

## Characterisation

- Refers to the process of determining whether a law falls within one of these heads of power. The question is whether the law relates to the subject matter or purpose of the head of power in a way that allows it to be described as a law 'with respect to' that head of power.
- **Dual characterisation:** A law can have more than one character, and only one of those characters has to fall within a head of power for the law to be valid: *Fairfax (1965)*; *Herald & Weekly Times (1966)*.
- **Subject-matter powers:** need a sufficient connection between the law and a head of power.
  - o **Grainpool approach to characterisation:**
    1. Construe the Constitution with all the generality the words permit: *Jumbunna*
    2. Determine the character of the law by reference to rights, powers, liabilities, duties and privileges it creates
    3. Examine the practical and legal operation of the law to determine whether there is a "sufficient connection"
    4. If a law has more than one character, only need a sufficient connection to one head of power (dual characterisation): *Fairfax (1965)*; *Herald & Weekly Times (1966)*
    5. If sufficient connection to head of power exists, the justice or wisdom of the law, and the degree to which the means it adopts are necessary and desirable are matters of legislative choice.
- **Incidental powers:**
  - o **Express incidental power:** s 51(xxxix) of the Constitution – '[m]atters incidental to the execution of any power vested by this Constitution in the Parliament... or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'
  - o **Implied incidental power:** each head of power in s 51 contains an implied incidental power: *Burton v Honan (1952)*, *Dixon J.*
- Purpose powers: it is relevant to ask not only **whether the law is intended to achieve that purpose**, but whether its provisions are '**proportionate**' or '**reasonably appropriate and adapted**' to the achievement of the intended purpose.
  - o External affairs power (treaty implementation)
  - o Defence power

## External Affairs Power – s 51(xxix)

- **Relations with other countries:**
  - o Preservation of friendly relations with the King's dominions: *R v Sharkey (1949)*
  - o Can be non-friendly conduct, in violation of 'international comity': *Seas and Submerged Lands Case (1975)*
  - o Extension to relations with international persons/bodies: *Koowarta (1982)*
- **Matters external to Australia**
  - o Mere externality is sufficient: *Pokyukhovich (1991)*; *XYZ (2006)*
  - o Sufficient nexus to Australia (if necessary) may be provided by geographical closeness: *Horta (1994)*; or the fact that the Parliament sees fit to legislate on the topic: *Polyukhovich (1991)*; *Horta (1994)*
  - o Domestically focused legislation passed in response to an external event will not fall within the power: *Pape (2009)*
- **Implementing treaties**
  1. **Does the treaty obligation enliven the power?**
    - Treaty can be on any subject matter: *Tas Dam Case (1983)*, *Majority*.
    - Must be entered into bona fides, cannot be 'a mere device': *Burgess (1936)*, *Evatt and McTiernan JJ*; *Tas Dam Case (1983)*, *Deane J.*
    - Not aspirational, sufficiently specific: *IR Act Case (1996)*, *Brennan CJ*, *Toohey*, *Gaudron*, *McHugh and Gummow JJ*.
    - Maybe int. recommendations, if connected to a binding treaty obligation and are not too vague: *IR Act Case (1996)*, *Brennan CJ*, *Toohey*, *Gaudron*, *McHugh and Gummow JJ*; *Pape (2009)*, *Hayne and Kiefel JJ*; *Heydon J.*
  2. **Does the law implement the treaty obligation?**
    - Law must be reasonably considered to be appropriate and adapted to the treaty obligation: *Tas Dam Case (1983)*, *Deane J.*
    - Partial implementation is acceptable unless: 'the deficiency is so substantial as to deny the law the character of a measure implementing the Convention, or is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.': *IR Act Case (1996)*, *Brennan CJ*, *Toohey*, *Gaudron*, *McHugh and Gummow JJ*.

## Trade and Commerce Power – s 51(i)

- Includes 'the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery': *W & A McArthur v Qld (1920)*
- Includes regulation of persons employed in trade and commerce: *Re Maritime Union (2003)*
- Includes participation in trade and commerce: *ANA Case (1945)*
- Includes 'packing, get-up, description, labelling, handling, and anything at all that may be reasonably considered likely to affect an export market by developing it or impairing it': *O'Sullivan v Noarlunga Meats (1954)*, *Fullagar J.*
- **Incidental aspect** – *Second Airlines Case (1965)*, *Kitto J*, confirmed in *AG (WA) v Australian National Airlines Commission (1976)*, *Stephen J*:
  - o Laws that regulate intra-state trade and commerce because it protects against danger of physical interference with interstate trade and commerce will fall within the power
  - o Laws that regulate intra-state trade and commerce for efficiency (profit/loss etc.) will not fall within power

## Corporations Power – s 51(xx)

- **Foreign corporations:** incorporated overseas: *Incorporation Case (1990)*.
- **Trading corporations:**
  - o Engage in trading activities; profit is not an essential element of trade: *Adamson's Case (1979)*, *Mason J.*
  - o Substantial/not insignificant trading activities: *Adamson's Case (1979)*; *adopted by a majority in State Super Board of Vic (1982)*; *Tas Dam Case (1983)*
  - o Can be a government owned corporation: *Tas Dam Case (1983)*
  - o Purpose still relevant if not yet commenced activities (shelf companies): *Fencott v Muller (1983)*
- **Financial corporations:**
  - o Subject of transaction must be finance: *Re Ku-ring-gai (1978)*.
  - o Otherwise, same test as trading corporations – substantial/not insignificant activities: *State Super Board of Vic (1982)*