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## LAWS2011 Federal Constitutional Law

**A. Constitutional Interpretation and characterization; reading down; severance; purposive and non-purposive powers; incidental power; The *Engineers Case*; using s 51(i) Trade and Commerce Power as an illustration and also as a basis for an introduction to the constitutional consequences of Australian federalism**

**NOTE:** Cases in **GREEN** are mandatory reading; cases in **YELLOW** are additional – either included in the casebook, referenced in mandatory cases, or otherwise referenced in lectures.

**Characterisation:** Determines whether impugned legislation falls within the scope of the subject matter of a relevant head of power.

**Interpretation:** Defines the relevant head of power.

***Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479** at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: general principles to apply to determine whether a law is ‘**with respect to**’ a head of legislative power under s 51.

1. The text of the Constitution is ‘**to be construed with all the generality which the words used admit**’. When validity of a law is challenged, purpose and object are ignored – look simply to whether the words ‘**answer the description**’ of the head of power.
2. ‘**The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates.**’
3. Sufficient connection between the law and the head of power – look to the **practical** as well as **legal** operation of the law.
4. If a law answers the description of being a law with respect to a s 51 and a non-s 51 power, the law is valid even if there’s no connection between the two subject matters.
5. If there is sufficient connection, it is a matter of **legislative choice**.

***Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1** at 6-18 per Kitto J: discusses the appropriate question to ask when discussing constitutional validity under s 51.

→ ‘Under [s 51] the question is always one of **subject matter**, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say **by reference to the nature of rights, duties, powers and privileges which it changes, regulates or**

**abolishes**; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, ‘**with respect to**’, one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?’

→ Quoting Dixon in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79, Kitto discussed the ‘dual characterisation’ principle, that is, so long as it falls under one head of constitutional power, a law will not be invalidated if there is another discernible purpose outside the area of federal power.

**Reading Down:** Court attempts to save legislation by reading it in a way which is within power.

**Severance:** Court investigates whether the invalid parts of an Act can be deleted leaving the rest to be enforced. For both severance and reading down, the fundamental principle is to leave the **original character of the law from Parliament unchanged, not to create new law.**

### Severance Statutes

→ *Acts Interpretation Act 1901* (Cth) s 15A: Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it **shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.** (See *Industrial Relations Act Case (Victoria v Cth)* (1996) 187 CLR 416, *Work Choices Case (NSW v Cth)* (2006) 229 CLR 1 and *Airlines Case (Australian National Airways Pty Ltd v Commonwealth)* (1945) 71 CLR 29 below.)

→ *Interpretation Act 1987* (NSW) s 31(2): If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament: (a) **it shall be a valid provision to the extent to which it is not in excess of that power**, and (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

*Industrial Relations Act Case (Victoria v Cth)* (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ: discussion of the application of s 15A of the above Act. Held that s 15A applies in two scenarios:

1. Particular provisions/clauses: s 15A applies if ‘the operation of the remaining parts of the law remains unchanged’

2. General terms: s 15A does not apply where ‘the law was intended to operate fully and completely according to its terms, or not at all.’ If multiple limitations are possible, then the law is invalid.

- ‘The limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject-matter. Thus, a law which is ‘clearly made with the intention of exercising the power to make laws with respect to trade and commerce’ can be read down ‘so as to limit its application to inter-State and foreign trade and commerce.’ (Quotes Latham CJ in *Pidoto v Victoria* (1943) 68 CLR 87 at 108-11.)
- Also, can be read to be subject to a clear limitation of Parliament’s legislative power: ‘Thus, if any provision of the Act would otherwise operate to prevent the States from determining for themselves any of those matters which were held in *Re Australian Education Union* to be beyond the legislative power of the Commonwealth, the reading down of s 6 precludes invalidity for infringing the limitation on Commonwealth legislative power.’

*Work Choices Case (NSW v Cth)* (2006) 229 CLR 1 at 240-243 per Kirby J (dissenting): more discussion of s 15A:

- The Court’s limit in using s 15A is where ‘faced with a conclusion of apparent constitutional invalidity of particular provisions, a court “**cannot separate the wool from the warp and manufacture a new web.**”...[The Court] has expressed a willingness to undertake **amputation and excision, where necessary, but not to perform judicial “plastic surgery” upon the challenged law.**’
- ‘It is not the function of this Court to save bits and pieces of the new law. The Cth might, if it chose, proceed to resubmit for re-enactment its substantive amendments to federal law on IR in relation to the territories where its powers, under s 122 of the Const., are extremely largely and arguably unrestricted. **However, were this Court to attempt to uphold those particular provisions of the new Act...the outcome would be a law quite different from that propounded by the Government and enacted by the federal Parliament. In accordance with the established principles that I have identified, in the conclusions that I have reached, severance is not available.**

## Trade and Commerce Power

Section 51(i) Aus. Const.:

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

Section 92 Aus. Const.:

**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...

**W&A McArthur Ltd v Queensland (1920) 28 CLR 350**: Transportation being an aspect of trade and commerce was held to be a 'truism'; takes an expansive view of 'trade and commerce among the States' to be determined based on the 'distinctive character' of the transactions.

→ Knox CJ, Isaacs and Starke JJ at 546-9: 'Commercial transactions are multiform, and each transaction that is said to be inter-State must be judged by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated.'

- Trade and commerce includes (but not exclusively) 'mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery'.

**'Transport Cases'**: What followed in the 1930s in the HCA – especially Evatt J – was a position that 'buying and selling' were the 'essential elements' of commerce, with a view that *McArthur* took an 'extremely wide' view, privileging 'matters "relating to" or "with respect to" trade and commerce, rather than trade and commerce itself.' (See **Willard v Rawson (1933) 48 CLR 316 at 337**; **R v Vizzard**; **Ex parte Hill (1933) 50 CLR 30 at 88** – both per Evatt J.) But this view in the 'transport cases' was unequivocally rejected by the HCA in the **Airlines Case (1945)**.

**Airlines Case (Australian National Airways Pty Ltd v Commonwealth) (1945) 71 CLR 29**: Section 19(1) of the *Australian National Airlines Act 1945* (Cth) empowered the ANA Commission to transport for reward passengers and goods by air: (a) between States; (b) between Territories and other States or Territories; and (c) within Territories – Part IV effectively gave a monopoly over these airline services.

→ '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** (see *Grain Pool* above), a law with respect to trade and commerce amongst the States.'

→ *Contra* the '**Transport Cases**', and persuaded by US cases, Dixon held **transportation to be 'anything but subsidiary'**, as being something 'inseparable from the movement of things and people'. Therefore, '**if not all inter-State transportation, at all events 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.**'

Part IV was held to be invalidated by s 92 of the Constitution. The question then became whether the whole Act was brought down, or whether the void provisions can be **severed** from the valid ones.

→ Section 15A of the *Acts Interpretation Act 1901-41* 'has, in effect, **introduced a rule of construction whereby unless an intention affirmatively appears to the contrary, the provisions of a statute are to be taken as independent of one another and not interdependent.**'

→ There is a **presumption of 'independence'** of an enactment's provisions '**unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions**' (at 92; quoting from *Fraser Henleins Pty Ltd v Cody; Crowther v Cody* (1945) 70 CLR 100 at 127).

→ Key question: 'Was the intention that the air service be exclusive paramount, so that the intention there should be a government air service was completely dependent on it?'

- In this case, the '**arrangement and text of the enactment** appear to me to support, rather than weaken, the presumption that the main provisions are, so to speak, to stand on their own feet in a question of *ultra vires*... The draftsmen of the *Airlines Act*, whatever may have been in the minds of the authors, seems to have been at pains in the formal structure of the Act to give it the **appearance of separability.**'

→ Held: s 46(2) and s 47(b) are capable of full operation and are not invalidated by s 92 of the Constitution. Therefore, Part IV was held to be '**internally severable**', with s 46(1) and s 47(a) invalidated. **However, even if the whole of Part IV were invalidated, it was held that the rest of the Act would not have been brought down.**

**Purposive v Non-Purposive Powers:** Purposive powers (e.g. defence power under s 51(vi)) need to be exercised pursuant to a **specific constitutional purpose** as well as being with respect to the stated subject matter. Non-purposive powers – i.e. an activity (trade and commerce); a type of person (aliens, corporations); recognised categories of legislation (taxation; bankruptcy); or an object (lighthouses; fisheries; currency) – deal with **subject matter alone**.

*Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 per Mason J at 18-20: The trade and commerce power is non-purposive, i.e. defined by subject matter, not purpose. Here, the power was used for apparently environmental purposes, extraneous to trade and commerce, yet it was held valid since the subject matter concerned licences to export to other countries.

- ‘There is nothing in the subject matter of the constitutional power which justifies the implication of any limitation on Parliament’s power of selection. It does not follow, for example, that because the subject of the power is trade and commerce, selection of the exporter or of the goods to be exported must be made by reference to considerations of trading policy...It is far too late in the day to say that a law should be characterized by reference to the motives which inspire it or the consequences which flow from it.’
- Followed *Huddart Parker v Commonwealth* (1931) 44 CLR 492 per Dixon J (Rich J agreeing) at 515-516, in which a law giving transport authority for union members was held to be legitimate ‘notwithstanding its industrial aspects’. ‘Once the [legislative] power over the matter is established, it becomes irrelevant how, or upon what grounds, or for what motives it is exercised...It obtains [its character as a law with respect to trade and commerce with other countries and among the States] from the circumstance that it directly regulates the choice of persons to perform the work which forms part of or is an incident in inter-State and external commerce.’
- In 1986-7, the Constitutional Commission’s Distribution of Powers Advisory Committee decided against introducing a ‘purposive criterion’ in ‘subject matter powers’.

**Incidental Power – Express Incidental Power:** s 51 (xxxix) (applies only to legislative power)

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:...

(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.

**Implied Incidental Power:** (doctrine applies to executive, judicial and legislative power)

*D’Emden v Pedder* (1904) 1 CLR 91 at 110, adopting what had been said by Marshall CJ in

*McCulloch v Maryland* 4 Wheat 316; 4 Law Ed 579 (1819) at 321-323: ‘Where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the

grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective.’

→ **Old standard: ‘necessity’** – a high standard, but one which, nonetheless, extended Cth power.

*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Mason CJ at 27: ‘It is enough that the provision is **appropriate** to effectuate the exercise of the power; one is **not confined to what is necessary** for the effective exercise of the power.’

→ **New standard: ‘appropriateness’** – expansion of *D’Emden v Pedder*.

- Incidental power is **just as strong and valid** as if it were to be directly within a head of power. Incidental power applies to every s 51 head of power.

Two key questions *vis-à-vis* the trade and commerce power:

1) Can the Cth regulate intrastate trade?

→ Critically: this is **exclusively trade and commerce**. The definition of the subject matter as being trade and commerce is not at issue. What is at issue is whether or not a given law can regulate **intrastate** trade and commerce.

2) Can the Cth regulate matters antecedent or subsequent to interstate or overseas trade?

→ Critically: this is **not trade and commerce**.