

TRADE & COMMERCE POWER

CHARACTERISATION OF THE TRADE & COMMERCE POWER

1.1 Head of power

S 51(i): The Parliament shall...have the power to make laws...with respect to... trade and commerce with other countries, and among the States.

1.2 Characterising “trade & commerce”

Interaction between s 51(i) & s 92

S 92: On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be **absolutely free.**

Note: this restriction applies to ALL laws of Australia (whether Cth or State)

- The original meaning of the phrase “*absolutely free*” (derived from an examination of federation convention debates) appeared to be freedom from fiscal burdens on interstate trade (that is, custom duties and other discriminatory imposts and guarantees).
- However, following the decision in *Engineers (1920)* the HCA could no longer justify its interpretation by reference to *extraneous material*, but only the “**text & structure**” of the Constitution itself.
- Two extreme views emerged, with nuanced views in between:
 1. s 92 was a constitutional guarantee of laissez-faire economy (capitalism)
 2. s 92 was concerned only with prohibiting fiscal burdens on interstate trade
- s 51(i) is subject to s 92 however, s 51(i) **permits Cth to regulate trade & commerce** so long as it does not amount to protectionist discrimination: *Cole v Whitfield*
e.g. safety standards, conditions of employment of those involved in overseas/interstate trade & commerce e.g. stevedores, ban importation of goods, fairness of trade (under CCA 2010), promote certain types of trade & prohibit others (subject to s 92), **participate** in overseas trade & commerce e.g. by running own airline (*Airlines Case*) or shipping line (*Australian Coastal Shipping Commission v O’Reilly*) or setting up co-operative State & Cth bodies e.g. Aus Wheat Board
 - Consequently, if trade & commerce expands to include interstate trading, it also expands the meaning of trade & commerce in s 92: see *Airlines Case*

The meaning of “trade & commerce”

- The words “trade and commerce” are given their ordinary meaning as understood by business people: *W & A McArthur v Qld*
- The term is not confined to transporting goods across borders. It includes “*all commercial arrangements of which transportation is direct and necessary result*” [includes entire transaction]: *W & A McArthur v Qld*.
Includes:
 - Intangibles e.g. banking services: *Bank of NSW v Cth (1948) 76 CLR*,
 - Supply of electricity
 - Broadcasting and the sale of ideas
 - Ordinary goods
 - Transportation of goods or people for profit: *W & A McArthur v Qld*
 - **Not JUST limited to transportation across the border** (could be transportation between two places in the one state, IF it is associated with an inter-state contract. On the flip side, could arise out of an intra-state contract, but involve transportation between states, and still be classed as interstate T&C)