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CIGAMATIC			
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IS CTH LAW VALID?

1. HOP

- a. HOP ID Law may be attached to multiple HOPs (Kitto J Fairfax) including...
- b. SCOPE
- c. CHARACTERISE
 - i. Subject matter sufficient connection
 - ii. Purposive power reasonably appropriate + adapted
 - Defence + external affairs
 - iii. Incidental power reasonably necessary
 - Trade and commerce

2. LIMITATIONS

- a. JUDICIAL POWER (CH III) *Boilermakers; persona designata*
- b. Melbourne Corporation doctrine
- c. Trial by jury s 80
- d. Just terms *Acquisition of property*

3. CAN YOU SEVER PART?

IS STATE LAW VALID?

1. States have plenary power (Union Steamship)
2. Limitations → Cigamatic doctrine + JUDICIAL

IS THERE AN INCONSISTENCY BETWEEN CTH AND STATE LAW?

1. Are both 'laws'?
2. Are both laws valid?
3. Test for inconsistency
 - a. Dual obedience
 - b. Rights and duties
 - c. Covering the field

UNDERLINE CASES + SECTIONS

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 51

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:

- ii. taxation
- iii. bounties on production/export of goods
- iv. borrowing money
- v. telecommunications
- vii. lighthouses
- viii. astronomy
- ix. quarantine
- x. fisheries
- xi. census
- xii. currency
- xiii. banking
- xiv. insurance
- xv. weights/measures
- xvi. bills of exchange/promissory notes
- xvii. bankruptcy
- xviii. copyrights
- xx. foreign corporations
- xxi. marriage
- xxii. divorce, custody of infants
- xxiii. pensions
- xxiiiA. Allowances, pensions, unemployment, benefits
- xxiv. civil/criminal process
- xxxvii. immigration
- xxviii. criminals
- xxxii. railways
- xxxv. conciliation/arbitration to settle industrial disputes

DEFENCE POWER

s 51 (vi)

S 51 (vi): Cth can legislate with respect to:

“the naval and military defence of the Cth and States; and the control of the forces to execute and maintain the laws of the Cth”

- Includes air force
- Execution + maintenance = law enforcement agencies (AFP)

HOP

For the Cth to have validly enacted this Act, it must fall within a s 51 HOP. This Act may fall within the HOP of the defence power **s 51 (vi)**.

SCOPE

- The defence power ‘**waxes and wanes**’. It is broad during war time and narrow during peace time (**Farey v Burvett; Stenhouse**)
- It was suggested in **Farey v Burvett** that it is virtually **unlimited during war time**.
 - Emergency power to **take property** for purpose of defence unfettered by requirement of just terms under s 51(xxxi) (**Farey v Burvett**)
 - **Fixing of prices** (**Price Regulation Case**)
 - **Restriction on sale**/distribution of essential items (**Stenhouse**)
- Even **after war time** can continue defence power
 - Continued regulation of economy (**Dawson v Cth**)
 - Continued regulation of sales (meat trade) (**Morgan v Cth**)
 - Scheme of giving preference to former service personnel in employment (**Wenn (1948)**)
- War is based on **public knowledge** but the courts also show a significant deference to the **Parliament’s judgement** for knowledge of threats (**Stenhouse**)
- Legislation can be targeted towards **internal threats**
 - Latham CJ in the **Communist Party Case** stated that there should be no distinction between defending an external and an internal attack. I
 - Protecting from **terrorism** within Australia (by individual, group, foreign State) can fall within the defence power (**Thomas v Mowbray**). For example, imposing control orders for those suspected of being associated with terrorism groups. (**Thomas v Mowbray**).
 - ❖ **Thomas v Mowbray**: P convicted of terrorism related offences, interim control order placed, held defence power used to protect Cth from terrorist attack.
 - ❖ **Communist Party Case**: Cth wanted to abolish the Communist party as they were considered a threat to the nation. Held internal threats can fit within defence power but this law was excessive and disproportionate.
- The defence power supports laws with a **purpose of**:
 - Repairing economic damage and **strengthening the nation’s economy** to withstand war
 - ❖ **Andrews v Howell**: Ships needed to be used for war rather than to ship apples.
 - ❖ **Capital Issues case**: Person unable to borrow money unless received consent from Treasurer because it could divert resources from Cth’s defence program.
 - Penalising a person/body engaged or likely to become engaged in activities harmful to defence (**Communist Party Case Fullager J**)

- Protecting Cth and States as institutions (**Thomas v Mowbray**)

S 51 (vi) supports laws which have, as their **direct and immediate object**, the naval and military defence of the Commonwealth and the States. Including laws that: (**Communist Party Case**)

- establish the military, the army and the airforce
- establish a system of military discipline
- concern the enlistment (compulsory or voluntary), and training and equipment, of men and women in navy, army and air force
- provide for ships and munitions
- provide for the manufacture of weapons, and
- build fortifications.

Therefore, this law is likely/unlikely to fit the scope.

CHARACTERISE – purposive → RAA

S 51 (vi) is a purposive power so the proportionality test is applied. The question to ask is whether the law is reasonably appropriate and adapted to its purpose of defence.

It is not enough that the law has something to do with defence – it must have a defence related purpose and further the defence of the Cth (**Stenhouse**).

- ❖ **Communist Party Case**: Act empowering GG to dissolve associations likely to engage in activities prejudicial to the defence of Cth was purely subjective, had no connection to the defence of the Cth.

Look for:

- Broadness/excessively restrictive
- Severe penalty
- Subjectiveness
- Unnecessary – other more reasonable options?

Perhaps **IMPLIED INCIDENTAL POWER**? Cth can enact a law that is reasonably necessary for defence.

Every grant of power conferred by the Constitution, s 51 extends to the making of laws in relation to matters necessary to achieve the main purpose or purposes of that power: **Nationwide News v Wills (1992)**.

CONCLUDE

VALID: In conclusion, although it cannot be said with certainty, this Act likely fits within the HOP and therefore is valid. The limitations will now be considered.

INVALID: In conclusion, although it cannot be said with certainty, this Act does not likely fit within the HOP and therefore is invalid. If it does fit in the HOP the limitations need to be considered