

## Federal Constitutional Law Scaffolds

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# Trade and Commerce s51(i)

## Characterisation

- what rights, duties, powers privileges which it changes, regulates or abolishes– (*Fairfax v The Commissioner for Taxation*)

## Is it under s51(i) Head of Power?

- “Trade and Commerce” = popular meaning (*W & A McArthur Ltd v Queensland*) Includes:
  - Transport of goods and people for profit (*W & A McArthur Ltd v Queensland*)
  - Intangibles: Banking services (*Bank of NSW v Cth*), supply of gas and electricity, broadcasting, the sale of ideas, Cth can itself engage in T&C (*Australian National Airways v Commonwealth*) (but note if monopoly in breach of s92)
  - Making contracts if they are in relation to trade and commerce with other countries or among the states (*Redfern Dunlop*)
- “Interstate and overseas”
  - Does not apply to intrastate trade and commerce (*Wragg*; *Australian National Airways v Commonwealth*)

## Incidental Power

- In every grant of power under the constitution there is an implied inclusion of “every power and...control the denial of which would render the grant ineffective” (*D’emden v Pedder*)
  - Intrastate trade: Prima facie no
    - If it can be shown to be necessary or appropriate (*Nationwide News*) to protect or foster interstate or foreign trade from “physical interference” (*Airlines 1965*)
      - Safety, regularity and efficiency of air navigation rules (*Airlines 1965*) – ground maintenance, timetabling..
        - “efficiency” in the sense of being expedient or ensuring “economic success of the activity” is not enough to bring a law within the incidental power if purely economic (*WA Airlines* per Barwick CJ)
      - “acting on the actual conduct of an activity” (*Airlines 1965* per Kitto J)
        - Must further be shown that it would be “impossible” to regulate interstate/overseas trade without also regulating intrastate trade (*WA Airlines*)
      - Economic factors? (would require a development in the law)
        - Mason J (in dissent) and Stephen JJ in closely decided *WA Airlines* argued practical economic factors cannot be excluded from the notion of what is reasonably necessary to fulfill s51(i) power
        - Criticism of the distinction between physical and economic as Cth Law should be characterised by reference to the practical consequences (*Grainpool*)
        - US position: Commerce Clause parallels s51(i) and has been interpreted broadly to encompass all activities that “exert a substantial economic effect on interstate commerce” (*Wickard v Filburn*)
          - Limit: requirement that the subject itself be commercial in nature (*US v Lopez*)
          - However, US cases have been decided on slim majorities with persuasive dissents so this position may in time be overruled
  - Production: Prima facie no
    - The power under s51(i) includes a power to make provision for the condition and quality of ...any...commodity to be exported (*Noarlunga* but note statutory majority). Two limbs:
      - Anything that either beneficially or adversely impacts interstate or overseas export trade of Aus
      - The process is identified by the industry as a requirement for export

- Mixed contracts: can't avoid Cth regulation by inserting an intrastate element into a contract (*Redfern v Dunlop Rubber*)
- Mixed-production scenarios?
  - Dicta in *Swift* – a Cth regulation that purported to regulate the production of goods otherwise than for export would not find justification in *Noarlunga* (per Taylor J) – excluding mixed-production scenarios
  - Owen J's dissent : in certain scenarios it is impossible to predict what stock will be exported making it necessary for Cth to regulate the whole operations "lest the condition or quality of [the export product] be prejudicially affected"
  - US position: power to regulate those activities having a substantial relation to interstate commerce (*US v Morrison*)
    - Means chosen to regulate the activity are a reasonable and appropriate" (*Heart of Atlanta Motel*)
    - Quotas valid under doctrine of aggregation (*Wickard v Filburn*)
    - Limit: subject matter be commercial in nature (*US v Lopez*)

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