

# Constitutional Final Exam Notes

Power	Examples	Test
<b>Purposive</b> (Proportionality test)	Nationhood, defence power	Appropriate and adapted to a head of power. <i>Proportionality test</i> (between purpose of law and purpose of power)
<b>Non-Purposive</b> – Powers concerned with a subject matter or thing (most common)	Race, trade commerce, corporations	<i>Substantial connection test</i> (between operation and effect of law and head of power)
<b>Implied and Incidental</b>	<b>S51(xxxix)</b> , imposition of penalties	Appropriate and adapted to a head of power (proportional in relation to the section it breaches)

## Non-Purposive(subject matter) powers - sufficient connection test - Fairfax

The sufficient connection test is used to characterise a law under a subject matter power.

As long as the law can be characterised as being a law with respect to a subject matter which is within power it does not matter that it might also be characterised as bearing upon some other subject matter not within

To characterise a law the focus should be on the direct legal operation of the law

In characterising a law the court is not concerned with the policy it embodies but only whether it can fairly be described as a law with respect to a specified subject matter – is there a sufficient connection between the law and the head of power. Do not examine the motives which inspire it or the consequences which flow from it.

## As in the *Bank Nationalisation Case*

- The subject matter of the head of power is construed broadly
- The commonwealth may make any law within this subject matter

Dixon J in the *Bank Nationalisation Case* [limit of banking power]

## As in *Fairfax (1965)*

1. What is the law with respect to?
2. What does it do?
3. What does it command or prescribe

*Once it appears that a law has an actual and immediate operation within a field assigned to the CW as a subject of power that is enough ... That it discloses another purpose that lies outside power is not sufficient to invalidate it*

Kitto J in *Fairfax v Commr of Taxation* [involving taxation and superannuation]

As in *Herald (1966)*

Since s51 of the constitution allows for laws “with respect to”, a substantial connection is sufficient.

Kitto J in *Herald v Weekly Times [involving whether the law was with regards to television licences or those who hold them]*

As in *Murphyores (1976)*

Policy is irrelevant

That the law is dealing centrally with a topic, that it deals with other topics is fine.

Purposive powers + Incidental - Reasonably appropriate and adapted test

This test is used to characterize purposive powers (e.g. defense, nationhood); we ask is the Act appropriate and adapted to the purpose of the power.

This test is also used in the implied incidental power.

- Discretion is important → it can be disproportionate if no discretion is allowed

Reasonably appropriate and adapted, proportionality test applied.

*Davis*

*does it go beyond what is reasonably appropriate and adapted to its purpose*

McHugh J in *Nationwide News*

*Where it's (1) a purposive power or (2) where the law impinges on an express or implied freedom or prohibition you can examine the law to see whether it is appropriate and adapted*

Brennan in *Cunliffe*

Interpretation

- **Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd & Ors (1920) 28 CLR 129**

*‘ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning’* → approach adopted by majority is often referred to as *literal* approach, as it emphasises the importance of the express language of the Constitution in establishing constitutional meaning.

General Information

Although s.1 imposes a **penalty** it can be seen as being reasonably necessary for the enforcement of a law and can be seen as being incidental to the exercise of the power under s51(...) (*Murphyores v Commonwealth*).

## Nationhood/Executive Power

S 61	<i>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</i>
S 51	<i>The Parliament shall, subject to this Constitution, have power to make laws...with respect to:</i>
Sub s xxxix	<i>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</i>

Nationhood power is the Power of the Commonwealth (specifically, the executive) to make laws based on Commonwealth as a nation. There has been much debate of the source of the power. Power from either the executive in s61 plus the incidental power s51(xxxix) (emphasis on word 'execution') or implicit in the Constitution.

### Scope:

- The current position draws the existence of this power from the implication that a national government has power to engage in activities adapted to the government of a nation
- **1. BENEFIT (ADVANCEMENT)**
- The nationhood power is used for the advancement of the nation
  - Brennan J in ***Davis v Commonwealth***: 'it extends to the advancement of the nation whereby its strength is fostered'
  - Mason J in ***Victoria v the Commonwealth and Hayden***: 'there is to be deduced from the existence and character of the commonwealth as a national government and from the presence of ss 51(xxxix) and 61 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.'
  - Deane J in ***Commonwealth v Tasmania (Tasmanian Dam Case)*** said 'the protection, preservation or promotion' of some 'physical property or artistic, intellectual, scientific or sporting achievement or endeavor' may attract the 'nationhood' power
  - ***Pape v Commissioner of Taxation 2009*** – benefit of the nation confirmed.
- At issue 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 was whether this Act could be justified as an exercise of executive power.
  - Fench, Gummow, Crennan and Bell found that it was a valid use of power.
    - Hayne and Kiefel JJ, while in the minority, agreed the scope of executive power extends to national issues
- **2. PROTECTION**
- The nationhood power can also be used for the protection of the nation
  - Nationhood power includes a legitimate concern with 'national' issues with Gummow, Crennan and Bell JJ saying 'it can hardly be doubted that the

current financial and economic crisis concerns Australia as a nation' (***Pape v Commissioner of Taxation***)

- **CASES**

- In ***New South Wales v Commonwealth*** (*Seas and Submerged Lands Case*) it was suggested that, quite apart from the 'external affairs' power, the nationhood power might enable the commonwealth to legislate for the Australian territorial sea.
- One result of ***Pape*** is that many expenditures traditionally regarded as justified by the 'appropriation' or 'nationhood' powers may now be thrown into doubt, or at least left in search of a new rationale.

1. Must not interfere with Federal balance (**Federalism**)

- must be **something only the Federal govt could achieve** - couldn't otherwise be completed. Mason at 396 in *AAP's case*.
- Something than mere convenience – can't be a disagreement between states and Federal govt. Barwick CJ. Confirmed this in ***Tasmanian Dams*** by Deane J
- Confirmed further in *Pape's case* with all seven judges said it had to be limited by considerations of federalism.

**Limits:**

- 'Power is not unlimited' Mason in *AAP Case*. The executive power is limited to the distribution of powers effected by the Constitution. ***Commonwealth v Colonial Combing, Spinning & Weaving Co***
- *Pape*: Despite the consensus that the executive power includes a legitimate concern with nationhood issues all seven judges said it had to be limited by considerations of federalism
- Can't be said to compete with interests of the state which would undermine powers of the states.
  - 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(demands/needs) 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."*
- **Must be something only Cth govt could achieve AAP's case**
- **Can't be more appropriate for states to act AAP's case.**  
**Melbourne Corporation Principle** - Immunity of States from Cth legislation that would destroy or curtail their continued existence or their capacity to function as governments
  - And that it can only be used for the benefit of the nation, ***Davis v Cth***. Benefit is defined by the parliament.
  - Neither federal nor State Governments may destroy the other nor curtail in any substantial manner the exercise of its powers, or obviously interfere with one another's operations.

Plus all other limitations (implied freedom of political communication, freedom of religion etc)