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## 5. TRADE AND COMMERCE

### 51 Legislative powers of the Parliament

(i) trade and commerce with other countries, and among the States;

Subject matter power: there must be a substantial connection between the law and the head of power, not a tenuous one (*Re Dingjan*)

### 5.1 Trade and commerce

- 5.1.1 Sale of goods and services
- 5.1.2 All the commercial arrangements of which transportation is the direct and necessary result, such as negotiations, transport and delivery (*W & A McArthur*)
- 5.1.3 Intangibles such as banking services, supply of gas and electricity, broadcasting and sale of ideas (*Bank Nationalisation case*)
- 5.1.4 Transport of goods or people for profit (*ANA case*)

### 5.2 Power to regulate and participate

- 5.2.1 Commonwealth parliament can regulate trade and commerce
  - (A) It can set safety standards or employment conditions of those involved in interstate trade and commerce (*Re Maritime Union*)
  - (B) It can ban the import of goods (*Murphyores*)
  - (C) It can promote certain types of trade and prohibit others (subject to s 92)
- 5.2.2 Commonwealth can establish government-owned instrumentality to engage in interstate and overseas trade and commerce (*ANA case*; *O'Reilly*)
- 5.2.3 Legislation (e.g. subsidies) affecting the amount of interstate trade is unlikely to be supported by 51(i) unless by economic modelling and evidence the Commonwealth can show some definable relationship with interstate trade (*Pape*)

### 5.3 Interstate and intrastate

Commonwealth does not have the power to regulate intrastate trade and commerce (*Burgess*)

### 5.4 Incidental power

#### 5.4.1 Re intrastate trade and commerce

- (A) The incidental power cannot be used to obliterate the distinction between interstate and intrastate trade (*Wragg*)
 

A law protecting against a prejudicial effect merely consequential on the interstate activities cannot extend to intrastate activities for that reason (*Second Airlines Case*)
- (B) Where the law, in its effect upon intrastate trade, protects against danger of physical interference with the activity which is within federal power, then the law is within power (*Second Airlines Case*)

If a law is necessary for the safety of interstate trade and commerce, it will be valid as being incidental to interstate trade and commerce, but not if its sole justification is efficiency, competitiveness and profitability (*ANA Commission*)

However, Mason J in *ANA Commission* noted that he could not see a distinction between what is physically necessary and what is economically necessary. Given that the High Court today looks to the legal and practical operation of law, there is possibility that an extension to intrastate trade might be allowed if the interstate trade would otherwise not be economically viable at all

#### 5.4.2 Re matters antecedent or subsequent to interstate trade and commerce

If it is objectively ascertainable that a production process is conditioned by the fact the goods in question are destined for export, the implied incidental power might support direct regulation of production by Commonwealth (*Noarlunga* per Fullagar J)

- 5.4.3 Commonwealth law can regulate the conduct of persons employed in activities which form part of interstate trade and commerce (*Re Maritime Union of Australia*)

## HEADS OF POWER

### 4. TRADE AND COMMERCIE POWER

#### 51 Legislative powers of the Parliament

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;

#### 4.1 Scope of the power

##### 4.1.1 Meaning of “trade and commerce”

- (A) The words ‘trade and commerce’ take their ordinary meaning and include the sale of goods and services.
- (B) The term is not confined to transporting goods across borders. It includes ‘all the commercial arrangements of which transportation is the direct and necessary result’, such as negotiations, transport and delivery (*W & A McArthur Ltd v Queensland*)

#### ***W & A McArthur Ltd v Queensland* (1920) 28 CLR 530**

**Held:** (Knox CJ, Isaacs and Starke JJ) “trade, commerce and intercourse” are terms of common knowledge, as well known to laymen as to lawyers. The particular instances that may fall within the ambit of the expression depend upon the varying phases and development of trade, commerce and intercourse itself.

Not confined to the mere act of transportation of merchandise over the frontier. They go far beyond it. All the commercial arrangements of which transportation is the direct and necessary result form part of trade and commerce. Mutual communings, negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all parts of trade and commerce.

- (C) Trade and commerce may involve intangibles, such as banking services (*Bank of NSW v Commonwealth* (1948) 76 CLR 1) the supply of gas and electricity, broadcasting and the sale of ideas, as well as ordinary goods. It may include the transportation of goods or people for profit (*ANA case*).

#### ***Australian National Airways Pty Ltd v Commonwealth (ANA Case)* (1945) 71 CLR 29**

**Held:** (Dixon J)

- Does transportation amount to trade and commerce?  
It does when goods are being transported from seller to buyer in the course of being sold.
- What about transporting people? They are not slaves being sold. Is an airline engaged in trade and commerce when it transports people?  
Yes, because it is selling tickets to provide the service of transporting people from one place to another.

All carriage for reward of goods or persons between States is within the legislative power, whatever may be the reason or purpose for which the goods or persons are in transit

##### 4.1.2 Power to regulate and participate

###### (A) Regulate

The trade and commerce power in s 51(i) allows the Commonwealth Parliament to regulate trade and commerce.

- (1) It can regulate by setting safety standards or dealing with the conditions of employment of those involved in overseas or interstate trade and commerce (such as stevedores).
- (2) It can ban the importation of goods (e.g. drugs, pornography, weapons etc).
- (3) It can regulate the fairness of trade (eg under the Competition and Consumer Act 2010 – formerly the Trade Practices Act).
- (4) It can promote certain types of trade and prohibit others (subject to s 92).

(B) **Participate**

The power extends to participation in the specified trade and commerce – can be used to establish government-owned instrumentality to engage in such trade and commerce.

Commonwealth can participate in interstate and overseas trade and commerce, for example, by running its own airline or shipping line (*Australian Coastal Shipping Commission v O'Reilly*) or setting up co-operative State and Commonwealth bodies such as the Australian Wheat Board.

***Australian National Airways Pty Ltd v Commonwealth (ANA Case) (1945) 71 CLR 29***

**Issue:** whether the Airlines Act can be regarded as an exercise of the commerce power

**Held:** (Dixon J) it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.

A law authorizing the government to conduct a transport service for inter-State trade, whether as a monopoly or not, appears to me to answer the description, a law with respect to trade and commerce amongst the States. It is only by importing a limitation into the descriptive words of the power that such a law can be excluded.

4.1.3 **Interaction between s 51(i) and s 92**

Section 51(i) is 'subject to this Constitution'. It is therefore subject to s 92.

**92 Trade within the Commonwealth to be free**

...

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.

- (A) The High Court has held that s 92 is directed at discrimination of a protectionist kind, so s 51(i) permits regulation of trade and commerce as long as it does not amount to protectionist discrimination.
- (B) Judicial interpretation has been inhibited by the need to harmonise s 51(i) with s 92. An interpretation that expands scope of interstate trade and commerce for the purpose of s 51(i) might also entail a parallel expansion for the purpose of s 92 and thereby restrict Commonwealth power.

4.1.4 **Interstate and intrastate distinction**

Section 51(i) only gives the Commonwealth power with respect to overseas trade and commerce and inter-state trade and commerce. It does not allow the Commonwealth to regulate 'intra-state trade and commerce' (i.e. trade and commerce within a State).

Because intra-state trade and commerce is not expressly excluded (i.e. s 51(i) does not say 'other than intra-state trade and commerce') other powers may be used to regulate intra-state trade and commerce, but not s 51(i).

***R v Burgess, ex parte Henry (1936) 55 CLR 608***

**Facts:** s 4 of the Air Navigation Act authorised the making of regulations for the control of air navigation in the Commonwealth and the territories. The Commonwealth argued that in order to have effective regulation of inter-state and overseas air travel, it also had to control intra-State air travel.

**Held:** Section 51(i) implied a clear distinction between interstate and intrastate trade and commerce and the distinction must be recognised, both in relation to the core power and the incidental power.

(Latham CJ) there are difficulties of any double control of aviation and they might well be used to support the contention that it is wise or expedient that there should be a single control of this subject matter. Considerations of wisdom or expediency cannot, however, control the natural construction of statutory language.

The court has always rejected the argument that where inter-State and intra-state trade and commerce are so intermingled that it is practically essential to control all of them as one subject matter, the Commonwealth parliament has power under s 51(i) to deal with intra-State trade and commerce. Although they may be closely associated, the distinction drawn by the Constitution must be fully recognised. The power to deal with foreign and interstate trade and commerce does not involve an incidental power to deal with intrastate trade.