, that ***in O'Sullivan***, if the Cth's ability to engage in export, and thus trade and commerce, would benefitted/increased via the implementation of the legislative regulations in question).

Must be inseparably connected to t & c

- **KEY TEST:** From an **objective standpoint**, regarding production of goods (to be exported)were **inseparably connected** to the exportation, and therefore, to trade and commerce → **objectively established; not founded upon subjective intent as in *Beale Margarine***

  - In ***O'Sullivan v Noarlunga Meat*****,** production was **clearly identifiable** as a part held of the chain of activities which made up the export trade in meat; that is, there was a **direct INSEPERABLE physical link between production and export/trade**

    - Thus, s51(i) may allow the Cth to regulate all activities related to the production/processing, '***supervision and control*** *of all acts or processes which can be identified as being done or carried out for* ***export'***

      - The **packaging, labeling and handling** involved in export of goods can also be regulated since it is necessary and incidental to export.

O'Sullivan v Noarlunga Meat Ltd (No 1) (1954) 92 CLR 565 **– Case related to regulations surrounding production/processing and preparation of products FOR EXPORT – sufficient connection to trade and commerce ➔ nb:** 2 Acts: one State, and 1 Cth - could be a s109 inconsistency issue as well

- ***FACTS***: Noarlunga operated a **slaughterhouse** and **abattoirs** in SA. The company's premises

were registered under the *Commonwealth Regulations*, which were made under the *Customs Act* 1901 (Cth). The Regulations provided that the **export** of meat was **prohibited unless** the **treatment and storage** of meat had been carried out in accordance with certain standards. The ***State Act*** **prohibited** the use of any premises for the purpose of **slaughtering** and froze 152 lambs for export. All of the carcasses were sold to the Australia Meant Board and exported to the UK. The company was charged with **breaching** the *State Act*. The company pleaded that the State Legislation was **inconsistent** with the Commonwealth Regulations and therefore **invalid**.

- ***ISSUE:*** Can the Commonwealth power with respect to trade and commerce with other countries extend to authorizing legislation regulating and controlling the slaughter of meat for export?

Nb: may be impossible without the reg

Nb: economic connection/function/convenience is not sufficient (see below)

Looking up/ forward

- The marketing and distribution of goods abroad typically constitutes and essential and real part of international trade- regulations can apply right up until sale – ***Crowe v Cth* (1935)** – McTiernan J

(1) HORIZONTAL – intra-state trade

- While s51(i) contains to direct power that can be used to legitimise laws or legislative regulations regarding intra-state trade (***R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission*),** its implied incidental power can validate such provisions if certain tests are satisfied

MUST be an INSEPARABLE connection; not too remote

- Under ***Redfern v Dunlop Rubber Australia Pty Ltd* (1964)**, Menzies J held that s51(i), that is, the Commonwealth power over trade and commerce can only extend to intra state trade and commerce if it is **inseparably connected** to interstate trade and commerce

- The connection has to be **real – cannot be remote or insignificant** – ***Redfern v Dunlop Rubber Australia Pty Ltd* (1964)**,

    - *For the law to validly regulate intrastate trade under s 51(i) "the connexion (between intra-State trade and) ... overseas or inter-State trade or commerce must not be so remote or insignificant that there is no real relationship"* - Windeyer J at 229 ***Redfern v Dunlop Rubber Australia Pty Ltd* (1964)**

Redfern v Dunlop Rubber Australia Pty Ltd (1964) –

fixing tyre prices; trading was occurring between multiple tyre suppliers and purchasers in a single state; inherently intra state

Facts:

- Here, the plaintiffs, Highway Tyre Service, Pakenham Tyre Service, and H.J. King Tyre Service ("Redfern") were three companies engaged in carrying on the business of buying, selling and **dealing in motor and cycle tyres and tubes**. The defendants consisted of five companies: Dunlop Rubber Australia Limited, B.F. Goodrich Australia Pty. Limited, The Olympic Tyre & Rubber Co. Proprietary Limited, Hardie Rubber Company Pty. Limited, and The Goodyear Tyre & Rubber Co. (Australia) Limited. These companies were all incorporated in the state of Victoria.

    - The companies entered into a series of contracts between them, which contained terms to the **effect of fixing the prices of goods for traders**, and the terms on which the goods could be retailed. It was alleged that all of this was done in restraint of, or with intent to restrain, trade and commerce among the States. The plaintiffs claimed that damage resulted from the contracts, arising in their inability to obtain tyres and other goods at wholesale prices and the ability to obtain them only at the prices established under the contracts.

- The case involved the ***Australian Industries Preservation Act***, which made it an offence to enter into a contract covering a restraint of trade

Issue:

The issue present was whether the Commonwealth Act could regulate contracts concerning trade and commerce of companies within a single state.

Held:

- The High Court held that the Commonwealth could render the contract void, even if it contained terms that cover purely intrastate trade. This involved a practical consideration where a party could void the involvement of the Commonwealth in regulating trade and commerce by simply inserting an intrastate clause in a contract.
    - Menzies J stressed the importance of the principle that the Commonwealth's power over trade and commerce extends only to intrastate trade and commerce that is inseparably connected with interstate trade and commerce. Menzies J further noted that this principle was quite consistent with allowing the Commonwealth the power to prohibit or regulate acts that relate to intrastate trade and commerce if they relate to interstate trade and commerce or overseas trade and commerce as well
    - The High Court hence unanimously adopted **Owen J's dissent in Swift Australian Co (Pty) Ltd v Boyd Parkinson** by holding that the Commonwealth was within power to produce legislation covering mixed activities.

MAY be permissible where it would be impossible to otherwise regulate interstate trade and commerce

- Regulation of intrastate trade and commerce ***may*** (not must) be permissible where it would be **impossible to otherwise regulate** interstate trade and commerce (***Airline of NSW Pty Ltd v NSW (No 2) (Second Airlines case)***
    - This position, according to Barwick CJ and Taylor J, is consistent with the fact that the implied incidental power is meant to apply to regulations that would **make the facilitation** of and legislation surrounding trade and commerce (inter state and intra state) **effective**
        - **So regulation of intrastate trade and commerce may be permissible where impossible to otherwise regulate interstate trade and commerce**
        - Kitto J at 115 – 'If **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.'

- Kitto J 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 none the less so because it is also legislation with respect to that intra-State air navigation which is not within the power.'

Grounds of Practicality/necessity are insufficient

- ***R v Burgess; Ex Parte Henry***
    - Indeed, it is not **practically essential** that the legislative regulations control both interstate and intrastate.
    - Dixon J argued that a distinction must be maintained between inter state and intra state trade, however artificial it may appear
        - **The inconvenience that this causes is irrelevant**
        - Must instead be a real effect on interstate trade for regulations to fall within s51(i)'s ambit

- ***Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) v Australian National Airlines Commission* (1976) -**
    - High Court rejected both arguments, and held that **s51(i) was wide enough to make laws to ensure safety, and efficiency and regularity of interstate and overseas air navigation**
    - With regards to the **financial convenience argument** - Economic or commercial considerations cannot be used to justify the Commonwealth regulating intrastate trading activities.

**Limitation/nb: *Economic necessity/connection is insufficient* **

- There must be a **physical connection** between the activity and s51(i)(T&C) must be demonstrated, a mere economic connection is insufficient to established it is linked.- ***Attorney-General (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission* (1976) 138 CLR 492**
    - Here, Gibbs J further clarified that mere efficiency, competitiveness and profitability were not sufficient grounds for a connection and that the distinctions must be maintained no matter how much interdependence may had existed between them two.

Facts:
❖ Involved a flight occurring **entirely within one state**, could they provide this service as it is **intra-state**, it would be economically impossible to fly without flying into WA, HC said this is not the type of factor to allow it to govern purely intra-state. The Australian National Airways Commission was created by the *Australian National Airlines Act* 1945 (Cth). The Commission's function was to carry passengers and goods **between state or territories** or

within **territories**. In 1973, the Act was amended to include **s 19B** to enable the Commission to conduct intrastate services. The Commission proposed to commence a service between Perth and Darwin with an immediate stop at Port Hedland. The stop was dictated by economic reasons. The WA Attorney-General, at the relation of Ansett who conducted a similar service, sought a declaration that s 19B was an invalid exercise of T&C power.

Issue:

- Does s 51(i) incidentally include a grant of power to legislate for intrastate T&C when its only relationship to interstate T&C 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? – **no distinction made in the legislation between inter state and intra state trade. The appellants tried to argue that it would be more convenient if 1 piece of legislation governed both kinds of trade.**

Held:

S 19B of the Act could be construed so as to be confined to intrastate air transport which promoted the efficiency, competitiveness and profitability of Territory air services between a Territory and other parts of Australia. S 19B was **valid** under the power conferred by s 122 (**Territories Power**) of the C. Territories power is plenary and not subject to the same restrictions as intra-states, s 122 allows for legislation to happen. However this would not apply if was only a states issue.

Other considerations (see characterisation notes)

Parliamentary purpose is irrelevant; that is, if P attempts to enact a law so as to achieve a purpose which is inconsistent with the head of power that characterises it, it does not become invalid

- If a law, on its face, is one with respect to a Commonwealth legislative power, it does not cease to have that character because the Commonwealth Parliament seeks to achieve **by its enactment a purpose which is not within, or consistent with, the Commonwealth's legislative power**: ***Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555 , Mason CJ, Deane, Toohey and Gaudron JJ at 569, Dawson J at 589, McHugh J at 596***.
    - Echoes Latham CJ's statement that *'the **motives of Parliament**, and, as a general rule, the objects which Parliament seeks to achieve, are **not relevant to questions** of constitutional validity'* when applying the sufficient connection test ***Bank Nationalisation Case***

- **EXAMPLE 1 – intention of Parliament in enacting legislation sis irrelevant-** Specifically, in ***Murphyores Pty Ltd v The Commonwealth (1976) 136 CLR 1*** , the Court held that it did not matter that the legislation was enacted to satisfy an **ulterior motive**; namely **protecting the environment/ensuring that mining companies complied with environmental standards**, (which itself was a concern external to **s51(i)**
    - This is because as the legislation was sufficiently connected to trade and commerce -
        - Indeed, so long as the subject matter of a law is itself clearly located within the ambit of the constitutional grant of power, ('with respect to it')the way that Parliament deals with that subject matter/ its ulterior motive and its purpose in doing so, are judicially irrelevant - ***Australian National Airways Pty Ltd v Commonwealth* (ANA Case) (1945) 71 CLR 29 ; *Herald & Weekly TImes***

- **EXAMPLE 2: - prohibitions are contrary to Parliament's prevailing attitudes/policy concerns-** Similarly, in ***Fairfax v Commissioner of Taxation (Cth)* (1965) 114 CLR** 1, the High Court held that provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), which denied exemption from income tax liability to the income of a superannuation fund which *did not invest in certain public securities,* **could properly be characterised as a law with respect to taxation**
    - As the law imposed a liability to pay taxation, it was irrelevant that the acknowledged policy of Parliament in enacting the law **was to increase investment in public securities by superannuation funds**: ***Fairfax v Commissioner of Taxation (Cth)* (1965) 114 CLR 1** , Taylor J at 16, Windeyer J at 18.

Prohibition – conditional or unlimited

- Where the Commonwealth Parliament possesses power to make a law in relation to an activity, it may *prohibit* that activity or *permit* it conditionally (***Murphyores Inc Pty Ltd v Commonwealth***)
    - **EXAMPLE 1:** Here, the Court prohibited mining companies from exporting minerals (which were extracted from Frasier Island), until they had complied with the necessary environmental standards- had to obtain a license.

Conditions imposed by Parliament need not be relevant to the subject matter of the power-head

Conditions or criteria laid down by the Parliament which authourise an otherwise prohibited activity need have no relevance to the subject matter of the Commonwealth's legislative power pursuant to which the prohibition was imposed (***Herald & Weekly Times Ltd v Commonwealth***)

- **EXAMPLE 1:**. In ***Herald & Weekly Times Ltd v Commonwealth* (1966)** 115 CLR 418, the Court held that the ***Broadcasting Act 1942*** **(Cth)**, which prohibited persons from holding shares in and lending money to companies holding television licences and companies holding shares in those companies, was a law with respect to the **provision of television services**, and thereby authorised by the Constitution**, s 51(v)**. Menzies J considered the practical operation of the law.

Here, Kitto J rejected the argument that *conditions* attached to a television license might be invalid because the subject matter of these conditions was not within the power Instead, the law for **licensing TV services was a necessarily a law with 'respect to' those services,** and the nature of the conditions attached to the license did not affect the conclusion

Legislation need not exclusively relate to an enumerated power-head – can touch on external concerns

A Commonwealth, subject matter law need not relate exclusively to an enumerated grant of legislative power: ***Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169,** Stephen J at 192.

Indeed, the fact that **only some elements of the description of a law falls within one or more of the grants of power in s51** or **elsewhere** will in **NO WAY BE FATAL** to its validity – ***Actors and Announcers***

- So long as the remaining elements, *which do not fall within any such grant of power,* **are not of such significance that the law cannot be fairly described as one "with respect to" one or more of such grants of power then**, however else it may also be described, the law will be valid. ***Actors and Announcers***

- Ultimately -'It will be enough if the law fairly answers the description of a law '*with respect to'* one given subject matter appearing in s51, regardless of whether it may equally be described as a law with respect to other subject matters. **This will be so whether or not those other subject matters appear in the enumeration of heads of legislative power in s51**

  - **EXAMPLE 1:** Consequently, in ***Actors and Announcers***, the Court held that as the 'opening words' of s45D(1)(b)(i) of the *Trade Practice Act* (1974)(Cth) were **directly related** to the trading activities of corporations, (by **attempting to protect them from secondary boycotts**), whatever other descriptions might be assigned to it are irrelevant .

    - Indeed, to fail to include as one characterization of it that of a law about corporations would seem to "**ignore the obvious**", as, to describe it as a law with respect to trading corporations **seems entirely apt**; it does n more than recogise what is the manifest purpose and direct effect of the law

Legislation can be characterised by more than 1 power head Nb: Strickland & limitations

- The legislation in question need not possess only one, 'true' characterization, as the rigid either/or approach previously adopted by the High Court, i.e. in ***R v Barger* (1908); *Melbourne Corporation* by Latham CJ,** has **since been discredited –(initially by *Bank Nationalization case)***

  - **EXAMPLE 1:** In ***Work Choices*, it** was held that the ***Workers Choice*** legislation, which would have historically been exclusively characterized by the **industrial disputes power (s51xxxv)**, could also be characterized **by s51xx (the corporations power)**

- ***Strickland v Rocla Concrete Pipes (1971***): as long as it is within one power, it does not matter that it (impliedly) falls outside another power **UNLESS** it falls into one but is **EXPRESSLY** excluded by another power: ***Wurridjal v CTH 2009***- this only occurs in situations involving acquisition of property on just terms

If dually characterised, it is 'fruitless' to attempt to place it under one power head

Where a Commonwealth law bears several characters, **it is fruitless** to attempt to characterise it as relating to one subject to the exclusion of all others ***Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, Stephen J at 192; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1,** Murphy J at 180.

- Indeed, in ***New South Wales v Commonwealth* (Work Choices Case) (2006) (Cth) –** Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ (majority) held that to describe a law as "really, truly or properly characterized as a law with respect to one subject matter rather than another, **bespeaks fundamental constitutional error**."

- This error was recently explained in ***Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982)** – Stephen J held that to '*recognise that a law may possess a number of quite disparate character is, **then, to accept reality***.

All that is required is that the law can be 'can fairly be characterised as one with respect to a Commonwealth grant of legislative power, it is irrelevant that it may also be characterised as one with respect to a power exercised by the States, even where the obvious or primary character of the law falls outside the Commonwealth's legislative powers.' Kitto J in ***WorkChoices***.

Characterisation of trade and commerce power (Scaffold)

Broad approach to characterisation

- Firstly, it must be noted that when attempting to characterize legislation, the Constitution is to be construed "***with all the generality** which the words used admit"* (***Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 *; R v Public Vehciles Licensing Appeal Tribunal; Ex Parte Australian National Airways PtyLtd***), **unless there is something** in the context or in the rest of the constitution **to indicate' otherwise**. ***Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908**

    - Indeed, in the ***Bank Nationalisation***, it was held that the subject matter that is affected, namely, 'banking', must be understood in a broad and general way; **avoiding artificial limitations**

A. Direct power – sufficient connection test

- Is a subject matter power
- Consequently, there must be a **sufficient connection** required between law and head of power/ trade and commerce in s51(i): ***Fairfax v Federal Commissioner of Taxation* (1965)**
    - To determine whether or not it is sufficiently connected look at the **rights, duties, powers and privileges that it affects: *Bank of NSW v Commonwealth* (1948); *Cunliffe v Commonwealth* (1994).**
    - The connection must be **substantial, not merely tenuous**: ***Re Dingjan; Ex parte Wagner* (1995)** per Toohey J.

- If the subject matter of the law is sufficiently connected to the subject matter of the power, then the Court will not be concerned with the **policy of the law**.
    - Indeed, the policy of law is irrelevant: ***Murphyores Inc Pty Ltd v The Commonwealth (1976) 136 CLR 1*** (even though the legislation in this case was enacted to protect the environment, this was irrelevant, as the prohibitions it placed on mining were sufficiently connected to t & c function of importing and exporting minerals for overseas/interstate trade)

B. Implied incidental power

- Attached to every express grant of power in the Constitution is an implied grant of power wide enough to make the express grant effective, – ***D'Emded and Pedder ;O'Sullivan v Noarlunga Meat* (1954)**

Key test (sufficient connection) & necessity sub-test (proportionality: appropriate and adapted sub-test

- Implied incidental power will apply if there is:

(1) A **sufficient connection** between **the subject matter of the power, (**namely interstate or overseas trade and commerce) and the **legislation** at hand – ***D'Emded and Pedder ; Granall v Marrickville Margarine Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, Dixon CJ, McTiernan, Webb and Kitto JJ at 77; *O'Sullivan v Noarlunga Meat* (1954)**

(a) proportionality/ appropriate and adapted (???) relate only to production?? Although s51(i) is a subject matter power, this ids apparently one instance where the Cth will consider whether the legislation in question is not only sufficiently connected to trade and commerce, but also whether this connection **REASONABLE** (reasonably **necessary), 'conceivably desirable', or** reasonably **appropriate and adapted,** to achieving a purpose under the express grant of power; that is, trade and commerce (only apply to production?) ***O'Sullivan v Noarlunga Meat* (1954)**

a. Will be necessary if the law/regulation's absence would **adversely impact** trade and commerce – (i.e. in O'Sullivan, if the Cth's ability to engage in export, and thus, trade and commerce, would be adversely affected if the regulations were not implemented) ***O'Sullivan v Noarlunga Meat* (1954)** – drawing on the general principle established in ***Nationwide News*** with regards to implied incidental powers
b. And/OR if the law/regulation's implementation would **beneficially impact** trade and commerce – (i.e. in O'Sullivan, if the Cth's ability to engage in export, and thus trade and commerce, would benefitted/increased via the implementation of the legislative regulations in question).

Key areas

- The implied incidental power has enabled the Federal Parliament to regulate
    - **Vertical -**Activities preparatory to trade ***O'Sullivan v Noarlunga Meat Ltd (No 1)* (1954);**
    - **Horizontal -** Activities occurring wholly within a State: ***Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission***

Limitations

Specific: *Not regulate general economic activity*

- Not a power to regulate general economic activity (irrespective of whether power is direct of t&C or implied incidental) – ***Pape v Commissioner***

General

- Acquisition of Property on Just Terms;