

## TRADE AND COMMERCE

1. What is our interpretation of the power?
  - a. s51(i) of Constitution: the Commonwealth parliament can make laws with respect to “trade and commerce with other countries and among the States”
  - b. What does this include?
    - i. You need not actually have trade (in the sense of buying and selling goods, of which price is essential - McArthur) for there to be commerce – it may mean communication, transportation, business association
    - ii. “all the commercial arrangements of which transportation is the direct and necessary result form part of trade and commerce” (McArthur v Queensland)
    - iii. Covers intangibles as well as the movement of goods and persons (Dixon J, Bank Nationalisation case)
    - iv. Government can actually itself engage in trade and commerce, in addition to regulating it (Australian National Airlines case)
    - v. A power to regulate includes a power to prohibit (Murphyores)
    - vi. This is not a purposive power – gives government power to do things not directly related to subject matter
  - c. What does this not include?
    - i. Intrastate trade and commerce is not included (distinction maintained by HC, Airline case)
    - ii. Government can engage in trade and commerce, but cannot create a monopoly (breach of s92 prohibition)
  - d. An incidental power (i.e. a power required to make effective original grant of power, first recognized in Demden v Pedder) that potentially may allow government to make laws with respect to:
    - i. Scenario A: controlling intrastate trade and commerce
    - ii. Scenario B: controlling things that are not trade and commerce – i.e. antecedent or subsequent to trade and commerce
2. Through characterizing the law, does it come within the heads of power of s51(i), and thus is it valid?
  - a. Scenario A: controlling intrastate trade and commerce
    - i. You can regulate intrastate trade, by the incidental power, if you could show by evidence that it was impossible to regulate interstate trade without regulating intrastate trade (Burgess)
      1. Impossibility would arise from fact that they were so interconnected/intermingled that you couldn't distinguish one from the other
    - ii. You must be able to show that you cannot protect interstate trade from physical interference unless you can also regulate the intrastate trade (Airlines NSW)
      1. Court will not allow furtherance of incidental power for reasons beyond protection from physical interference
        - a. Cannot use it for general economic efficiency (WA Airlines)

- b. Economic necessity has not been dealt with, i.e. that something won't be economically viable at all (interstate trade) unless can control intrastate trade
    - 2. However, note compelling dissenting judgement by Mason J in WA Airlines, followed up in a subsequent article, that there is no practical difference between economic and physical factors. Further, in light of court's changing position on practicality, it is possible that it could be extended to economic factors
  - iii. Cth can regulate activities analogous to a mixed production scenario – i.e. where an individual is engaging in trade and commerce where some things affecting interstate trade, and some affecting intrastate trade, then court will take into account practical considerations (Redfern v Dunlop Brother, following Owens in Sift)
  - iv. If it is invalid, can it be read down?
    - 1. If it is an expression such as “within Australia or “within the Commonwealth”, then it is an undistributed expression (Burgess) and these cannot be read down
- b. Scenario B: controlling things antecedent or subsequent to trade and commerce
  - i. Antecedent:
    - 1. General position: where intrastate activities are steps in the process which lead inevitably/in virtually all circumstances to international or interstate trade (export) it is likely the Cth can control those activities using the incidental power
    - 2. Two-part test (from Fullager in O'Sullivan):
      - a. By virtue of that trade/commerce power “all matters which may affect beneficially or adversely the export trade of Australia, in any commodity, produced or manufactured in Australia, must be the legitimate concern of the Cth”
        - i. Such matters may include not only grade/quality, packing, labelling, handling, etc. anything at all that may be considered likely to affect export market
        - ii. If there is a mixed production scenario, where there is some goods exported and some not, then in order for the Cth to ensure that the export aspect is regulated, it must also be able to regulate that which is not being exported – i.e. Cth can regulate whole operation (Owens in Swift Australia v Boyd Parkinson)
      - b. But this broad interpretation can only apply if in the particular industry you're regulating there can be objectively identified a process for export (a manufacturing process for export)
  - ii. Subsequent:
    - 1. If needed to be done to make effective regulation/prohibition regarding importation, then it is possible that regulation of