

PROBLEM QUESTION PROCESS 2
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	COMMONWEALTH	STATE
Is there a head of power?	<ul style="list-style-type: none"> • Trade and commerce: s51(i) • External affairs: s51(xxix) • Corporations: s51(xx) • Defence: s51(vi) • Nationhood: s51(xxxix) + s61 • Race: s51(xxvi) • Grants: s96 • Appropriations: s81 • Tax: s51(ii) • Acquisition of property: s51(xxxi) 	<ul style="list-style-type: none"> • Plenary power • Exclusive to the Commonwealth • Exclusive to the Commonwealth • Can impose a tax (NB: s 90 – no excise) • States can acquire on less than just terms

Limitations on power	Express prohibition	
	Prohibition on acquisition of property on other than just terms: s51(xxxi)	
	Freedom of religion: s116	
	Prohibition on restraint of interstate trade, commerce, intercourse: s92	
		Prohibition on imposition of excise: s90
	Implied prohibition	
	Immunity from discrimination on grounds of interstate residence: s 117	
	Implied freedom of political communication	
	Implied impunity of state governments: <i>Melbourne Corporation</i>	Implied immunity of Commonwealth government: <i>Cigamic</i>

PROBLEM QUESTION PROCESS

1. Commonwealth or State law?
2. Does the relevant Parliament have the power to enact the law in question?
 - a. Commonwealth – characterise the law, relevant head of power, subject matter (sufficient connection test) or purposive power (reasonably appropriate and adapted), does the incidental power apply?
 - b. State – plenary legislative power, but is it a law with respect to the peace welfare and good government of the State, or is there a Cigamatic issue?
3. Does the law breach an express constitutional prohibition?
 - a. Section 51(xxxi), Section 116, Section 90
 - b. State – section 92
4. Does the law breach an implied constitutional prohibition?
5. Do any issues arise as to the formalities of enacting the law
 - a. Section 55 and money bills
6. If part of an act is invalid, can it be severed or read down?
7. Is the law ineffective or inoperative for some other reason?
 - a. Inconsistency
 - b. Scheme to avoid the application of s 51 (xxxi)
8. To whom does the law apply? e.g. is it intended to bind the Crown, and can it do so? Does it only apply to trading corporations and if so, is the body in question a trading corporation?

SECTION 51 POWERS

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) Trade and commerce with other countries, and among the States;
- (ii) Taxation; but so as not to discriminate between States or parts of States;
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- (iv) Borrowing money on the public credit of the Commonwealth;
- (v) Postal, telegraphic, telephonic, and other like services;
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
- (vii) Lighthouses, lightships, beacons and buoys;
- (viii) Astronomical and meteorological observations;
- (ix) Quarantine;
- (x) Fisheries in Australian waters beyond territorial limits;
- (xi) Census and statistics;
- (xii) Currency, coinage, and legal tender;
- (xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- (xv) Weights and measures;
- (xvi) Bills of exchange and promissory notes;
- (xvii) Bankruptcy and insolvency;
- (xviii) Copyrights, patents of inventions and designs, and trade marks;
- (xix) Naturalization and aliens;
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) Marriage;
- (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- (xxiii) Invalid and old-age pensions;
- (xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxvi) The people of any race for whom it is deemed necessary to make special laws;
- (xxvii) Immigration and emigration;
- (xxviii) The influx of criminals;
- (xxix) External affairs;
- (xxx) The relations of the Commonwealth with the islands of the Pacific;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxiv) Railway construction and extension in any State with the consent of that State;
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- (xxxix) 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

Section 64: allows for the appointment of officers to administer government departments

CHARACTERISATION OF LAWS

State

- Laws do not need a head of power
- States have plenary legislative power
- No subject areas 'reserved' for the States: *Engineers*
- Section 51 powers are concurrent – the States can still legislate with respect to those matters unless they are otherwise constrained

Commonwealth

Test per Latham CJ *Bank Nationalisation*

1. What is the actual operation of of the law in creating, changing, regulating or abolishing rights, duties, powers or privileges?

Fairfax v FCT

- The character of a law is determined by its operative effect
- Motives of Parliament and name of the Act are irrelevant

2. Does it fall within the scope of one or more heads of power?

- Whilst a law can possess multiple characterisations (*Fairfax*), a connection must be demonstrated to the power which is not 'so insubstantial or distant that it cannot be sensibly described as a law with respect to that head of power' (*Re Dingjan*)
- There is no need to search for the one 'true' character of a law, or for its 'predominant' character'
- Look to the legal and practical operation of the law: *Re Dingjan*
- Distinguish
 - Subject matter powers – test: whether there is a sufficient connection between the law and the subject matter: *Stenhouse v Coleman* (Dixon J), applied in *Grain Pool*
 - Purposive powers – test: is the law reasonably capable of being seen as appropriate and adapted to serve the purpose
 - Defence power
 - External affairs power is not itself purposive, but it supports laws enacted for the purpose of implementing treaties
 - The nationhood power

3. Incidental Powers

- Express Incidental Power: Section 51(xxxix) allows the Commonwealth Parliament to legislate with respect to matters incidental to the execution of any power vested in the Parliament, or either House, or the Commonwealth Government or a federal court or public servant
- Implied Incidental Power: If you have the power to do X, you also have all the power necessary to do X: *D'Emden v Pedder*
- Connection to the Incidental Power
 - *Leask v Commonwealth*: whether there is sufficiency of connection (apply this)
 - *McCloy v NSW*: seemed to recognise proportionality – but not confirmed in ratio